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Evaluation of the United States Court of Appeals for the Seventh Circuit - Report

Chicago Council of Lawyers

EVALUATION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

*Chicago Council of Lawyers**

Editor's Note:

Law reviews are often criticized for not publishing more pieces containing helpful, relevant information to the *practice* of law. The *DePaul Law Review* was therefore intrigued by the following Evaluation of the Seventh Circuit Court of Appeals done by the Chicago Council of Lawyers. This Evaluation is based, in part, on the Council's informal survey of attorneys practicing in the Seventh Circuit. Although this survey information was not quantitative, and thus could not be verified by the *DePaul Law Review*, it serves to substantiate the Council's opinions regarding individual judges, expressed herein.

All of the opinions and inferences drawn are those of the Chicago Council of Lawyers and not of the *DePaul Law Review*.

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* The principal editors of this Evaluation were Barry A. Miller and Thomas R. Meites. Mr. Miller, B.A., Yale College, 1975; J.D., Harvard University, 1978; President, Chicago Council of Lawyers, 1991-93. Mr. Meites, B.A., Harvard College, 1965; J.D., Harvard University, 1969; member, Board of Governors, Chicago Council of Lawyers and Chair, Seventh Circuit Evaluation, 1991-93. Mr. Miller and Mr. Meites wish to thank current President, Paul Strauss, Executive Director, Malcolm Rich, Ann Reading, and the dozens of attorneys who worked on the project. Services for checking the accuracy of citations were donated by Lexis.

This Evaluation was released in February, 1994 by the Council. It has been edited for publication and appears in slightly different form here. The opinions and interpretations expressed herein are solely those of the Chicago Council of Lawyers, as approved by its Board of Governors, and not those of the DePaul Law Review.

INTRODUCTION

This is the first evaluation the Chicago Council of Lawyers ("the Council") has conducted of the United States Court of Appeals for the Seventh Circuit. The Council was founded out of a concern by a wide variety of lawyers that other local bar associations were unwilling to criticize current judges and were too parochial in their interests.[1] Since its inception, the Council has evaluated candidates for selection to state and federal courts, both trial and appellate.[2] The Council worked closely with former Senators Charles Percy and Adlai E. Stevenson, III, in evaluating candidates for the federal bench in Chicago and has continued to evaluate candidates during the past decade.

The Council has also conducted four comprehensive evaluations of the U.S. District Court for the Northern District of Illinois, most recently in 1991. These evaluations have been useful to the bar because they publicly identify the strengths, weaknesses, and practices of the different judges. The Council also believes its evaluations have helped the district court by articulating problems perceived by the bar, as well as by letting the judges know that good work is appreciated. The 1991 evaluation described characteristics shared by successful judges to be used as a guide in selecting future judges;

1. Among the Council's founding members were some of the most prominent lawyers in the city — including Bill Brackett, Kermit Coleman, Alex Elson, Albert E. Jenner, Jr., Alexander Polikoff, and Milton Shadur — as well as noted legal academics such as Gerhart Casper, David Currie, Philip Kurland, and Dallin Oaks. The Council's members predominantly are lawyers at large firms, as well as small firm lawyers, prosecutors and defense lawyers, academics, judges, and members of Chicago's legal aid and civil rights bar.

2. District Court evaluations are on file with the Chicago Council of Lawyers.

this proved helpful in evaluating candidates for recent vacancies on the U.S. District Court in Chicago.

A. Reasons for Conducting this Evaluation

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

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

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

It is not easy for practicing lawyers to criticize judges before whom they appear. Nonetheless, the public has the right to informed views about the performance of its judges and its courts. A bar association is in a unique position to provide that information.

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

B. Overview of the Evaluation

The Evaluation is divided into four parts. The first discusses the Council's recommendations for selecting judges to the Seventh Circuit. The second describes the functioning of the court as a unit, identifying some of the court's administrative processes, including the role of the chief judge, and discussing problems identified by practitioners with the court's current procedures.

The third section of the report reviews statistical information concerning the court and its members. Some of the statistics relied on by the Council were gathered from reports compiled by the Administrative Office of the United States Courts, and they compare the Seventh Circuit's performance with that of other federal appellate courts. The Evaluation also reports the results of a preliminary statistical analysis of the work of individual judges conducted by Assistant Professor Lawrence Lessig of the University of Chicago Law School.[3]

The fourth section evaluates each individual judge on the court. Although the Evaluation indicates judges vary substantially in ability, the Council sees no point in rating judges with life tenure as "highly qualified," "qualified," or "not qualified," as we do when evaluating candidates for appointment to the federal bench, or for election or retention to the state courts. Instead, we include only a narrative description of their performance. These evaluations are not designed to be a comprehensive summary of the opinions written by each judge — we are not writing a digest of the court's rulings.

While we have tried to give examples for most of the conclusions we have drawn about judges, in some instances we have not done so. Because we promised confidentiality to our sources, we do not always use the best possible examples of cases to illustrate our conclusions. For example, if lawyers involved in a case tell us that judge *X* was not fair to the facts in that case, we will evaluate that opinion and see if that lawyer's viewpoint was shared by other lawyers. We tried to determine for ourselves if the general criticism was true. We

3. *See infra* Appendix A.

do not, however, necessarily point to the particular cases raised by lawyers with whom we spoke, in order to protect their confidentiality.[4] In some cases, we cite to concurrences, dissents, other opinions, or law review articles to illustrate a more widely-stated criticism. The item we cite may not be the best or only illustration of the point being made.[5]

For the evaluations of individual judges, the Council asked the investigators[6] to read a substantial sample of the assigned judge's opinions, generally at least 150, as well as almost all of the judges' dissents and concurrences.[7] In addition, the investigators were asked to interview a number of the attorneys who briefed and argued cases before the judge. Overall, the Council reviewed well over 1,000 opinions.

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

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4. We had to pledge confidentiality in order to obtain accurate information. We discuss in the text why the lawyers who participated insisted on confidentiality.

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

We do not credit a random comment about a problem; we do credit recurrent comments when they became a theme. We have developed this methodology in conducting evaluations over twenty years of well over a thousand candidates and incumbents on the state and federal bench at both the trial and appellate levels. The methodology used in this Evaluation expands on the approach used in these past evaluations.

6. For the individual evaluations, the Council assigned a team of lawyers to study each judge of the court. The investigators, who are members of the Council, were largely composed of experienced litigators who participated in past Council evaluations of state or federal judges. Most were from large Chicago law firms, while others were from law school faculties, small firms, and legal service organizations. In each case, a principal investigator was assigned to coordinate the work of the team.

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

assigned to the judge. The investigators also had access to the statistical information reported in the Appendix.

After reading the opinions and the interview reports and conducting interviews with persons who appeared before the judge, the investigators prepared preliminary reports which were reviewed by the Council's Board. The reports were then revised, edited, and incorporated into this Evaluation.[8]

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

I. Recommendations For Criteria And Procedures For Selecting Judges

A. How Circuit Judges Have Been Selected

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

Over the past several decades, a number of different methods of selecting circuit judges have been utilized. In the 1960s and 1970s, appointments were usually made with the active participation of the senior senator from the state who was a member of the same party as the President. During the Carter Administration, circuit-wide

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

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

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

nominating commissions were established in most circuits to screen candidates for a vacancy and to forward a small list of names to the President for his consideration. During the Reagan and Bush Administrations, the selection of federal appellate court judges was centralized in the Justice Department and the White House. While senators usually have been given control over district court nominations, in recent years senators have had only *input* into court of appeals nominations, with final decisions being made by the administration.

It is too early to know how President Clinton and the senators from Illinois, Indiana, and Wisconsin will handle Seventh Circuit appointments. Early indications are that the Clinton Administration intends to choose circuit judges with input and advice from the Justice Department, without having either a merit selection panel or feeling bound to follow senatorial advice.

The Council urges the President and the senators to instead establish a circuit-wide nominating commission to solicit and review applications and to forward the names of a small number of finalists to the senators and the President. There are a number of reasons for favoring the commission approach:

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

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

B. The Criteria Used by the Council in Evaluating Candidates for Circuit Judge

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

candidates:

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

Persons nominated to the federal courts should have demonstrated excellence in all these areas. The Council's standards for evaluating federal judges are deliberately high; this is most clearly seen when we review judicial candidates with substantial ability in some or most areas but a lack of *demonstrated excellence* in one or more of the areas identified above. The Council believes that it is preferable to risk error by not appointing such a candidate to the federal bench for three reasons. First, appointment is for life and, therefore, judges of limited ability or poor temperament cannot be removed. Second, federal judges decide some of the most important and difficult issues facing today's society. Even in less critical matters, poor judges increase litigation costs, cause undue delay and uncertainty in rendering justice, and do substantial damage to litigants. Finally, the position often defeats anyone lacking outstanding credentials. Experience has shown that for this position, being a good (or even a very good) lawyer or judge is simply not enough to qualify one for elevation to a federal judgeship.

In evaluating a proposed nominee to the Seventh Circuit, the Council weighs these factors somewhat differently than it would for

district judges. Appellate courts are strengthened by having members with different backgrounds. Thus, while strong trial court experience is good preparation for a potential appellate court judge, it is less necessary that every judge on an appellate court have extensive trial experience. An appellate court benefits from members with active and differing litigation backgrounds, including backgrounds in government and academics. A diversity of personal characteristics is also important, giving the court the benefit of perspectives from members of different groups in our society and increasing the court's legitimacy among the varying factions of the public. The Council firmly believes, however, that *in every case, a judge must meet the necessary intellectual and experiential criteria.*

C. *The Council's Recommendation on Qualities Which the Next Appointees Should Possess*

The current court suffers as a result of having too many judges with similar backgrounds and experience. The active members of the current court include three judges whose principal backgrounds were academic, three with experience in the Solicitor General's Office and one other government lawyer, two lawyers with substantial complex commercial private practice experience, four who were former district judges, one former state supreme court judge, two former federal prosecutors, and one lawyer from a small private practice.[9] The court does not, however, have any lawyers with substantial criminal defense, civil rights, pro bono, or legal aid experience. The court also lacks members with substantial experience as trial lawyers.[10] The court just received its first woman member.

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9. This summary totals more than eleven because some judges fall into more than one category.

10. Two en banc cases illustrate different perspectives relating to the issue of whether a judge had substantial trial court experience before becoming a circuit judge. In United States v. Best, 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992), the court vacated a panel opinion that had reversed a criminal conviction because the government exhibit books, which contained only materials entered into evidence, had been erroneously sent to the jury room. *Id.* at 427. None of the five dissenting judges had experience as a trial judge, while five of the six majority judges had previously been trial judges.

Similarly, in G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc), the court ruled that a federal magistrate had inherent authority to order a party represented by counsel to appear at a pre-trial settlement conference even though Federal Rule of Civil Procedure 16(a) expressly authorizes the compelled appearance of counsel and *pro se* parties only. *Id.* at 650-53. All four former district judges then sitting on the Seventh Circuit joined the en banc majority in ruling that the ability to compel the attendance of parties at a settlement conference is an essential tool of district courts in alleviating overcrowded dockets. Two circuits have

Currently, no judge is a member of a racial minority group.

The Council believes that the next few appointments to the Seventh Circuit will be very important. Every judge appointed to the Seventh Circuit should meet the criteria set forth in the preceding section. But, in addition, the court would benefit if the next few appointments possessed some or all of the following qualities:

- The intellectual capacity to engage in principled argument with the present judges, several of whom have outstanding intellectual ability.
- Increased racial and gender diversity.
- Substantial experience in preparing, litigating, and trying civil cases, and an understanding of the practicalities of trial court and appellate practice.[11]
- Experience in responding to the needs of clients and an understanding of what is needed in the court's decisions to guide clients' behavior and resolve real conflicts.
- Substantial experience in civil rights, legal aid, criminal defense, and/or pro bono practice.

II. EVALUATION OF THE ORGANIZATION, PROCEDURES, AND DECISIONAL PRINCIPLES OF THE COURT

A. What the Current Court Does Well

A project like the current Evaluation necessarily focuses on areas where the court's procedures are subject to question or improvement. However, the Council recognizes that for the vast majority of cases and litigants, the court functions very well. The following are areas in which the court is strong:

- All of the judges take their jobs seriously and appreciate the

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followed the majority's interpretation of Rule 16(a), and no circuit has ruled directly to the contrary. *See* Official Airline Guides, Inc. v. Goss, 6 F.3d 1385, 1396 (9th Cir. 1993) (holding that the district court did not abuse its discretion in sanctioning a defendant for failure to obey the court's order regarding a settlement conference); *In re* Stone, 986 F.2d 898, 903 n.3 (5th Cir. 1993) (stating that a district court's standing order invoked its inherent power to manage its caseload efficiently, an idea shared by other circuits). *But see In re* Novak, 932 F.2d 1397, 1405-07 (11th Cir. 1991) (holding that a district court was not authorized by statute or inherent power to order Novak to appear before settlement discussions but that Novak should have obeyed the order until it was vacated).

11. The court has taken a very restrictive role towards procedural and jurisdictional issues in the past decade. *See infra* notes 47-57 and accompanying text. In many cases, the court's decisions seem out of step with the spirit of the Federal Rules of Civil and Appellate Procedure. Adding several judges who have practiced law and have a better understanding of how trial courts actually work would thus greatly benefit the court.

importance of the matters they decide.

- All of the judges read the briefs and almost all prepare well for oral argument (this is not true of all appellate courts). Lawyers appreciate the preparedness of the judges.
- Unlike some circuits, the court schedules oral argument in most cases. Compared to some circuits, the court is, and appears to the public to be, relatively accessible to litigants. Lawyers and clients view the court's preference for oral argument as an important indication that the court's business is open to the public.
- Unlike some circuits, the court does not decide any cases on the merits without issuing an order or opinion explaining the reasons for its decision.
- The court's Circuit Executive is skilled, accessible, and helpful.
- The clerk's office is well-run and helpful. The deputy clerks are well-trained and knowledgeable.[12]
- Despite the philosophical, temperamental, and other differences among the judges, they have managed to avoid, for the most part, public acrimony. As far as the Council has determined, almost all are on good terms with their colleagues. Former Chief Judge William Bauer deserves much of the credit for fostering this collegiality.

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

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

We have not sought to conduct a detailed review of the court's substantive jurisprudence. Instead, in the introductory sections, we focus on the court's decisions on procedural matters, and on how its administrative and organizational aspects function. While the individual evaluations do focus more on substantive law, the Council has attempted to apply a standard of legal ability and faithfulness to a judge's job, rather than whether we agreed with the substantive results in every case. Inevitably, however, views about the results are part of any views on the performance of the judge. In the Council's view, there are several procedural areas and approaches to decisions

12. Although the Clerk's Office is criticized for taking an overly strict approach towards enforcing the court's rules, it does so on the instruction of the court and cannot be faulted.

in which the court is not fulfilling its role well.

1. Fidelity to the Facts of the Case and the Issues Presented

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

- An appellate court must decide the disputes pending before it. In most cases, the court should decide the disputes as framed by the parties and the trial court. At the same time, an appellate court does have an obligation to see that justice is done. In unusual cases, therefore, the appellate court may be required to reframe the issues in order to avoid manifest injustice. We believe that deciding disputes is the court's core function.
- Within the context of the disputes presented before it, an appellate court's principal function is to correct error.[13]
- An appellate court also should articulate clear rules to guide the conduct of individuals, businesses, and other organizations within its jurisdiction, and to provide direction to lower courts. That includes identifying and — if presented — resolving unsettled, and often difficult, issues of law within the circuit.
- An appellate court also has a responsibility to identify unsettled or important questions of law for consideration by the Supreme Court when issues need national resolution or previously decided issues need reconsideration.

In summary, we think the most important job of a judge is to get the result right in the case before the court and to do justice to the parties. In doing so, however, judges have other responsibilities, including: (1) respecting precedent and other limitations on the judicial process; (2) identifying important questions needing legislative, administrative, or scholarly consideration; and (3) articulating clear rules of law to guide future conduct. In the Council's view, the best appellate judges perform all these tasks well.

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

13. As then-Judge Ruth Bader Ginsburg wrote: "First, courts strive to 'get it right' — to reach a correct result in the case at hand." Ruth Bader Ginsburg, *The Obligation To Reason Why*, 37 U. FLA. L. REV. 205, 206 (1985) [hereinafter Ginsburg, *Obligation to Reason*].

take. Many lawyers have told the Council they believe the Seventh Circuit has gone too far in the direction of making general statements about the law without due regard to the facts of the specific case and the issues properly before the court. Opinions that stray from the facts of a case and the issues presented by the parties to general principles of law take the court far from its core function.[14] The costs of such an approach include: (1) unclear decisions; (2) decisions based solely on the judge's analysis without the basis of the factual information and analytical insights developed from an adversarial presentation; and (3) a sense by litigants and lawyers that the reason they are in court — to have *their* case decided fairly — has been sacrificed. In addition, many lawyers have complained to the Council that the laws of the circuit — and the actions of the court in particular cases — have become unpredictable,[15] since lawyers do not know which issues the court will decide and, indeed, whether the court will reach out and decide issues not presented by the parties.

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

If an issue — no matter how important or interesting — is not squarely presented by a case, the court should not reach out to decide it.[16] The court will get another chance — particularly if the

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14. As Judith Kaye, now Chief Justice of the New York Court of Appeals, stated: "Cases are limits; courts do not render advisory opinions, they resolve live disputes on the facts before them." Judith S. Kaye, *The Human Dimension In Appellate Judging: A Brief Reflection On A Timeless Concern*, 73 CORNELL L. REV. 1004, 1015 (1988).

15. *See* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 620 (7th Cir.) (en banc) (Easterbrook, J., dissenting) (arguing that the risk caused by inconsistent decisions makes business more difficult), *cert. denied*, 114 S. Ct. 291 (1993). Of course, some cases do present broad issues of social policy, private law, or legal theory. The problem, as lawyers and litigants see it, occurs when judges inject those considerations into cases where they are not needed for decision.

16. It is an axiom of appellate judges that the majority of cases are "easy." As Judge Harry

court notes the issue but does not express any opinion on it.[17] Litigants will then present the issue in a future case. When the court expresses dicta on an issue that is unbriefed and not supported by a factual record, it necessarily expresses an opinion that is not fully informed. Nevertheless, the dicta will influence the law in the district courts or state courts without being fully considered by a panel of the court.

The problem created by broadly worded opinions is exacerbated because many judges of the Seventh Circuit rarely write separate opinions that could limit the phrasing of the majority. This is somewhat surprising, since most judges of the Seventh Circuit do not reach out for issues in writing their own opinions. How is it, then, that certain judges — notably Chief Judge Richard Posner and Judge Frank Easterbrook — commonly write such broad opinions, often without comment by their colleagues?[18] Statistics indicate that most Seventh Circuit judges rarely concur or dissent.[19] This failure to write separately may be attributable to a failure to appreciate the effects of broad opinions on lower courts, lawyers, businesses, and the public; everyone will supposedly understand that the opinion is mostly *dicta*. This approach leads judges to sign-on to opinions that discuss a variety of non-dispositive issues not necessarily presented by the case. The Council believes the judges joining the opinion may

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Edwards of the Circuit Court of Appeals for the D. C. Circuit put it, they are easy in the sense that "the pertinent legal rules are readily identified and applied to the facts at hand, revealing a single 'right answer.' " Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 856. He goes on to note that there are some cases that are "hard" in that "each party is able to advance at least one plausible legal argument in its favor," and that a few cases are "very hard" in that there is no clear answer and the court is left at equipoise. *Id.* at 857. Judge Edwards notes the danger of turning "hard" cases into "very hard" cases to allow the exercise of judicial discretion where none should be employed. *Id.* at 859; *accord* Ginsburg, *Obligation to Reason*, *supra* note 13, at 216 (quoting Judge Henry Friendly's statement that "in most appellate cases the governing law is already made and not genuinely debatable"); *see also* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 275 (1994); David I. Levine, *The Seven Virtues of Judging: Alvin Rubin's Civil Rights Opinions*, 52 LA. L. REV. 1499, 1522-23 n.112 (1992) (discussing the views of former Fifth Circuit Judge Alvin Rubin).

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

17. It is traditional for a concurring opinion to telegraph a view on the merits of an issue that is not presented. It is far less traditional for a majority opinion to do so.

18. *See infra* notes 276-351, 595-671 and accompanying text (discussing specific opinions authored by Judges Easterbrook and Posner, respectively). Most judges on the Seventh Circuit do not reach out to decide issues not presented by the case.

19. *See infra* Appendix A, at A-38, A-39.

not always have fully considered the issues and thus may not agree with the way all the issues were resolved by the majority opinion.

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

The Council also recognizes that negotiation over the language of opinions does in fact occur on a regular basis and that, in many cases, broad language and dicta are removed from draft majority opinions without the knowledge of the public, thus making a separate opinion unnecessary. On the other hand, the Council has been advised that some judges write dissents and concurrences without first discussing concerns about the majority opinion with its author. We were also told that once a separate opinion is drafted, positions often harden; the author of the majority opinion is often unwilling to make changes to accommodate the points raised in the dissent or concurrence. Ideally, each judge would call or visit a colleague before committing a concurrence or dissent to writing.[20] However, it is possible (though regrettable) that some judges feel that their points will likely go unheeded by the majority and so they do not bother raising them in advance. It is also possible, given the liberal use of dicta by some members of the court, that some judges prefer to commit their doubts to writing as an attempt to inoculate against the dicta which might otherwise be viewed as almost binding by district judges.

The Council believes, therefore, that separate opinions serve an important purpose.[21] In addition to stating fundamental disagree-

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20. Similarly, the author of a majority opinion should not be reluctant to change an opinion when written criticism is advanced.

21. There is relatively little scholarly literature on the virtues and vices of separate opinions, and most of what does exist focuses on the U.S. Supreme Court. For recent commentaries, see COFFIN, *supra* note 16, at 224-28; RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 232-42 (1985) [hereinafter POSNER, FEDERAL COURTS]; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 448, 461 (1990) [hereinafter POSNER, JURISPRUDENCE]; Robert W. Bennett, *A Dissent on Dissent*, 74 JUDICATURE 255 (1991); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777 (1990) [hereinafter Ray, *Uses of the Concurrence*]; Laura Krugman Ray, *Justice Brennan and the Juris-*

ments on issues, it is very useful, given the broad opinions written by some judges in this circuit, for judges to write separately to identify portions of the majority opinion that are not necessary to the decision, or to point out issues that have not been given the consideration they deserve by the court. The Council does not believe that principled concurrences and dissents to overly broad opinions will impair collegiality. They are, instead, a recognition of the importance of each judge's view as an individual.[22] Further, principled concurrences and dissents need not be lengthy or significantly contribute to the court's backlog. A one or two paragraph statement of the point of disagreement would often suffice.[23] In addition, concurrences and dissents need not be personal; some judges on the court regularly dissent and concur without making personal attacks. As far as the Council is aware, this does not in any way impair the court's collegiality. We urge the other judges on the court to follow their example.

2. Waiver and Reaching Out to Decide Issues That Have Not Been Briefed or Need Not Be Decided

a. The Court Should Avoid Deciding Unbriefed Issues

The Council believes that the Seventh Circuit is too prone to deciding cases on issues that were not briefed by the parties. In addition, the court rarely requests further submissions by the parties when it is about to decide an issue not submitted by them.[24] When-

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prudence of Dissent, 61 TEMP. L. REV. 307 (1988) [hereinafter Ray, *Justice Brennan*].

22. Separate opinions are useful despite the fact that all dissents and most concurrences do not state law that is binding on the Seventh Circuit or on district courts. By pointing out issues that have not been fully considered, or language that is dicta and not binding, dissents and concurrences clarify which issues remain open for further consideration by the court. Such clarification can be relied on by district judges, lawyers, litigants, and the court itself in later cases.

23. *See, e.g.*, Barron v. Ford Motor Co., 965 F.2d 195, 202 (7th Cir.) (Ripple, J., concurring) (stating in a short paragraph that the majority opinion underestimated the difficulty of the issue before the court and offered only a "shorthand approach to the difficult and nuanced substance-procedure dichotomy of *Erie Railroad Co. v. Tompkins*") (citations omitted), *cert. denied*, 113 S. Ct. 605 (1992).

24. *See, e.g.*, Perry R. Pennington Co. v. T.R. Miller Co., 994 F.2d 390, 392-93 (7th Cir. 1993) (holding that the court lacked jurisdiction to hear an appeal even though the jurisdictional issue was not briefed and the court admitted that it had the authority under Federal Rule of Civil Procedure 60(a) to correct the trial court error that it claimed divested the court of jurisdiction); United States v. Spears, 965 F.2d 262, 269 (7th Cir. 1992) (changing the standard of appellate review for warrantless searches without briefs, oral argument, or even an en banc ruling), *cert. denied*, 113 S. Ct. 502 (1992); Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338, 1347 (7th Cir. 1990) (*sua sponte* creating the federal common law of demand on corporate directors), *cert. de-*

ever the court (or an individual judge) is considering addressing significant or potentially dispositive issues, precedents, legal theories, arguments, or facts not contained in the briefs and the record, the court should notify the parties and provide them with an opportunity to address these matters.[25] Here are several examples:

- Before oral argument, if the court discovers an issue that the parties can address in oral argument but have not briefed, the court should send a short written notice to the parties asking them to prepare the issue for oral argument.
- In preparing for oral argument, if the court locates a case or statute that it believes should be addressed by the parties, the court should so notify the parties prior to oral argument so that counsel can prepare properly. In this case, a telephone and fax notice should suffice.
- During or after oral argument, if the court discovers an issue that the parties should address, it should ask the parties to address it in writing. The response can be limited in both length and time. For example, an order directing simultaneous submissions not to exceed five pages within seven days would be entirely appropriate.[26]

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

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nied. 498 U.S. 999 (1991).

When the court has asked for additional briefs, it has frequently been on jurisdictional questions. *See, e.g.*, Chambers v. American Trans Air, Inc., 990 F.2d 317, 317-18 (7th Cir. 1993) (ordering additional briefing on a jurisdictional issue and then deciding that the parties had correctly interpreted the district court's orders); Peters v. Welsh Dev. Agency, 920 F.2d 438 (7th Cir. 1990) (raising *sua sponte* the jurisdictional issue, the court then requested briefs, postponed ruling until after argument, ordered briefs on the merits, and finally dismissed the appeal for want of jurisdiction after argument); *cf.* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 936-37 (7th Cir. 1989) (en banc) (adopting a highly deferential standard of review for Rule 11 sanctions after requesting *amicus curiae* briefs from several bar associations).

25. *See* Ginsburg, *Obligation to Reason*, *supra* note 13, at 214 ("The parties' contentions ordinarily determine the issues to be addressed."); *see also id.* at 214-15 n.45 (noting that the practice in the D.C. Circuit is to give parties a chance to brief issues raised by the court).

26. A similar order would be appropriate for complex issues discovered prior to oral argument that justify a written response.

in their initial briefs.[27]

We believe none of these arguments is sufficient to justify the court's present practice. Litigants have a right to be heard on the merits of any matter being considered by the court prior to the court's decision. This right may or may not rise to the level of a due process right under the Constitution; nevertheless, it is the theory underlying the Federal Rules of Appellate Procedure. Even more important, lawyers' and litigants' fundamental sense of fairness is offended when the court reaches out to decide issues that the parties have not had an opportunity to brief. Respect for the court's decisions is diminished when the court takes such an approach.[28]

Additionally, the Council feels that each of these four concerns is mistaken. First, while it is true that some parties' submissions will not be helpful to the court, the court should not underestimate the assistance the parties can provide. The parties understand the record and background of each lawsuit better than the court does, or can. Precedents, issues, and factual questions can be placed in context by the parties in ways that help frame the issues for the court. For example, the parties may not have raised arguments for tactical or factual reasons not readily apparent from the record.

Second, providing notice and an opportunity to be heard will not delay an appeal if done before argument. And even if done after argument, a short schedule for submissions will not be a substantial cause of delay.[29]

As to the third point, with modern communications, the judges can confer with the parties by phone or by fax if necessary. If the

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27. *Cf.* Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.) ("If we assume the lawyers' responsibilities, we unbalance the market for legal services and take time away from our consideration and decision of other cases."), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977).

28. This is part of the broader issue of a need for the perception of fairness in the court's procedures and proceedings. As observed by Judge Edwards, given the stature of the judiciary in general and the federal appellate courts in particular, the judiciary's attitude towards the law and its job affects other groups, notably attorneys practicing before those courts. Edwards, *supra* note 16, at 864. As Judge Edwards noted, "[T]he emphasis placed on principle by one group will find itself reflected in the work of the others." *Id.* This led Judge Edwards to conclude that "[t]he judiciary, therefore, bears a heavy institutional responsibility to nurture a conception of law and justice as principled ventures . . . ." *Id.*

29. The Council is very concerned about the problem of delay in the circuit. *See infra* notes 147-64 and accompanying text (detailing the delays in the Seventh Circuit as compared to those of other circuits). Nevertheless, allowing the parties to address issues before decision is appropriate, even if we are wrong and significant additional delay would result. In the Council's view, the benefits of accuracy in decision-making and the removal of the perception of arbitrary action far outweigh any incremental increase in delay.

point is substantial enough to be a potential basis for decision, it is certainly substantial enough to give the parties an opportunity to address it. The need for a conference serves to highlight the reason why the parties should be given an opportunity to address the point.

Finally, the "one bite at the apple" argument does not answer the fairness concerns that are raised. The adversary process sometimes places the court in a position where it may see issues not fully addressed by the parties. The litigants should be given the chance to address how the facts (which they know better than the court), precedent, and policy considerations affect the issues that the court is considering for the basis of decision.[30]

b. The Court Should Develop a Consistent Position on Waiver

The Court's willingness to address issues it wants to address — whether or not those issues have been briefed — stands in contrast to its strict enforcement of waiver rules to avoid addressing issues it does not want to address. A recent opinion illustrates the court's formal rule:

> [W]e conclude that [the appellant] has waived any claim to a due process violation. After raising the matter in his complaint, he let it lapse. He failed to argue it again during the proceedings leading up to the entry of final judgment, and he did not argue it in a post-final judgment motion or on appeal.
>
> Furthermore, we do not find this matter one of those rare instances where justice demands flexibility, causing us to examine a question the district court did not have the first opportunity to address.[31]

In applying this rule, the court has usually been very firm. Recently, in *Hartmann v. Prudential Insurance Co.*,[32] the court affirmed a grant of summary judgment for an insurance company and its agent against the insured's daughters. The company had paid out

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30. This is apparently the practice in the D. C. Circuit. *See* Ginsburg, *Obligation to Reason*, *supra* note 13, at 214-15. In the view of an eminent former California Supreme Court Justice, the late Roger Traynor, if an appellate court is considering cases or legal theories not covered by the briefs, "it is only fair that the appellate court direct the attention of counsel to these materials, if it appears that they may affect the outcome of the case, and give them the opportunity to submit additional briefs." Roger J. Traynor, *Some Open Questions On the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 219 (1957).

31. Brookins v. Kolb, 990 F.2d 308, 316 (7th Cir. 1993); *accord* City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1101 (7th Cir.) (stating that issues not argued below are waived "except in rare cases involving jurisdiction or if justice demands flexibility") (quoting Magicsilk Corp. v. Vinson, 924 F.2d 123, 125 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 2961 (1993)).

32. 9 F.3d 1207 (7th Cir. 1993).

a claim to a widow who was subsequently convicted of federal mail fraud charges in connection with the murder of the insured. The agent, who was also convicted, had tipped off the widow that the insured wished to change the beneficiary on the policy from the widow to the insured's daughters.[33] After the convictions, the daughter sued for recovery on the insured's policy, and the court ruled that the plaintiffs' counsel had erred by pleading the wrong claims. The court applied a strict rule of waiver and explained:

> [Plaintiffs' counsel] had it backwards. They should have based the equitable reformation claim against Prudential on the fraud committed by [the agent and the widow]. The only liability to which Prudential is properly subject on the facts of this case is vicarious liability, based on the acts or knowledge of its agent. . . . The plaintiffs mistakenly believed that the fraud claim depended on reforming the policies to name themselves as beneficiaries, and because of that mistaken belief have disclaimed vicarious liability. By disclaiming vicarious liability, the plaintiffs disclaimed [relevant case authority]. Their disclaimer disclaimed them out of court.
>
> We are not happy with this result. This is a sympathetic case for the plaintiffs. But we cannot have a rule that in a sympathetic case an appellant can serve us up a muddle in the hope that we or our law clerks will find somewhere in it a reversible error. One consequence of such an approach would be that prudent appellees would have to brief issues not raised or pressed by appellants lest the appellate court fasten on such a (non)issue and use it to upend the judgment of the trial court. So briefs would be even longer than they are, and their focus even more diffuse. Another consequence would be to diminish the responsibility of lawyers and to reduce competition among them, since the court would tend to side with the weaker counsel even more than it does anyway, at least when his was the more appealing case. Our system unlike that of the Continent is not geared to having judges take over the function of lawyers, even when the result would be to rescue clients from their lawyers' mistakes. The remedy, if any, for the questionable tactical decisions apparently made by the plaintiffs' counsel in this case lies elsewhere.
>
> It is true that courts sometimes relieve parties from the consequences of their waivers, even if the case does not fall within one of the established exceptions such as those for issues of jurisdiction or comity. We did that in a recent case where the defendant had waived an issue in the district court but it was a pure issue of law fully briefed in our court and we could find "no reason to defer its resolution to another case. There will be no better time to resolve the issue than now." . . . This is not such a case. Nor is it a case, most famously *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) . . . , where a court decides to reexamine a precedent so deeply entrenched in the law that a litigant might not think to challenge it — though, even so, the Court's procedure in *Erie* has not escaped criticism. . . . This is a case in which the lawyer for a party *tells* the appellate court that he does *not* base his claim

33. *Id.* at 1208-09.

> on grounds X and Y . . . but the court's independent research and reflection persuade the court that the lawyer is wrong. If reversal on such grounds is proper, we no longer have an adversary system of justice in the federal courts.[34]

Yet in other cases, the court has allowed issues to be raised that were waived by parties without articulating why justice required overlooking the waiver.[35] The only apparent reason was that the issue was one of interest to the panel.

A review of the court's cases suggests that the court has not consistently applied its own rule. The court's actions in this area have

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34. *Id.* at 1214-15 (citations omitted); *accord In re* Tolona Pizza Prod. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993) (stating that a failure to argue that the district court used the wrong standard of review in reversing a bankruptcy judge's findings waives an attack on the findings); *In re* Scarlata, 979 F.2d 521, 527 n.7 (7th Cir. 1992) (stating that a question was not argued effectively enough to warrant discussion); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.) (deciding that a skeletal argument is waived), *petition for cert. filed,* 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977); Mason v. Ashland Exploration, Inc., 965 F.2d 1421, 1425 (7th Cir. 1992) (stating that a party waives a waiver argument by failing to raise the waiver issue at the first opportunity); Deppe v. Tripp, 863 F.2d 1356, 1364 (7th Cir. 1988) ("In civil cases where economic and property interests are usually at stake, as opposed to criminal cases where more substantial liberty interests are involved, a plain error doctrine is unneeded."); Tom v. Heckler, 779 F.2d 1250, 1258-59 (7th Cir. 1985) (Posner, J., dissenting) (listing cases which the court did not reverse on issues not preserved by the appellants); *cf.* Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992). Judge Posner wrote:

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

Id. (citations omitted) (emphasis added); *see also* Thompson v. Paasche, 950 F.2d 306, 315 n.7 (6th Cir. 1991) (criticizing the Seventh Circuit's discussion of the plain error rule in *Deppe*).

35. *See, e.g.,* United States v. Spears, 965 F.2d 262, 269 (7th Cir.) (changing the standard of review for warrantless searches without briefs, argument, or an en banc ruling), *cert. denied,* 113 S. Ct. 502 (1992); Flamm v. Eberstadt, 814 F.2d 1169 (7th Cir.) (deciding an issue not raised by the parties), *cert. denied,* 484 U.S. 853 (1987); Skycom Corp. v. Telstar Corp., 813 F.2d 810, 819 (7th Cir. 1987) (remanding the case in order to allow the district court to address issues not raised by the parties); *see also* Gacy v. Welborn, 994 F.2d 305, 308-09 (7th Cir.) (deciding issues that were not of record but were raised by a district court decision in another case, and stating that the interest in finality in a habeas corpus petition in a death penalty case outweighed the normal rules of procedure), *cert. denied,* 114 S. Ct. 269 (1993); Glass v. Dachel, 2 F.3d 733, 739-40 (7th Cir. 1993) (allowing a county and sheriff to raise the *Pickering* defense to an unconstitutional discipline case brought by an employee even though the defendants failed to raise a defense in response to a summary judgment motion); *cf.* Commodity Futures Trading Comm'n v. Collins, 997 F.2d 1230, 1234 (7th Cir. 1993) (deciding that appellants had "not presented the abuse of discretion ground with the perspicuity ordinarily required to preserve an issue for appellate review; it [was] mentioned in their appeal brief, but only in passing"). In *Collins,* the court explained why it decided the question: "We are disposed to be lenient, however, where larger interests are at stake than those of the immediate parties . . . ." *Id.*

been far too capricious. The court should adopt a standard on waiver and then apply it consistently. Otherwise, the decision whether to consider an issue that has not been raised appears to depend on whether the issue strikes the fancy of the panel.

c. The Court's Willingness to Decide Unnecessary Issues

The Seventh Circuit's "activist" approach causes it to decide issues that are not necessary to the case presented. Circuit Rule 52 allows the Seventh Circuit to certify controlling questions of state law for decision by a state supreme court. The court can also defer decisions when an issue presented by a case is currently pending before a state supreme court.[36] The court, however, has refused, at times, to issue such a certification or defer a decision even though such an approach was warranted. In *Diginet, Inc. v. Western Union ATS, Inc.*,[37] the court decided an Illinois state law issue, despite being aware that the same issue was pending in another case before the Illinois Supreme Court.[38] The court could have held the case over until the state supreme court decided the issue or certified the issue to that court, so that the two cases could have been considered together. Instead, the court issued an opinion, which was explicitly acknowledged as advisory.[39]

An unnecessary advisory opinion was also issued by the court in *Mojica v. Gannett Co.*[40] In that case, the court decided a question concerning the retroactivity of the Civil Rights Act of 1991,[41] even though the Supreme Court had already agreed to decide that issue.[42] As Judge Kenneth Ripple pointed out in his dissent, "[I]t is a

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36. 7TH CIR. R. 52.

37. 958 F.2d 1388 (7th Cir. 1992).

38. *Id.* at 1395.

39. The willingness of a majority of the court to certify questions to a state supreme court may have changed. The court recently issued an en banc opinion in Todd v. Societe BIC, S.A., 9 F.3d 1216 (7th Cir. 1993), in which a 6-5 majority certified two questions to the Illinois Supreme Court. The Illinois Supreme Court, however, refused to accept the certification. *See* John F. Rooney, *Lighter Case Heads Back to 7th Circuit*, CHI. DAILY L. BULL., Nov. 23, 1993, at 1 [hereinafter Rooney, *Lighter Case*].

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

40. 7 F.3d 552 (7th Cir.) (en banc), *petition for cert. filed*, 62 U.S.L.W. 3378 (U.S. Oct. 28, 1993) (No. 93-800).

41. *Mojica*, 7 F.3d at 557-58.

42. Landgraf v. USI Film Products, 113 S. Ct. 1250 (1993).

significant judicial diseconomy for this court to proceed to judgment in this en banc proceeding . . . ."[43]

C. *The Court's Operation and Internal Procedures*

This section reviews the court's internal procedures with respect to matters such as jurisdictional rules, sanctions, delay in deciding cases, page limitations, panel assignments, oral arguments, petitions for rehearing, and settlement. Some of our comments concern relatively minor matters, others are of more significance. Throughout, we are concerned with some recurrent issues. First, the Council found that in many areas, the court imposes strict procedural rules and applies them in a way likely to interfere with the ultimate goal of speedy, efficient, and inexpensive resolution of litigation on the merits. Harsh application of a multitude of rules governing minor areas of practice involves the court and litigants in expensive detours away from the ultimate resolution of the merits. Second, the Council found that the court often acts adversely to litigants without giving them reasonable notice and an opportunity to be heard. This increases delay and expense as litigants seek to correct mistakes. It also fosters a sense that the court itself does not respect and promote the orderly resolution of disputes. These concerns are illustrated in the discussion below.

1. *The Court's Concern For Its Own Needs Above the Needs of the Parties*

Many lawyers are first introduced to the Seventh Circuit's practices and procedures through its *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* ("*Handbook*"), a publication available in the clerk's office. The *Handbook* explains the steps that a lawyer must follow when litigating an appeal before the Seventh Circuit.

The *Handbook* is, in general, a well-written and very useful pub-

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43. *Mojica*, 7 F.3d at 570 (Ripple, J., dissenting); *see also* United States v. Lechuga, 994 F.2d 346, 355-56 (7th Cir.) (en banc) (Flaum and Kanne, JJ., concurring) (criticizing Judge Posner's majority opinion as an unnecessary advisory opinion), *cert. denied*, 114 S.Ct. 482 (1993); Harris v. Board of Governors, 938 F.2d 720, 724-25 (7th Cir. 1991) (Ripple, J., concurring) (arguing that the majority issued an advisory opinion after finding the case was moot); Norris v. United States, 687 F.2d 899, 904-05 (7th Cir. 1982) (holding in a *pro se* appeal without oral argument or argument of counsel, that prior Supreme Court precedent was no longer good law); *Id.* at 912 (Cudahy, J., concurring) (arguing that the ruling was not necessary to the decision).

lication. Some of its language, however, reveals more than its authors may have intended. Both its tone and its content are a series of admonitions to strictly adhere to the court's rules. The *Handbook* makes it clear that the rules are for the administrative convenience of the court. While these rules do not necessarily stem directly from the Federal Rules of Appellate Procedure, failure to follow them may have dire consequences. As the *Handbook* says: "Consistent and strict compliance with these rules and court orders is required of all attorneys handling appeals in this court."[44] According to the court, this strict compliance "enables the court to handle its cases effectively and smoothly . . . ."[45]

The Council is aware that the court feels many of the practitioners who appear before it do sloppy work, are unprepared for oral argument, and seem ignorant of — or worse, indifferent to — the court's rules. Many of these lawyers may be first-time advocates before the court.[46] For some clients, it is not economical to retain more experienced lawyers or to authorize counsel to spend more time preparing briefs or oral arguments. The Council does not minimize the need for rules. Nevertheless, when there are legitimate reasons for extensions of time, longer briefs, or other departures from the court's standard model for briefing an appeal, those departures should be freely authorized.

The *Handbook* reflects a frequently heard complaint: that the court is too concerned with the demands of managing its own business and not aware enough of, or concerned about, the real needs of lawyers and parties in litigating cases. In the Council's view, the court does not consider litigants to be its customers. For the most part, it should do so. While it is true that the court does not function in a market and does not need to sell its services, its services are nonetheless consumed by litigants. And while the court's decisions have a broader audience, as long as it remains true that a court can decide only the conflicts brought before it by real litigants, its obligations, in the first instance, are to those who have brought their

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44. PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 47 (1994 ed.) [hereinafter HANDBOOK].

45. *Id.*

46. Unlike the Northern District of Illinois's Trial Bar, there is no experience requirement to make oral argument or file a brief before the court. *See id.* at 14 ("The lead attorneys for all parties represented by counsel, as well as counsel presenting oral argument, must be admitted to practice in this court within no more than 30 days after the docketing of the matters in which they are involved.").

disputes for resolution.

While the analogy of litigants as customers is obviously imperfect, it illustrates some of the problems with the court's approach. In drafting procedures the court needs to show greater appreciation of the effects of its actions on the ability of litigants to present their cases fully and efficiently. This problem is revealed in several areas.

a. The Court's Excessive Concern with Jurisdiction and Other Procedural Matters

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

Perhaps the best recent example of the court's tendency to abuse a jurisdictional ruling to avoid a decision on the merits is its opinion in *Perry R. Pennington Co. v. T.R. Miller Co.*[47] There, the court raised *sua sponte* at oral argument the question of whether the case was appealable, since the last order issued by the district court had remanded the "action" to state court after the district judge dismissed the federal claims.[48] The court acknowledged that the district judge had not intended to remand the entire action, but only the claims he had not dismissed.[49] The court also admitted that it had the power to correct the district judge's error under Federal Rules 59(e) or 60(a).[50] Nevertheless, the Seventh Circuit, having raised this matter *sua sponte* without briefing, failed to correct the error — or to at least invite a Rule 60(a) motion by the appellant. Either approach would have been proper; instead, the court dismissed the appeal for lack of jurisdiction.[51]

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47. 994 F.2d 390 (7th Cir. 1993).

48. *Id.* at 391.

49. *Id.* at 392.

50. *Id.* at 393.

51. The court's final paragraph states:

Notwithstanding the clerk's failure to comply with Rule 58, the requirement of a separate judgment may be deemed waived when the final disposition of the district court clearly was intended to be the final decision in the case. The problem here is

The Federal Rules of Civil Procedure were designed to allow cases to be decided speedily, on their merits.[52] At times, the Seventh Circuit honors the spirit of the rules.[53] More often, however, the Seventh Circuit gives the impression in its jurisdictional and other procedural rulings that it desires to resolve as few cases as it can on the merits.[54] While the court prides itself on announcing clear rules, its tendency to avoid merits decisions has created a jurisdictional mine field. At a minimum, a misstep now causes wasted effort for attorneys and district judges; sometimes, even worse consequences follow.[55]

Another area where the Seventh Circuit has been very harsh is in its refusal to allow parties to amend their pleadings.[56] The clear pat-

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> that the district court's June 10 order dismissed Count 3 and then remanded the "action" to the Illinois state court; the order did not simply remand Count 3. The word "action" suggests that the judgment refers to more than just Count 3. Since Counts 1 and 2 were never dismissed, we must assume that "action" in the judgment of June 10 meant all three counts still before the court. . . . *Pennington should have realized the defect in the district court's order and moved under Fed.R.Civ.P. 59(e) or Fed.R.Civ.P. 60(a) to alter, amend or correct the judgment. Pennington did not, and thus we do not have jurisdiction to hear this appeal.*

Id. at 392-93 (footnotes and citations omitted) (emphasis added); *see also* Peters v. Welsh Dev. Agency, 920 F.2d 438, 440 (7th Cir. 1990) (raising *sua sponte* a jurisdictional issue, requesting briefs, and determining after arguments on the merits that the court had no jurisdiction to consider an appeal of a district court order dismissing the complaint without prejudice, even though the district court refused to reinstate the case or take any further action).

52. *E.g.*, FED. R. CIV. P. 1, 15(b), 60(a); *see also* Robert E. Keeton, *The Function of Local Rules and the Tenson with Uniformity*, 50 U. PITT. L. REV. 853, 853 (1989) ("A 'just . . . determination,' in the sense that phrase is used in Rule 1, occurs when the dispute is resolved A) on the merits, and B) as determined by governing substantive law.").

53. *See, e.g.*, Duff v. Marathon Petroleum Co., 985 F.2d 339, 340-41 (7th Cir. 1993) (criticizing a district judge for a hypercritical procedural approach and vacating a grant of summary judgment); United States v. Security Pac. Business Credit, Inc., 956 F.2d 703, 707-08 (7th Cir. 1992) (permitting the government to amend its complaint five days before trial); Duran v. Elrod, 713 F.2d 292, 295 (7th Cir. 1983) (en banc) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. . .") (citations omitted), *cert. denied*, 465 U.S. 1108 (1984).

54. *See, e.g.*, Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654-55 (7th Cir. 1984) (applying a fact-pleading approach to the dismissal of an antitrust complaint); *see also* Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993) (affirming the dismissal of a prisoner's lawsuit, instead of a stay, for failure to exhaust state remedies even though the statute of limitations might have prevented a refiling of the suit), *cert. granted*, 114 S.Ct. 751 (1994); Linda R. Hirshman, *Foreword: Tough Love: The Court of Appeals Runs the Seventh Circuit the Old Fashioned Way*, 63 CHI.-KENT L. REV. 191, 195 (1987) (arguing that the Seventh Circuit's jurisdictional decisions reflect a "substantive commitment to minimize the reach of the federal courts").

55. *E.g.*, *Pennington*, 994 F.2d at 392-93 (dismissing a case where the plaintiff failed to detect a defect in the district court's order).

56. *See* Holstein v. Brill, 987 F.2d 1268, 1271 (7th Cir. 1993) (stating that the bankruptcy judge abused his discretion by allowing amendment of a claim); O'Rourke v. Continental Casualty Co., 983 F.2d 94, 97-8 (7th Cir. 1993) (en banc) (holding that an employee was not entitled to

tern is an exceptionally strict application of jurisdictional and procedural rules.[57] Again, the Seventh Circuit's approach prevents cases from being decided on the merits and offers no real offsetting benefit, either to the public or to the judicial system as a whole.

b. The Court's Use of Sanctions

In the early to mid-1980s, the Seventh Circuit seemed to be moving toward the position that a losing appeal could subject an appellant and its attorney to a substantial risk of sanctions. This trend was apparently the product of the desire of some judges to reduce what they saw as an uncontrollable appellate caseload by discouraging appeals and, perhaps, a desire by some to move our legal system closer to the "English rule," where the loser pays the winner's legal fees.[58]

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amend a discrimination complaint to add a retaliation claim); *Id.* at 98 (Wood, J., concurring) (cautioning against a strict application of the majority opinion); Rivinius Inc., v. Cross Mfg. Inc., 977 F.2d 1171, 1177 (7th Cir. 1992) (refusing to allow a party to amend the pleadings to reflect the case actually tried); *Id.* at 1178 (Cudahy, J., dissenting) (accusing the court of "resuscitating the theory-of-the-pleadings doctrine"); Daugherity v. Traylor Bros., Inc., 970 F.2d 348, 353 (7th Cir. 1992) (criticizing the district court for granting leave to amend the answer); Burdett v. Miller, 957 F.2d 1375, 1380 (7th Cir. 1992) (refusing to allow a party to amend the complaint after trial in order to conform to the evidence).

57. *See, e.g.*, Knox v. McGinnis, 998 F.2d 1405, 1408 (7th Cir. 1993) (affirming the district court's refusal to accept a tardy brief in response to a summary judgment motion and stating that "[i]n today's climate of crowded dockets and limited judicial resources, a district court is not required to accept and to consider a response that is submitted after the court has ruled on a motion") (citations omitted); Harold Washington Party v. Cook County, Illinois Democratic Party, 984 F.2d 875, 880 (7th Cir.) (affirming the district court's refusal to reopen the case due to a delay in filing the papers, despite the claim of a meritorious defense, but recognizing that the "facts in this case are not as egregious as some"), *cert. denied*, 114 S. Ct. 86 (1993); Tso v. Delaney, 969 F.2d 373, 375-77 (7th Cir. 1992) (affirming a dismissal for failure to complete service of process); Schulz v. Serfilco, Ltd., 965 F.2d 516, 518, 520 (7th Cir. 1992) (affirming the grant of summary judgment for failing to specifically deny one of the "uncontested" statements of fact under a local rule and for failing to request the opportunity to amend the answer to correct an obvious oversight); Nelson v. City Colleges of Chicago, 962 F.2d 754, 756 (7th Cir. 1992) (holding that the gross negligence of counsel was not grounds for reopening litigation and that the client's only remedy was a legal malpractice action); Gomez v. Chody, 867 F.2d 395, 405 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part) (discussing the majority's affirmance of the denial of a Rule 60(b) motion when plaintiffs came forward with evidence that would have prevented summary judgment, since the plaintiffs failed to exercise due diligence). ***But see*** Glass v. Dachel, 2 F.3d 733, 739-40 (7th Cir. 1993) (allowing the county and sheriff to raise the *Pickering* defense in an unconstitutional discipline case brought by an employee even though the defendants had failed to raise the defense in response to a summary judgment motion).

58. *See, e.g.*, Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269-70 (7th Cir. 1983) (en banc) (approving sanctions for "bad faith" litigation, despite a dissent on the merits). The *Analytica* opinion was criticized on these grounds in Hirshman, *supra* note 54 at 202. *See also id.* at 199-206 (reviewing several cases from that era).

At times, the Seventh Circuit's decisions regarding sanctions show a lack of concern with basic principles of notice and due process.[59] In some cases, the court has imposed sanctions *sua sponte,* without giving a lawyer or litigant an opportunity to explain her behavior before sanctions were imposed.[60]

In *United States v. Best,*[61] the panel opinion for the court excoriated an Assistant U.S. Attorney for allowing the government's binders — which consisted solely of material entered in evidence — into the jury room.[62] Without giving the Assistant U.S. Attorney an effective opportunity to respond, the court said it was "persuade[d] . . . that in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there,"[63] and referred the matter to the Illinois Attorney Registration and Disciplinary Commission. This action was taken despite the refusal of an experienced district judge to find that any impropriety occurred. The court later took the case en banc and vacated the panel holding.[64] But the en banc reversal of the panel opinion did not prevent the lawyer's career from being damaged by the equivalent of a *sua sponte* sanction, given without notice and an opportunity for counsel to explain the conduct. After substantial protest by the bar, the court also enacted Circuit Rule 38, effective February 1, 1992, which requires notice and an opportunity to be heard before sanctions are imposed.[65] In addition, the court's decisions reflect a backing away from its attempt to use the threat of sanctions to curtail

59. The Council makes these observations not because we act as a guild protecting lawyers but because for over two decades we have worked hard to improve the legal system, whether or not the improvements adversely affect the parochial interests of attorneys. We have long focused on improving public participation in and confidence of the attorney discipline system in Illinois. Indeed, the Illinois Supreme Court created the Illinois attorney disciplinary agency in response, in part, to the efforts of the Council. See 1 REPORT OF THE ILLINOIS SUPREME COURT SPECIAL COMMISSION ON THE ADMINISTRATION OF JUSTICE 220 (1993). Although it is true that the court's sanction practice has made the lives of some attorneys more difficult, that is not our complaint. Rather, it is that certain actions of the court are fundamentally unfair and affect the confidence of litigants, their attorneys, and the public in the fairness of the system.

60. *See, e.g.,* Weinstein v. University of Illinois, 811 F.2d 1091, 1098 (7th Cir. 1987) (granting attorney fees because the claim was "defunct" and litigation was "frivolous"); Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 425 (7th Cir. 1987) (imposing sanctions when the lawyers were "caught with their hands in the cookie jar" and noting that "[t]he penalty for a violation should smart").

61. 913 F.2d 1179 (7th Cir. 1990), *rev'd,* 924 F.2d 646 (7th Cir. 1991) (en banc), *cert. denied,* 112 S. Ct. 1243 (1992).

62. *Best,* 913 F.2d at 1182-84.

63. *Id.* at 1183.

64. *Id.* at 1185.

65. 7TH CIR. R. 38.

appeals in cases which, in hindsight, the court considered easy.

While the court usually follows Circuit Rule 38,[66] it continues to have an impulse to assess sanctions *sua sponte* and without adequate notice. A recent example is *United States v. Ashman*,[67] where the court used a routine motion for leave to file an oversize brief by appellee as an occasion, *sua sponte* and without adequate notice, to sanction appellants' counsel.[68] Although that sanction was eventually withdrawn,[69] there was no excuse for it having been instituted in the first place, in derogation of the court's own rule.

The court at times seems unaware that criticism of an attorney in an opinion is a form of sanction. Indeed, it is a form of sanction that can, in practical terms, be more damaging than a formal but unpublicized censure or reprimand.[70] The Council therefore believes that Circuit Rule 38 should also be considered as applying to criticism of a lawyer's conduct in a published opinion.[71] However, despite these occasional slips, the court's trend away from *sua sponte* sanctions shows that the court can and does respond when the problems caused by its excessive concern for its operations are forcefully brought to its attention.

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66. *E.g.*, Osuch v. INS, 970 F.2d 394, 396-97 (7th Cir. 1992) (per curiam).

67. 964 F.2d 596 (7th Cir. 1992).

68. *Id.* at 598.

69. *Id.*; United States v. Ashman, 979 F.2d 469, 496 (7th Cir. 1992) *cert. denied*, 114 S. Ct. 62 (1993).

70. *See, e.g.*, Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 607 (7th Cir. 1993) (reversing sanctions against one side, but ordering the district court's executive committee to investigate the conduct of the lawyers for the other side). For a discussion of the motion filed following the opinion in *Phillips*, see John F. Rooney, *Court Asked to Delete Comments in Opinion on Possible Misconduct By Two Lawyers*, CHI. DAILY L. BULL., Nov. 16, 1993, at 1 [hereinafter Rooney, *Possible Misconduct*].

71. The Council is not bothered by criticism of the type found in United States v. Alex Janows & Co., 2 F.3d 716 (7th Cir. 1993). There, the prosecutor defined "reasonable doubt" in his closing argument contrary to well-established case law. *Id.* at 722. The court expressed its "incredulity" at the prosecutor's conduct, given the court's repeated prior warnings, but found the error nonetheless to be harmless. *Id.* at 723. The criticism in *Janows* was proportionate to the offense, did not single out the prosecutor by name, and was apparently made after the point was raised in the defendant's brief. The government responded in its brief and was given the opportunity to address the point at oral argument. Supervisors in the prosecutors' office were made aware of the criticism and will take steps to see that the conduct is not repeated. Further, the Council recognizes that the court has an obligation under Canon 3(B)(3) of the Code of Judicial Conduct for United States Judges to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." *See* Houston v. Partee, 978 F.2d 362, 369 (7th Cir. 1992) (directing the clerk to send an opinion to the ARDC to monitor further litigation of allegations of gross prosecutorial misconduct), *cert. denied*, 113 S. Ct. 1647 (1993).

c. Delay in Issuing Opinions

While the Seventh Circuit is very prompt at setting oral argument in most cases, it is the slowest circuit in the country in issuing decisions after oral argument.[72] This delay cannot be explained by caseload; rather, it is the clear result of the court's tolerance of slow judges.[73] In the past, the court has tended to treat this as a relatively minor problem. It is the Council's understanding that former Chief Judge Bauer did call other judges to request the issuance of overdue opinions and that some progress has recently been made. Nevertheless, the statistics demonstrate that this approach has not been sufficiently effective.[74]

Every party is entitled to prompt action by the court. Litigants whose cases are assigned to a particular judge for the drafting of an opinion have a right to a prompt decision. In the Council's view, it is the responsibility of the chief judge, as well as of the entire court, to ensure that all the court's business is acted upon promptly. To effectuate that right, we suggest the court consider granting the chief judge authority to effectuate a mandatory reassignment of responsibility for writing an opinion if it is not issued within six months of oral argument, absent exceptional circumstances.[75] Judges have traditionally been reluctant to institute such a policy because it means that conscientious judges in control of their docket have to work harder. In the Council's view, that is a fact of life that is unavoidable if the court is to fulfil its responsibilities to litigants. The Council has been assured that the court is now actively considering the question of delay.

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72. *See infra* note 151 and accompanying text.

73. *See infra* Appendix A.

74. *See infra* Appendix A, at A-30.

75. Other circuits already have mechanisms for managing both isolated and systematic problems of delay. In the Second Circuit, for example, the court has monthly meetings at which the "sixty-day list" (cases in which more than sixty days have passed since oral argument) are publicly reviewed by the judges. Wilfred Feinberg, *The Office of Chief Judge Of A Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 385 (1984). In the D. C. Circuit, there is a similar monthly meeting at which there is a presentation of each judge's current writing assignments. If a judge has too many cases awaiting completion of his opinion writing, the judge will be asked to stop sitting until he or she catches up. Ginsburg, *Obligation to Reason, supra* note 13, at 214.

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

d. The Court's Stringent Use of Page Limitations

The Federal Rules of Appellate Procedure give a litigant fifty pages to present her main brief in the usual case.[76] That is enough space for most, but not all, cases. For example, when a single appellant or appellee faces more than one opposing party, each of whom is allowed a fifty-page brief, the single party's allotted fifty pages may not be sufficient to respond. In addition, the Seventh Circuit has frequently stated that it will not consider arguments that have not been discussed *at some length* in a brief.[77] Yet, many cases contain a large number of factual and legal issues. Furthermore, since the Seventh Circuit sometimes decides cases on grounds not invoked by the trial court, the parties are required to brief issues that may not have been central below. Taken together, these factors suggest that counsel in many cases are left in a real quandary — they must fully discuss many issues, the discussion must be lengthy, but the total length of the brief is limited. In a significant number of cases, counsel legitimately needs more than fifty pages to brief a case. However, the court has viewed its own docket control as more important than the full briefing of a case. The court has unequivocally announced its hostility to waiving page limitations:

> In rare cases, counsel may find that an adequate argument cannot be presented within the page limitations of Fed. R. App. P. 28(g). Extra pages are allowed only by leave of court. Because of the court's heavy workload

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76. FED. R. APP. P. 28(g).

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

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

> and desire for concise and refined briefs, these enlargements are granted only in truly exceptional circumstances.[78]

The Council understands the need for concise and refined briefs. The court assumes, however, that in virtually every case competent counsel can produce such a brief within the fifty-page limit; this is simply not true. It is unfair to demand that litigants truncate their arguments because the court has an "enormous workload."[79]

This problem is complicated by the Seventh Circuit's indication that it does not want counsel to use footnotes to "evade" its page limitation policies by moving material from double-spaced text to single-spaced footnotes.[80] Even if the footnote is properly in the brief, the court has indicated that an argument made in a footnote may be insufficient to preserve a point for the court's consideration.[81] Sometimes, the Seventh Circuit's approach has led to the extreme waste of judicial resources as the court issues successive orders on whether a brief has met its standards of propriety.[82]

If a case appears to the court to be complex, either factually or legally, the court should give counsel any reasonable number of pages they request. Most lawyers understand that a concise brief improves their clients' chances on appeal and thus they will not

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78. HANDBOOK, *supra* note 44, at 49. The *Handbook* provides:

> Counsel should file a motion for leave to file an oversize brief long in advance of the due date. These motions are seldom granted and even then only for a specific number of additional pages. Producing an oversized brief before receiving permission can only result in needless delay and unnecessary production costs. The practice of tendering an oversized brief with a motion of leave to file has been unequivocally forbidden by this court.

Id.; *see also* Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co., 690 F.2d 115, 116 (7th Cir. 1982) (expressing regret at laxity in enforcing the rule against accepting briefs filed *instanter*), *cert. denied*, 464 U.S. 999 (1983).

79. It is by no means clear that the court's workload is that heavy. See *infra* notes 153-59 and accompanying text (discussing reasons for delay among the circuits).

80. *See* Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 424-25 n.* (7th Cir. 1987) (noting how Westinghouse evaded the page limit rules). There is, however, no proscription in the Federal Rules of Appellate Procedure, or the circuit rules, against the use of footnotes. Unwary counsel can submit a fifty-page brief with extensive footnotes, then find that the clerk will not accept it. Counsel must therefore pay strict attention to the court's procedures. *See* HANDBOOK, *supra* note 44, at 41.

81. Dresser Indus. Inc. v. Gradall Co., 965 F.2d 1442, 1448 (7th Cir. 1992) (per curiam) (dictum).

82. *See, e.g.*, EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082, 1083-84 (7th Cir. 1990) (rejecting compressed vertical type and discussing 11-point and 11-pitch type). In *EDC*, Judge Easterbrook denied the appellant's third attempt at filing a brief *instanter* after its initial motion for extra pages was denied. Judge Easterbrook issued an order to show cause why the appeal should not be dismissed as a sanction. After he heard the explanation he vacated the order to show cause and a brief was filed. *Id.* at 1084-85.

abuse the request for more pages. If the court finds that some lawyers do repeatedly abuse the process by filing excessive briefs, it should then hold only those lawyers more strictly to page limits.

A related problem is the Seventh Circuit's frequent refusal to allow a party to file even a fifty-page initial brief.[83] In *United States v. Ashman*,[84] the court refused to allow each defendant-appellant to file a fifty-page brief in an appeal from a multiple defendant commodities fraud trial that lasted several months.[85] The court struck the defendants' briefs, ordered the submission of a single consolidated brief not to exceed seventy-five pages, and permitted each defendant to submit an additional brief not to exceed twelve pages.[86] The Council filed an *amicus curiae* brief supporting full briefing after the court's initial ruling and continues to believe the court's ruling was in error. Due process issues arise when a criminal defendant-appellant is limited to a twelve-page individual brief after a trial lasting several months. While the court may not appreciate reading full briefs from each defendant, each defendant's liberty is at stake and each defendant is entitled to a full hearing in the court of appeals before their conviction is considered. If the court does not like lengthy, multi-defendant, several-month-long criminal trials, it should say so[87] rather than taking out its dislike on the defendants.

2. *The Court's Assignments to Panels and Opinions*

The Seventh Circuit's official policy is to assign judges to panels at random. For a long time, many members of the bar have expressed their concern that assignments to panels are not in fact random. All the evidence that the Council has seen is to the contrary, however, and the Council is convinced that the official policy is fol-

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

84. 964 F.2d 596 (7th Cir.) (opinion prior to oral argument), *adhered to*, 979 F.2d 469 (7th Cir. 1992) (opinion after argument), *cert. denied*, 114 S. Ct. 62 (1993).

85. *Ashman*, 979 F.2d at 495-96.

86. *Id.*

87. *See, e.g.*, United States v. Baker, 10 F.3d 1374, 1389, 1391 (9th Cir. 1993) (discussing the court's concerns regarding "mega-trials").

lowed. However, the assignment of judges to write opinions is not random and some aspects of the court's assignment policy raise problems.

A panel hears six cases on most days that it sits. The court tries to balance each day's cases by assigning a mix of civil and criminal cases. In addition, the court tries to assign some cases that have been allowed a short time for oral argument with others that have longer times assigned for argument because of perceived complexity. The court also tries to assign a "difficult" case to each panel's sitting. This assignment process is conducted by the circuit executive, who reviews the briefs in all cases and then schedules each case. Randomness is achieved by a random selection process that assigns judges only after the cases are set. After the last case of the day, the panel meets and the presiding judge assigns two cases to each judge for the drafting of the panel's opinions. The presiding judge (who is the chief judge or the most senior active Seventh Circuit judge on the panel) usually tries to give one "easy" and one "more difficult" case to each member of the panel.[88]

The main problem with having the presiding judge assign cases arises from the perception that certain judges have areas of expertise. A judge with a strong interest in a subject matter will assign to himself, or be assigned, a disproportionate number of cases in that area. This tendency is understandable since it may minimize work for the other judges who are less familiar with that area. Congress, however, does not appoint a particular judge to be the "criminal" judge or another judge to be the "establishment of religion" judge. The Seventh Circuit would never institute a rule to that effect, and the Council believes that it is wrong for the court to do by practice what it could not do directly. Indeed, multi-judge appeals courts are created and sit in panels precisely in order to eliminate this kind of domination or specialization.[89]

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

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

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

The Illinois Supreme Court and the other state appellate courts randomly assign cases before argument.[90] The Council believes that this system creates even more problems since it leads some appellate judges to pay attention only to the cases assigned to them. The Seventh Circuit's system has the benefit of encouraging every judge to prepare for every case, since the job of drafting the opinion for any case might be assigned to him or her. Thus, although we do not recommend the Seventh Circuit change its assignment system, we do believe the court should ensure that too many cases of one type are not assigned to any individual judge. This goal could be facilitated if the circuit executive kept records of opinion assignments by subject matter.[91]

One other area of case assignment the court should revise is the apparent unwritten practice of scheduling two unconsolidated cases that raise the same point of law for argument before the same panel. Neither the court's rules nor the *Handbook* clarify how and when this happens. If the court believes this practice is useful, it should enact a formal rule providing that such scheduling should be done by a judge or the Clerk's Office. In each such case, notice of the joint scheduling should be given to all counsel so that each attorney can read the briefs in the other case or cases before argument and become familiar with the other issues that may be before the court and possibly affect the decision in his or her own case.[92]

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the same number of cases, the number of published opinions and the number of opinions in significant cases may differ.

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

90. A common justification for random assignment is that it avoids the problems of one-judge dominance. As the late Justice Traynor of the California Supreme Court put it, under a random assignment system "no one judge carries overwhelming authority even in fields in which he is specially versed." Traynor, *supra* note 30, at 217. Random assignment of opinion writing is used by most of the state supreme courts. RICHARD A. POSNER, CARDOZO, A STUDY IN REPUTATION 145-48 (1990) [hereinafter POSNER, STUDY IN REPUTATION].

91. The Council has been told that no such record currently exists.

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

The court from time to time receives motions requesting that a case not be set at the same time

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

One area of case assignment that may warrant reconsideration, however, is the practice of assigning new panels to successive appeals.[93] This practice sometimes leads to unseemly results where a second panel does not appear to accept a decision made by the first panel. An example of this problem was seen in the Chicago tort judgment case, *Evans v. City of Chicago*.[94] The initial panel opinion was reconsidered and described as "clearly erroneous" by a second panel,[95] and the second opinion was later essentially ignored by a third panel.[96] Rehearing en banc was subsequently granted, the third opinion was vacated,[97] and a fourth opinion was issued overturning the third opinion.[98] Either the court should reconsider its practice of assigning different panels to subsequent appeals in the same case, or its members should follow the law of the case without trying to manipulate it.[99]

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as another case. The court has routinely denied all such motions, taking the position that the parties have no right to address which cases are scheduled at which times (beyond notifying the court of scheduling conflicts, vacations, etc.) The court should consider stating this rule in its *Handbook*.

93. HANDBOOK, *supra* note 44, at 214.

94. 689 F.2d 1286 (7th Cir. 1982).

95. 873 F.2d 1007, 1013-16 (7th Cir. 1989) (noting that a panel does not have to follow the law of the case if it strongly disagrees).

96. 995 F.2d 1393 (7th Cir. 1993).

97. No. 91-3277, 1993 U.S. App. LEXIS 21677 (7th Cir. Aug. 19, 1993).

98. 10 F.3d 474, 475 (7th Cir. 1993) (en banc) (plurality opinion) (noting that "the parties' current dispute arises out of the conflicting decisions of the first two panels"). *Compare* Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600 (7th Cir. 1993) (tacitly criticizing the lenity of the prior panel's opinion in allowing the defendant an opportunity to vacate a default judgment) *with* Philips Medical Sys. Int'l B.V. v. Bruetman, 982 F.2d 211 (7th Cir. 1992) (allowing a defendant to cure a default judgment by complying with court orders).

99. Since the preparation of this Report, the court has advised the Council that it has proposed a new rule to assign successive appeals to the same panel.

3. *The Court's Conduct of Oral Argument*

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

In general, there is nothing about the Seventh Circuit's conduct of oral argument that differs from the other appellate courts the Council has studied, with two notable exceptions.[100] First, almost all the judges of the Seventh Circuit are routinely prepared for oral argument in a manner that is not always met by the justices of the Illinois Supreme Court and the Illinois appellate courts. They are to be praised for their preparation.

Unfortunately, the second difference is negative. As discussed in more detail in their individual evaluations below, the Council has received consistent complaints about the conduct at oral argument of two judges, Judges Coffey and Easterbrook. The court's behavior at oral argument is the responsibility of the entire panel and, indeed, the entire court. Litigants and lawyers are entitled to courtesy and respect. It is the responsibility of the other judges on the panel to stop improper behavior as soon as it occurs. The Council understands that this is unpleasant because it may require the other two judges to admonish one of their colleagues publicly, or at least in private. Nevertheless, all public officials, including appellate judges, have the obligation to treat members of the public to whom they are providing services — and lawyers — in a civil manner.[101]

As noted above, some judges use oral argument in an apparent attempt to persuade their colleagues of a particular view about the case. This use of oral argument punctures the fiction that all judges

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

101. For a discussion of civility, see *infra* notes 138-44 and accompanying text. For a discussion of the Council's willingness to file formal complaints of misconduct, see *infra* note 131 and accompanying text.

come to the argument with, if not a blank slate, at least an open mind. On the other hand, most lawyers prefer to know how a judge or, indeed, the whole panel perceives a case before the judges retire to deliberate. That knowledge gives a lawyer a chance to address arguments to the court's particular concerns. The Council does not believe that it is improper for a judge to suggest his or her views at oral argument.[102] The practice becomes troublesome when the judge becomes an advocate, sacrificing a proper judicial demeanor to make his or her points, such as by demeaning the position expressed by an attorney. In addition, if one judge dominates the argument to the point where one counsel is not permitted to present his or her responses and address concerns raised by other judges, substantial problems exist. However, as long as both counsel are treated courteously and permitted to respond to the concerns of the judges of the panel, lawyers should not object to a judge suggesting his or her own views.

4. *The Court's Procedures for Disposing of Motions*

In the Seventh Circuit, substantive motions are presented either to a single judge, two judges, or a panel of three judges, depending on their complexity.[103] The procedures for deciding how motions are assigned are set forth in the Seventh Circuit's operating procedures.[104] Since panels are not assigned until about six weeks before oral argument, motions filed before that time will not regularly be assigned to the argument panel. These provisions are sensible.

The court's Operating Procedures formally provide for a rotating motion judge and motions panel.[105] Most pre-oral argument motions are reviewed by staff law clerks prior to presentation to a judge of the court. The Council's inquiries suggest that in the past, staff law clerks have not always adhered to a rigid rotation of motion judges and motion panels, but instead have contacted whichever judge is available and presented the motion for ruling. The court has assured

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102. Justice Ginsburg admits that questions are sometimes framed to elicit a concession. Ginsburg, *Obligation to Reason*, *supra* note 13, at 210. She also writes that she finds the questions asked by other judges helpful, as they alert her to concerns that will have to be addressed at conference or in the opinion. *Id.* at 211.

103. Routine motions, such as for a first extension of time or the consolidation of appeals arising from the same matter, are normally decided by court staff. *See* HANDBOOK, *supra* note 44, at 207-09 (containing Seventh Circuit Operating Procedures 1(c)(1),(7)).

104. *Id.* at 207 (containing Seventh Circuit Operating Procedure 1(a)(b)).

105. *Id.*

the Council that a strict, random rotation system is now followed.

One of the court's practices with respect to motions is disturbing. The court has two forms for deciding motions: one form is labelled "By the court," and the Council understands it is for routine motions resolved by the court's staff; the other form identifies the judge or judges who ruled on the motion. Unfortunately, the court, from time to time, has issued rulings on nonroutine, substantive motions using the "By the court" form. There are two things wrong with this practice. First, it does not tell the parties how many judges decided the motion; a motion for reconsideration may well be more appropriate if an order has been issued by less than a full panel. Second, it does not tell the parties the identity of the judge or judges who decided the motion. That is contrary to the traditional practice of identifying the judicial officers who participated in a ruling. Moreover, lawyers are better able to decide how to conduct future matters when they know which judge or judges have decided their motion. The "By the court" form should only be used for routine motions decided by the Clerk's Office. Whenever one or more judges acts on a motion, their name or names should be listed.[106]

There is one other area where the court's practices with respect to motions should be reviewed. The court almost never hears arguments on motions. Some appellate courts do hear oral arguments on select motions. It may be useful to the court, as well as advance the timely and accurate resolution of the motion, to schedule a brief oral hearing, particularly on substantive motions or questions related to jurisdiction. That hearing need not be conducted in person; a telephone conference would frequently suffice when either the judges or lawyers are in different cities.

5. *The Court's Assignment of Pro Bono Cases*

The court operates a pro bono panel for appointment of counsel to indigents on a "volunteer" basis. The clerk accepts self-nomination for a spot on the panel. While the existence of the panel is certainly

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

not a secret, it has not been well-publicized. For that reason, the membership of the panel does not appear to be a cross-section of the membership of the bar.

Many lawyers, particularly younger lawyers, would be interested in accepting a pro bono appointment in order to gain the experience of briefing and arguing a case in the court. The clerk and the circuit executive do mention the existence of the panel when they speak to lawyers' groups but this publicity is not sufficient. Instead of making the opportunity to argue pro bono appeals generally known, the court has allowed a situation to develop where the majority of appointments to the pro bono panel go to a few law firms.[107] The Council recommends that the court re-evaluate its process for making appointments. At a minimum, the court should publicize the program to new admittees to the bar. In addition, for broader publicity, the court could include a notice of the existence of the pro bono panel with the first notice or order it sends to counsel in every case.

6. *Court-Assisted Settlement Efforts*

In the past decade, the court has not taken an active role in promoting settlement of cases on appeal. The Council understands that the court is reviewing possible programs to promote the pre-argument settlement of cases. Such programs have been successful in some appellate courts[108] and the Council urges the court to implement such a program on a trial basis.

Some cases could be settled before oral argument if the court were to provide assistance to the parties. Most lawyers find it easier to settle if a judge or former judge is actively involved to promote compromise by the parties. It does not make sense, however, for an active judge of the court to be involved in the settlement efforts. The court should consider designating senior circuit or district judges, magistrate or bankruptcy judges, or retired judges or magistrates who are respected for their settlement ability, to act as settlement

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107. The court has two practices in this area that are not publicized. First, it assigns cases that it views as requiring particularly strong briefs to counsel whose abilities it trusts. Second, it assigns cases that may involve large, non-reimbursable costs to large firms that it feels can afford the costs. The first practice is difficult to criticize, but the second practice is not so difficult. The court can ask other counsel if they are willing to accept appointments in such cases, while pointing out the amount of costs anticipated.

108. *See generally* Susan A. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1993 J. DISP. RESOL. 57 (surveying the variety of court-sponsored settlement programs).

facilitators on behalf of the court.[109] Before briefing in each non-pro se civil appeal, the court should require a conference, either in person or by phone, between counsel and a settlement facilitator to explore whether settlement is possible. After the briefs are submitted, the settlement facilitator should review the briefs and then arrange a second conference, either by phone or in person, to explore settlement again.

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

7. *Rehearings and Rehearings En Banc*

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

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

> (c) *Required Statement for Suggestion of Rehearing In Banc.* Suggestions that an appeal be reheard in banc shall state in a concise sentence at the beginning of the petition why the appeal is of *exceptional importance* or with what decision of the United States Supreme Court, this court, or another court of appeals the panel decision is claimed to be in conflict.[110]

Because the first factor looked to is "exceptional importance" and because the court too often construes this factor very loosely, lawyers view filing for rehearing en banc as a gamble without rules.[111]

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109. The parties may prefer that retired judges whom they respect be assigned this role. The court may have to make arrangements for the payment of the retired judges.

110. 7TH CIR. R. 40(c).

111. *See* Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 866 (1989) [hereinaf-

Thus, counsel often file suggestions for rehearing en banc that present only fact-specific issues that should be reheard, if at all, by the original panel. The problem is exacerbated because of the court's tendency to grant rehearing en banc in cases that are highly fact-specific, apparently because the case presents some highly-charged issue, even though the legal significance of the precise holding may not be that great.[112] Thus, counsel are encouraged to believe that even fact-specific cases will be reheard en banc.

The rehearing process serves two functions. First, it provides the panel with an opportunity to correct clear and demonstrable errors in its opinion. This function, though valuable, is best served by the original panel itself and should not justify rehearing en banc.[113] Second, in areas in which the law is unsettled or the current law in the circuit is unsatisfactory, the rehearing process provides the court as a whole an opportunity to address the question.[114] This, in the Council's view, is the appropriate function of the rehearing en banc process.

The court also grants rehearing en banc to correct "aberrant" panel decisions that are inconsistent with the law of the circuit. The Council views it as unfortunate that the court must waste its limited en banc resources on "disciplining" aberrant panels. Judges on all sides of more "political" issues should respect the court's decision-making process; if the law of the circuit is clear, a few judges who

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ter Note, *En Banc Review*] (arguing that "exceptional importance" is frequently used as an invitation to partisan decision-making); *see also* Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29 (1988) (examining the evolution of the en banc process and suggesting objective criteria on which to make the decision to invoke an en banc hearing).

112. *See, e.g.*, Billish v. City of Chicago, 989 F.2d 890, 897 (7th Cir.) (en banc) (remanding for a factual finding on whether affirmative action provided for by the consent decree was justified by prior discrimination), *cert. denied*, 114 S. Ct. 290 (1993); Doe v. Small, 964 F.2d 611, 622 (7th Cir. 1992) (en banc) (holding that an injunction granted by a lower court was too broad after a fact-intensive review of the case, which involved the constitutionality of private religious speech in a public forum); Auriemma v. Rice, 910 F.2d 1449, 1454-55 (7th Cir. 1990) (en banc) (determining that there was no factual basis for an affirmative action argument raised to support a qualified immunity defense in an action against a police chief for demoting white police officers), *cert. denied*, 111 S. Ct. 2796 (1991); Greenberg v. Kmetko, 840 F.2d 467, 472-75 (7th Cir. 1988) (en banc) (remanding for a factual determination of qualified immunity in a public employee's claim of retaliation for speech made outside the office); Egger v. Phillips, 710 F.2d 292, 294 (7th Cir.) (en banc) (overturning a panel's ruling that summary judgment was not appropriate in a case alleging intent to retaliate against an FBI agent complaining of interdepartmental corruption), *cert. denied*, 464 U.S. 918 (1983).

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

114. *See* Note, *En Banc Review*, *supra* note 111, at 864.

disagree should not try to ignore or change it by drawing questionable distinctions.[115] By the same token, an en banc rehearing should not automatically be granted just because the decision of a new issue may be unpopular with some, or even a majority, of the judges. All judges should respect the law and the processes of the circuit.

The court should "uncouple" requests for a panel rehearing from suggestions for a rehearing en banc. In addition, if the court was to clarify its specific criteria for evaluating rehearing petitions and was more willing to correct errors at the panel rehearing level, the volume of suggestions for a rehearing en banc would, over time, be reduced. Consequently, the quality of the court's consideration of those petitions would be improved. We also suggest that the court consider modifying Circuit Rule 40(c) to move the phrase "exceptional importance" to the end of the list of criteria justifying rehearing en banc and perhaps to add the qualifier "truly" in front of it. The court should state that suggestions for rehearing en banc will not be granted merely because the petitioner claims that the panel opinion is incorrect.

The court should also make clear under what circumstances a rehearing en banc will be granted or scheduled if a panel opinion has not yet issued. That appears to have happened in the recent case of *Cuppett v. Ducksworth*.[116] These circumstances should be specified in the local rules or the court's internal operating procedures.

The Seventh Circuit employs a procedure in which proposed opinions are circulated to the entire court before they are issued if they overrule a prior decision or create a split in the circuits.[117] The Council questions this procedure. While it clearly has efficiency benefits, it also has a major disadvantage: when draft opinions are circulated to the entire court, the other members of the court, who have not had the benefit of a full briefing and argument, are unlikely to be able to give full consideration to the arguments on both sides of an issue. However, the ability of a party seeking rehearing to convince the entire court to reverse itself is highly circumscribed when the court has approved a draft opinion using the circulation

115. *Cf.* Evans v. City of Chicago, 10 F.3d 474 (1993).

116. 8 F.3d 1132, 1149 (7th Cir. 1993).

117. *See* 7TH CIR. R. 40(f). After the panel adopts the position in compliance with the procedure set forth, the published opinion, under certain circumstances, shall contain a footnote stating that "[t]his opinion has been circulated among all the judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe*)." *Id.*

procedure. If a case presents an issue important enough to be circulated to all the active members of the court, the Council believes that the issue is entitled to the circulation of briefs.[118]

Finally, the court may need to settle the extent to which panels are bound by rulings of prior panels on the same issue. It is preferable that all panels follow prior circuit precedent unless that precedent is overturned by the court en banc. Yet panels of the court sometimes declare that issues are "open" because there are inconsistent panel decisions;[119] this can lead to a series of arguments about what is the law of the circuit.[120]

8. *The Circuit Judicial Council and Judicial Discipline*

Pursuant to statute, each circuit has a Circuit Judicial Council, which consists of the chief judge of the circuit and an equal number of circuit judges and district judges.[121] The Judicial Council is authorized to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."[122] Working with the circuit executive, the Judicial Council exercises administrative control of all non-judicial activities of the court of appeals and administers the personnel system, budget, and accounting system of the court. Among other duties, the circuit executive is responsible to the Judicial Council for conducting studies relating to the business and administration of the courts within the circuit and collecting and analyzing data about the courts within the circuit. In general, we have heard few complaints about the administrative functions of the Judicial Council.[123]

The Judicial Council has one other important role. Together with the chief judge, the Judicial Council has the power to discipline ju-

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

119. *E.g.*, United States v. Davenport, 986 F.2d 1047, 1050 (7th Cir. 1993).

120. *See, e.g.*, Guinan v. United States, 6 F.3d 468 (7th Cir. 1993) (discussing various panel opinions on the timing of claims of ineffective assistance of counsel by criminal defendants).

121. 28 U.S.C. § 332 (1988 & Supp. IV 1992).

122. *Id.* § 332(d)(1).

123. We do note, however, that there has recently been an unseemly dispute concerning the location of a new courthouse; the two district judges in Hammond strongly disagree on that issue with the local Congressman. We have not been able to determine the role the Judicial Council has played in that dispute.

dicial officers.[124] As provided by statute, any person may file a complaint with the chief judge about the conduct of a judicial officer in the circuit.[125] The chief judge may either dismiss it,[126] take corrective action and conclude the proceeding,[127] or, if the chief judge finds the matter to be sufficiently serious, "appoint himself and equal numbers of circuit and district judges . . . to a special committee to investigate the facts and allegations contained in the complaint."[128] If a complaint is found to be warranted, the Judicial Council may "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts . . . including, but not limited to" certifying disability of a judge, requesting that a judge retire, ordering that no further cases be assigned to a judge, censuring or reprimanding a judge, or ordering such other action as it considers appropriate, short of removal from office.[129]

Only a small number of complaints concerning serious matters of inappropriate judicial conduct have been filed under this provision. Most complaints are from disgruntled litigants and concern matters subject to correction only on appeal. We are aware of one case where a private reprimand was administered by the chief judge, and one other case where action was taken against a district judge.

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

Under statute, the chief judge of the circuit may, by written order, also initiate a complaint for purposes of the disciplinary process without actually receiving a formal written complaint from any party.[130] We believe that the chief judge and the Judicial Council have not fulfilled their responsibilities under this statute.

It is very difficult for attorneys to file a complaint against a judge.

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124. 28 U.S.C. § 372(c) (1988).
125. *Id.*
126. *Id.* § 372 (c)(3)(B).
127. *Id.*
128. *Id.* § 372 (c)(4)(A).
129. *Id.* § 372 (c)(6)(B).
130. *Id.* § 372 (c)(1).

Attorneys in offices that frequently appear before each judge, such as the U.S. Attorney or the Federal Defender, are very reluctant to antagonize any judge. Attorneys in private practice are afraid to sacrifice the interests of present or potential clients in matters that are or might be assigned before that judge. In addition, many complaints of misconduct may relate to repeated patterns of behavior. Few private attorneys can be expected to spend time documenting such a pattern of conduct when there is no prospect of compensation and it is likely to harm, rather than benefit, their clients. Even bar associations are apparently unwilling to file such complaints, as most bar associations are not interested in antagonizing judges any more than a given attorney would be.

It may be that the Council and other bar groups share the blame for not filing formal complaints against judges in the past. Nevertheless, most of the blame lies with the Judicial Council and the chief judge, since under the statute they are charged with the responsibility of acting *sua sponte* as soon as the chief judge receives credible information concerning a possible problem. The Judicial Council and the chief judge share responsibility for ensuring that litigants in the circuit receive courteous and competent treatment from judges.[131] When, for example, a judge appears to be no longer competent due to illness (whether related to age or otherwise), or appears to be behaving in a recurring, very erratic fashion, the Judicial Council, on the chief judge's own motion, should initiate an appropriate inquiry. Lawyers and bar associations find it difficult to allege and "prove" lack of mental capacity. When the court becomes aware of the need for such an inquiry, it should request that judicial officers submit to appropriate medical examinations. When the federal judiciary was small, peer pressure may have been sufficient to resolve problems in judicial conduct. In the Council's view, given the increase in the size of our federal judiciary and the procedures created by Congress to manage the judiciary, the Judicial Council has the clear responsibility to take the active role outlined above. Notions of judicial independence and comity apply to the

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

substance of decisions made by judicial officers — they do not apply to issues of physical and mental competence or misconduct in the manner of performing duties.

9. *The Role of the Chief Judge*

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

In administrative matters, however, the chief judge has greater influence. The chief judge has statutory responsibility for a number of functions, including certifying whether senior judges are eligible to continue to receive salary and staff — that is, that they are competent and working, instituting and reviewing complaints of judicial misconduct, and coordinating administrative matters with the Judicial Council and the circuit executive.[132] The chief judge also approves reimbursement for private criminal defense lawyers who are appointed to represent defendants when the request for reimbursement exceeds $3,500 for a felony trial, $1,000 for a misdemeanor trial, or $2,500 for appellate work.[133]

In addition, the chief judge has an important leadership role. He can set a tone for the court as to how it conducts its business. The chief judge also has a liaison role with the bar and can thereby influence conduct of the bar. Given the nature of the position, the chief judge is able to bring issues to the attention of the court, the bar, and the public and see that they are resolved.[134]

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132. 28 U.S.C. § 371(f) (1988).

133. 18 U.S.C. § 3006A(d)(2) (1988). Private practitioners play an important role in the criminal justice system by providing representation to many indigent criminal defendants. Congress has chosen to fund that representation at an hourly rate of $40 for out-of-court work and $60 for in-court time unless the Judicial Conference finds $75 per hour is justified for a particular circuit or district. *Id.* § 3006 A(d)(1). To represent defendants competently, substantial time is required to investigate and prepare a case. The current level of compensation is very low, and requires successful practitioners to make some sacrifice to accept appointments in complicated cases. Former Chief Judge Bauer had a good reputation for appropriate review and approval of fee requests, without requiring practitioners to jump through unreasonable hoops to collect their fees.

134. For a useful review of the public role of an active chief judge, see the account of Wilfred Feinberg, former Chief Judge of the Second Circuit, in Feinberg, *supra* note 75, at 383. He recounts among his other activities as chief judge numerous talks, both informal and formal, before state and local bar associations and their committees on the practices and procedures of his court. *Id.*

The chief judge invites visiting judges to sit with the court[135] and must also authorize the designation of any circuit, district, bankruptcy, or magistrate judge to sit on another court within the circuit, whether to meet a special need or for administrative or personal convenience.[136] The chief judge can request the chief justice to designate judges outside the circuit to sit on the Seventh Circuit or one of its lower courts, as needed, and can reject the assignment of any judge from within the Seventh Circuit to another court.[137]

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

- Exercise a more thorough review of senior judges at all levels before certifying their eligibility to continue to have a staff to hear cases — in the past, the chief judge has been too willing to recertify senior judges who are no longer competent to hear matters. While the illness of a senior judge is lamentable, the chief judge must, by law, deal with that problem when it develops.
- Take a more active role in instituting complaints concerning judicial performance.
- Take a more active role in caseflow management — if a circuit judge is substantially behind in resolving cases, the chief judge must persuade that judge to issue decisions more promptly or reassign the case.
- Act with the Judicial Council to ensure that disputes over administrative matters are resolved more expeditiously and harmoniously.
- Act more forcefully to foster civility by the court towards the district court and the bar.

10. The Civility Issue

Civility has been a buzzword in the Seventh Circuit the last few years. Indeed, the Seventh Circuit commissioned a major study of

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135. In the past, invitations appear to have been based on factors other than ideology. We understand that the new chief judge intends to continue this practice, which we commend.

136. 28 U.S.C. § 333 (1988).

137. *Id.* § 295.

the matter,[138] setting up a "Committee on Civility"[139] that was chaired by U.S. District Judge Marvin Aspen. That study suggested that a civility problem existed and that a wide range of steps be taken to foster civility among the bar.[140]

We believe that the judges of the Seventh Circuit should play a leadership role in fostering civility. As noted above, several members of the Seventh Circuit are often impolite during oral argument; this sets the wrong tone for advocacy. Also, several members of the court at times have gone out of their way to be harshly critical to district judges[141] and lawyers in written opinions.[142]

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

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

For example, criminal appeals, social security, and other government benefit claims are very important to the litigants. But the litigants in those cases often do not have sufficient funds to pay their attorneys for extensive research, brief writing, and preparation.[143]

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138. *See* MARVIN E. ASPEN, FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT (1992).

139. *Id.* at 1-2.

140. *Id.* at 9-10.

141. *See, e.g.*, United States v. Mittelstadt, 969 F.2d 335 (7th Cir. 1992) (lecturing the district judge and then ruling that the Seventh Circuit did not have jurisdiction over the appeal). This is not to say that erroneous rulings and improper conduct of district judges should not be noted and corrected, of course; our point is a question of tone.

142. *E.g.*, United States v. Best, 913 F.2d 1179 (7th Cir. 1990), *aff'd*, 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992); Olympia Equip. Leasing Co. v. Western Union Tel. Co., 802 F.2d 217, 219 (7th Cir. 1986) (Flaum, J., concurring); *see also* Hirshman, *supra* note 54, at 204-08 (noting cases where the court has "taken the opportunity to administer a public scolding.").

143. By no means does the Council suggest that solo practitioners, lawyers in small firms, and

Even when litigants do have sufficient funds, the amount at stake in the litigation may not justify spending the money required to hire an experienced appellate practitioner and/or to pay him or her enough to do the best possible job. Demeaning criticism of well-intentioned counsel who are doing the best they can for their client under the circumstances of the case is not constructive.[144]

III. A Statistical Analysis of the Court and its Judges

The Council looked at statistics regarding the court's performance in three areas: delay in writing majority opinions, frequency of concurrences and dissents, and a citation analysis of the active judges. Although the work — particularly the citation analysis — is still quite tentative,[145] the results are nonetheless of great interest. Statistical analyses of these areas are attached in the Appendix to this Evaluation.[146]

A. The Court's Delay in Disposing of Appeals

Delay in issuing opinions is a problem in the Seventh Circuit. For the twelve-month period ending September 30, 1992, the most re-

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the lawyers in legal services, the Federal Defender, and other agencies that litigate those types of cases are incapable of doing top-quality work, or regularly do not do such work in the court. The reality of the way in which legal services are provided in this country, however, is that most criminal defendants and low-income people do not have access to lawyers who have the luxury of a small caseload which permits them to give the attention to every case that it might deserve.

144. Excessive criticism of the bar creates unnecessary friction with the court. It engenders disrespect among the bar and disrespect for the legal process. In addition, no lawyer deserves to be criticized in an opinion unless given notice and an opportunity to respond, since such criticism is a form of sanction. *See supra* notes 58-71 and accompanying text (discussing the court's use of sanctions); COFFIN, *supra* note 16, at 268-79.

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

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

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

cent period for which figures are available, the court ranked tenth out of the twelve circuits in the median time interval between notice of appeal and final disposition.[147] In terms of actual time, the court's median time for disposition from notice of appeal to final disposition was 13.5 months, as compared to 10.6 months in all courts of appeals for all cases.[148]

That the problem is not caused in substantial measure by delays in briefing is made clear by the figures for the time between the notice of appeal and the filing of the last brief. Thus, for the year ending September 30, 1992, the Seventh Circuit had a median time for all cases of 4.3 months from the notice of appeal to the filing of the final brief, as compared to a median for all circuits combined of 4.8 months.[149] Rather, the Seventh Circuit's dubious record in the time for its dispositions is largely caused by delays between oral argument and final disposition.[150] For the year ending September 30, 1992, the court was *last* both overall and in each of the three major categories (prisoner petitions, other civil, and criminal) as reported by the Administrative Office.[151] For example, the time between hearing and final disposition for all cases terminated by the Seventh Circuit in the past was 4.3 months (or roughly 130 days), as compared to an overall median interval for all circuits of 2.5 months (or roughly seventy-five days).[152]

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147. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT: REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 151 tbl. B-4 (1992) [hereinafter 1992 ANNUAL REPORT] (showing that the Seventh Circuit finished ahead of only the Ninth and Eleventh Circuits).

148. *Id.*

149. *Id.* In this category, the court ranked fifth overall. *Id.* The Seventh Circuit had similar favorable rankings in the two principal subcategories provided by the Administrative Office of the Courts: it ranked fifth overall in civil cases (other than prisoner petitions), with a median time interval of 3.7 months as compared to an overall median of 4.2, and was tied for fourth in criminal cases, with a median interval of 5 months, as compared to an overall interval of 5.9. *Id.* at 152 tbl. B-4. It was only in prisoner petitions, where it ranked tenth overall with an interval of 6.3 months as compared to an overall interval of 4.6 months, that the Seventh Circuit's slow disposition process could even in part be attributed to prehearing delays. *Id.* at 151.

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

151. *Id.*

152. *Id.* As noted, the pattern is repeated in each of the three major subcategories reported. In criminal cases, the Seventh Circuit's median disposition time after oral argument was 4.1 months, as compared to a median for all courts of appeals of 2.2 months. *Id.* In prisoner cases, it was 4.0

Delay in several of the circuits can be explained, at least in part, by either organizational or caseload factors. Thus, the Ninth Circuit, with twenty-eight active judges and a huge geographical area, has built-in reasons for the slow overall disposition rate. It ranks last both from the filing of the notice of appeal to final disposition and from the filing of the last brief to hearing or submission.[153] However, in the area which the Ninth Circuit judges can control — the time between hearing and disposition — the court is tied for fourth.[154] Similarly, the D.C. Circuit, which gets a number of multiparty appeals from complex administrative proceedings, is last in the median interval between notice of appeal and completion of briefing, both overall and in the "other civil" category.[155] But again, in the area that its judges can control — the time between hearing and final disposition — it is tied (with the Ninth Circuit) for fourth overall and tied for fifth in "other civil" cases.[156]

By contrast, the Seventh Circuit has nothing either in its case load, geographical area, or number of judges that can justify its overall poor performance. While the Seventh Circuit does hear argument in a greater percentage of cases than most circuits,[157] the court is only fourth in the number of signed opinions written by each judge, with the fifth and sixth place circuits close behind.[158]

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months, as compared to 2.7 months, and in other civil cases (which comprised 54.8 percent of all dispositions in which oral argument was held in the Seventh Circuit) it was 4.5 months (or approximately 135 days), as compared to 2.7 months (or eighty-one days) for all the federal courts of appeals combined. *Id.*

153. THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1992 FEDERAL COURT MANAGEMENT STATISTICS 27 (1992) [hereinafter 1992 COURT MANAGEMENT]; 1992 ANNUAL REPORT, *supra* note 147, at 151 tbl. B-4.

154. 1992 ANNUAL REPORT, *supra* note 147, at 151 tbl. B-4.

155. *Id.*

156. *Id.*

157. In the year under discussion, the court heard oral argument in 56.4 percent of the matters that it terminated on the merits, as compared to an overall average of 43.9 percent. *Id.* at 131, 133 tbl. B-1.

158. The number of signed opinions for each active judge per year may be a good measure of the relative burden on each judge. If we assume that a circuit judge devotes most of his or her time to writing opinions, then the work load measured as output of a Seventh Circuit judge does not appear to be materially higher than that of other circuits (First, Fifth, Eighth) with similar output per judge but far lower medians for producing decisions. *Id.* at 151 tbl. B-4; 1992 COURT MANAGEMENT, *supra* note 153, at 26. These figures overstate the productivity of the Tenth and Second Circuits, as those circuits appear to sign virtually all their opinions. In contrast, the Seventh Circuit — like the First, Fifth, and Eighth — issues a substantial number of unsigned, substantive decisions. However, at least in the case of the Seventh Circuit, these decisions are virtually all short, *per curiam* opinions which are not to be published, and so do not substantially increase the writing burden on the judges.

It is true that in the year ending September 30, 1992, there was at least one vacancy on the

The Council believes that the delay is caused by a few judges whose slow conduct is tolerated by the court. An analysis performed for the Council, which looked at time between oral argument and disposition by Seventh Circuit judges for the years 1988 to 1992, found that the average time for writing an opinion in the Seventh Circuit — without a dissent or concurrence — was 141 days.[159]

What is most interesting is the substantial disparity in the average time between oral argument and decision from judge to judge. Several judges consistently take longer than the court's average of 4.3 months.[160] On the other hand, several of the court's judges are extremely quick (especially by Seventh Circuit standards); Chief Judge Posner and Judges Easterbrook and Cummings normally issue opinions within about two to three months of oral argument.[161] Nonetheless, these judges cannot by themselves prevent serious delay.

The delay created by the slower judges is even more glaring when compared to the judges on the courts of appeals nationwide, as reported by the Administrative Office. Thus, while the slow Seventh Circuit judges were taking between five to eight months to write their opinions, the nationwide figure for circuit judges in 1992 was 2.5 months.[162] It is true that the figures are not fully comparable, since the Seventh Circuit figures are in terms of an average time over an approximately five-year period, while the nationwide figures are in terms of median numbers for one year. However, given the large number of opinions included in the Seventh Circuit figures for

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court for about 8.5 months, between the time that Judge Wood took senior status and Judge Rovner assumed the bench. However, this cannot in large measure explain the 1992 results, since Judge Wood remained active throughout this period and, in any event, in 1991 — when the court was at all times fully staffed — the Seventh Circuit in terms of median time for dispositions did even worse, ranking eleventh out of twelve. 1992 ANNUAL REPORT, *supra* note 147, at 175 tbl. B-4. Another possible explanation is that the burden on judges on the Seventh Circuit is atypically heavy. In terms of appeals filed per panel, the Seventh Circuit in 1992 was 6th, and third in 1991. 1992 COURT MANAGEMENT, *supra* note 153, at 27. In terms of total terminations, the court was tied for third in 1992 and fifth in 1991, and in terms of terminations on the merits, it was fourth in 1992 and seventh in 1991. *Id.* While these figures suggest a busy court with a relatively high filing and disposition rate, they do not provide a clear explanation of the court's delay in issuing opinions.

159. This is reasonably close to the median time interval reported by the Administrative Office for the year ending September 30, 1992, which found a median disposition interval of 4.3 months (or approximately 129 days). 1992 ANNUAL REPORT. *supra* note 147, at 151 tbl. B-4.

160. *See infra* Appendix A, at A-30 (discussing the average time each judge took to write an opinion per year).

161. *See infra* Appendix A, at A-29.

162. 1992 ANNUAL REPORT. *supra* note 147, at 151 tbl. B-4.

each judge, the different measures are not likely to produce significantly different results, nor is review of only 1992 likely to make much of a difference.

The cure is clear: the court must stop permitting the slower judges to delay the court's cases.[163] Other circuits routinely act when an opinion is not produced within six months of oral argument, either by reassigning the opinion or not permitting the assigned judge to hear more appeals until he or she has caught up.[164] The Seventh Circuit should adopt a similar practice.

B. Separate Opinions issued by the Court

Seventh Circuit judges rarely dissent and rarely concur. An analysis of 3,175 reported decisions in the five-year period from 1988 to 1992 found only 184 dissents and 185 concurrences in the Seventh Circuit.[165] Moreover, just two judges accounted for a substantial part of this activity: Judges Cudahy and Ripple together wrote 41 of the dissents (41 for Judge Cudahy, 35 for Judge Ripple) and 52 (50 and 46, respectively) of the concurrences.[166]

Some judges may feel less of a need to concur or dissent because they have a talent for persuading other judges to change their opinions to remove objectionable language. Other judges may concur and dissent more, in part, because they lack that facility. Nevertheless, the variations in the frequency of separate opinions by Seventh Circuit judges are too extreme to explain away on those grounds alone. For reasons discussed above, the Council believes an increase in the number of separate opinions is desirable.[167]

IV. Evaluation of the Individual Judges

We have already described our methodology,[168] as well as some

163. The slow judges seem to inhibit panel action even when they are not writing the opinion. The study suggested that their mere presence on a panel is enough to slow down the opinion producing process. Thus, in an examination of panel combinations that have produced ten or more reported opinions and took an average of more than six months to write a decision, two of the four slowest judges over the five-year period (Coffey, Kanne, Manion, or Ripple) turned up on twenty of the thirty-four panels, or 59 percent of these slower panels, although two or more of them sat on only 23 percent of all panel combinations that issued ten or more written decisions (thirty-five out of 154). *See infra* Appendix A, at A-35.

164. *See supra* note 75 and accompanying text (discussing the practices of other circuits).

165. *See infra* Appendix A, at A-36, A-37.

166. *See infra* Appendix A, at A-36, A-37.

167. *See supra* notes 18-23 and accompanying text.

168. *See supra* notes 4-8 and accompanying text.

general principles. In this section of the Evaluation, we present our results on a judge-by-judge basis. These evaluations are not designed to be a comprehensive summary of the cases considered by the court or of the opinions written by each judge. Nor do we grade judges by whether their decisions are "liberal" or "conservative."[169] Instead, we have tried to evaluate each judge's work by the criteria set forth: legal ability, temperament, integrity, work ethic, and communication skills. The Council thinks that the most important job of a judge sitting on an intermediate appellate court is to get the result right in the case before him or her, and do justice to the parties. In doing so, judges have three other responsibilities: to respect precedent and the other limitations on the judicial process; to identify questions meriting further legislation, administrative action, or study; and to articulate clear rules of law to guide future conduct.

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

The Council values highly the work of a judge who is always prepared, willing to follow precedent, open-minded, and understands the vagaries of life and the practical aspects of litigation, even if that judge's legal ability would not be described as brilliant. The best appellate judges have deep appreciation of the human condition, a wide base of knowledge, superb legal ability, and a devotion to the appellate process. They are fair to the parties before them, reach the correct result in almost every case, respect their roles, and articulate clear rules of law. The Council has evaluated all of the judges against that ideal, recognizing that very few judges will mea-

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

sure up in all respects. We do not believe, however, that any one of those virtues must be sacrificed for another. Brilliant judges need not ignore the record, and craftsmanlike judges need not blind themselves to the larger implications of their work.

A. William J. Bauer

William J. Bauer, 67, graduated from DePaul Law School in 1952. Between 1953 and 1964 he was a partner with the firm of Erlenborn, Bauer & Hottle, and he also served as an Assistant State's Attorney, First Assistant State's Attorney, and the State's Attorney (1959-64) for DuPage County. From 1964 to 1970, Judge Bauer was a Circuit Judge in DuPage County. For a portion of that period, he was assigned to the Illinois Appellate Court, Second District. Judge Bauer was the U.S. Attorney for the Northern District of Illinois from 1970 to 1971, when he was appointed to the U.S. District Court in Chicago. He was appointed to the Seventh Circuit in 1975 by President Ford and served as Chief Judge from 1986 to 1993.

Judge Bauer is generally well-regarded. While he is not viewed as a scholar, his legal ability is very good. Judge Bauer draws upon a great depth and range of experience. Relying on that experience, he is perceived to be highly practical and is respected for his common sense understanding of courtroom practice and of the real life effects of legal decisions on litigants.[170]

Perhaps the best recent example of Judge Bauer's practical wisdom is his opinion for the en banc court in *United States v. Best*.[171] In *Best*, the panel had held that the government's binder of exhibits being in the jury room was reversible error — even though all of the exhibits had been introduced into evidence.[172] Judge Posner, for the panel, had gone so far as to suggest that the Assistant U.S. Attorney on the case had "quite possibly" committed misconduct.[173] After examining each juror, however, the district judge had found no

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170. *See, e.g.*, Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 980 F.2d 449, 456 (7th Cir. 1992) (Bauer, C.J., dissenting) (questioning the "estimate" in hospital collection case); United States ex rel. Walker v. O'Leary, 973 F.2d 521 (7th Cir. 1992) (ordering the Illinois Attorney General to take an active approach to ensure that prisoners held under improper sentences receive correct sentences).

171. 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992).

172. 913 F.2d 1179 (7th Cir. 1990) *vacated and reh'g granted*, 924 F.2d 646 (7th Cir.); *reh'g*, 939 F.2d 425 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1243 (1992).

173. *Best*, 913 F.2d at 1184.

prejudice to the defendants at all. Writing for the en banc majority, Judge Bauer saw the issue as an attempt by the defense to make a minor error into reversible prosecutorial "misconduct" and properly vacated the panel opinion.[174]

Judge Bauer has an engaging writing style. Most of his opinions are straightforward and solid. They are clear, coherent, and articulate easily understood rules. While his opinions usually do not contain elaborate legal scholarship, he has produced some very good opinions in complex cases.[175]

An overview of Judge Bauer's work reflects that he is fair to many different types of litigants. For example, though Judge Bauer served as a prosecutor and may defer in some cases to the concerns of law enforcement personnel more than some of his colleagues,[176] his decisions reflect an appropriate concern for the rights of criminal defendants.[177] He relies on his substantial experience to ensure fairness in trial procedures.[178] Few would describe Judge Bauer as a bold jurist but he is not unduly cautious either. Indeed, he shows an appropriate commitment to follow applicable governing precedent.[179] When Judge Bauer has been willing to write or join in concurrences and dissents, his opinions are sound[180] and not predictably doctrinaire — he looks at the facts and the law applicable to each

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174. *Best*, 939 F.2d at 437-32.

175. *E.g.*, Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990).

176. *See, e.g.*, Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) (Bauer, C.J., dissenting) (disagreeing with the majority's denial of qualified immunity to a police officer who shot a suspect).

177. *See, e.g.*, United States v. Davenport, 943 F.2d 13, 14 (7th Cir. 1991) (Bauer, C.J., dissenting) (discussing a prosecutorial comment on post-arrest silence), *cert. denied*, 112 S. Ct. 871 (1992); United States v. Cortina, 630 F.2d 1207, 1213 (7th Cir. 1980) (requiring suppression of evidence gained without probable cause). As chief judge, Judge Bauer was responsible for assigning opinions in every case in which he sat as long as he was in the majority. He seems to have used that authority to assign himself a large number of criminal opinions.

178. *See, e.g.*, United States v. Randle, 966 F.2d 1209, 1214 (7th Cir. 1992) (reversing a conviction because the trial judge failed to allow the defense lawyer time to request a polling of the jury).

179. *See, e.g.*, Gonzales v. North Township, 4 F.3d 1413, 1423 (7th Cir. 1993) (reversing the district court and requiring removal of a crucifix from a public park); Harris v. City of Zion, 927 F.2d 1401, 1411 (7th Cir. 1991) (rejecting the dissent's attack on Lemon v. Kurtzman, 403 U.S. 602 (1971), which established the constitutional test for determining the effects of government action on religion), *cert. denied*, 112 S. Ct. 3054 (1992).

180. *See, e.g.*, United States v. Brigham, 977 F.2d 317, 320 (7th Cir. 1992) (Bauer, C.J., dissenting) (arguing that the conspiracy conviction was based only on suspicion); Clay v. Director, Dep't of Juv. Div. Corrections, 749 F.2d 427, 437 (7th Cir. 1984) (Bauer, J., concurring) (criticizing Judge Posner's analysis of a claim of ineffective assistance of counsel), *cert. denied sub nom.* Irving v. Clay, 471 U.S. 1108 (1985).

case to reach the result he thinks is correct.[181]

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

While lawyers described the strengths and overall positive performance noted above, they also raise some concerns about Judge Bauer in that he is one of the Seventh Circuit judges who has not been an active writer of separate opinions. That may stem from his ability to persuade others to modify their opinions,[182] but it may also stem, in part, from a sense of collegiality that, in the Council's view, is mistaken. Judge Bauer joined in a special concurrence in one case that seemed more concerned with protecting another judge than with the frank presentation of important issues.[183] In addition to accommodating his colleagues on the Seventh Circuit, Judge Bauer is sometimes overly deferential to district judges,[184] and he is also sometimes unwilling to reexamine Seventh Circuit precedent that has been criticized or rejected in other circuits.[185] Moreover,

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181. *Compare* Evans v. City of Chicago, 10 F.3d 474, 482-83 (7th Cir. 1993) (en banc) (Bauer, J., joining the plurality opinion by Judge Easterbrook) (supporting a government effort to invalidate a consent decree) *with* Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993) (en banc) (upholding a city ordinance requiring newsstand operators to acquire a permit.) In *Graff*, Judge Bauer joined Judge Cummings' dissent from a narrow construction of the First Amendment. *Id.* at 1335 (Cumming, J., dissenting). The plurality opinion, written by Judge Manion, was joined by Judges Posner, Coffey, Easterbrook, and Kanne. Judges Posner, Coffey, and Manion joined Judge Easterbrook's opinion in *Evans*.

182. The Council received reports that this indeed is the case.

183. *See* Olympia Equip. Leasing Co. v. Western Union Tel. Co., 802 F.2d 217, 219 (7th Cir. 1986) (Flaum, J., concurring) (stating that appellants demonstrated disrespect to an appellate judge in a petition for rehearing), *cert. denied*, 480 U.S. 934 (1987). *See infra* notes 441-49 and accompanying text.

184. *See, e.g.*, Higgins v. White Sox Baseball Club, Inc., 787 F.2d 1125, 1131 (7th Cir. 1986) (Bauer, J., dissenting) (objecting to a remand for a new trial because of garbled and error-filled jury instructions, based largely on the ground that the trial judge was "a veteran of ten years on the district court and twelve years as a trial and appellate court judge of the state of Illinois").

185. *See, e.g.*, Thomas v. United Parcel Serv., Inc., 890 F.2d 909, 924 (7th Cir. 1989) (Bauer, C.J., concurring) (refusing to join the majority's observation that every other circuit had taken a position on a question of law that was opposite to that of the Seventh Circuit and more in accord with Supreme Court precedent).

while many of Judge Bauer's decisions show that he certainly can handle difficult cases, some of his opinions avoid the tough analysis required in a particular case.[186]

With regard to Judge Bauer's tenure as chief judge, most of the lawyers questioned believe he performed well. He has the skills of a politician, in the positive sense of the word, and he used those skills well as chief judge. Judge Bauer's friendly style and temperament make him especially adept at working out personality problems on the court, as well as in performing his role as ambassador to the bar and the public. While Chief Judge Bauer reportedly did try to encourage his slower colleagues to issue prompt opinions, those efforts have been only partially successful.[187] Also, the Council believes that, as chief judge, he should have been more active in dealing with problems relating to the performance of district judges within the circuit. In that respect, Judge Bauer was too willing to live with unacceptable performance among his judicial colleagues.

B. John L. Coffey

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

As discussed below, the Council believes that Judge Coffey's performance as a circuit judge is lacking in a number of significant

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186. *See, e.g.*, King v. General Elec. Co., 960 F.2d 617, 628 (7th Cir. 1992) (Cudahy, J., dissenting) (involving an employment discrimination claim); United States v. Bafia, 949 F.2d 1465 (7th Cir. 1991) (concerning criminal jury instructions) (Posner, J., concurring in part and dissenting in part), *cert. denied sub nom.* Kerridan v. United States, 112 S. Ct. 1989 (1992).

In *King*, two groups brought age discrimination claims against General Electric ("GE"). *King*, 960 F.2d at 619. Both claims were joined for trial to determine whether GE had engaged in a pattern and practice of age discrimination, but only one group had obtained verdicts on their individual claims when GE appealed from those verdicts. *Id.* at 619-20. That group of plaintiffs defended the appeal on the basis of both statistical and anecdotal evidence demonstrating age bias in GE's selection as to who would be laid off. *Id.* at 626-27. The court, in a decision by Chief Judge Bauer, reversed the judgments and ordered new trials for both groups of plaintiffs. *Id.* at 628. Thus, the second group of plaintiffs had their rights adjudicated even though their case was not on appeal. With regard to the first group of plaintiffs, Chief Judge Bauer (joined by Judge Kanne) rejected the statistical and anecdotal evidence for reasons that Judge Cudahy in his dissent, convincingly argued, were erroneous. *See id.* at 628-29 (Cudahy, J., dissenting).

187. *See infra* Appendix A, at A-30 (discussing the average time that each judge took to write an opinion per year).

respects. Judge Coffey's opinions are almost invariably written forcefully in favor of a particular result and they also typically treat that result as being clear and beyond dispute.

There are, of course, many cases of exactly this type, and in these instances, Judge Coffey's opinions are usually solid and straightforward. But there are also many cases where either the legal rules or the facts are not so black-and-white. Judge Coffey's opinions rarely acknowledge serious factual or legal uncertainties, however. The consequence is a somewhat mechanical jurisprudence that, while effective and persuasive at some times, at other times seems to overly simplify or distort difficult issues.[188] The cost of Judge Coffey's failure to acknowledge the difficulties or ambiguities presented by a case, and his failure to acknowledge at least the legitimacy of competing arguments and concerns, is that his opinions at times appear result-oriented.

These problems are exacerbated by Judge Coffey's tendency to go too far in attempting to prove that a given result is the right one for every conceivable reason. For example, *United States v. Martin*[189] involved a criminal defendant's challenge to his conviction on the ground that he had been prejudiced by being forced to appear at trial in prison garb, consisting of a blue jumpsuit.[190] Moreover, the defendant initially appeared before the jury together with two co-defendants (who subsequently pled guilty) also dressed in identical prison jumpsuits.[191] The constitutional rule established in *Estelle v. Williams*,[192] acknowledged in Judge Coffey's opinion, is that it violates a defendant's right to a fair trial to compel a defendant to

188. *See, e.g.*, Castillo v. Cook County Mail Room Dep't, 990 F.2d 304, 308 (7th Cir. 1993) (Coffey, J., dissenting) (claiming that an "unintentional and isolated" opening of a prisoner's letters does not violate any constitutional right, even though the majority pointed out that there was no way to make such factual determinations on the basis of the complaint alone); Senn v. United Dominion Indus., Inc., 951 F.2d 806 (7th Cir.) (holding that collective bargaining agreements and plan documents did not unambiguously provide for vestment of lifetime benefits), *reh'g denied*, 962 F.2d 655, 656 (7th Cir. 1992) (Cudahy, J., dissenting) (criticizing panel opinion for use of a "default rule" that ignored the problem of contractual ambiguity), *cert. denied*, 113 S. Ct. 2992 (1993); Teague v. Lane, 820 F.2d 832, 844, 848 (7th Cir. 1987) (en banc) (Cudahy, J., dissenting) (arguing that the majority opinion by Judge Coffey "devote[d] many pages" to establishing the lack of a right to a representative petit jury when that was not the real issue), *aff'd*, 489 U.S. 288 (1989).

189. 964 F.2d 714 (7th Cir. 1992)

190. *Id.* at 716.

191. *Id.* at 719.

192. 425 U.S. 501 (1976).

stand trial before a jury in prison attire.[193] Notwithstanding this rule, the conviction could have been affirmed on several grounds, including harmless error in light of the overwhelming evidence of guilt. Judge Coffey in fact reached such a conclusion of harmless error,[194] but he went further and held that there was no reason to believe that the jury was able to identify the identical jumpsuits worn by the three co-defendants as prison garb.[195] This determination has an air of unreality about it, as suggested by Judge Ripple's concurrence. The very lack of necessity for making such a finding makes it all the more inappropriate.[196]

Judge Coffey often deals with potentially difficult issues that could stand in the way of a given outcome by finding that the issues either have not properly been raised or have been waived. While in some cases these findings clearly have been legitimate, in others they appear to disregard the facts and the law. In the panel opinion in *Hunter v. Clark*,[197] Judge Coffey held, over a strong dissent by Judge Flaum,[198] that a defendant had waived his constitutional right to have the jury informed that no adverse inference could be taken from his failure to testify. The basis of the waiver was that the defendant had refused to accept a proposal, made by the state trial judge at the end of the trial, to start the defendant's trial over again in a proceeding severed from his co-defendants (who did not wish a "no adverse inference" instruction to be given).[199] In short, Judge Coffey found that the defendant's refusal to waive his double jeopardy rights constituted a waiver of his self-incrimination rights. This rationale was subsequently abandoned by Judge Coffey in the en banc affirmance of the conviction on "harmless error" grounds.[200]

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193. *Martin*, 964 F.2d at 719-22.

194. *Id.* at 721.

195. *Id.* at 720.

196. *Id.* at 722 (Ripple, J., concurring); *see also* Cole v. Bertsch Vending Co., 766 F.2d 327, 335 (7th Cir. 1985) (Haynsworth, J., concurring) (criticizing Judge Coffey for attempting to decide a proximate causation issue unnecessary to the decision).

197. 906 F.2d 302 (7th Cir. 1990), *rev'd*, 934 F.2d 856 (7th Cir.) (en banc), *cert. denied*, 112 S. Ct. 388 (1991).

198. *Hunter*, 906 F.2d at 310-12 (Flaum, J., dissenting).

199. *Id.* at 307.

200. *Hunter*, 934 F.2d at 857, 860; *see also* Banks v. NCAA, 977 F.2d 1081, 1094 (7th Cir. 1992) (Flaum, J., dissenting) (claiming that the majority opinion by Judge Coffey failed to properly acknowledge the issues raised by the complaint), *cert. denied*, 113 S. Ct. 2336 (1993); United States v. Berkowitz, 927 F.2d 1376, 1392 (7th Cir.) (Coffey, J., concurring in part and dissenting in part) (finding, over a dissent by Judge Ripple, that although the issue regarding constitutional violation was clearly raised on appeal, it was waived because of its "cursory treatment"), *cert.*

Some of Judge Coffey's opinions appear to be heavily influenced by his personal values and biases to an extent that casts considerable doubt upon his ability to apply the law fairly in certain areas. This is particularly true with regard to church/state issues. For example, his lengthy dissent in *Doe v. Village of Crestwood*,[201] which attempted to defend government sponsorship of a Roman Catholic mass as part of an Italian festival, ends with a diatribe against "the eroding moral fibre of this nation," which he ascribes in part to "unhealthy secularism."[202] Similarly, although Judge Coffey's majority opinion in *Welsh v. Boy Scouts of America*[203] contains a reasonable statutory analysis of why the Boy Scouts are not covered by Title II, the opinion ends with an extraneous paean to the virtues of the Boy Scouts that bears no relation to the purported grounds for the decision but succeeds in raising questions about whether there is a policy agenda underlying the seemingly neutral statutory analysis.[204] Moreover, in cases where he obviously has strong personal views, Judge Coffey displays a willingness to second-guess the factual findings of the district court or jury at odds with his approach in other types of cases, such as appeals by criminal defendants.[205]

Judge Coffey was reported to sometimes make inappropriately disparaging or hostile remarks in rejecting opposing arguments. While these *ad hominem* attacks are usually directed at litigants, they have sometimes spilled over to his colleagues on the bench.[206]

From a stylistic standpoint, while some of Judge Coffey's opinions

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denied, 112 S. Ct. 141 (1991); Teague v. Lane, 820 F.2d 832, 843-44 (7th Cir. 1987) (en banc) (Cudahy, J., dissenting) (criticizing the majority opinion for finding a waiver of an equal protection claim), *aff'd*, 489 U.S. 288 (1989).

201. 917 F.2d 1476, 1480 (7th Cir. 1990) (Coffey, J., dissenting), *cert. denied*, 112 S. Ct. 3025 (1992).

202. *Id.* at 1494 (Coffey, J., dissenting).

203. 993 F.2d 1267 (7th Cir.), *cert. denied*, 114 S. Ct. 602 (1993).

204. *See Welsh*, 993 F.2d at 1278.

205. *Compare Doe*, 917 F.2d at 1488-89 (Coffey, J., dissenting) (claiming that a trial judge reached out and magnified evidence) *and* Madison County Jail Inmates v. Thompson, 773 F.2d 834, 845 (7th Cir. 1985) (Coffey, J., concurring) (overturning a jury verdict for prisoners in an unconstitutional conditions case, and finding expert testimony inadequate to establish actual injury) *with* United States v. Martin, 964 F.2d 714, 720 (7th Cir. 1992) (deferring to the district court finding that the defendant's single-color jumpsuit worn in the jury's presence was not obvious prison garb) *and* United States v. Marin, 761 F.2d 426, 434 (7th Cir. 1985) (deferring to a district court's finding that it was not "credible that a woman who has been in the country for nine years indicates that she does not read and understand English").

206. *See, e.g.*, In re Scarlata, 979 F.2d 521, 534 (7th Cir. 1992) (Coffey, J., dissenting) (taking offense at the majority's criticism that he reached out to decide an issue); United States v. Berkowitz, 927 F.2d 1376, 1400 n.1 (7th Cir.) (expressly objecting to Judge Coffey's "*ad hominem* argumentation"), *cert. denied*, 112 S. Ct. 141 (1991).

are well written, others are unnecessarily lengthy, redundant, and poorly written. The opinions usually spend a great deal of time detailing facts and often quote at length from transcripts. Consistent with his general approach of trying to demonstrate that the case at hand is clearly governed by an existing rule, Judge Coffey's opinions also typically quote prior decisions at length and string together blocks of additional citations.[207] We do not mean to suggest that all, or even most, of Judge Coffey's opinions suffer from these problems. As we have said earlier and wish to reiterate, Judge Coffey produces many sound and well-reasoned opinions, including opinions in complex cases. But an unacceptably large number of Judge Coffey's opinions do evidence the faults described above.

Judge Coffey takes longer to issue his opinions than the majority of other Seventh Circuit judges.[208] Over the last five years, on average, majority opinions written by Judge Coffey have been issued approximately seven months after oral arguments.[209] We have also received reports that even when he is not the author of the majority opinion, Judge Coffey is slow in responding to circulated opinions, thereby causing the panels on which he sits to take longer than average in issuing opinions.[210]

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

The complaints about Judge Coffey's temperament are not limited to his conduct from the bench. From our investigation, Judge Coffey possesses a considerable temper and is often inexcusably abusive to Seventh Circuit staff members, especially his law

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207. *E.g.*, Banks v. NCAA, 977 F.2d 1081 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2336 (1993); Senn v. United Dominion Indus. Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2992 (1993).

208. *See infra* Appendix A, at A-30.

209. *See infra* Appendix A, at A-29.

210. Judge Coffey, however, is willing to write dissents and concurrences. *See, e.g.*, Hessel v. O'Hearn, 977 F.2d 299, 305 (7th Cir. 1992) (Coffey, J., dissenting) (arguing that the court unnecessarily expanded the plain view doctrine); HOPE, Inc. v. County of Du Page, 717 F.2d 1061, 1077 (7th Cir. 1983) (Coffey, J., dissenting) (objecting to the court's finding of standing in a fair housing case), *rev'd*, 738 F.2d 797 (7th Cir. 1984) (en banc).

clerks.[211] We are also concerned about reports that Judge Coffey does not enjoy a good collegial relationship with his fellow judges. Unfortunately, these strains may be showing through and affecting the court's work.[212] Both Chief Judge Posner and former Chief Judge Bauer, however, say that while he expresses himself forcefully, he is on good terms with all the members of the court.

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

C. *Richard D. Cudahy*

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

Judge Cudahy has been one of the court's most prolific writers. He files separate concurring or dissenting opinions far more often than the court's other members, and he writes the court's opinions more frequently than many of the other judges.[213] Judge Cudahy writes opinions for the court in a direct and pointed style, characterized by most lawyers as scholarly. His writing is uncomplicated

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211. A lengthy article about Judge Coffey that appeared in the March 1987 issue of *Milwaukee Magazine* contains similar reports that are consistent with the results of the Council's own investigation. James Romenesko, *Disorder in the Court*, MILWAUKEE MAG., March 1987, at 54.

212. *See, e.g.*, United States v. Berkowitz, 927 F.2d 1376, 1400 n.1. (7th Cir.) (Ripple, J., dissenting) ("Judge Coffey has filed a separate opinion that expresses disagreement with the views set forth here. The *ad hominem* argumentation in that opinion demonstrates, far better than anything more that could be written here, the deficiencies of his criticism."), *cert. denied*, 112 S.Ct. 141 (1991).

213. *See infra* Appendix A, at A-38. A-39.

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

His opinions' treatment of the applicable law generally leads to a straightforward application of the law to the facts of the case. Before concluding, he often — but not always — will give attention to the most important arguments of the losing side, further explaining the basis of the decision.[214] Judge Cudahy's writing is even-handed and temperate, neither displaying nor evoking passion or notoriety. This basic sturdiness of style is considerably easier to appreciate than it is to achieve. Posing few obstacles to the reader, Judge Cudahy's opinions usually accomplish what they set out to do — decide the case before the court — and incrementally advance the law without regard to generalized theories or activist agendas. In contrast to Judge Cudahy's established reputation as a frequent dissenter, other judges of the court dissent from Judge Cudahy's majority opinions at no more than an average rate.[215]

Although almost any of Judge Cudahy's published opinions would provide a good example of his style and care, some cases illustrate particularly well his skill for resolving difficult issues. In *FMC Corp. v. Capital Cities/ABC, Inc.*,[216] the court reversed the district court's ruling that the plaintiff defense contractor could not state a claim against a television network for conversion of the contractor's confidential documents.[217] Judge Cudahy's opinion for the panel carefully sorted through a choice of law issue and deftly harmonized the defendant's important First Amendment concerns with the plain-

214. *E.g.*, Paper Express, Ltd. v. Pfankuch Maschinen Gmblt, 972 F.2d 753 (7th Cir. 1992); U.S. ex rel Valders Stone & Marble, Inc. v. C-Way Construction Co. 909 F.2d 259 (7th Cir. 1990).

215. *See infra* Appendix A, at A-36, A-37.

216. 915 F.2d 300 (7th Cir. 1990).

217. *Id.* at 304-05.

tiff's need for the information allegedly pilfered from its files.[218]

In *Merk v. Jewel Food Stores*,[219] Judge Cudahy wrote the majority opinion, withstanding a lengthy and caustic dissent by Judge Easterbrook.[220] The court reversed a judgment entered in the defendant's favor by Judge Posner, who had presided over a jury trial in the district court.[221] Judge Cudahy's opinion held that oral agreements secretly negotiated between the company and the union did not override a collective bargaining contract, noting "the grave dangers posed by a back room deal that is secretly negotiated between union officials and company management without the knowledge or consent of the union rank and file."[222] This decision permitted approximately 15,000 former food store employees to sue the company for back pay and benefits under the collective bargaining agreement.[223] Both the opinion and the dissent appeared thoroughly researched.

Judge Cudahy does not necessarily jump at the chance to resolve an important question if the case can be decided without doing so. Judge Posner criticized Judge Cudahy's majority opinion in a separate concurrence in *Martin v. Consultants & Administrators, Inc.*,[224] writing that the court should have used the case "as a vehicle for clarifying issues that have been a recurrent source of uncertainty and confusion;"[225] that is, the distinctions between self-concealing fraud and active concealment of an underlying fraud, and equitable estoppel and equitable tolling. The two scholarly opinions reached the same result for the case before the court, but Judge Cudahy's principal opinion was content to decide the case on narrow grounds and not to resolve the other issues.

Quite recently, Judge Cudahy wrote for a unanimous panel in *Great Lakes Dredge & Dock Co. v. City of Chicago*,[226] one of the many cases arising out of the Chicago flood of April of 1992. The city's contractor, Great Lakes, was sued in state court by thousands

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218. *Id.* at 302, 305.

219. 945 F.2d 889 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1951 (1992).

220. *Mark*, 945 F.2d at 899-906 (Easterbrook, J., dissenting).

221. *Id.* at 899.

222. *Id.*

223. *Id.* at 890; *see also* Bidlack v. Wheelabrator Corp., 993 F.2d 603, 610-13 (7th Cir.) (en banc) (Cudahy, J., concurring) (opinions in a case concerning the appropriate default role for collective bargaining agreements), *cert. denied*, 114 S. Ct. 291 (1993).

224. 966 F.2d 1078 (7th Cir. 1992).

225. *Id.* at 1104 (Posner, J., concurring).

226. 3 F.3d 225 (7th Cir. 1993).

of plaintiffs, including individuals, businesses, and the city, who alleged that the contractor had negligently installed pile clusters in the Chicago River, causing a break in a subterranean freight tunnel that sent millions of gallons of river water into basements of many Loop buildings.[227] The contractor filed a complaint in district court, claiming the existence of federal admiralty jurisdiction and seeking the benefit of a statutory limitation of liability for vessel owners.[228] The city successfully moved to dismiss the action in the district court but the court of appeals reversed, concluding that the contractor's alleged negligence was within admiralty jurisdiction.[229] The scholarly opinion traces the origins and development of the somewhat arcane field of admiralty, carefully grounding the court's holding in the statutes and cases, and methodically applying a three-staged inquiry to the specific facts of the case. The court remanded the case to the district court for further proceedings relative to the limitation of liability, which Judge Cudahy wryly noted was "the substantive law upon which Great Lakes anchor[ed] its claim."[230]

While Judge Cudahy is to be commended for his ability to produce opinions of this quality with reasonable speed, he can also be criticized for contributing to the court's backlog. Because Judge Cudahy is more apt than anyone else on the court to voice objections to opinions circulated from other chambers, he has been known to delay other judges in issuing their final opinions. Judge Cudahy's own opinions tend to be longer and more academic in style, and it often takes him longer to issue opinions than his colleagues.[231] Most of the opinions written by Judge Cudahy and reviewed by the Council were issued within six months after oral argument. On occasion, however, Judge Cudahy takes an inordinate amount of time to produce a decision.[232] In recent years, his opinions have revealed a tendency to request supplemental briefing of particular issues, especially jurisdiction. In all, however, Judge Cudahy's contribution to the court's backlog is small. The Council views the delay attributa-

227. *Id.* at 226.

228. *Id.*

229. *Id.* at 226-27.

230. *Id.* at 230.

231. *See infra* Appendix A, at A-29.

232. *See, e.g., In re* Chicago Rock Island & Pacific R.R. Co., 753 F.2d 56 (7th Cir. 1985). The court took fourteen months to issue Judge Cudahy's majority opinion in a relatively uncomplicated dispute with a particularly small amount of value in controversy. This case was argued on November 15, 1983 and decided on January 7, 1985. *Id.* at 56.

ble to Judge Cudahy's separate opinions as worthwhile.

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

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

Judge Cudahy also has come to be perceived by the bar as somewhat ideologically distanced from his colleagues on the court. To some, this perception raises a question as to the extent of Judge Cudahy's influence on the court when he must compete for a colleague's deciding vote. His dissents have grown shorter and pithier, though usually not biting.[233] But Judge Cudahy can be biting when Chief Judge Posner or Judge Easterbrook is on the other side, as in *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*[234]

The Council believes that published dissents and separate concurrences are useful instruments in the explication and advancement of the law. Judge Cudahy has issued numerous important and effective

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233. *E.g.*, *In re* Rivinius, Inc., 977 F.2d 1171 (7th Cir. 1992).

234. 970 F.2d 273 (7th Cir. 1992). Judge Cudahy wrote: "Apparently, the legislators had not read enough scholarly musings to realize that any efforts to protect the weak against the strong would, through the exhilarating alchemy of economic theory, increase rather than diminish the burden upon the powerless." *Id.* at 283 (Cudahy, J., dissenting). He went on to agree that a judge's thumb should not be on the scales of justice, perhaps in response to Judge Easterbrook's criticism of Judge Cudahy's majority opinion in Merk v. Jewel Food Stores Div., 945 F.2d 889, 906 (7th Cir. 1991) (Easterbrook, J., dissenting), *cert. denied*, 112 S. Ct. 1951 (1992).

separate opinions,[235] and he has also played an important role in the court by writing majority opinions that narrow overly-broad opinions issued by other judges.[236] Judge Cudahy's record — whether speaking for the court, concurring, or dissenting — reflects a substantial contribution to the law and the court. He continues to be an excellent judge.

D. Walter J. Cummings

Walter J. Cummings, 77, is a 1940 graduate of Harvard Law School. From 1940 to 1946, he worked in the Justice Department, primarily in the Solicitor General's office, and he served as Solicitor

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235. There are so many they cannot all be listed here. *E.g.*, Cuppett v. Ducksworth, 8 F.3d 1132 (7th Cir. 1993) (dissenting from a denial of habeas corpus and attacking the majority's acceptance of the validity of a pre-*Gideon* conviction); *In re* Rivinius, 977 F.2d at 1177-78 (refusing to allow a party to amend its pleadings to reflect the case actually tried); *Id.* at 1178 (Cudahy, J., dissenting) (attacking the court's "resuscitati[on] of the theory-of-the-pleadings doctrine"); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1123-26 (7th Cir. 1992) (Cudahy, J., dissenting), (dissenting from the reversal of an NLRB policy allowing illegal aliens to recover backpay) *amended on denial of reh'g*, 976 F.2d 1115 (7th Cir. 1992) (en banc); King v. General Elec. Co., 960 F.2d 617 (7th Cir. 1992) (Cudahy, J., dissenting) (charging the majority with applying the wrong standard in an employment discrimination case); Wallace v. Robinson, 940 F.2d 243, 249 (7th Cir. 1991) (en banc) (Cudahy, J., dissenting) (charging the majority with applying a new analysis in a prisoner due process case that conflicted with precedent of the Supreme Court and every other circuit), *cert. denied*, 112 S. Ct. 1563 (1992); Flamm v. Eberstadt, 814 F.2d 1169, 1181-82 (7th Cir.) (Cudahy, J., concurring in the judgment and concurring in part) (criticizing the majority opinion in Basic Inc. v. Levinson, 485 U.S. 224, 235 n.11 (1988)), *cert. denied*, 484 U.S. 853 (1987); Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983) (reversing the case based on the failure to appoint counsel for a prisoner), *cert. denied*, 464 U.S. 986 (1983); *Merritt*, 697 F.2d at 769-70 (Posner, J., concurring in part, dissenting in part) (arguing that if a prisoner had a good case, the market would provide counsel); *Id.* at 768-69 (Cudahy, J., concurring) (noting that "the barriers to entry into the prison litigation market might be very high" for prisoners); Norris v. United States, 687 F.2d 899 (7th Cir. 1982) (refusing to follow a Supreme Court decision that the majority claimed was no longer good law); *Id.* at 904-12 (Judge Cudahy joining an opinion over a dissent that essentially ignored the opinion issued by a prior panel in *Evans II*) (criticizing the decision as unnecessary to the result, bad law, and inappropriate for decision without oral argument or appointment of counsel).

236. *See, e.g.*, Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 826 F.2d 712, 716-19 (7th Cir. 1987) (limiting Will v. Comprehensive Accounting Corp., 776 F.2d 665 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986), *appeal after remand*, 866 F.2d 228 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989)); *But see* Evans v. City of Chicago, 10 F.3d 474, 483-85 (7th Cir. 1993) (Cudahy, J., dissenting).

See also Benning v. Board of Regents, 928 F.2d 775, 778 (7th Cir. 1991) (limiting Watkins v. Blinzinger, 789 F.2d 474 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987)). In *Benning*, however, Judge Cudahy did not expressly limit *Watkins*. Instead, he appears to have mischaracterized the *Watkins* decision as being limited to declarations that state officials violated state law and not federal law. *Id.* at 778. This mischaracterization appears to have been designed to narrow the scope of *Watkins*. While the Council believes that *Watkins* was an inappropriate expansion of precedent, *Benning* is not an accurate reading of *Watkins*.

General at the end of the Truman Administration from 1952 to 1953. For most of the period from 1946 to 1966, he was a partner with the firm that is now Sidley & Austin in Chicago. President Johnson appointed Judge Cummings to the Seventh Circuit in 1966, where he served as Chief Judge from 1981 to 1986.[237] Judge Cummings is also a former president of the Seventh Circuit Bar Association.

Judge Cummings is the most senior of the active judges on the Seventh Circuit. The Council believes that he also is one of the more able judges on the court and is impressed with the high quality of Judge Cummings's opinions. They reflect a fair-minded approach to the cases that come before him without regard to subject matter, and without apparent bias by his own political or ideological views. Indeed, it is difficult to discern from his opinions what those views might be.

Our investigators found several positive themes that consistently run through Judge Cummings's written opinions:

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

237. During Judge Cummings's tenure as chief judge, the court was given the power to appoint bankruptcy judges. (That power had previously been exercised by the district court, and the bankruptcy court had functioned as a legal backwater.) With the cooperation of other members of the Seventh Circuit, Judge Cummings succeeded in attracting and appointing outstanding candidates to the bankruptcy court. In our 1992 evaluation of that court, the Council praised it as perhaps the best court, top to bottom, sitting in Chicago. It is also viewed as one of the best bankruptcy courts in the country.

parties.

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

Judge Cummings is described as one who strongly believes that the court should speak with one voice whenever possible and, accordingly, he seeks to create consensus rather than conflict with his colleagues on the Seventh Circuit. This may help account for the fact that judges who preside over a case with him rarely write separate concurrences or dissents to the majority opinions he authors.[238]

Likewise, Judge Cummings himself writes concurring and dissenting opinions very sparingly. Between January 1985 and March 1, 1993, Professor Lessig's study of a large sample of the court's opinions showed that he authored relatively few concurrences and dissents.[239] In the Council's view, however, several of Judge Cummings's concurrences served the important jurisprudential function of highlighting limitations in the reach of seemingly expansive majority opinions or serious defects in majority or dissenting opinions in the case. For example, in *Wilcox v. Niagara of Wisconsin Paper Corp.*,[240] Judge Cummings wrote separately to criticize Judge Easterbrook's dissenting opinion for its factual analysis and its misreading of the governing state law. In *Ford v. Childers*,[241] which affirmed a directed verdict in a case seeking to impose liability for a law enforcement officer's use of deadly force, Judge Cummings wrote separately to explain the distinction that led him to join Judge Coffey's majority opinion in *Ford* but to dissent from Judge Coffey's

238. Judge Cummings has joined some of the court's more questionable decisions, including important decisions that were subsequently reversed. *E.g.*, Soldal v. County of Cook, 942 F.2d 1073 (7th Cir. 1991) (en banc), *rev'd*, 113 S. Ct. 538 (1992); United States v. Best, 913 F.2d 1179 (7th Cir. 1990), *rev'd*, 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992); Kamen v. Kemper Fin. Servs., Inc., 908 F.2d 1338 (7th Cir. 1990), *rev'd*, 111 S. Ct. 1711 (1991).

239. Judge Cummings both concurs and dissents far less than his colleagues. Thus, the Lessig Study reports that during the period under study, Judge Cummings contributed only 1 percent of the dissents and .5 percent of the concurrences of the dissents and concurrences written by the ten active judges. *See infra* Appendix A, at A-38, A-39.

240. 965 F.2d 355, 365-67 (7th Cir. 1992) (Cummings, J., concurring).

241. 855 F.2d 1271 (7th Cir. 1988) (en banc).

opinion in *Sherrod v. Berry*,[242] which nullified a damage award for the plaintiff in another deadly force case.[243] And in *Faheem-El v. Klincar*,[244] the court overturned a preliminary injunction that the panel had affirmed, which prohibited the state of Illinois from continuing its *per se* denial of bail to parolees being detained pending a final parole revocation hearing.[245] Judge Cummings wrote separately to emphasize that he had not departed from the views in the panel opinion he authored in the case.[246] Judge Cummings emphasized that the en banc opinion left open the possibility that on remand the District Court might find that the Illinois procedure violated due process, and he argued forcefully that this would be the correct finding and could justify an injunction requiring that Illinois consider parolees for conditional release pending the parole revocation hearing.[247]

Some of Judge Cummings's dissents have, in the Council's view, been particularly appropriate. For example, in *Sherrod*,[248] the jury awarded damages against an officer who shot and killed a criminal suspect, despite the officer's testimony that the suspect made a quick hand motion, as though reaching for a gun.[249] The en banc opinion written by Judge Coffey reversed the jury verdict and held that the trial court improperly admitted evidence that the suspect in fact was unarmed.[250] Judge Cummings's dissenting opinion criticized this ruling as "a miscarriage of justice,"[251] reasoning that even though the police officer did not claim to have seen a gun, the suspect's lack of a weapon was relevant to the credibility of the officer's testimony that he believed the suspect had reached for a gun.[252] Judge Cummings wrote that the en banc opinion "misrepresents the parties and events involved in the killing[,] . . . misinterprets the applicable legal standards and rules, and allows an argument waived by the defendants to prevail."[253]

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242. 856 F.2d 802 (7th Cir. 1988) (en banc).
243. *Ford*, 855 F.2d at 1277 (Cummings, J., concurring).
244. 841 F.2d 712 (7th Cir. 1988) (en banc).
245. Id. at 714.
246. *Id.* at 729 (Cummings, J., concurring).
247. *Id.*
248. 856 F.2d 802 (7th Cir. 1988) (en banc).
249. *Id.* at 804.
250. *Id.* at 807.
251. *Id.* at 808 (Cummings, J., dissenting).
252. *Id.* at 811 (Cummings, J., concurring).
253. *Id.*; *see also* Mojica v. Gannett Co., 986 F.2d 1158, 1158-68 (7th Cir.) (Cummings, J.,

A few instances involve cases where Judge Cummings joined, without explanation, in a majority opinion that contained broad language, when later opinions revealed that his views in fact were much narrower. For example, the court in *Visser v. Packer Engineering Associates, Inc.*,[254] affirmed summary judgment for the defendant on a claim by a 64-year-old plaintiff that his discharge nine months before his pension vested constituted age discrimination.[255] Judge Posner's majority opinion, in which Judge Cummings joined, categorically stated that the fact that the plaintiff "incurred a loss of pension benefits when he was fired . . . is [not] evidence of age discrimination."[256] Yet, not long thereafter, in *Castleman v. Acme Boot Co.*,[257] Judge Cummings wrote a majority opinion in which he held that "evidence of timing in relation to the vesting of pension benefits can be evidence of age discrimination."[258] He stated that *Visser* was "not to the contrary," and distinguished the decision on the factual basis that the evidence in that case was "overwhelming" that the reason for the termination was not age. Limiting the broad language of the *Visser* majority opinion would have been the appropriate subject of a concurring opinion in that case.[259]

Similarly, in *Sherman v. Community Consolidated School District 21*,[260] Judge Cummings joined Judge Easterbrook's majority opinion which upheld the Illinois statute providing that the Pledge of Allegiance (containing the phrase "one Nation under God") "shall be recited each day" by public school elementary pupils.[261] The majority opinion stated that, in light of the U.S. Supreme Court decision in *Lee v. Weisman*,[262] the Establishment Clause analysis articulated in *Lemon v. Kurtzman*[263] "is in doubt . . . .

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dissenting), *on reh'g*, 7 F.3d 552 (7th Cir.) (en banc), *petition for cert. filed*, 62 U.S.L.W. 3378 (U.S. Oct. 28, 1993) (No. 93-800).

254. 924 F.2d 655 (7th Cir. 1991) (en banc).

255. *Id.* at 660.

256. *Id.* at 658-59.

257. 959 F.2d 1417 (7th Cir. 1992).

258. *Id.* at 1421.

259. *Id.* n.2. The Supreme Court implicitly disapproved of *Castleman* in Hazen Paper Co. v. Biggins, 113 S. Ct. 1701, 1707-08 (1993). Our point, however, is not tied to which opinion accurately predicted the Supreme Court's position on the law, rather that Judge Cummings supported apparently inconsistent positions.

260. 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993).

261. *Sherman*, 980 F.2d at 439.

262. 112 S. Ct. 2649 (1992) (holding that a school could not select a clergyman to provide a nonsectarian prayer).

263. 403 U.S. 602 (1971).

The Court heard *Lee v. Weisman* in large part to reconsider *Lemon*, and *Lee* concluded without renewing *Lemon*'s lease."[264] Thereafter, in *Berger v. Rensselaer Central School Corp.*,[265] which held that the distribution of Gideon Bibles to elementary public school students violated the Establishment Clause, Judge Cummings wrote in the majority opinion that *Lee* "left *Lemon* untouched."[266] Judge Cummings distinguished the Seventh Circuit's *Sherman* opinion as inapplicable, describing it as a "narrow" decision which did not "trigger Establishment Clause analysis" because the pledge was civic, not religious in character,[267] a limitation Judge Cummings did not take the opportunity to articulate in *Sherman*.

In another case, *Bennett v. Jett*,[268] Judge Cummings joined — without explanation — Judge Kanne's majority opinion holding that a U.S. Supreme Court decision should not have been applied retroactively to require the Illinois Department of Human Rights to adjudicate old charges of discrimination that it had previously failed to process.[269] The majority opinion relied exclusively on the retroactivity analysis in *Chevron Oil Co. v. Huson*[270] and failed to mention a more recent Supreme Court case that the parties had brought to the court's attention, *James B. Beam Distilling Co. v. Georgia*.[271] To its credit, in response to a petition for rehearing, the court vacated its initial opinion in a subsequent per curiam decision.[272]

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

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264. *Sherman*, 980 F.2d at 445.

265. 982 F.2d 1160, 1162 (7th Cir.), *cert. denied*, 113 S. Ct. 2344 (1993).

266. *Id.* at 1162.

267. *Id.* at 1169 n.8.

268. 956 F.2d 138 (7th Cir. 1992).

269. *Id.* at 142.

270. 404 U.S. 97 (1971) (allowing retroactive application of a state statute where the respondent would otherwise have been deprived of a remedy due to unforseeable superceding legal doctrine).

271. 111 S. Ct. 2439 (1991) (holding that a Georgia excise tax statute applied retroactively to a present claim).

272. Bennett v. Jett, 966 F.2d 207 (7th Cir. 1992).

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

E. Frank H. Easterbrook

Frank H. Easterbrook, 45, is a 1973 graduate of the University of Chicago Law School. Judge Easterbrook was an assistant and deputy solicitor general from 1974 to 1979, a University of Chicago law professor from 1978 to 1985, and a principal of Lexecon, an economic consulting firm co-founded by Chief Judge Posner, from 1980 to 1985. President Reagan appointed Judge Easterbrook to the Seventh Circuit in 1985. From 1982 to 1991, Judge Easterbrook was an editor of the *Journal of Law and Economics* and he continues to serve on the University of Chicago faculty and remains a prolific and influential writer.[273]

Judge Easterbrook was generally praised as being exceptionally intelligent (many said "brilliant"). He has a great knowledge of the law, is a clear writer, and produces opinions faster than any judge on the court.[274] He is well prepared for oral argument and is, by all accounts, an extremely hard worker.

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

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273. *See, e.g.*, Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1392 (1992) (reviewing JUDGE FRANK EASTERBROOK & PROFESSOR DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991), and noting that "[t]his may be the best book ever written about corporate law").

274. *See infra* Appendix A, at A-29.

some length.[275]

1. *Judge Easterbrook's Opinions*

Judge Easterbrook's opinions are generally insightful and often ground-breaking. Indeed, Judge Easterbrook's reasoning has been subsequently adopted by federal judges facing similar issues. For example, Judge Easterbrook's dissent in *International Union, UAW v. Johnson Controls Inc.*[276] was subsequently adopted by the Supreme Court. Judge Easterbrook also has been commended by several attorneys for properly encouraging lower courts and members of the bar to return to certain basic "first principles" regarding obligations under Rule 11 of the Federal Rules of Civil Procedure, pleading requirements, jurisdictional predicates, and the proper role of discovery in civil litigation.

There are several areas of the law in which Judge Easterbrook has distinguished himself as the author of several of the court's key decisions, such as attorney sanctions under both Rule 11 of the Federal Rules of Civil Procedure and Rule 38 of the Federal Rules of Appellate Procedure.[277] Securities, corporate, and antitrust cases are other areas in which Judge Easterbrook has had a significant impact on the court's jurisprudence.[278]

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

276. 886 F.2d 871, 908-21 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting), *rev'd*, 499 U.S. 187 (1991).

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

278. Chicago Pro Sports Ltd. Partnership v. NBA, 961 F.2d 667 (7th Cir. 1992); Astor Chauffeured Limosine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540 (7th Cir. 1990); DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir. 1990); Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989); Jordan v. Duff & Phelps, 815 F.2d 429 (7th Cir. 1987).

Judge Easterbrook has written many strong, solid opinions that clearly articulate appropriate concerns.[279] An example is his recent opinion for the en banc court in *Todd v. Societe BIC, S.A.*[280] Whether or not one agrees with the result in *Todd*, Judge Easterbrook did an excellent job of fairly setting forth the applicable issues and advancing the discussion of those issues.

Judge Easterbrook provides the reader with a clear road map through an opinion, and he can describe difficult and complex legal issues in plain terms. Several attorneys applauded Judge Easterbrook's frequent use of evocative and colloquial language. For example, he described the uncertain state of the law governing the statute of limitations for judicially-created federal securities fraud actions as "one tottering parapet of a ramshackle edifice."[281] In characterizing the state of mind required for incurring liability for aiding and abetting violations of section 10(b) of the Securities Exchange Act of 1934,[282] Judge Easterbrook did not adopt the typical legalese common to the cases in this area. Instead, he wrote that plaintiffs in such cases must establish that the defendant has "thrown in his lot with the primary violators" or gained by "bilking" investors or by trying to "feather their nest."[283] One attorney noted that such creative use of everyday language often makes Judge Easterbrook's opinions a pleasure to read. Many attorneys

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279. *See, e.g.*, Hill v. Richardson, 7 F.3d 656, 657-58 (7th Cir. 1993) (explaining why counsel for a plaintiff who obtains desired relief through settlement of a § 1983 case is entitled to an award of fees); Guinan v. United States, 6 F.3d 468, 473-76 (7th Cir. 1993) (Easterbrook, J., concurring) (discussing concerns related to the timing of a claim by a criminal defendant of ineffective assistance of counsel); United States v. Springs, 988 F.2d 746, 747 (7th Cir. 1993) (discussing the district judge's ability to modify a sentence); *In re* Krynicki, 983 F.2d 74, 78 (7th Cir. 1992) (refusing to seal briefs and recognizing the public's right to information); NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 294 (7th Cir. 1992) (employing a broad application of fair housing law to insurance redlining), *cert. denied*, 113 S. Ct. 2335 (1993); *In re* CMC Heartland Partners, 966 F.2d 1143, 1146-48 (7th Cir. 1992) (discussing the intersection of CERCLA and bankruptcy law); Owens-Corning Fiberglas Corp. v. Moran, 959 F.2d 634, 635 (7th Cir. 1992) (declining federal interference in a state court proceeding).

280. 9 F.3d 1216 (7th Cir. 1993) (en banc) (certifying product liability questions to the Illinois Supreme Court). The Illinois Supreme Court subsequently refused certification. *See* Rooney, *Lighter Case*, *supra* note 39.

281. Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 108 S. Ct. 329 (1987).

282. 15 U.S.C. § 78j(b) (1988).

283. Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986); *see also* Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp., 910 F.2d 1540, 1546 (7th Cir. 1990) (noting that the defendant characterized its offering statements as "such obvious hooey that no reasonable investor would be taken in"); United States v. Myers, 917 F.2d 1008, 1010 (7th Cir. 1990) (stating, in response to a failure to include a jury instruction: "Imagine what happens if a judge intones: 'For the next two hours, do not say the word "hippopotamus" to yourself.' ").

questioned, however, whether Judge Easterbrook's examples sometimes go too far, noting that some of his statements or examples appear smug or inappropriate.[284]

Judge Easterbrook has been very strict in applying procedural rules to defeat discussion on the merits. He has, for example, taken a narrow view toward filing briefs late or exceeding page limits,[285] as well as amending complaints.[286] In the Council's view, this kind of blind adherence to the rules for their own sake too often sacrifices the litigant in multi-issue or multi-party cases with real needs for more time or space.[287] Also, by discovering hitherto unsuspected barriers to finality and jurisdiction, he often has turned perfecting an appeal into a mine field for litigants and lower courts alike.[288]

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

Judge Easterbrook has been perceived as selecting a result consistent with his views of economic efficiency and then working backwards, and often outside the record, to reach the result he deems appropriate.[289] As a consequence, the results in many of Judge Easterbrook's opinions appear to be based on unproven factual assump-

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284. *See, e.g.*, United States v. Eaken, 995 F.2d 740, 745 (7th Cir. 1993) (Easterbrook, J., dissenting) ("Eaken owes the United States a year of his life for failure to file his tax return for 1985."); *Id.* at 743 n.3 (noting that the majority opinion disagreed with Judge Easterbrook's conclusion that a one-year sentence would be given on remand even if the tax conviction was reversed because Eaken still had to serve his sentence for failure to file a conviction, which he did not appeal); United States v. Finley, 934 F.2d 837, 840 (7th Cir. 1991) (explaining how a prosecutor may formulate a question, Judge Easterbrook used the example: "Did you tell me that in the evenings [defendant] is a female impersonator who fleeces customers in seedy bars?").

285. *See, e.g.*, EDC, Inc. v. Navistar Int'l Transp. Corp., 915 F.2d 1082, 1085 (7th Cir. 1990) (holding that while a misinterpretation of the rule may furnish good cause to file a brief instanter, ignorance of the rule does not).

286. *See,, e.g.*, Holstein v. Brill, 987 F.2d 1268, 1270 (7th Cir. 1993) (holding that post-confirmation claim amendments should be allowed in Chapter 11 cases only for compelling reasons); O'Rourke v. Continental Casualty Co., 983 F.2d 94, 97 (7th Cir. 1993) (prohibiting an employee from amending his age discrimination complaint to include a retaliation claim).

287. *See supra* notes 76-87 and accompanying text (discussing the problems inherent in strict page limitations).

288. *E.g.*, U.S. v. Mosley, 967 F.2d 242, 243-44 (1992); FDIC v. Elefant, 790 F.2d 661 (7th Cir. 1986).

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

tions and/or hypotheses not obtained from the record in the case, but instead from his own assumptions about how a market or a transaction should work. This approach quite properly infuriates lawyers; it deprives them of a chance to prove their case, to brief the case law, and even to challenge the factual presentation of expert opinion which Judge Easterbrook, in effect, unilaterally introduces into his opinion as irrebuttable "fact." This problem is perhaps most prominent in Judge Easterbrook's opinions in significant corporate and securities cases.

For example, in *Flamm v. Eberstadt*,[290] Judge Easterbrook, after first citing a wealth of literature from the "Chicago School" of law and economics, concluded in accordance with his own law review article[291] that since management's "silence pending settlement of . . . a deal is beneficial to most investors, most of the time,"[292] the failure to disclose a pending deal prior to a price and structure agreement is immaterial as a matter of law and economic policy.[293] Shortly thereafter, in *Basic, Inc. v. Levinson*,[294] the Supreme Court expressly criticized Judge Easterbrook's opinion in *Flamm* for "[r]easoning backwards from a goal of economic efficiency" to achieve the result reached in that case.[295] The benefit to investors "fact" that Judge Easterbrook relied upon in *Flamm*[296] was not even discussed in the record before him. In the Council's view, this is a "legislative" — rather than an "adjudicative" — fact, which under the statutory scheme is appropriately left to an administrative agency and not to a common law court.[297]

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290. 814 F.2d 1169 (7th Cir.), *cert. denied*, 484 U.S. 853 (1987).

291. *See* Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. (1985) (setting out the principles of optimal sanctions and applying them to common problems found in securities cases).

292. *Flamm*, 814 F.2d at 1177.

293. *Id.*

294. 485 U.S. 224 (1988).

295. *Id.* at 235 n.11; *see also* Wallace v. Robinson, 940 F.2d 243, 249 (7th Cir. 1991) (Cudahy, J., dissenting) ("By artfully framing the question in this way, however, the en banc majority [through Judge Easterbrook] orchestrates its answer.").

296. 814 F.2d at 1177.

297. A number of influential judges have recently argued that an articulation of clear, "bright-line" rules is preferable to fact-intensive distinctions. *See* POSNER, STUDY IN REPUTATION, *supra* note 90, at 107; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182-83 (1989). Other scholars have addressed a related topic and have tried to identify a "default rule" for apparently incomplete contracts. *See* Ayres, *supra* note 273; Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992). For a recent example of an attempt by the Seventh Circuit to identify the appropriate "default" rule, compare the opinions of Judges Cudahy, Posner, and Easterbrook in Bidlack

Another example is Judge Easterbrook's opinion in *Kamen v. Kemper Financial Services, Inc.*[298] In *Kamen,* Judge Easterbrook confronted the narrow issue of whether the district court erred in dismissing a shareholder derivative action for failure to plead with sufficient particularity facts excusing a "demand" on the board of directors.[299] Rather than address that issue, however, Judge Easterbrook expressly overruled Seventh Circuit precedent holding that the issue was governed by state corporate law and concluded that, as a matter of economic policy, the requirement of making a "demand" on the board should never be excused.[300] Judge Easterbrook justified his power to use economic policy to create a universal demand requirement by arguing that the issue of "demand" was governed by federal common law.[301]

The Supreme Court unanimously reversed Judge Easterbrook's opinion.[302] Suggesting that Judge Easterbrook's decision was akin to "legal reform," the Supreme Court concluded the result reached by the Seventh Circuit "would require a quantum of federal common lawmaking that exceeds federal courts' interstitial mandate."[303] The Supreme Court also criticized the Court of Appeals' view that it was "free to adopt the American Law Institute's universal-demand rule even though *neither* party addressed whether the futility exception should be abolished as a matter of federal common law."[304] Moreover, the Supreme Court chided Judge Easterbrook for writing an opinion that contains dictum: "[T]he court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided."[305] The Court concluded that by creating a federal

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v. Wheelabrator Corp., 993 F.2d 603 (7th Cir.) (en banc), *cert. denied,* 114 S. Ct. 291 (1993).

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

298. 908 F.2d 1338 (7th Cir. 1990), *rev'd,* 111 S. Ct. 1711 (1991).

299. *Kamen,* 908 F.2d at 1340-41.

300. *Id.* at 1343-47.

301. *Id.* at 1342. Judge Easterbrook did circulate the opinion pursuant to Rule 40(f), and the court approved the departure from its prior precedent.

302. *Kamen,* 111 S. Ct. at 1716.

303. *Id.* at 1720.

304. *Id.* at 1718.

305. *Id.* n.5.

law of universal demand, "The Court of Appeals thus erred."[306]

Regrettably, *Kamen* and *Flamm* are only two examples among many evidencing this disturbing practice in the corporate and securities area.[307] Moreover, cases in the securities field are not the only area in which Judge Easterbrook appears to rely on assumptions about economic efficiency taken from outside the record.[308]

Another such area is attorney fee awards to prevailing plaintiffs under civil rights and other statutes. Judge Easterbrook has exhibited a willingness to overturn district court fee awards that set attorneys' hourly rates based upon the prevailing market rates in the relevant legal community. Notwithstanding the "abuse of discretion" standard that is to be applied on appellate court review of fee awards, Judge Easterbrook has reversed trial court determinations awarding fees based on "market" hourly rates, which vary from those the prevailing party's attorney typically charges for his or her services. Under Judge Easterbrook's analysis, "Lawyers do not come from cookie cutters," and a lawyer with a usual hourly billing rate above or below the market rate in the community is presumptively

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306. *Id.* at 1723.

307. *See, e.g.*, Eckstein v. Balcor Film Investors, 8 F.3d 1121, 1130-31 (7th Cir. 1993) (employing the efficient capital market hypothesis to reject theory of liability based on a fraud that "created" a market), *cert. denied*, 114 S.Ct. 883 (1994); Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 515 (7th Cir. 1989) (employing the efficient capital market hypothesis to limit securities fraud liability); Goldberg v. Household Bank, 890 F.2d 965, 966 (7th Cir. 1989) (using the efficient market theory to limit the measure of damages recoverable by victims of securities fraud); Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 442 (7th Cir. 1987) (relying on his own theory of optimal damages in securities fraud cases to limit recovery to situations where investors as a whole suffer a net loss), *cert. dismissed*, 485 U.S. 901 (1988).

308. *See, e.g.*, Merk v. Jewel Food Stores, 945 F.2d 889, 898-99 nn.3-4 (7th Cir. 1991) (criticizing Judge Easterbrook's dissent for relying on an unsupported assertion about economic motives and for ignoring and mischaracterizing controlling precedent), *cert. denied*, 112 S. Ct. 1951 (1992); *see also* United States v. Mount, 966 F.2d 262 (7th Cir. 1992) (applying an economic analysis to baseball); Adam H. Kurland, *Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 CHI.-KENT L. REV. 3, 7 (1991) (criticizing the law and economics approach to the writ of *coram nobis* in United States v. Keane, 852 F.2d 199, 206 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989)); *Id.* at 14-20 (discussing the willingness of Judges Easterbrook and Posner to go beyond Supreme Court precedent to advance their views in criminal cases); Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503 (1991) (discussing Judge Easterbrook's opinion in Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990)).

Judge Easterbrook has also issued other "result-oriented" or "activist" opinions in areas not directly tied to economic efficiency, but in which he has a strong view as to a legal question presented. *See, e.g.*, Watkins v. Blinzinger, 789 F.2d 474, 483-84 (7th Cir. 1986) (expanding Eleventh Amendment doctrine to limit *Ex Parte* Young, 209 U.S. 123 (1905), and thereby limiting many suits against the states), *cert. denied*, 481 U.S. 1038 (1987); *cf.* United States v. Sassi, 966 F.2d 283 (7th Cir.) (discussing which of the many prior opinions on the subject are the law of the circuit, and which the court can ignore), *cert. denied*, 113 S. Ct. 509 (1992).

entitled to that rate and not to one devised by the court.[309]

As applied to public interest attorneys, who choose to reduce their hourly billing rates for certain clients or causes, Judge Easterbrook has suggested in dictum, despite Supreme Court holdings to the contrary, that "if ideology leads some lawyers to favor a particular clientele, and so reduces what these persons must pay for legal services, this is the market at work."[310] In that same dictum, he asserted that "lawyers get consumption value out of working for certain clients," and he compared the lower rates they charge to those charged by lawyers "who flock to Arizona for the desert air and scenery."[311] The result of awarding higher hourly rates to such attorneys, he sarcastically concluded, is "a rare treat: psychic income they can spend."[312]

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

In his opinions, Judge Easterbrook frequently includes lengthy discussions of issues that are not directly presented by the case.[313] There are many opinions of which it could be said, in Judge Easterbrook's own words: "All of this is no more than an interesting detour, however."[314] The analyses in these and other cases, however,

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309. Gusman v. Unisys Corp., 986 F.2d 1146, 1150 (7th Cir. 1993); *see also* Barrow v. Falck, 977 F.2d 1100, 1105-06 (7th Cir. 1992) (reversing and remanding with directions to lower the hourly rate allowed).

310. *Barrow*, 977 F.2d at 1106.

311. *Id.*

312. *Id.* While the criticism expressed in this section suggests a judge committed principally to his own view of the law's development, the conclusion does not necessarily follow that Judge Easterbrook is consistently reaching results that are different from the trial courts or his colleagues. It should be noted that Judge Easterbrook authors only 8 percent of the court's reversals, placing him on a percentage basis near the center of the court. Similarly, Judge Easterbrook dissents in only 6.32 percent of the cases on which he sits, placing him below the court average.

In addition to more traditional separate opinions, Judge Easterbrook wrote one unusual opinion in which he described himself as "dubitante." National Solid Wastes Management Ass'n. v. Killian, 918 F.2d 671, 685 (7th Cir. 1990) (Easterbrook, J., dubitante), *aff'd sub nom.* 112 S.Ct. 2374 (1992), and a recent opinion that was neither concurring nor dissenting. Freeman United Coal Mining Co. v. Office of Workers' Compensation Program, 999 F.2d 291 (7th Cir. 1993).

313. *See, e.g.*, Koch v. Stanard, 962 F.2d 605, 607-08 (7th Cir. 1992) (Flaum, J., concurring) (criticizing the court's dicta); United States v. Bader, 956 F.2d 708, 709 (7th Cir. 1992) (explaining sentencing guidelines that were not at issue before the court).

314. Kerrigan v. American Orthopedics Corp., 960 F.2d 43, 47-48 (Shadur, J., concurring) (criticizing dicta in the majority opinion). Another example is his opinion in Hrubec v. National R.R. Passenger Corp., 981 F.2d 962 (7th Cir. 1992). After reaching a result necessary to resolve the case, Judge Easterbrook states "[w]hether bad faith plays any role at all is a question we need not answer." *Id.* at 964. He proceeded, however, to discuss whether the Seventh Circuit should

are so lengthy and detailed that they fall into a category well beyond mere dictum. As discussed below, it has been suggested by members of the Seventh Circuit that such analyses are inappropriate; the Council agrees.[315]

As discussed above, substantive consideration of issues not properly before the court is inconsistent with the court's duty to give full and fair consideration to the trial court's resolution of an issue before it and to consider the litigants' presentations of the facts and law with respect to that issue.[316] Meanwhile, other litigants may have had issues properly presented by their cases foreclosed, without the issues ever being fully briefed and presented against the background of a full factual record in the Seventh Circuit.

Judge Easterbrook himself has acknowledged how the court should act. In *Cornfield v. Consolidated High School Dististrict No. 230*,[317] Judge Easterbrook wrote separately to criticize the majority's discussion of a qualified immunity issue that was unnecessary to the decision, since the court found that the defendants had committed no wrong.[318] He wrote:

> [T]hese subjects lose their significance once we conclude, as we have, that the individual defendants respected Cornfield's constitutional rights. Having made the litigants' contentions irrelevant, we should withhold comment. Our views about these subjects are advisory — pertinent to some other case, perhaps, but inconsequential to this one. That the parties have mooted a subject that turns out to be irrelevant is neither reason nor authority for judicial exegesis on the matter.[319]

The Council agrees.

Judge Easterbrook has written further about the evils of deciding issues not before the court:

> I have also left out of the list [of praiseworthy qualities in judges] any praise for judges who seize the moment to write essays about issues the parties did not present. Just as parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a

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adopt the Sixth Circuit's position. *Id.* He concluded that the Seventh Circuit was not likely to follow the Sixth Circuit; Judge Flaum concurred. *Id.* at 965.

315. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 235 (1988) (noting that there is at least a dispute over whether secrecy maximizes shareholder wealth); *see also infra* notes 323-28 and accompanying text (discussing Easterbrook's own criticism of dicta).

316. *Cf.* PSI Energy, Inc. v. Exxon Coal USA, Inc., 991 F.2d 1265, 1272 (7th Cir. 1993) ("It would be inappropriate for us to address these questions without the benefit of the district court's views.").

317. 991 F.2d 1316, 1328 (7th Cir. 1993) (Easterbrook, J., concurring).

318. *Id.*

319. *Id.*

> ground not presented denies the parties this autonomy and increases the risk that an uninformed opinion will impede rather than promote commerce. It is hard enough to navigate when the court sticks to questions fully ventilated by counsel.[320]

Despite this language, Judge Easterbrook is one of the court's chief practitioners of deciding issues that have not been briefed by the parties.[321] He apparently does this to present his views of legal issues as soon as possible, and to preempt consideration of other viewpoints after briefing and argument.[322] In his willingness to reach out and decide issues not necessarily before the court, Judge Easterbrook has established himself as an activist judge.

An important, recent example of Judge Easterbrook's reaching out to decide an issue not before the court is the opinion in *Gacy v. Welborn*,[323] a case in which the notorious murderer John Wayne Gacy challenged the jury instructions that the jury received during the sentencing phase of his trial. On appeal, Gacy's attorneys requested that the court remand the case so that Gacy could present to Judge Grady the same evidence that recently persuaded another judge of the unconstitutionality of comparable instructions.[324] Because Gacy had not raised the evidence — a study by the late University of Chicago professor Hans Zeisel — in the lower courts, the state asked the court to treat the subject as waived.[325] After oral argument, the court requested additional briefs on the issues raised by *Free*. Judge Easterbrook neither remanded the matter nor treated it as waived; instead, he treated it as if it had been raised below, concluding that because prisoners cannot wage a series of collateral attacks, "it is best to consider all of the contentions he presses on us."[326] To support this conclusion, Judge Easterbrook cited the Supreme Court's admonition that capital appeals are to be resolved expeditiously, and concluded that "[b]oth Gacy and the

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320. Frank H. Easterbrook, *Afterword: On Being a Commercial Court*, 65 CHI.-KENT L. REV. 877, 880 (1989).

321. *See supra* notes 290-308 and accompanying text (discussing the holdings in *Flamm* and *Kamen*, respectively).

322. *See* Wilcox v. Niagara of Wis. Paper Corp., 965 F.2d 355, 366 n.* (7th Cir. 1992) (Cummings, J., concurring) (noting that Judge Easterbrook's suggestion that the Wisconsin statute at issue "probably is no longer law at all" was not raised by the parties' briefs and was unpersuasive).

323. 994 F.2d 305, 307-08 (7th Cir.), *cert. denied*, 114 S. Ct. 269 (1993).

324. *Id.* at 308 (citations omitted). The same evidence was used to persuade Judge Aspen in United States *ex rel* Free v. Peters, 806 F. Supp. 705 (1992).

325. *Gacy*, 994 F.2d at 308 (citations omitted).

326. *Id.* at 309.

State of Illinois are entitled to decision without indefinite delay."[327] Judge Easterbrook reached this conclusion even though the Zeisel study was not in the record before him, made up no part of the lower court's decision (since that court had denied a motion to hear the evidence), and neither party had asked for a substantive resolution of the matter before the court. He nevertheless provided a lengthy analysis, rejecting the conclusions reached in the Zeisel study and by Judge Aspen in *Free*.[328] We believe the court should have followed normal appellate practices and either found the issue waived or remanded it to the district court.[329]

4. *Judge Easterbrook's Use of Precedent and the Record*

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

One opinion by Judge Easterbrook that was criticized as omitting controlling precedent was the decision in *Will v. Comprehensive Accounting Corp.*[330] In *Will,* he stated that a plaintiff alleging the purchase of one product was illegally tied to a second product must show a danger of the seller obtaining market power or a potential monopoly in the market of the second, tied product.[331] Less than a year earlier, however, that position was rejected by a 5-4 vote of the Supreme Court in *Jefferson Parish Hospital District No. 2 v. Hyde.*[332] Judge Easterbrook must certainly have been aware of the position in *Jefferson Hospital* because he was counsel to Jefferson Hospital in that case before the Supreme Court. In a subsequent opinion by Judge Cudahy, joined by Chief Judge Bauer and Judge

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327. *Id.*

328. *Id.* at 309-14.

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

330. 776 F.2d 665 (7th Cir. 1985), *cert. denied,* 475 U.S. 1129 (1986).

331. *Will,* 776 F.2d at 673.

332. 466 U.S. 2 (1984).

Ripple, in *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*,[333] the Seventh Circuit noted that Judge Easterbrook's prior opinion in *Will* for misstating the law.

It is not unusual for Judge Easterbrook to refer in a later opinion to his own extensive and free-wheeling dicta as either controlling precedent or creating an open question when the issue that he has foreshadowed actually does present itself in a case before him. For example, by the time he authored *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*,[334] Judge Easterbrook had concluded — based in large part on his own prior expansively written opinions in *Flamm* and *Teamsters Local 282 Pension Trust Fund v. Angelos*,[335] as well as the opinions of other federal judges following his lead in those cases — that "justifiable reliance is not an *independent* element in securities litigation."[336]

In *United States v. Chaidez*,[337] Judge Easterbrook asserted that "[t]he standard of review for the conclusion that the seizures were reasonable . . . is in transition in this circuit. Several cases hold that review is *de novo* . . . [, but recently doubts have been expressed . . . ."[338] Judge Ripple, however, would have none of it:

> I agree with the panel majority that, under the law of this circuit, our review is *de novo*. I do not know what the panel majority means when it says that the governing law "is in transition." Under the doctrines of precedent and *stare decisis*, this court applies established principles unless and until the full court determines that our former course was erroneous. The disagreement of a particular judge or even several judges, [citing the concurrence by Judges Easterbrook and Posner in United States v. Malin, 908 F.2d 163, 169-70 (7th Cir. 1990),] hardly justifies an announcement to bench and bar that well-settled principles may no longer control. Such a pronouncement is both premature and presumptuous.[339]

Judge Easterbrook has also been criticized for mischaracterizing the record below in order to reach certain results.[340] The Council

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333. 826 F.2d 712, 716-19 (7th Cir. 1987).

334. 910 F.2d 1540 (7th Cir. 1990).

335. 762 F.2d 522 (7th Cir. 1985).

336. *Astor*, 910 F.2d at 1546 (citations omitted).

337. 919 F.2d 1193 (7th Cir. 1990), *cert. denied, sub nom.* Chavira v. U.S., 111 S.Ct. 2861 (1991), *cert. denied sub nom.* Chaidez v. U.S. 112 U.S. 209 (1991).

338. *Chaidez*, 919 F.2d at 1196 (citations omitted).

339. *Id.* at 1203 n.1 (Ripple, J., dissenting) (citations omitted); *see also* Rakestraw v. United Airlines, Inc., 989 F.2d 944, 945-48 (7th Cir. 1993) (Ripple, J., dissenting) (asserting that Judge Easterbrook misread a Supreme Court case).

340. For a condemnation of this practice, see POSNER, STUDY IN REPUTATION, *supra* note 90, at 55.

received this complaint from attorneys and it was also recently made by Judge Cummings in *Wilcox v. Niagara Wisconsin Paper Corp.*[341] In *Wilcox,* which was a diversity case, Judge Cummings wrote:

> [T]he dissent's mischaracterization of the facts, misstatement of the public policy at issue, and misapplication of Wisconsin precedent compels me to write a brief response. . . . It is striking how little this imagined scenario [set forth by Judge Easterbrook] resembles the actual facts presented in the parties' stipulated joint appendix.[342]

In still other cases, particularly criminal cases, Judge Easterbrook is willing to assume facts that are not part of the record in order to support the conclusion he apparently wishes to reach. For example, in *United States v. Mosley*[343] Judge Easterbrook dismissed an appeal because he found three hypothetical reasons why the appeal was not filed on time, and the most likely possibility did not suggest ineffective assistance of counsel. In *United States v. Ferra,*[344] Judge Easterbrook upheld a sentence based on what Judge Cudahy described as an "unimaginable" assumption.[345] Although the police confiscated only 174 grams of cocaine, Judge Easterbrook accepted the trial court's sentence based on a weight of over 500 grams.[346] The trial court extrapolated from the amount confiscated to over 500 grams based on testimony that Ferra had given one-sixteenth of an ounce of cocaine to an informant in each of 200 "fencing" transactions. Even though this assumption required the informant to commit more than one robbery per day, Judge Easterbrook upheld the finding because "some burglars are hyperactive."[347]

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341. 965 F.2d 355, 365 (7th Cir. 1992) (Cummings, J., concurring) (criticizing Judge Easterbrook's dissenting opinion).

342. *Id.*; *see also* Weinstein v. University of Ill., 811 F.2d 1091, 1098-99 (7th Cir. 1987) (Cudahy, J., dissenting) (criticizing the majority's mischaracterization of issues on the merits); Hrubec v. National R.R. Passenger Corp., 981 F.2d 962, 965 (7th Cir. 1992) (Flaum, J., concurring). Responding to Judge Easterbrook's conclusion that this circuit was "not apt to follow" the Sixth Circuit's bad faith requirement, Judge Flaum concurred in the judgment in *Hrubec,* stating: "Because the district court did not base its holding on bad faith, we have no need to review the issue. . . . Therefore, I believe we should await an appropriate case before addressing the issue, instead of reflecting on the likely outcome in this circuit." *Id.*

343. 967 F.2d 242, 243-44 (7th Cir. 1992).

344. 948 F.2d 352, 354 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 1939 (1992).

345. *Id.* at 355.

346. *Id.* at 354.

347. *Id.; see also* United States v. Widgery, 778 F.2d 325, 331 (7th Cir. 1985) (Cudahy, J., dissenting) (attacking Judge Easterbrook's conclusion that jurors were not prejudiced by inappropriate communications during deliberation as "speculation"); Gacy v. Wellborn, 994 F.2d 305, 308 (7th Cir.) (speculating that "the question at hand probably did not arise in the jury's deliber-

5. *Judge Easterbrook's Judicial Demeanor*

Judge Easterbrook has consistently displayed a temperament that is improper for a circuit judge. While he has many good qualities, there is a widespread belief that he is arrogant and intolerant of those who he believes do not match his own intellectual ability. In the Council's view, this problem seriously interferes with the performance of his duties.

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

The tone of Judge Easterbrook's opinions can be particularly harsh, especially in cases in which he is dissatisfied with the conduct of counsel. In *Kale v. Obuchowski*,[348] he assessed a litigant's argument on appeal as "pettifoggery,"[349] and concluded: "Appellants have other arguments, but displaying them would do little more than illustrate why some members of the public believe that 'shyster' and 'lawyer' are synonyms. This is a frivolous, doomed and sanctionable appeal."[350] Regardless of whether the attorney's conduct in *Kale* merited sanctions, the language chosen by Judge Easterbrook certainly did not enhance the administration of justice.[351]

6. *Conclusion*

Judge Easterbrook's performance is divided between the ex-

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ations; they must have been in agreement from the outset"), *cert. denied*, 114 S.Ct. 269 (1993).

348. 985 F.2d 360, 362-64 (7th Cir. 1993).

349. *Id.* at 363.

350. *Id.*

351. In addition, the issuance of what is, in effect, a published reprimand without benefit of notice and an opportunity to be heard, in the Council's view violates the spirit, if not the letter, of Circuit Rule 38. *See supra* notes 58-71 and accompanying text.

tremes; in some respects he is excellent, in some he is subject to the most severe criticism. His talents should make him one of the great judges in the country, and sometimes he is. He is a brilliant and provocative thinker who is hard working and has full control of his docket. But other qualities are required of judges. All too often, particularly when he disregards the facts or the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and limit his diversions from the facts and issues specifically presented. The Council finds it regrettable that Judge Easterbrook's failings prevent the court and the legal community from taking full advantage of his abilities.

F. Jesse E. Eschbach

Jesse E. Eschbach, 73, is a 1949 graduate of Indiana Law School. He was in private practice from 1949 to 1962, while also serving as a city attorney and prosecutor for Warsaw, Indiana. He was appointed to the U.S. District Court for the Northern District of Indiana by President Kennedy in 1962, and served as its chief judge from 1974 to 1981. Judge Eschbach was appointed by President Reagan to the Seventh Circuit in 1981 and he took senior status in 1985.

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

Lawyers reported that Judge Eschbach is diligent in following the law, regardless of any ideological instincts or predilections. Judge Eschbach draws heavily on his many years of experience as a federal trial judge, giving both his questions at oral argument and his opinions a practical and common sense quality. Judge Eschbach is usually careful not to distort or ignore precedent.[352] To the contrary, he will try hard to reach the result he believes is correct, regardless of his ideological views. At the same time, Judge Eschbach is not prone to break new ground in his opinions.

Judge Eschbach is consistently well-prepared for oral argument.

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

Almost every lawyer interviewed who has argued in front of or who has observed Judge Eschbach noted that he asks thoughtful and probing questions designed to explore the heart of the case. Moreover, he is generally regarded as courteous and attentive to lawyers appearing before him.

Judge Eschbach's opinions tend to be written with clarity and organization.[353] He invariably begins with a brief statement of the issue and the panel's decision. This introductory statement is usually followed by a detailed statement of the procedural and substantive facts. His writing style is uncluttered and rather formal, without asides or colloquialisms, and lends itself to quick understanding by the reader. He generally avoids rhetorical flourish or excess and manifests a strong desire to get to the heart of the case presented. In most opinions, Judge Eschbach reiterates and addresses the arguments of the parties point by point. Propositions of law are supported by cited authority, conflicts among the circuits are fully aired, and cases relied on by the court are discussed in detail. In many cases, Judge Eschbach explains the policies behind the rules of law at issue, providing even further insight and guidance to practitioners. Because of his concise and careful writing style, many of his opinions are fairly short without sacrificing thoroughness. He does give considerable deference to trial courts and administrative agencies.[354]

Judge Eschbach is generally praised for the speed and diligence with which he produces opinions. Comparative statistics provide support for this statement. From 1988 to 1992, he has taken, on average, one hundred days to produce a majority opinion. This compares quite favorably with the Seventh Circuit average of 141 days.[355] Judge Eschbach infrequently writes separate opinions.[356]

On several occasions, Judge Eschbach has dissented when he believed practical considerations of justice were being disregarded by his colleagues. For example, his practical nature was apparent in

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353. *See, e.g.*, Wilson v. Williams, 997 F.2d 348 (7th Cir. 1993) (reversing a grant of summary judgment since the affidavits raised a genuine issue of material fact).

354. *See infra* Appendix A, at A-38, A-39.

355. *E.g.*, Deimer v. Cincinnati Sub-Zero Prods., Inc. 990 F.2d 342, 347-48 (7th Cir. 1993) (Easterbrook, J., dissenting); Kirchoff v. Flynn, 786 F.2d 320, 328-31 (7th Cir. 1986) (Esbach, J., dissenting); *see also infra* notes 360-61 and accompanying text (discussing Judge Eschbach's dissent in *Kirchoff*).

356. *See infra* Appendix A, at A-28, A-29.

United States v. Bruscino,[357] where he relied on his twenty years of experience as a trial judge in agreeing with the panel that the defendant should have been granted a new trial because improper documents, including a newspaper article about the case, had been brought into the jury room.[358] He found it impossible to conclude that the jury was not influenced by such materials, particularly since the jury disregarded repeated admonitions from the bench to disregard press accounts.[359] In *Kirchoff v. Flynn,*[360] he would have affirmed the district court's award of attorneys' fees rather than a remand for an explanation of the award because the record showed that the award was reasonable, the trial judge was aware of the relevant considerations, the majority provided no standards or guidance to the trial court, and a remand would have encouraged future appeals of attorneys' fee awards.[361]

A number of Judge Eschbach's dissents are based on policy considerations. In *Serpas v. Schmidt,*[362] the court affirmed a determination that Illinois Racing Board rules authorizing warrantless searches of racetrack dormitories violated the Fourth Amendment.[363] Judge Eschbach, in dissent, would have side-stepped the constitutional issue; he argued for invocation of the abstention doctrine for reasons of federalism and comity, and would have allowed the state court to determine whether the rules exceeded the agency's authority under the enabling legislation.[364] In *Marrese v. American Academy of Orthopaedic Surgeons,*[365] Judge Eschbach dissented from the court's decision that res judicata barred a federal antitrust action. In a one paragraph dissent, he distinguished the Fourth Circuit opinion on which Judge Posner, writing for the majority, relied and admonished the court to adhere to precedent.[366]

When writing for the majority, Judge Eschbach generally evidences a solid practical understanding of the facts presented in the appeal and the effects of the case on the litigants. A good example is

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357. 687 F.2d 938 (7th Cir. 1982) (en banc) *cert. denied,* 459 U.S. 1211 (1983).

358. *Bruscino,* 687 F.2d at 943 (Eschbach, J., dissenting).

359. *Id.*

360. 786 F.2d 320 (7th Cir. 1986).

361. *Id.* at 331 (Eschbach, J., dissenting).

362. 808 F.2d 601 (7th Cir. 1986), *amended,* 827 F.2d 23 (7th Cir. 1987), *cert. denied,* 485 U.S. 904 (1988).

363. *Serpas,* 808 F.2d at 607.

364. *Id.* at 607-08 (Eschbach, J., dissenting).

365. 726 F.2d 1150 (7th Cir. 1984) (en banc), *rev'd,* 470 U.S. 373 (1985).

366. *Id.* at 1162-63.

UNR Industries, Inc. v. Continental Casualty Co.[367] In this complex dispute arising out of the funding of a trust to pay asbestos-related claims, Judge Eschbach's decision for the panel refused to permit a narrow reading of an excess insurer's liability policy that would have provided the insurer with a windfall and reduced available resources for potential claimants.[368]

Judge Eschbach has, on occasion, departed from his usual careful and deliberative approach and strained to reach a desired result. In *In re Scarlata,*[369] an opinion which drew a vigorous dissent from Judge Coffey, the court determined that an option trader's debt to his brokerage firm was dischargeable in bankruptcy, notwithstanding proof that the debtor had made material misrepresentations which caused a $5 million loss to the firm. Although the bankruptcy court found after an evidentiary hearing that fraud was proved by clear and convincing evidence, and that the firm had established reasonable and actual reliance on the debtor's misrepresentations, Judge Eschbach held there was insufficient evidence to support the bankruptcy court's finding of reliance.[370] The dissent strongly criticized the majority for reweighing the evidence and going out of its way to make a finding that neither the district court nor the bankruptcy court had made,[371] for going against authority from seven other circuits, and for unduly relying on the waiver doctrine in refusing to consider an argument that had been raised.[372]

Also, in *Forrester v. White,*[373] the court, in an opinion written by Judge Eschbach, held that absolute judicial immunity barred a civil rights action brought by a probation officer who alleged she was fired by a state trial judge for reasons of gender discrimination. Judge Eschbach's reasoning was not persuasive; he found that immunity applied because the judge was acting within the scope of his authority and because the employee worked in the judicial system.[374] The dissent by Judge Posner — arguing that judges should not be immunized for executive functions such as hiring and firing,

367. 942 F.2d 1101 (7th Cir. 1991), *cert. denied,* 112 S. Ct. 1586 (1992).
368. *UNR Industries,* 942 F.2d at 1110.
369. 979 F.2d 521 (7th Cir. 1992).
370. *Id.* at 525-26.
371. *Id.* at 531 (Coffee, J., dissenting).
372. *Id.* at 534-35 (Coffee, J., dissenting).
373. 792 F.2d 647 (7th Cir. 1986), *rev'd,* 484 U.S. 219 (1988).
374. *Forrester,* 792 F.2d at 656-57.

as opposed to judicial functions — was far more convincing,[375] and the Supreme Court reversed.[376]

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

G. Thomas E. Fairchild

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

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

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

Judge Fairchild's majority opinions follow a set organizational pattern. First he sets forth a brief summary of the procedural history and describes the issues raised on appeal, and then he describes in appropriate and usually very clear detail the pertinent facts of the case. He next addresses each of the substantive legal issues *seriatim.* He begins a discussion of each issue by raising the appropriate legal precedents and then applies those precedents to the facts presented.

Judge Fairchild's opinions are generally short, concise, and persuasive. He appears to be especially gifted in his ability to describe complex factual situations in a clear and comprehensible manner.[377]

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375. *Id.* at 663 (Posner, J., dissenting).

376. 484 U.S. 219 (1988).

377. *E.g.*, United States *ex rel.* Bell v. Director, Dep't of Corrections, 847 F.2d 399 (7th Cir.

In the Council's view, his opinions show that his an approach to deciding cases that is based to a great extent on reaching the "right" result, as dictated by the facts. A number of attorneys complimented Judge Fairchild on his practice of addressing and deciding only the issues raised by the litigants and refraining from deciding issues which were not raised.

Judge Fairchild is also adept at analyzing complex statutory schemes and applying both case law and relevant procedural rules. Examples of this include his opinion in *In re Hartman Brothers Construction Corp.*,[378] as well as a number of diversity cases explicating state law issues.[379] Judge Fairchild (who ran for the United States Senate in 1952 against Sen. Joseph McCarthy) generally appears particularly sensitive to procedural due process claims.[380]

The main criticism attorneys raised about Judge Fairchild is his delay in rendering his decisions.[381] Twenty-three of the eighty-eight majority opinions written by Judge Fairchild that we identified after 1985 were issued more than a year after oral argument. Another twenty of his opinions during this period were issued eight to twelve months after oral argument.[382] Absent exceptional circumstances, these delays are unacceptable.

Some attorneys have also criticized Judge Fairchild on substantive grounds. First, some attorneys argue that his opinions do not always address conflicting arguments adequately. Perhaps the

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1988); Ende v. Board of Regents, 757 F.2d 176 (7th Cir. 1985).

378. 835 F.2d 1215 (7th Cir. 1987) (holding that because an Indiana tax lien had expired, a federal tax lien took priority over an Indiana tax warrant in the debtor's subsequent filing for bankruptcy).

379. *See, e.g.*, American Ins. Corp. v. Sederes, 807 F.2d 1402 (7th Cir. 1986) (affirming a declaratory judgment in favor of an insurance company disallowing the claim of a widow of a deceased charter pilot for worker's compensation benefits under Illinois law); Young v. Colgate-Palmolive Co., 790 F.2d 567 (7th Cir. 1986) (affirming the dismissal of a shareholders' derivative action brought against the directors of a corporation challenging their adoption of a poison pill takeover plan for lack of personal jurisdiction pursuant to Illinois law).

380. *See* Ramirez v. Turner, 991 F.2d 351 (7th Cir. 1993) (holding that discipline was imposed without adequate due process where the evidence suggested that a hearing officer was biased against the inmate and that discipline could have affected the inmate's ability to obtain parole from a "life plus ninety-nine-year" term); United States v. Micke, 859 F.2d 473, 483 (7th Cir. 1988) (Fairchild, J., dissenting) (arguing that the district court's decision prohibiting the defendant's principal counsel from cross-examining a witness because counsel might have been called as a witness violated due process).

381. *See infra* Appendix A, at A-29.

382. *See, e.g., In re* Hartman Bros. Constr. Corp., 835 F.2d 1215 (7th Cir. 1987) (noting that there were 622 days between oral argument and issuance of the decision); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) (noting a similar delay of 788 days), *cert. denied*, 483 U.S. 1023 (1987).

strongest example of this is found in *Ragsdale v. Turnock (Ragsdale II)*.[383] That case involved a class action complaint brought by a physician and several Illinois women challenging the constitutionality of certain statutes adopted by the Illinois Legislature for the purpose of placing substantial constraints on the ability of women to obtain abortions within the state.[384] The district court held that most portions of the statutory scheme were in violation of *Roe v. Wade*.[385] The Seventh Circuit affirmed the district court's decision in *Ragsdale v. Turnock (Ragsdale I)*,[386] a case in which Judge Fairchild did not participate. The United States Supreme Court had granted *certiorari* when, in November of 1989, a settlement was reached between the representatives of the plaintiff class and Illinois Attorney General Neil Hartigan, who had been defending the constitutionality of the statutes.[387]

Several anti-abortion women objected to the proposed consent decree in the district court.[388] Several men, claiming to act as representatives of the unborn fetuses, sought to intervene as additional defendants to object to the settlement.[389] The district court held that neither the objecting women nor the intervening men had standing,[390] and the issue came before the Seventh Circuit in *Ragsdale II*.[391]

Judge Fairchild wrote a very short, simple opinion in which he affirmed the decision of the district court on the standing issue, as to both the objecting women and the intervening men.[392] Judge Fairchild held that the intervening men had appeared far too late in the case, nearly five years after its inception, and that there was no extraordinary reason to permit their intervention.[393] He also determined that the women had no standing, as members of the plaintiff

383. 941 F.2d 501 (7th Cir. 1991) ("*Ragsdale II*"), *cert. denied*, 112 S. Ct. 879 (1992).

384. *Ragsdale II*, 941 F.2d at 502.

385. Ragsdale v. Turnock, 625 F. Supp. 1212, 1228-30 (N.D. Ill. 1985) (citing Roe v. Wade, 410 U.S. 113 (1973)), *aff'd in part and vacated in part*, 841 F.2d 1358 (7th Cir. 1988).

386. 841 F.2d 1358 (7th Cir. 1988) ("*Ragsdale I*"), *joint motion to defer proceedings granted*, 493 U.S. 987 (1989), *later proceeding*, 734 F. Supp. 1457 (N.D. Ill. 1990), *aff'd*, 941 F.2d 501 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 879 (1992).

387. Ethan Bonner, *Key Abortion Case Settled Out of Court*, BOSTON GLOBE, Nov. 23, 1989, at 1.

388. Ragsdale v. Turnock, 734 F. Supp. 1457, 1461 (N.D. Ill. 1990).

389. *Id.* at 1459 n.4.

390. *Id.* at 1459 n.4, 1462.

391. *Ragsdale II*, 941 F.2d 501 (7th Cir. 1991).

392. *Id.* at 506.

393. *Id.* at 505.

class of Illinois women, to object that the settlement was "too favorable" to their class.[394]

Although Judge Posner concurred with the result reached by Judge Fairchild, he relied on different grounds with respect to both the women and the men.[395] Judge Flaum also concurred, agreeing that the men did not have standing to intervene.[396] However, he dissented from the determination that the women lacked standing to challenge the consent decree, stating that the women were not objecting to the decree on the ground that it was "too favorable" to their class but that the women were "challenging both the result of the settlement *and* the process by which that result was reached, a process which . . . left much to be desired."[397] While Judge Fairchild set forth his own rationale for ruling on the standing issue in a fair and succinct manner, in a case of such extraordinary public importance, he should have fully addressed the arguments raised by both Judges Posner and Flaum. In fact, Judge Fairchild did not even mention Judge Flaum's comments and only alluded once to Judge Posner's opinion.[398] Judge Fairchild's failure to adequately address arguments and concerns raised by his fellow judges is also demonstrated in less dramatic fashion in other cases.[399]

In general, Judge Fairchild dissents or concurs very rarely;[400] when he does dissent, those opinions are usually quite short. He often states in only a sentence or two the reason for his dissent or

394. *Id.* at 505-06.

395. *Id.* at 506-09 (Posner, J., concurring).

396. *Id.* at 511 (Flaum, J., concurring in part and dissenting in part).

397. *Id.*

398. *Id.* at 505.

399. *See* Chathas v. Smith, 884 F.2d 980, 990 (7th Cir. 1989) (Fairchild, J., concurring in part and dissenting in part) (noting that a one-sentence discussion of the excessive force issue failed to fully explain the reasons why he disagreed with the majority), *cert. denied*, 493 U.S. 1095 (1990); United States v. Kimberlin, 805 F.2d 210, 254-55 (Cudahy, J., concurring) (criticizing Judge Fairchild's majority opinion for failing to adopt any standard for the admission of testimony obtained through hypnosis).

Some attorneys also questioned whether Judge Fairchild can be unduly deferential to local governmental bodies. *See, e.g.*, International Caucus of Labor Comms. v. City of Chicago, 816 F.2d 337 (7th Cir. 1987) (affirming a dismissal of a challenge to the constitutionality of the city's regulations regarding the distribution and storage of literature at O'Hare Field, over a dissent by Judge Cudahy); *see also* La Crosse County v. Gershman, Brickner & Bratton, Inc., 982 F.2d 1171, 1177 (7th Cir. 1993) (Fairchild, J., concurring) (distinguishing prior Wisconsin law at great lengths to permit officials to explain their actions); Rathert v. Village of Peotone, 903 F.2d 510, 517 (7th Cir.) (Fairchild, J., concurring) (arguing that a village regulation barring police officers from wearing ear studs while off duty was probably unconstitutional, but then joining a majority opinion sustaining its constitutionality), *cert. denied*, 498 U.S. 921 (1990).

400. *See infra* Appendix A, at A-38, A-39.

concurrence, and he seldom develops those arguments beyond the topic sentence. Consequently, his dissents and concurrences do not appear to advance the development of the law very much.

Overall, Judge Fairchild continues to be an excellent judge who makes a substantial contribution to the work of the Seventh Circuit. He is a clear, crisp, and persuasive writer. He obviously understands the facts and the law of the cases which come before him. Nevertheless, the Council is concerned about his delay in deciding cases.[401] The Council hopes that Judge Fairchild will better balance his workload to solve this problem.

H. Joel M. Flaum

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

Judge Flaum was praised for being courteous and cordial in all his relationships. He is reluctant to criticize his fellow judges and is deferential to district judges. Judge Flaum carefully prepares for oral argument and takes it seriously (although, according to some attorneys, his preparation may depend on his level of interest in the case). He is unfailingly polite at argument and generally participates.

Judge Flaum's opinions are noticeably free from certain questionable traits. He does not digress into ruminations about what the law might be and generally is careful to avoid unnecessary dicta. Nor does he make clever remarks at the expense of the litigants or counsel. One gets the sense of a judge who appreciates litigation and lawyers. Judge Flaum's general personality — his collegiality and concern for others' feelings — as well as his many years of experience as a prosecutor and district judge are reflected in his opinions, to his credit.

Judge Flaum's opinions are generally well-organized, straightforward, clearly written, and he usually can be relied on to correctly apply established law. His judicial style is illustrated by his numer-

401. *See infra* Appendix A, at A-29.

ous decisions applying the standard rules of statutory and contract construction.[402] He applies these rules as given, with little explanation or discussion of why they should be followed. Judge Flaum does not blindly adhere to these rules, however; he will not apply rules of construction so rigidly that it would produce an impractical result.[403] At the same time, Judge Flaum's construction of statutes does not appear to be heavily influenced by ideological views about government and social policy.

Practitioners and former clerks reported that Judge Flaum rarely advocates bright-line rules.[404] Rather, he attempts to find balancing tests that are flexible. Some criticize that Judge Flaum for going out of his way to avoid making new law and for trying to be a consensus builder. This leads some lawyers to suggest that there is no feeling of strong principle underlying Judge Flaum's work.[405] While it is rare to find Judge Flaum announcing new legal rules, *United States v. Duran*[406] shows that he does so on occasion. It is not surprising that *Duran* is a criminal case, as Judge Flaum appears to be much more sure of himself in reviewing criminal and related issues.[407]

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402. See, e.g., Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1039-40 (7th Cir. 1992) (construing an insurance contract); McCammon v. Indiana Dept. of Fin. Insts., 973 F.2d 1348, 1353 (7th Cir. 1992) (construing an Indiana statute), *cert. denied sub. nom.* Indiana Dept. of Fin. Insts. v. Miller, 113 S.Ct 1282 (1993); United States v. Doherty, 969 F.2d 425, 428 (7th Cir.) (construing a bank fraud statute), *cert. denied*, 113 S.Ct. 607 (1992); United States v. Carr, 965 F.2d 176, 178 (7th Cir. 1992) (construing a postal statute); Resolution Trust Corp. v. Lightfoot, 938 F.2d 65, 67 (7th Cir. 1991) (construing removal statutes).

403. *See, e.g.*, Marlowe v. Bottarelli, 938 F.2d 807, 811-12 (7th Cir. 1991) (refusing to apply the "plain language" of a regulatory agreement where it would have produced "absurd results").

404. An example of the way Judge Flaum avoids bright-line rules is United States v. Townsend, 924 F.2d 1385 (7th Cir. 1991). In *Townsend*, Judge Flaum developed a complicated test for determining the propriety of linking a number of defendants in a single drug conspiracy. *Id.* at 1389.

405. While Judge Flaum's opinions tend to be thoughtful, some lawyers believe he attempts to find a middle ground, which sometimes produces confusing or incoherent results. *See* United States v. Neapolitan, 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986). In *Neapolitan*, Judge Flaum upheld a RICO conviction but wrote that the government's authority was not unlimited. *Neapolitan*, 791 F.2d at 501. The limits he proposed included some confusing language about what constitutes a pattern of racketeering activity, and they apparently required pleading with great specificity. *Id.* Later decisions appear to be attempts to correct the confusion caused by the *Neapolitan* decision. *See* United States v. Crockett, 979 F.2d 1204, 1209 (7th Cir. 1992) (explaining that *Neapolitan* set an "[o]uter boundary for RICO conspiracy indictments at . . . various acts of bribery"), *cert. denied*, 113 S. Ct. 1617 (1993) ; United States v. Glecier, 923 F.2d 496, 500-01 (7th Cir.) (noting that while there are some limits on RICO, pleading specific predicate acts is not required), *cert. denied*, 112 S. Ct. 54 (1991).

406. 957 F.2d 499, 505 (7th Cir. 1992) (creating a rebuttable presumption that spouses have the authority to consent to searches of all areas in the homestead).

407. *See* Soldal v. County of Cook, 923 F.2d 1241 (7th Cir.), *aff'd in part and rev'd in part*, 942 F.2d 1073, 1087-89 (7th Cir. 1991) (en banc) (Flaum, J., dissenting) (arguing that the court

Substantive policy preferences do find their way into some of Judge Flaum's opinions. For example, in *Heck v. City of Freeport*,[408] He described his belief that it may be valuable for public employees to be selected for reasons of political patronage,[409] even though this policy goal conflicts with the First Amendment policy of the Supreme Court.[410]

Judge Flaum's policy views and predilections are also reflected in a comparison of his decisions in *Montgomery Ward & Co. v. NLRB*[411] and *Cowherd v. HUD*.[412] Both cases involved the deference owed to an administrative agency in its interpretation of a law. In *Montgomery Ward*, Judge Flaum showed virtually no deference to the NLRB, refusing to enforce an NLRB bargaining order and leaving unremedied some extreme labor law violations.[413] In comparison, in *Cowherd* Judge Flaum showed great deference to a HUD decision to sell and essentially abandon a floundering public housing unit without requiring future rent subsidies.[414]

Civil rights plaintiffs' lawyers have been disappointed with several of Judge Flaum's opinions, but his opinions in this area have generally been consistent with or affirmed by the Reagan-Bush Supreme Court. For instance, Judge Flaum wrote an opinion for the court denying an attorneys' fees multiplier in a major race discrimination class action;[415] the Supreme Court recently disallowed virtually all

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was "patently unreasonable" in holding that the removal of a trailer home by sheriff's deputies did not constitute a Fourth Amendment seizure), *rev'd*, 113 S. Ct. 538 (1992).

408. 985 F.2d 305 (7th Cir. 1993).

409. *Id.* at 307, 310.

410. *Id.* at 308. The *Heck* decision may be categorized as part of the general trend on the Seventh Circuit to resist the Supreme Court's First Amendment restrictions on patronage hiring and firing, starting with Elrod v. Burns, 427 U.S. 347 (1976) (holding that patronage dismissals based on political affiliations were a basis for relief of deprivation of constitutional rights under the First and Fourteenth Amendments), and leading to Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990) (holding that the statement used by the Seventh Circuit to measure alleged governmental patronage practices was unduly restrictive). *See, e.g.*, Selch v. Letts, 5 F.3d 1040, 1047 (7th Cir. 1993) (criticizing Supreme Court patronage decisions). Judge Flaum participated in the dismissal on standing grounds of a challenge to political patronage hiring in Shakman v. Dunne, 829 F.2d 1387, 1398 (7th Cir. 1987), *cert. denied*, 484 U.S. 1065 (1988).

411. 904 F.2d 1156 (7th Cir. 1990).

412. 827 F.2d 40 (7th Cir. 1987).

413. *Montgomery Ward*, 904 F.2d at 1159. Judge Flaum also showed great impatience with the NLRB in NLRB v. Affiliated Midwest Hosp., Inc., 789 F.2d 524, 528 (7th Cir. 1986) ("This case is nothing more than the latest chapter in what has become a continuing saga concerning the NLRB's posture with regard to election misrepresentation.").

414. *Cowherd*, 827 F.2d at 46.

415. *In re* Burlington N., Inc., 810 F.2d 601, 607 (7th Cir. 1986), *cert. denied*, 484 U.S. 821 (1987).

such fee multipliers.[416] Judge Flaum also wrote the opinion for the Seventh Circuit in *Lorance v. AT&T Technologies, Inc.*,[417] a Title VII case, holding that a plaintiff's claim challenging a seniority system is time-barred unless brought within 300 days of when the seniority system was adopted, even if the plaintiff was not effected by the seniority system until many years later.[418] The *Lorance* decision was affirmed by the Supreme Court[419] but later overturned by Congress in the Civil Rights Act of 1991.[420]

A key question about Judge Flaum is the extent to which he acts to restrain members of the court who are more activist in their agenda. On several occasions, he has resisted unusually expansive theories advocated by his colleagues.[421] For example, one of Judge Flaum's best-known opinions was his opinion for the court in *Lawson Products, Inc. v. Avnet, Inc.*[422] He reconsidered the numerical formula for the grant of a preliminary injunction that Judge Posner had developed in *Roland Machinery Co. v. Dresser Industries, Inc.*,[423] and *American Hospital Supply Corp. v. Hospital Products, Ltd.*[424] In *Lawson*, Judge Flaum carefully restated the traditional

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416. City of Burlington v. Dague, 112 S. Ct. 2638 (1992).

417. 827 F.2d 163 (7th Cir. 1987), *aff'd*, 490 U.S. 900 (1989).

418. *Lorance*, 827 F.2d at 167.

419. *Lorance*, 490 U.S. at 913.

420. *See* 42 U.S.C. § 2000e-5(e)(2) (1993) ("[A]n unlawful employment practice occurs, with respect to a seniority system . . . when a person aggrieved is injured by the application of the seniority systems . . . .").

421. *See, e.g.*, Graff v. City of Chicago, 9 F.3d 1309, 1327-28 (7th Cir. 1993) (en banc) (Flaum, J., concurring) (criticizing the court's dicta); *In re* Tolona Pizza Prods. Corp., 3 F.3d 1029, 1034 n.1 (7th Cir. 1993) (Flaum, J., dissenting) (criticizing the court's strict application of the waiver rule to prevent its review of a district court's questionable reversal of bankruptcy court findings); Doe v. Small, 964 F.2d 611, 627-28 (7th Cir. 1992) (en banc) (Flaum, J., concurring) (criticizing the majority's failure to defer to an unappealed factual finding by the district court); United States v. Spears, 965 F.2d 262, 282-83 (7th Cir.) (Flaum, J., dissenting) (announcing new standards for warrantless searches), *cert. denied*, 113 S. Ct. 502 (1992); Koch v. Stanard, 962 F.2d 605, 607-08 (7th Cir. 1992) (Flaum, J., concurring) (narrowing the scope of Judge Easterbrook's opinion a § 1983 issue and criticizing the court's dicta); Hunter v. Clark, 934 F.2d 856, 867-68 (7th Cir.) (en banc) (Flaum, J., dissenting) (criticizing a court for finding harmless error in a habeas corpus case where the trial court failed to give an instruction of no adverse influence from the defendant's failure to testify), *cert. denied*, 112 S. Ct. 388 (1991); Prater v. United States Parole Comm'n, 802 F.2d 948, 960 (7th Cir. 1986) (en banc) (joining a dissent from Judge Posner's opinion on an *ex post facto* law issue); Maier v. FCC, 735 F.2d 220, 226 (7th Cir. 1984) (holding that the FCC's failure to find a violation of the fairness doctrine was reviewable over a dissent by Judge Posner).

422. 782 F.2d 1429 (7th Cir. 1986).

423. 749 F.2d 380, 382 (7th Cir. 1984).

424. 780 F.2d 589, 593 (7th Cir. 1986).

preliminary injunction formula,[425] explained why *Roland* and *American Hospital* provided "important insights,"[426] and removed Judge Posner's approach[427] — which had been subject to great criticism — from the law of the circuit.[428]

Lawyers view Judge Flaum as a practical judge who applies rules to prevent litigation from being unnecessarily protracted.[429] Furthermore, his opinions show concern for their effects on litigants and counsel[430] and he often dissents from written sanctions or criticisms of attorneys, arguing instead that an unpublished admonishment would suffice.[431] While he is usually restrained in rebuking private attorneys in civil cases, Judge Flaum indicates in his writings a belief that government attorneys should be held to a higher standard.[432]

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425. *Lawson*, 782 F.2d at 1433.

426. *Id.* at 1432.

427. *Id.* at 1437.

428. *Id.; see* Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1347 (7th Cir. 1986) (Will, J., concurring) (suggesting that *Lawson* was "an attempt to 'bury with kindness' the legal revisionism undertaken in *Roland* and *American Hospital*."); Linda J. Silberman, *Injunctions By the Numbers: Less Than the Sum of Its Parts*, 63 CHI.-KENT L. REV. 279, 287 (1987) (noting that while *Lawson* acknowledged Posner's formula as an "effective shorthand method . . . [in] determining the relationship of success on merits to degree of harm to the nonprevailing party," at the same time the court emphasized that there was no "single correct result and . . . [an] inconsistency between a mathematical formula and the discretion that should be entrusted to the district court in a preliminary injunction case").

429. *See, e.g.*, Marlowe v. Bottarelli, 938 F.2d 807, 811-12 (7th Cir. 1991) (deferring to an agency's reasonable interpretation of a "difficult to discern" statute); Buggs v. Elgin, Joliet & E. Ry., 852 F.2d 318, 321-22 (7th Cir. 1988) (holding that correction of a magistrate's damage calculation does not open up the merits on appeal); Bennett v. Tucker, 827 F.2d 63, 67 (7th Cir. 1987) (accepting the court's jurisdiction).

430. *See, e.g.*, Shine v. Owens-Illinois, Inc., 979 F.2d 93, 98 (7th Cir. 1992) (sympathizing with the plaintiff as to the effect the exclusion of a witnesses had on her case).

431. *See, e.g.*, Smith v. Town of Eaton, 910 F.2d 1469, 1473-74 (7th Cir. 1990) (Flaum, J., concurring) (disagreeing with a pecuniary sanction and public admonition), *cert. denied*, 111 S. Ct. 1587 (1991); Auriemma v. City of Chicago, 906 F.2d 312, 314-15 (7th Cir. 1990) (Flaum, J., concurring) (suggesting that an attorney's performance in a case should not be an issue); *see also* Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 940 (7th Cir. 1989) (en banc) (Flaum, J., concurring) (advocating the benefits of de novo review); Frazier v. Cast, 771 F.2d 259, 266 (7th Cir. 1985) (Flaum, J., concurring) (noting the subjectivity of the decision).

432. *See* United States v. Alex Janows & Co., 2 F.3d 716, 722-23 (7th Cir. 1993) (criticizing a prosecutor for defining "reasonable doubt" in violation of several Seventh Circuit cases); McCammon v. Indiana Dep't of Fin. Insts., 973 F.2d 1348, 1351 (7th Cir. 1992) (criticizing the government's brief), *cert. denied sub. nom.* Indiana Dep't of Fin. Insts. v. Miller, 113 S. Ct. 1282 (1993); United States v. Threw, 861 F.2d 1046, 1050-51 (7th Cir. 1988) (disapproving of overreaching by prosecutors in plea bargains); United States v. Swiatek, 819 F.2d 721, 731 (7th Cir.) (criticizing a prosecutor even though the conviction was not overturned), *cert. denied*, 484 U.S. 903 (1987); United States v. Board of Educ., 744 F.2d 1300, 1308 (7th Cir. 1984) (criticizing the Justice Department's handling of a desegregation case), *cert. denied*, 471 U.S. 1116 (1985). *But*

One example of Judge Flaum's unusual concern with courteous behavior, perhaps to the detriment of plain-speaking, can be found in *Olympia Equipment Leasing Co. v. Western Union Telephone Co.*[433] *Olympia* was an antitrust monopolization and implied contract case in which the jury returned a verdict of $54 million, later reduced by the trial judge to $36 million.[434] The panel on appeal consisted of Judges Posner, Flaum, and Bauer, with Judge Posner writing the opinion for the court. The court reasoned that the defendant in *Olympia* could not have been liable because it would have made no sense and would have violated antitrust policy by requiring a monopolist to continue a voluntary program of aiding a competitor.[435]

The attorneys for the plaintiff wrote a forceful and blunt motion for rehearing and rehearing en banc.[436] They argued that Judge Posner, writing for the court, had been heavily influenced by his own views of proper antitrust policy; had purposefully read the controlling Supreme Court case[437] in an unduly narrow fashion to comport with his policy views; and had engaged in unusual and improper fact-finding on appeal, reflecting his distrust of juries and his unwillingness to live within the limitations of appellate review as set forth by the Supreme Court.[438] The Council's investigations revealed a widely-held view of lawyers practicing in the Seventh Circuit that Judge Posner has at times engaged in this kind of conduct, particularly in antitrust cases. Plaintiff's lawyers in the *Olympia*

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

433. 797 F.2d 370 (7th Cir.), *reh'g denied*, 802 F.2d 217 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

434. *Olympia*, 797 F.2d at 371.

435. *Id.* at 377-80.

436. *See Olympia*, 802 F.2d at 218 ("The petition both characterizes the opinion as a 'frontal assault' on *Aspen* and suggests that it is a sneaky end run effected by making findings of fact at the appellate level.").

437. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

438. *See Olympia*, 802 F.2d at 218 (responding to the "principal ground urged for rehearing . . ., which is that the panel 'avoided and counter-attacked,' rather than following, the Supreme Court's decision in [*Aspen*]. . . . The other points raised in the petition . . . are either ancillary to this one or rest on errors of fact and misstatements concerning the panel's opinion.") (citation omitted).

case brought the issue into the open and challenged the panel and the Seventh Circuit as a whole to address it.

The panel issued a per curiam opinion denying rehearing, and no judge on the court voted to hear the case en banc. Judge Flaum, joined by Judge Bauer, wrote a special concurrence criticizing the plaintiff's lawyers for supposedly showing a lack of proper respect for the court and Judge Posner.[439] Almost no mention was made of the merits. Judge Flaum wrote:

> [T]o state as does the petition for rehearing in this case that a judge of this court has seized an opportunity to preempt a ruling of the United States Supreme Court and emasculate its principles while purporting to give the case careful and respectful consideration is simply, in our view, beyond the bounds of acceptable aggressive appellate advocacy.
>
> Moreover, to charge that the panel opinion engages in rampant de novo fact finding, ignores or misstates uncontested facts, and treats other factual issues as questions of law to be redecided on appeal constitutes neither respectful nor responsible pleading. In addition, to conclude, at least by implication, that the above described approach is undertaken to advance the individual legal/economic views of the authoring judge is an inappropriate commentary on the perceived thrust of the panel opinion issued in this case as well as the role of the other panel members.[440]

Thus, Judge Flaum found it improper for a lawyer to even raise the issue of Judge Posner's unusual activism and strong views. The Council has reviewed the petition for rehearing in the *Olympia* case. It is forceful and raises important issues. We do not find it to be disrespectful.[441]

As should be clear from this discussion, Judge Flaum's opinions reflect an apparent attempt to try to find a middle ground, to avoid unnecessary decisions, and to show respect for and defer to the findings and judgments of district judges and juries. There is much debate about whether these qualities are good or bad. Some argue that Judge Flaum's sense of moderation leads him to be too indecisive and, ultimately, to be a judge without consistent principle. Alternatively, others argue that Judge Flaum's opinions show a strong and consistent commitment to the "classical" school of judicial restraint.

This issue is highlighted in the trilogy of cases involving the Chi-

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439. *Id.* at 219.

440. *Id.*

441. *See also* Howard W. Gutman, *Advance Sheet: A Posnerian Trilogy*, LITIG., Winter 1987, at 52 (suggesting that a plaintiff's "critique was worthy of thoughtful consideration, not righteous indignation").

cago Board of Education and the Department of Justice.[442] At the close of President Carter's term in office, the Justice Department entered into a consent decree with the Chicago Board of Education to end a race discrimination case.[443] Under the decree, the executive branch pledged "to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."[444] When the Reagan administration took office, it backed away from the plan, actively making efforts to reduce funding for the Chicago schools.

On three occasions, District Court Judges Marvin Shadur and Milton Aspen held the federal government in contempt and entered extraordinary orders, requiring the executive branch to lobby Congress to allocate over $100 million in education funds for Chicago.[445] On each occasion the court of appeals, in opinions written by Judge Flaum, reversed these decisions.[446] The court criticized the parties, particularly the federal government, for failing to act reasonably and in good faith to compromise their differences and live up to the terms of the consent decree.[447] In the first two decisions, the court carefully avoided determining the bounds of what could be demanded under the consent decree and the difficult constitutional issues involved. In the third decision, expressing disappointment with the parties, the court held that the decree was vague as to its terms and could not be read to require specific action,[448] and as such, decisions by the executive within a broad range would satisfy the government's obligations.[449]

These opinions may be viewed, alternatively, as examples of Judge Flaum's strengths or weaknesses as a judge. The positive interpretation argues that these cases illustrate Judge Flaum's consistent adherence to a classical school of judicial restraint, emphasizing

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442. United States v. Board of Educ., 799 F.2d 281 (7th Cir. 1986) (*"Board of Educ. III"*); United States v. Board of Educ., 744 F.2d 1300 (7th Cir. 1984) (*"Board of Educ. II"*), *cert. denied*, 471 U.S. 1116 (1985); United States v. Board of Educ., 717 F.2d 378 (7th Cir. 1983) (*"Board of Educ. I"*). Judge Flaum wrote the opinion for the court in each of these cases.

443. United States v. Board of Educ., 554 F. Supp. 912 (N.D. Ill. 1983).

444. *Board of Educ. I*, 717 F.2d at 380.

445. United States v. Board of Educ., 621 F. Supp. 1296 (N.D. Ill. 1985) (Aspen, J.); United States v. Board of Educ., 588 F. Supp. 132 (N.D. Ill. 1984) (Shadur, J.); United States v. Board of Educ., 567 F. Supp. 272 (N.D. Ill. 1983) (Shadur, J.).

446. *Board of Educ. III*, 799 F.2d at 298; *Board of Educ. II*, 744 F.2d at 1306; *Board of Educ. I*, 717 F.2d at 384 (7th Cir. 1983).

447. *Board of Educ. III*, 799 F.2d at 283.

448. *Id.* at 288-89.

449. *Id.* at 295.

the values of federalism, separation of powers, and the primacy of the political (as opposed to the judicial) process. Although Judge Flaum left little doubt that he personally found the conduct of the executive branch to be reprehensible, he believed that the dispute was essentially a political struggle over money that was "inevitable in light of the shifting ideological winds in the years since the decree was signed."[450] In defining the district court's role in this political struggle, he realistically acknowledged "the inherent problems with ordering remedial relief against the government."[451] He emphasized that the district court should have exercised its "oversight powers without supplanting the continuing responsibilities of the [governmental] parties."[452] Despite the fact that he had been nominated to the Seventh Circuit by the Reagan Administration and might have held hopes for a Supreme Court nomination, Judge Flaum sharply criticized the Reagan Justice Department for its conduct in these cases.[453]

A more critical interpretation, however, argues that this is another example of Judge Flaum substituting rhetoric for difficult substantive decisions. Under this interpretation, Judge Flaum's (and the court's) unwillingness to make decisions about the proper interpretation of the consent decree, and the limits of its enforcement, resulted in unnecessarily protracted litigation. Some might argue that the rulings issued in the third opinion in 1986 should have been made in the first one, in 1983. This interpretation argues that Judge Flaum's repeated disappointment — disappointment that the parties could not resolve their dispute themselves and instead looked to the courts to decide the issues — shows an unfortunate distaste for an essential judicial function. One role of the courts is to decide difficult, often heated, disputes that parties will not and cannot resolve themselves. Judge Flaum's aversion to that function, and his relative distaste for conflict, reflects an underlying weakness as a judge, according to this view.[454]

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450. *Id.* at 288.

451. *Id.* at 289.

452. *Id.* at 296.

453. United States v. Board of Educ. ("*Board of Educ. II*"), 744 F.2d 1300, 1308 (7th Cir. 1984), *cert denied*, 421 U.S. 1116 (1985). An additional example supporting the positive interpretation of Judge Flaum's work is Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1273-74 (7th Cir. 1984) (Flaum, J., concurring) (illustrating a concern for the values of federalism).

454. For another example supporting the interpretation of Judge Flaum as a compromiser who avoids difficult decisions, see Wyletal v. U.S., 907 F.2d 49 (7th Cir. 1990), where he affirmed the

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

I. Michael S. Kanne

Michael S. Kanne, 55, is a 1968 graduate of Indiana University Law School. From 1968 to 1972 he was in private practice in Rensselaer and was an attorney for that city in 1972. From 1972 to 1982, he was a state trial judge in Indiana. Judge Kanne was appointed by President Reagan to the U.S. District Court for the Northern District of Indiana in 1982, and to the Seventh Circuit in 1987. Judge Kanne's opinions are straightforward and attorneys interviewed view him as applying precedent fairly in most matters. As is discussed in more detail below, the major negative comments we received from attorneys concerned his delay in issuing opinions and some questions about his fairness in employment-related matters.

Judge Kanne is generally well-prepared for oral argument. He is moderately active in his questioning and asks good, reasonable questions that indicate that he has become well-acquainted with the briefs and the case. Judge Kanne is always courteous to attorneys at oral argument, and his questions are not designed to intimidate. Judge Kanne has a steady, pleasant judicial temperament.

Judge Kanne has spent the bulk of his legal career as a trial court judge. (He was first appointed to the state bench at age 34.) This experience has given him a valuable background in the workings of litigation and has strongly shaped his judicial philosophy. For example, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[455] Judge Kanne, writing for the en banc majority, ruled that a trial court could order a corporate representative to appear for a settlement conference despite some ambiguity in the rule.[456] Judge Kanne clearly sympathized with the need of district judges to have the ability to mandate participation by parties in settlement conferences.

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trial court's determination that both parties were equally negligent, even though the trial court refused to determine who hit whom. *Id.* at 50.

455. 871 F.2d 648 (7th Cir. 1989) (en banc).

456. *Id.* at 656.

Likewise, in *United States v. Best*,[457] Judge Kanne voted with the block of Seventh Circuit judges who had prior trial court experience.[458]

Some attorneys criticized Judge Kanne for being too willing to defer to district judges. While the Council has some concerns that Judge Kanne's deference may, at times, be excessive,[459] the statistical analysis below shows that Judge Kanne ranked solidly in the middle of the pack in terms of the percentage of reversals by Seventh Circuit judges.[460] This normal rate of reversal also held true in our research regarding Judge Kanne's disposition of criminal cases.

Our review of Judge Kanne's cases and the comments we received from others indicate that he strictly adheres to precedent. Judge Kanne's approach in his opinions is to recite the established law and apply that law to the facts. Although this is certainly what a judge should do, we found several things missing from his opinions, such as a measure of healthy skepticism regarding some precedent or any vision of how the law develops, or where it fails.

Several opinions illustrate these points. In *In re Rivinius, Inc.*,[461] Judge Kanne held that it was error to allow the defendant company to amend its pleadings after trial under Rule 15(b) of the Federal Rules of Civil Procedure.[462] Judge Cudahy dissented, stating that Judge Kanne's holding "elevated the technical over the substantial," and proposed a less strict rule.[463] Judge Cudahy also provided facts showing that the plaintiff had waived this appellate issue.[464] Judge Kanne provided little response to either of these arguments, leaving the reader to wonder whether his rule will have any significant precedential value. In *Cunningham v. Peters*,[465] Judge Easterbrook indicated in dissent that Judge Kanne had failed to adequately address

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457. 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992); *see supra* notes 171-74 and accompanying text (discussing the holding in *Best*); *see also* Politte v. United States, 852 F.2d 924, 928 (7th Cir. 1988) (showing Judge Kanne's sympathy for the good faith error of a district judge); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988) (demonstrating Judge Kanne's experience with the criminal trial process).

458. *Best*, 939 F.2d at 425. The other judges joining in the opinion were Bauer, Wood, Coffey, Flaum, and Manion. *Id.*

459. *See, e.g.*, Burda v. M. Ecker Co., 954 F.2d 434, 440-41 (7th Cir. 1992) (reversing a grant of Rule 11 sanctions).

460. *See infra* Appendix A, at A-40.

461. 977 F.2d 1171 (7th Cir. 1992).

462. *Id.* at 1176.

463. *Id.* at 1177 (Cudahy, J., dissenting).

464. *Id.* at 1177-78 (Cudahy, J., dissenting).

465. 941 F.2d 535, 542-43 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1484 (1992).

some important legal questions. In *Swamp v. Kennedy*,[466] Judges Posner, Easterbrook, and Ripple dissented from the denial of a rehearing en banc, stating that recent Supreme Court decisions required a more in-depth examination than that provided in Judge Kanne's opinion.[467]

Generally, Judge Kanne applies the law to the facts almost mechanically, without disclosing any particular ideology.[468] Given the appropriate facts, Judge Kanne will apply the law in favor of individuals,[469] but in some employment-related opinions his political philosophy has seemed to affect the outcome of the cases.[470] He does this despite his traditional deference to the fact-finder. For example, in *Hill-Rom Co. v. NLRB*,[471] Judges Kanne and Manion acted together to overturn a NLRB decision in favor of the employees based on what were essentially factual disagreements rather than deferring to the NLRB's role as a finder of fact.[472]

Furthermore, one civil rights opinion authored by Judge Kanne is particularly disturbing. In *Jackson v. County of McLean*,[473] he reversed the district court's holding and held that counsel should have been appointed for a prisoner.[474] In reaching that result, however,

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466. 950 F.2d 383 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 2992 (1992).

467. *Swamp*, 950 F.2d at 388-89; *see also, e.g.*, United States v. Belanger, 970 F.2d 416 (7th Cir. 1992) (showing that Judge Kanne reviewed the relevant facts and law, but failed to justify why his rule was better than the strict requirement the defendant urged); Fiorenzo v. Nolan, 965 F.2d 348 (7th Cir. 1992) (showing conclusory reasoning on the issue of intent to discriminate).

468. *But see* Selch v. Letts, 5 F.3d 1040, 1047 (7th Cir. 1993) (criticizing Supreme Court patronage decisions).

469. *See* Gorman v. Robinson, 977 F.2d 350, 356 (7th Cir. 1992) (ruling in favor of the plaintiff in a § 1983 case); United States v. Maciaga, 965 F.2d 404, 407-08 (7th Cir. 1992) (reversing the enhancement of the defendant's sentence); Brooms v. Regal Tube Co., 881 F.2d 412, 420 (7th Cir. 1989) (ruling in favor of an employee in a sexual harassment case); Sulie v. Duckworth, 864 F.2d 1348, 1356 (7th Cir. 1988) (affirming the denial of a habeas corpus petition, but going against a plurality opinion by the conservative members of the U.S. Supreme Court), *cert. denied*, 493 U.S. 828 (1989); *see also* United States v. Jungles, 903 F.2d 468 (7th Cir. 1990) (providing a well-reasoned opinion and giving a thorough hearing to a pro se defendant in a tax evasion case before upholding the conviction).

470. *See, e.g.*, Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119 (7th Cir. 1992) (Cudahy, J., dissenting) (holding that illegal aliens cannot get back pay); Heerdink v. Amoco Oil Co., 919 F.2d 1256, 1260-61 (7th Cir. 1990) (reversing a district court's finding of sexual discrimination), *cert. denied*, 111 S. Ct. 2826 (1991); Pugh v. Bowen, 870 F.2d 1271, 1278 (7th Cir. 1989) (limiting an award of disability benefits over a dissent); Grohs v. Gold Bond Bldg. Prods., 859 F.2d 1283, 1288 (7th Cir. 1988) (refusing to defer to the district court judge's assessment of the evidence showing age discrimination), *cert. denied*, 490 U.S. 1036 (1989).

471. 957 F.2d 454 (7th Cir. 1992).

472. *Id.* at 458-59 (Easterbrook, J., dissenting).

473. 953 F.2d 1070 (7th Cir. 1992).

474. *Id.* at 1073.

he adopted a standard that seems to put prisoners in a double bind: they cannot get a court-appointed lawyer unless they first try to get a private lawyer, but if they cannot get a private lawyer, that indicates that their claims may be without merit and thus not deserving of court-appointed counsel.[475]

The quality of Judge Kanne's opinions does appear to have improved during his time on the court. The Council's view is that they have been unduly devoid of legal analysis is supported by the statistical report in the Appendix. The analysis of *Shepherd's* citations to the opinions of the various Seventh Circuit judges per year ranks Judge Kanne either at the bottom or second from the bottom in all the important categories, including citations by district courts within the Seventh Circuit's jurisdiction, citations by non-Seventh Circuit district courts, citations by the Seventh Circuit, citations by other circuits, and all citations together. Judge Kanne is cited only half as often as the average Seventh Circuit judge.[476]

A major problem with Judge Kanne's performance on the bench has been his difficulty in issuing opinions on a timely basis. From our reading of the cases, this seemed to be a particular problem for cases from 1989 and 1990, but he has improved somewhat in the past two years. Judge Kanne's average time for publishing an opinion during the past five years was 235 days, the second slowest among the judges of the Seventh Circuit.[477] There is no indication that Judge Kanne is assigned more difficult opinions than the other judges on the Seventh Circuit. Moreover, many of his delayed opinions do not seem particularly difficult. For example, it took Judge Kanne 451 days to issue *United States v. Dweck*,[478] a routine affirmance of a conviction without dissent or concurrences that was seven reporter pages in length.[479]

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475. *Id.*

476. *See infra* Appendix A, at A-9.

477. *See infra* Appendix A, at A-29.

478. 913 F.2d 365 (7th Cir. 1990).

479. *See also* United States v. Glas, 957 F.2d 497 (7th Cir. 1992) (taking 184 days to issue a two-page opinion); Jupiter Corp. v. FERC, 943 F.2d 704 (7th Cir. 1991) (taking 290 days to publish an opinion on the simple issue of refunding an illegal tax); United States v. Dillon, 905 F.2d 1034 (7th Cir. 1990) (taking 264 days to issue a six-page opinion).

Professor Lessig deleted ten days from the time between oral argument or other submission of a case and the time of publication in order to accurately reflect the time a judge worked on an opinion. The ten days represent the time the court takes to check and print the opinion. The references to time in this evaluation, and in other evaluations, follow Professor Lessig's approach. To compute the actual time between the date of submission and the date the opinion was issued, therefore, ten days must be added to the numbers contained in the text. *See infra* Appendix A, at

On seemingly straightforward cases, Judge Kanne has often taken more than 270 days to publish an opinion;[480] other opinions have taken over *500* days to publish.[481] In *Bennett v. Jett*,[482] he took 618 days to issue an opinion; five months later, the opinion was vacated, per curiam.[483] The second order, which was one page long, was based entirely on a Supreme Court case, decided six months before the first opinion was handed down that was not cited by the first opinion.[484]

Another cause for concern with Judge Kanne's performance is the fact that he has written few separate opinions. The concurrences and dissents he *has* written are not impressive. Judge Kanne's separate opinions are usually brief and lack any substantial analysis that would improve the Seventh Circuit jurisprudence.[485] For example, in *United States v. Benson*,[486] Judge Manion, joined by Judge Fairchild, ruled that the expert testimony of an I.R.S. agent was inadmissible under Rule 702 of the Federal Rules of Evidence.[487] Judge Kanne dissented, pointing out some of the problems with Judge Manion's holding.[488] However, because his dissent is less than

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480. *E.g.*, Hill-Rom Co. v. NLRB, 957 F.2d 454 (7th Cir. 1992) (Easterbrook, J., dissenting) (480 days); Mary Thompson Hosp. v. NLRB, 943 F.2d 741 (7th Cir. 1991) (358 days); Ray v. Consolidated Rail Corp., 938 F.2d 704 (7th Cir. 1991) (291 days), *cert. denied*, 112 S. Ct. 914 (1992); United States v. Jungles, 903 F.2d 468 (7th Cir. 1990) (354 days); Myer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir.) (341 days), *cert. denied*, 498 U.S. 827 (1990); East Bay Running Store, Inc. v. Nike, Inc., 890 F.2d 996 (7th Cir. 1989) (368 days); Robbins v. Lady Baltimore Foods, Inc., 868 F.2d 258 (7th Cir. 1989) (289 days); *see also* Fullop v. Salem Nat'l Bank, 6 F.3d 422 (7th Cir. 1993) (344 days in a case involving a bankruptcy and article nine of the UCC).

481. Illinois EPA v. United States EPA, 947 F.2d 283 (7th Cir. 1991) (617 days); United States v. Ware, 914 F.2d 997 (7th Cir. 1990) (520 days); Daniel J. Hartwig Assocs., Inc. v. Kanner, 913 F.2d 1213 (7th Cir. 1990) (612 days).

482. 956 F.2d 138 (7th Cir. 1992).

483. Bennet v. Jett, 966 F.2d 207 (7th Cir. 1992).

484. *See* James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439, 2447-48 (1991) (holding that a prior ruling, which invalidated a similar tax scheme, applied retroactively to a present claim arising out of facts antedating that decision).

485. *See, e.g.*, Rand v. Monsanto Co., 926 F.2d 596, 603 (7th Cir. 1991) (Kanne, J., concurring) (stating that the majority's legal analysis was correct, and adding only that the legal profession is better off with ethical rules); Gillman v. Burlington N. R.R., 878 F.2d 1020, 1025 (7th Cir. 1990) (Kanne, J., concurring) (stating only that he would affirm a district court's dismissal because the claim did not exist under FELA); Greenberg v. Kmetko, 840 F.2d 467, 475-76 (7th Cir. 1988) (en banc) (Kanne, J., concurring) (accepting the "outcome" of a "difficult case," but asserting only that the facts did not "produce quite the same picture that [had] been developed").

486. 941 F.2d 598 (7th Cir. 1991), *amended*, 957 F.2d 301 (7th Cir. 1992).

487. *Benson*, 941 F.2d at 605. Rule 702 states in part: "[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 410.

488. *Benson*, 941 F.2d at 615-16 (Kanne, J., dissenting).

a page in length and does not deal with the legal questions in any detail, he missed an opportunity to shed some light on the issues presented and perhaps improve a weak majority opinion.

In general, Judge Kanne's opinions are competent, and in the great bulk of cases do not show him to be an ideologue. They show a predisposition toward imposing any certain result except, perhaps, in some employment cases. The Council, however, believes that he has not demonstrated he can handle difficult cases well. Indeed, the serious questions raised about Judge Kanne's delay and productivity suggest that he may not be able to handle routine cases as efficiently as the job requires.

J. Daniel A. Manion

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

Judge Manion reportedly is well-prepared for oral argument and can be an active participant. While a number of attorneys reported that he often starts with questions about the parties' basic positions, his questions tend to reflect a thorough familiarity with the advocates' briefs. He is also unfailingly courteous in questioning counsel. Attorneys reported that Judge Manion appears to be most comfortable when presented with cases involving tort claims and other matters that he handled as an attorney, or those cases involving issues that he has previously decided as a judge.

Judge Manion's opinions tend to be well-organized and solidly reasoned, if occasionally repetitive. For the most part, his opinions clearly and concisely set forth the important facts of the case, clearly analyze applicable precedents, and effectively treat decisions and arguments contrary to the result reached by the court. In some more complex cases, colleagues have questioned whether he adequately dealt with all of the relevant arguments.[489]

A LEXIS search revealed that during his first three years on the

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489. *See, e.g.*, Graff v. City of Chicago, 9 F.3d 1309, 1335-41 (7th Cir. 1993) (en banc) (Cummings, J., dissenting) (questioning the dicta and analysis of Judge Manion's majority opinion).

Seventh Circuit, Judge Manion produced his opinions very slowly. Of the first 124 majority opinions he wrote for the court, twenty-six (or twenty-one percent) were issued more than one year after oral argument. Another twelve (or 10 percent) took more than ten months to complete. In a 1987 interview, Judge Manion attributed these delays to "learning the system."[490] He told another interviewer that the logistics of setting up an office in his home town of South Bend also contributed to his slowness.[491]

During the past three years, the speed at which Judge Manion issues his opinions has improved dramatically. In that time he has never taken more than ten months to produce a decision, and the average interval between oral argument and the release of an opinion has been less than six months. Of the decisions issued by Judge Manion up to March of 1993, thirteen (11 percent) were issued within three months of oral argument.[492] Still, he remains one of the slower, non-senior judges on the court in terms of writing opinions.

From time to time, particularly when faced with a "hard" or "very hard" case, Judge Manion seems to depart from the record on appeal in order to support his decision. For example, in *Hoffman Homes, Inc. v. Administrator, United States EPA,*[493] Judge Manion authored an opinion holding, in part, that the federal Clean Water Act[494] did not protect small and isolated wetlands.[495] The EPA filed a petition for rehearing, asserting that Judge Manion's opinion had misstated certain facts and misread applicable precedent, including a Supreme Court decision and the legislative history of the Clean Water Act. The EPA also suggested that the court, through Judge Manion's opinion, "misconstrued its role as a reviewing court and impermissibly substituted its judgment for EPA's scientific expertise." The court granted the EPA's motion for rehearing and vacated Judge Manion's opinion.[496] Upon rehearing, the case was reassigned to another member of the panel, Judge Wood, who again ruled against the EPA, but on substantially more narrow grounds,[497]

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490. *Wheels of Justice*, CHI. LAWYER, Sept. 1987, at 7.

491. William Grady, *After Trial by Jury, Federal Judge Acquits Himself Well*, CHI. TRIB., Aug. 21, 1992, § 5, at 1.

492. The Council calculated this number by running a LEXIS search.

493. 961 F.2d 1310 (7th Cir.), *vacated*, 975 F.2d 1554 (7th Cir. 1992), *on rehearing*, 999 F.2d 256 (1993).

494. 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992).

495. *Hoffman Homes*, 961 F.2d at 1321.

496. *Hoffman Homes*, 975 F.2d at 1554.

497. *Hoffman Homes*, 999 F.2d at 260-62.

and Judge Manion issued a concurring opinion.[498] However, in some other complicated cases Judge Manion has analyzed the facts and the law thoroughly and competently.[499]

Judge Manion also went beyond the record on appeal to support his partial dissent in *United States v. Rodriguez-Nuez*.[500] That case was an appeal from a sentence given to a drug offender which had been enhanced pursuant to the federal sentencing guidelines because the offense involved possession of a firearm.[501] The court reversed and remanded, finding that the firearm in question was too remote from the defendant at the time of arrest to warrant enhancement of his sentence.[502] Judge Manion's partial dissent speculated that it was "quite possible" that the defendant "carried the weapons with him when he picked up or delivered cocaine to the storage house" where the drugs were found.[503] Although Judge Manion stressed the necessity of "due deference" to the findings of the district court,[504] there is nothing to suggest that the district court's decision or anything else in the record supported Judge Manion's assumption about the travels of the weapon.

In most cases, Judge Manion's opinions afford appropriate deference to the findings of district judges in bench trials, juries, and administrative agencies.[505] In other cases — particularly employment discrimination cases — he has been criticized, expressly or implicitly, for usurping the function of the trier of fact. For example, Judge Easterbrook dissented from a Judge Manion opinion reversing a jury verdict in favor of a Title VII plaintiff where "the inferences cut both ways."[506] Similarly, in *EEOC v. Century Broadcasting Corp.*,[507] Judge Ripple, on behalf of the court, "emphasize[d] that it

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498. *Id.* at 263 (Manion, J., concurring). His concurrence contained the colorful observation: "The commerce power as construed by the courts is indeed expansive, but not so expansive as to authorize regulation of puddles merely because a bird traveling interstate might decide to stop for a drink." *Id.*

499. *See, e.g.*, Havoco of Am., Ltd. v. Sumitomo Corp., 971 F.2d 1332 (7th Cir. 1992) (concerning a revolving letters of credit agreement).

500. 919 F.2d 461 (7th Cir. 1990).

501. *Id.* at 463.

502. *Id.* at 467.

503. *Id.* at 468 (Manion, J., concurring in part and dissenting in part).

504. *Id.*

505. NLRB v. Transport Serv. Co., 973 F.2d 562, 566-67 (7th Cir. 1992); United States v. Fulford, 980 F.2d 1110, 1114, 1117 (7th Cir. 1992).

506. Bruno v. City of Crown Point, 950 F.2d 355, 365 (7th Cir. 1991) (Easterbrook, J., dissenting), *cert. denied*, 112 S.Ct. 2998 (1992).

507. 957 F.2d 1446 (7th Cir. 1992).

is not our role to second-guess the determination of the jury."[508] This was a direct reference to Judge Manion's dissenting opinion, in which he rejected the sufficiency of the evidence supporting a jury verdict finding a willful violation of the Age Discrimination in Employment Act.[509]

Judge Manion's opinions have not, for the most part, been rigidly ideological.[510] He does, however, generally demand that the court strictly adhere to the language of the statutes, rules, and regulations that it is construing. For instance, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[511] Judge Manion insisted that a federal magistrate had no inherent authority to order a party represented by counsel to appear at a pre-trial settlement conference because Federal Rule of Civil Procedure 16(a) expressly authorizes the compelled appearance of counsel and pro se parties only.[512] Judge Manion also expressed concern that compelling parties to attend a pretrial settlement conference could run afoul of the Federal Rules Advisory Committee Notes' caveat against "impos[ing] settlement negotiations on unwilling litigants."[513] Writing in his dissent from the en banc decision vacating and superseding his original ruling in the case, Judge Manion stated, "[t]his court should give the drafters [of Rule 16] credit for being able to communicate what they actually intended."[514] He criticized the majority for "straining to circumvent Rule 16's clear command."[515]

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508. *Id.* at 1457.

509. *Id.* at 1466-67 (Manion, J., dissenting); *see* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621-34 (1988 & Supp. IV 1992); *see also* Union-Tribune Publishing Co. v. NLRB, 1 F.3d 486, 493 (7th Cir. 1993) (Manion, J., dissenting) (arguing against the court's deference to the NLRB where the board's firing of a worker was found to be due to an anti-union animus).

510. *Compare* United States v. Berkowitz, 927 F.2d 1376, 1391 (7th Cir. 1991) (finding that the defendant was not "deprived" because he waived assistance of counsel) *and id.* at 1399-1400 (Ripple, J., dissenting) (criticizing Judge Manion's majority opinion for misstating the facts and the law in order to evade a Supreme Court decision enforcing the right to counsel) *with* United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992) (issuing a broad, pro-government decision in a Fair Housing Act case), *cert. denied*, 114 S. Ct. 58 (1993) *and* Carter v. Casa Cent., 849 F.2d 1048 (7th Cir. 1988) (issuing a broad opinion upholding the rights of a person with multiple sclerosis under the Rehabilitation Act).

511. 848 F.2d 1415 (7th Cir. 1988), *rev'd en banc*, 871 F.2d 648 (7th Cir. 1989).

512. *G. Heileman*, 848 F.2d at 1420.

513. *Id.* at 1421.

514. *G. Heileman*, 871 F.2d at 668 (Manion, J., dissenting).

515. *Id.* at 671 (Manion, J., dissenting). Judge Manion later joined in an order requiring "the parties" to participate in settlement discussions with a senior staff attorney of the Seventh Circuit before the court proceeded with a rehearing in Hoffman Homes, Inc. v. Administrator, 961 F.2d 1310 (7th Cir.), *vacated*, 975 F.2d 1554 (1992), *on rehearing*, 999 F.2d 256 (7th Cir. 1993).

However, in *United States v. West*,[516] Judge Manion gave examples of how "a skilled [prosecuting] attorney can avoid some of the pernicious effects of [Federal] Rule [of Evidence] 704(b),"[517] which prohibits an expert witness, such as a psychiatrist, from offering opinions on such ultimate issues of the case as a criminal defendant's sanity.[518] The majority opinion criticized Judge Manion's concurrence, stating that "judicial suggestions on how to avoid Congress' clear prohibition . . . are unfortunate. . . . If Rule 704(b) is to be amended, Congress should do so and, until it does, we should not be suggesting ways for prosecutors to avoid it."[519]

Some attorneys criticized Judge Manion for tending to defer too much to Judge Easterbrook when they sit together. An example of an unfortunate decision by Judge Manion that can be seen as undue deference to the jurisprudence of Judge Easterbrook is found in *Bell v. Purdue University*,[520] an appeal from a jury verdict against a plaintiff in an age discrimination case.[521] Writing for a panel that included Judge Easterbrook, Judge Manion affirmed, holding that "the district court should have granted summary judgment to the defendants" prior to trial.[522] The defendants had not argued this as a ground for affirming the judgment in their favor; in fact, during oral argument counsel for the defendants expressly rejected Judge Easterbrook's suggestion to this effect. Judge Manion's opinion in *Bell* cited *Schachar v. American Academy of Ophthalmology, Inc.*,[523] a decision in which Judge Easterbrook (joined by Judge Manion) had affirmed a jury verdict because of his belief that the trial judge should have granted a previous motion for summary judgment.[524] As many as five other circuits have rejected this notion that the denial of a summary judgment motion is properly reviewable on an appeal from the final judgment entered after trial.[525]

However, Federal Rule of Appellate Procedure 33 and Circuit Rule 33, which the court relied on in issuing its order, only authorize the compelled appearance of attorneys, not parties, at a prehearing conference. FED. R. APP. P. 33; 7TH CIR. R. 33.

516. 962 F.2d 1243 (7th Cir. 1992).

517. *Id.* at 1251 (Manion, J., concurring).

518. FED. R. EVID. 704(b).

519. *West*, 962 F.2d at 1249.

520. 975 F.2d 422 (7th Cir. 1992).

521. *Id.* at 423.

522. *Id.* at 430.

523. 870 F.2d 397 (7th Cir. 1989).

524. *Id.* at 398.

525. Bottineau Farmers Elev. v. Woodward-Clyde Consultants, 963 F.2d 1064, 1068 n.5 (8th Cir. 1992); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Locricchio v. Legal Servs.

Judge Manion does not, however, uniformly follow Judge Easterbrook's lead. In *Sherman v. Community Consolidated School District 21*,[526] the court considered a First Amendment challenge to an Illinois statute requiring daily recitation of the Pledge of Allegiance in public schools.[527] Judge Easterbrook's majority opinion relied upon the doctrine of "ceremonial deism," an approach to Establishment Clause cases which holds that certain ceremonial references to God have "lost through rote repetition any significant religious content."[528] Judge Manion vigorously condemned this approach for the somewhat circular reason that "it selects only religious phrases as losing their significance through rote repetition."[529]

There are several instances in which Judge Manion's analysis in dissent has been adopted by the Supreme Court in reversing a Seventh Circuit majority.[530]

On balance, Judge Manion has worked hard to improve his understanding of the law. His performance on the Seventh Circuit has generally been competent, particularly in the "easier" cases.[531] However, many lawyers contacted still believe that Judge Manion has not demonstrated the legal ability necessary to serve with distinction on the court.

K. Wilbur F. Pell, Jr.

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

Judge Pell sits on a very reduced schedule with the Seventh Cir-

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Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Roberston Co., 797 F.2d 1564, 1573 (Fed. Cir. 1986), *cert. dismissed*, 479 U.S. 1072 (1987); *see also* Holley v. Northrop World Wide Aircraft Servs., Inc., 835 F.2d 1375, 1377-78 (11th Cir. 1988) (holding that a party may not appeal the denial of summary judgment if it is admitted that evidence was sufficient at trial to be submitted to the jury or had otherwise changed in favor of the party opposing summary judgment).

526. 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2439 (1993); *see also supra* notes 260-67 and accompanying text (discussing the *Sherman* case).

527. *Sherman*, 980 F.2d at 437.

528. *Id.* at 447.

529. *Id.* at 448 (Manion, J., concurring).

530. Artist M. v. Johnson, 917 F.2d 980 (7th Cir. 1990), *rev'd sub nom.* Suter v. Artist M., 112 S. Ct. 1360 (1992); Zipes v. Trans World Airlines, Inc., 846 F.2d 434 (7th Cir. 1988), *rev'd sub nom.* Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989).

531. *But see supra* note 499 and accompanying text.

cuit. At oral argument, he is reported to treat lawyers well. They reported that he always reads the briefs and is very familiar with the issues at the time of oral argument. Judge Pell is also reported to ask pointed questions, although he is not as active in questioning as some other judges.[532]

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

> In this country there has been a cause of public discontent with sentencing of convicted persons in judicial proceedings. The complaint was that two persons each convicted of essentially the same crime but appearing before different judges would receive widely disparate sentences: One to what was sometimes termed a slap on the wrist and the other to an extended period of incarceration.
>
> At least in the federal system an effort was made to correct the situation by the imposition of sentencing guidelines. These were greeted negatively by many district judges who thought their discretion in sentencing was being made the subject of undue interference. The resistance ended when the Supreme Court of the United States upheld the sentencing guidelines. . . .
>
> [N]evertheless, at no time, before or after the guidelines, was discretion in sentencing equated with substantial abandonment of discretion. Upon my reading of the record before us, it appears to me that the judge simply did not give any real consideration to the mitigating circumstances of this case.[533]

Judge Pell's opinions are succinct and usually contain a thorough, if not exhaustive, factual account of the case. The lawyers questioned reported that he handles statutory interpretation very well. He shows only moderate deference to district court findings but exhibits a clear unwillingness to interfere with the purview of administrative bodies.[534] Judge Pell's sensitivity to the factual record before the court often leads him to comment in concurring and dissenting opinions when he perceives that the district court or panel opinion has failed to adequately recognize important facts in the record.[535]

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532. Judge Pell did join, without opinion, a number of the opinions that are criticized elsewhere in this evaluation.

533. United States v. Barnett, 961 F.2d 1327, 1328-29 (7th Cir. 1992) (Pell, J., dissenting).

534. *See* United Retail Workers Local 881 v. NLRB, 797 F.2d 421, 423 (7th Cir. 1986) (Pell, J., dissenting) ("[W]e are a court of review of such proceedings and are not ourselves an administrative body. Any reconsideration must be made in the first instance by the board.").

535. *See, e.g.*, Nelson v. Monroe Regional Medical Ctr., 925 F.2d 1555, 1568 (7th Cir.) (Pell,

Panel members rarely dissent from Judge Pell's majority opinions, with the exception of Judge Cudahy, who, when sitting with Judge Pell since 1985, has recorded four dissents and one separate opinion from those of Judge Pell.[536] While he usually votes to affirm criminal convictions and leans toward the government in search and seizure issues, he has at times voted to reverse convictions and invalidate searches.[537] Judge Pell's opinions also show an unwillingness to grant summary judgment.[538] In *United States v. Schmidt*,[539] the citizenship of a former Nazi concentration camp armed guard was revoked for "assisting in persecution."[540] In spite of the panel opinion containing an extensive recitation of facts relative to the particular concentration camp and numerous accounts of the brutalization of individuals for their religious and political beliefs, Judge Pell dissented.[541] He based his dissent on the fact that sufficient knowledge on the part of Schmidt that prisoners were being persecuted was allegedly not proven.[542] In spite of evidence that Schmidt "guarded concentration camp prisoners who wore color-coded patches to signify their racial, ethnic, social or political status" and escorted prisoners to and from forced labor sites,[543] Judge Pell wrote that the record was devoid of knowledge on the part of Schmidt that prisoners were being persecuted because of their beliefs.[544] Judge Pell rationalized that Schmidt only knew that some prisoners were homosexuals, who also could have been found in jails in the United States in the 1940s:

J., concurring in part and dissenting in part) (arguing that the record failed to present an antitrust claim), *cert. dismissed*, 112 S. Ct. 285 (1991); United States v. Baxter Healthcare Corp., 901 F.2d 1401, 1418 (7th Cir. 1990) (Pell, J., dissenting) (disagreeing with the court's classification of the defendant as a "manufacturer," as defined by a relevant statute).

536. *See infra* Appendix A, at A-37, A-38.

537. *See* Mauricio v. Duckworth, 840 F.2d 454, 458-60 (7th Cir.) (reversing and remanding a denial of habeas corpus relief and holding that the defendant's due process rights were violated by a failure to disclose the identity of an alibi rebuttal witness), *cert. denied*, 488 U.S. 869 (1988); *In re* Cerro Copper Prods. Co., 752 F.2d 280, 283 (7th Cir. 1985) (Pell, J., dissenting) (disagreeing that there was a basis for a plant-wide inspection for safety violations and arguing that the inspection violated the Fourth Amendment).

538. *See, e.g.*, Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985) (Pell, J., dissenting) (criticizing the court for affirming summary judgment in a § 1983 case arising out of the plaintiff's arrest for disorderly conduct after shaking a video machine).

539. 923 F.2d 1253 (7th Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

540. *Schmidt*, 923 F.2d at 1258.

541. *Id.* at 1260 (Pell, J., dissenting).

542. *Id.*

543. *Id.* at 1258 n.8.

544. *Id.* at 1260 (Pell, J., dissenting).

> [T]he only straw that would appear to seem to suggest Schmidt had some idea that some of the work prisoners were persecuted because of beliefs would be found in that he knew from their triangles that they were homosexuals. But, as his counsel pointed out, homosexuals were jailed in some of the states of this country at that very period of time.[545]

Judge Pell argued that Schmidt was entitled to "a fair trial" as to his knowledge of and assistance in persecution, in spite of evidence in the record of the grim history of the Sachsenhausen camp and brutalization of many of the prisoners.[546]

Judge Pell has reacted unfavorably to awards of attorneys' fees to plaintiffs. For instance, in *Berberena v. Coler*,[547] he dissented from a panel decision affirming a $46,664.45 fee award to Legal Assistance Foundation attorneys representing class action plaintiffs.[548] Judge Pell would have affirmed the magistrate's reduction of petitioned fees to less than half of the requested $20,504, because such a reduction was "realistic."[549] He noted that the Legal Assistance Foundation of Chicago and other such organizations "traditionally have been in the forefront of instituting such litigation when fees were not recoverable," and therefore reasoned that suits against the government would not be "chilled by the lack of the attorney's fees."[550]

Judge Pell recently authored a strong dissent criticizing a panel's overly broad grant of qualified immunity in *Walsh v. Ward*.[551] In that case, a fire department battalion chief filed a civil rights action claiming that a job reassignment was retaliation for criticism of his supervisors.[552] The majority, in an opinion authored by Judge Easterbrook, held that both the director of the Department of Public Safety and the fire chief were immune from civil rights liability in the case,[553] holding that "reasonable supervisors acting in 1988 would not have understood that the law 'clearly established' that a promotion to a suitable job can nonetheless violate the Constitution when it diminishes an employee's opportunity to make money else-

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545. *Id.*

546. *Id.* at 1261 (Pell, J., dissenting).

547. 753 F.2d 629 (7th Cir. 1985).

548. *Id.* at 634 (Pell, J., dissenting).

549. *Id.*

550. *Id.*; *see also* Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692, 698 (7th Cir. 1991) (Pell, J., concurring in part and dissenting in part) (dissenting from an award of attorney's fees).

551. 991 F.2d 1344 (7th Cir. 1993).

552. *Id.* at 1344-45.

553. *Id.* at 1346. Judge Easterbrook's opinion was joined by Judge Posner.

where."[554] To the contrary, Judge Pell stated: "I believe that it was quite clear the defendants' actions constituted impermissible interference with Walsh's freedom of speech."[555] Judge Pell relied on a line of cases beginning with *McGill v. Board of Education*.[556] Judge Pell reasoned, "[t]hus, a transfer to a position which is intrinsically less desirable, such as one from an engine company to a training position for which an employee had no previous experience, may be actionable."[557] Judge Pell also took issue with the tone and standards applied in the panel opinion, stating: "I must respectfully disagree with the majority's demeaning characterization about fire fighters holding another job during the 48 hours off duty as 'moonlighting' . . . What the fire fighter does during his 48 hours off time has no relation to his regular job, as moonlighting or otherwise."[558]

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

> When we require a plaintiff to prove that he has been deprived of a clearly established right by citing cases that are closely analogous to his own, an employee who has been deprived of a more widely-recognized benefit has a much easier burden to carry, since the deprivation he has suffered is more likely to be acknowledged as a violation of a right that has been clearly established. In a case where it appears that under governing law, the right at issue would indeed be clear to the minds of reasonable defendants, it seems to me to be both unnecessary and inappropriate to insist that the plaintiff bring forward cases involving facts that are nearly identical to the facts of his own case.
>
> I think Judge Ripple's dissent in *Rakovich*, . . . while it did not prevail there, points up with particular pertinence here the problem inherent in requiring identical facts:
>
> > The Court's approach to the need for "closely analogous" case law sends a clear message to those officials, hopefully small in number, who are willing to use their power to inhibit freedom of speech: Choose a novel approach to your abuse of power. Avoid a *modus operandi* that someone has tried before. Create a verbal smoke screen by articulating fabricated justifications for your actions. Then, when you are sued, point to the fact that there has never been a case like yours.
>
> It appears that Judge Ripple's prediction is now a *fait accompli*.[559]

554. *Id.*

555. *Id.* at 1348 (Pell, J., dissenting).

556. 602 F.2d 774, 779-80 (7th Cir. 1979) (holding that a retaliatory transfer of a teacher for constitutionally protected speech can trigger First Amendment rights).

557. *Walsh*, 991 F.2d at 1348 (Pell, J., dissenting).

558. *Id.* at 1349 (Pell, J., dissenting).

It is the Council's belief that Judge Pell can still be an effective judge, even though he works on a reduced schedule.

L. Richard A. Posner

Richard A. Posner, 54, is a 1962 graduate of Harvard Law School, where he was president of the Harvard Law Review. After clerking for Supreme Court Justice William Brennan, Chief Judge Posner spent two years as an assistant to a commissioner of the Federal Trade Commission and another two years as an assistant to Solicitor General Thurgood Marshall. He spent a year at Stanford teaching law before moving to the University of Chicago in 1968, where he was a law professor until 1981. During his tenure at the University of Chicago, Judge Posner became known as a leading exponent of the "law and economics school." He is a prolific and highly influential scholar, especially in the antitrust area, with eighty law review articles to his credit. In addition to his scholarly activities, he is the co-founder of a highly successful company, Lexecon, Inc., which provides expert witness services to companies and litigants in antitrust matters. President Reagan appointed Judge Posner to the Seventh Circuit in 1981, and he became Chief Judge in September 1993. He continues to teach at the University of Chicago and he remains a prolific writer and lecturer.[560]

Chief Judge Posner is most widely known in academic circles for advocating the use of economic analysis to gain insights into legal and factual controversies. This "law and economics" approach finds its way into many of his decisions. It is most naturally applicable to

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559. *Id.* at 1350 (Pell, J., dissenting) (citing Rakovich v. Wade, 850 F.2d 1180, 1217 (7th Cir.), *cert. denied*, 488 U.S. 968 (1988)).

560. Chief Judge Posner's books include: RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); POSNER, STUDY IN REPUTATION, *supra* note 90; WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. (Richard A. Posner ed., 1992); POSNER, FEDERAL COURTS, *supra* note 21; RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); and RICHARD A. POSNER, SEX AND REASON (1992). Indeed, Chief Judge Posner's academic writings have provoked frequent commentaries. For a sample of recent articles, *see* Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U.L. REV. 7 (1991); Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221 (1991) (book review).

commercial cases. In those cases, it has been generally accepted by the Seventh Circuit court.[561] Chief Judge Posner's advocacy of a cost-benefit analysis becomes far more controversial — and problematic — when applied to what are commonly viewed as noneconomic issues, such as civil rights, criminal, and procedural matters.[562]

Chief Judge Posner is a legal realist who gives little weight to history and who is famously derisive of original intent.[563] He is candid about the fact that jurists, himself included, make choices that are not always dictated by precedent. He therefore takes responsibility for his positions and defends them. The Chief Judge has stated his judicial philosophy in a nutshell:

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

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561. We found only three dissents to Judge Posner's majority opinions in a random sample of 150 commercial cases. *See* American Dental Ass'n v. Martin, 984 F.2d 823, 831 (7th Cir. 1993) (Coffey, J., concurring in part and dissenting in part); Burlington N. R.R. v. City of Superior, 932 F.2d 1185, 1188 (7th Cir. 1991) (Flaum, J., dissenting in part); Lorenzen v. Employees Retirement Plan, 896 F.2d 228, 237 (7th Cir. 1990) (Cudahy, J., dissenting).

562. *See, e.g.*, United States v. Caputo, 978 F.2d 972, 974-75 (7th Cir. 1992) (applying a cost benefit analysis to a plain error question in a criminal case); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 228-30 (7th Cir.) (applying an economic analysis to a determination of whether a skeletal argument was waived), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977); Lawson Products, Inc. v. Avnet, Inc., 782 F.2d 1429, 1435 (7th Cir. 1986) (applying economic analysis to a preliminary injunction standard); American Hosp. Supply Corp. v. Hospital Prods. Ltd., 780 F.2d 589, 593 (7th Cir. 1986) (applying an economic analysis to a preliminary injunction standard); Merritt v. Faulkner, 697 F.2d 761, 768-70 (7th Cir.) (Posner, J., dissenting) (arguing that if a prisoner had a good case, the market would provide counsel), *cert. denied*, 464 U.S. 986 (1983); *Id.* at 768-69 (Cudahy, J., concurring) (pointing out that "the barriers to entry into the prison litigation market might be very high" for prisoners).

Posner's criticism of Justice Cardozo's lack of rigid ideology is revealing:

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

POSNER, STUDY IN REPUTATION, *supra* note 90, at 116-17.

563. *See* Richard A. Posner, *What Am I? A Potted Plant?: The Case Against Strict Constructionism*, NEW REPUBLIC, Sept. 28, 1987, at 23 (arguing that legal formalism is an unrealistic and unworkable theory of the judiciary's role).

judges prefer to keep under their hat.[564]

Chief Judge Posner feels less constrained by precedent, history, and the proper limits on appellate judging than, in the Council's view, he should. He frequently reaches out to comment on, and decide, issues not presented by the parties or even by the record.[565] In that sense, Chief Judge Posner can fairly be called a judicial activist. All too often, he does not defer to normal procedural rules constraining appellate courts' conduct.[566] Chief Judge Posner also, at times, refuses to accept existing circuit or Supreme Court precedent as controlling the outcome of a case.[567] His loose approach to

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564. Letter from Richard Posner, Chief Judge of The Seventh Circuit, to the Chicago Council of Lawyers (Dec. 28, 1993) (on file with the Council).

565. *E.g.*, Mojica v. Gannett Co., Inc., 7 F.3d 552, 564 (7th Cir. 1993) (Cummings, J., dissenting) (criticizing Judge Posner's majority opinion for discussing retroactivity issues not relevant to the case at hand), *petition for cert. filed*, 114 S. Ct. 482 (1993).

566. *See, e.g.*, United States v. Lechuga, 994 F.2d 346, 351 (7th Cir.) (en banc) (Coffey, J., concurring) (writing a separate opinion attacking Judge Posner's majority opinion for giving an advisory opinion en banc), *cert. denied*, 114 S. Ct. 482 (1993); Reed v. Gardner, 986 F.2d 1122, 1128 (7th Cir.) (Posner, J., dissenting) (arguing that it is permissible for a court of appeals to suggest *sua sponte* a remand leading to a grant of summary judgment, even where it has not been requested), *cert. denied*, 114 S. Ct. 389 (1993); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388 (7th Cir. 1992) (deciding an Illinois state law issue despite pendency of the same issue in another case before the Illinois Supreme Court and the possibility of certifying the issue in the pending case to that court); Harris v. Board of Governors, 938 F.2d 720, 724-25 (7th Cir. 1991) (Ripple, J., concurring) (criticizing the court for rendering an advisory opinion after finding the case moot); *see also, e.g.*, United States v. Mittelstadt, 969 F.2d 335, 336-37 (7th Cir. 1992) (criticizing and lecturing a district judge and then ruling that the court had no jurisdiction to hear the appeal); Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982) (holding that state officials had no duty to protect the public from dangerous madmen under § 1983); *Id.* at 619-20 (Wood, J., dissenting) (criticizing the court for failing to hear oral argument and more fully consider the case).

567. *See* Kurland, *supra* note 308, at 15-19 (discussing such cases). Kurland responds to Judge Wood's opinion in Hanrahan v. Thieret, 933 F.2d 1328, 1337 n.17 (7th Cir.), *cert. denied*, 112 S. Ct. 446 (1991), which stated the rule that the Seventh Circuit must respect a prior holding by the Supreme Court until it is overruled or formally modified, despite a lack of consistency in the court's application of the precedent. Kurland, *supra* note 308, at 16; *see also* Chicago Tribune Co. v. NLRB, 965 F.2d 244, 250 (7th Cir. 1992) (recognizing "tension" with an earlier, pro-labor opinion, but ruling for the company after characterizing the earlier opinion as "dictum"); United States v. Pallais, 921 F.2d 684, 688 (7th Cir. 1990) (criticizing Federal Rule of Evidence 801(d)(2)(E)'s agency rationale for the introduction of statements of a co-conspirator and suggesting that "[a] different and cleaner approach would be to cut loose from the agency issue and ask instead whether the particular hearsay statement was sufficiently reliable to be considered by the jury [as required by] . . . Fed. R. Evid. 803(24)"), *cert. denied*, 112 S. Ct. 134 (1991); United States v. Leibowitz, 919 F.2d 482, 484 (7th Cir. 1990) (suggesting that the requirement that the defendant be "surprised" by the testimony of a prosecution witness who later recants is an "ossified" rule), *cert. denied*, 111 S. Ct. 1428 (1991); United States v. Rutledge, 900 F.2d 1127, 1128-29 (7th Cir.) (criticizing the rule of United States v. Hawkins, 823 F.2d 1020 (7th Cir. 1987), which requires appellate courts to determine for themselves the voluntariness of a confession rather than reviewing the district court's decision for clear error), *cert. denied*, 498

constraints on appellate courts is exemplified by *Marrese v. American Academy of Orthopaedic Surgeons*.[568] There, he reached out to decide an antitrust issue on the merits when the issue on appeal was only the validity of a discovery order.[569]

Chief Judge Posner has clearly acknowledged that he does not always view the traditional limitations on a judge's role as constructive.[570] This notion is apparently derived from his very expansive

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U.S. 875 (1990); Van Duran v. Elrod, 760 F.2d 756, 763 (7th Cir. 1985) (Flaum, J., dissenting) (criticizing Judge Posner's failure to defer to the district court's interpretation of a consent decree involving conditions of confinement of pre-trial detainees); Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1272 (7th Cir. 1984) (contending that an appellate court may not be bound by Supreme Court precedent if it is convinced that the Supreme Court would no longer follow it); Vail v. Board of Educ., 706 F.2d 1435, 1449-56 (7th Cir. 1983) (Posner, J., dissenting) (questioning the underlying Supreme Court decision); *Id.* at 1441-49 (Eschbach, J., concurring) (questioning Judge Posner's reasoning from first principals and his disregard of precedent), *aff'd*, 466 U.S. 377 (1984); Kurland, *supra* note 308, at 19 n.95 (criticizing Judge Posner implicitly). *But see* Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731 (7th Cir. 1986) (providing a thoughtful and well-reasoned plea for the Supreme Court to overturn the "*Enelow-Ettelson*" doctrine); *see also* Linda S. Mullenix, *The Influence of History on Procedure: Volumes of Logic, Scant Pages of History*, 50 OHIO ST. L.J. 803, 815-16 (1989) (praising the *Olson* decision).

568. 692 F.2d 1083 (7th Cir. 1982), *vacated and replaced en banc*, 706 F.2d 1488 (7th Cir. 1983), *aff'd en banc*, 726 F.2d 1150 (7th Cir. 1984), *rev'd*, 470 U.S. 373 (1985).

569. *Marrese* 692 F.2d at 1093-96; *see also* Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654-55 (7th Cir. 1984) (dismissing an antitrust complaint with a fact-pleading analysis in order to reach the merits of an antitrust claim). The initial *Marrese* decision contained a strong dissent from Justice Stewart, sitting by designation. *Marrese*, 692 F.2d at 1096-1100. In addition to being reversed, *Marrese* has also been the subject of much scholarly criticism. Hirshman, *supra* note 54, at 198.

570. *E.g.*, POSNER, STUDY IN REPUTATION, *supra* note 90, at 107. He wrote:

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

Id. In the same book, Chief Judge Posner also wrote:

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

Id. at 127. Posner also noted: "Despite much pretense to the contrary by judges and lawyers, it is one of the marks of the great judge to recast the issues in cases of his own image rather than to assume a passive, 'umpireal' stance." *Id.* at 144.

It is interesting to compare these quotes with Judge Posner's dissenting opinion in Tom v. Heckler, 779 F.2d 1250 (7th Cir. 1985), where the court reversed a social security disability decision and remanded for more evidence. *Id.* at 1256-57. In that case Judge Posner discussed at some length the importance of strict application of the waiver rule in appellate proceedings:

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

view of his role as an appellate judge, as stated in his study of Justice Cardozo: "[T]he appellate judge is the central figure in Anglo-American jurisprudence . . . ."[571] Whether or not that claim is accurate, it is instructive as a statement of Chief Judge Posner's self-image.

While much of Chief Judge Posner's work is marked by a willingness to reach out to decide issues not clearly before the court, there is also a contrary strain apparent in some cases.[572] He has expressed a concern that the federal courts are overworked to the point of being in an institutional "crisis."[573] This view may influence his rulings in certain cases where he has sought to avoid ruling on the merits,[574] or to limit review of lower court orders.[575] Whatever the source of this view, many of the Seventh Circuit's opinions discussed in the introduction to this report that take a strict view of procedural, jurisdictional, and other points were authored by Judge Posner.[576]

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modifications which cast an appellate judge . . . in the role of *judge d'instruction* are unlikely to improve the system. . . .

Id. at 1259-60 (Posner, J., dissenting).

571. POSNER, STUDY IN REPUTATION, *supra* note 90, at viii; *see also id.* at 150 ("For better or for worse, the legal system has its superstars, and most of them — or at least the most luminous of them — are judges.").

572. *See* Tucker v. Dep't of Commerce, 958 F.2d 1411 (7th Cir.) (taking the narrow view in a political question case), *cert. denied*, 113 S. Ct. 407 (1992).

573. POSNER, FEDERAL COURTS, *supra* note 21, at 59-93; Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378 (1985) (reviewing POSNER, FEDERAL COURTS, *supra* note 21). *But see* Michael C. Gizzi, *Examining the Crisis of Volume in the U.S. Courts of Appeals*, 77 JUDICATURE 96 (1993) (arguing that there is no crisis of volume in the federal appellate courts).

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

575. *See* Kurland, *supra* note 308, at 17-20 (discussing how the Seventh Circuit attempts to manage their caseload).

576. *See, e.g.*, Hartmann v. Prudential Ins. Co. of Am., 9 F.3d 1207, 1212 (7th Cir. 1993) (stating that a "failure to press a point . . . and to support it with proper argument and authority forfeits it"); *In re* Tolona Pizza Prods. Corp., 3 F.3d 1029, 1033 (7th Cir. 1993) (suggesting that the plaintiff should have alleged that the district court judge applied the incorrect standard of review, since the court of appeals must show deference to a judge's factual finding); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225, 230 (7th Cir.) (noting that "identifying, framing and arguing" issues on appeal is role of lawyer, not judges, and if a lawyer fails to "make a complete and comprehensible argument" for each claim he loses, regardless of the merits of each claim), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977); Burdett v. Miller, 957

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

1. Chief Judge Posner's Approach to Oral Argument

Chief Judge Posner is extremely well prepared and active at oral argument. Many of the lawyers interviewed admire — and fear — the Chief Judge because they believe that he understands their cases better than they do. Indeed, many lawyers mentioned that one of their greatest professional challenges is the presentation of an oral argument before Chief Judge Posner. His questions are nearly always insightful and often suggest that he is looking at a case differently than the lawyers.

Some lawyers, however, were critical of his performance at oral argument. They reported that he is relatively unconcerned with the advocates' point of view, and sometimes uses oral argument to explore the questions that interest him, to the point where a lawyer often does not have enough time to make crucial points. He often expresses the view that the lawyers' briefs are not very helpful. As a result, some lawyers contacted feel that they do not get a meaningful hearing before Judge Posner. When he first came to the court, many lawyers the Council interviewed found his attitude at oral argument to be arrogant to the point of being offensive but lawyers now report that he has softened over the years. Although he is not overtly rude or hostile at oral argument, it is reported that he remains somewhat condescending toward advocates.

2. Chief Judge Posner's Opinions

Chief Judge Posner's writing can be clear and precise. His style is informal, almost conversational. He often uses colloquialisms that are somewhat startling to find in the midst of serious legal discussion.[577] The fact that their use is startling, however, does not mean

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F.2d 1375, 1380 (7th Cir. 1992) (misidentification of a RICO enterprise by a prosecutor does not allow a judge to infer consent to the amended pleadings).

577. *E.g.*, Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991).

that they are inappropriate. For the most part, they liven up the discourse. His relative informality tends to make his opinions accessible, if one is willing to contend with their length. This informality has its drawbacks, however. The style occasionally seems flip and breezy, conveying the impression that the litigants' concerns are not important. The informal manner in which he often dispenses with arguments might contribute to the impression that Chief Judge Posner fails to appreciate the "blood, sweat, and tears" expended in good faith by both practitioners and litigants.

In some cases, Chief Judge Posner's "breezy" accounts of the facts may cause lawyers on the losing side of a case to question the care with which the factual portion of the opinion was crafted. Although short, concise statements of the facts contribute to the smooth flow of his opinions, his frequent abridgment of the facts has provoked negative comments from his colleagues.[578] This approach leaves Chief Judge Posner open to the charge that he distorts the facts to suit a desired outcome.[579] There is considerable debate about whether this is a pervasive defect in his decisionmaking. A very substantial number of lawyers contacted by the Council believe that Chief Judge Posner routinely ignores crucial facts in order to reach desired conclusions; others believe that he is as faithful to the facts as is any other appellate judge. The Council cannot give a firm opinion on this issue without comparing factual statements to the records of numerous cases. However, the fact that many lawyers of high integrity and ability strongly believe that Chief Judge Posner does not pay sufficient attention to the facts suggests that this is an area of important concern.

Chief Judge Posner's opinions are notable for the frequency with which they digress[580] — in dicta of the most elaborate and extended

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578. *E.g.*, Indianapolis Airport Auth. v. American Airlines, Inc., 733 F.2d 1262, 1273 (7th Cir. 1984) (Flaum, J., concurring) (criticizing the court's finding of a monopoly as assuming the issue of whether the costs were properly allocated).

579. Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 283 (7th Cir. 1992) (Cudahy, J., dissenting) ("The majority review of the facts here is so lopsided as to be almost droll — if it were not such serious business."). Chief Judge Posner himself has criticized such abuse of the facts in his writings. *See infra* note 582.

580. Chief Judge Posner is not bashful about his digressions. *See, e.g.*, Traylor v. Husqvarna Motor, 988 F.2d 729, 735 (7th Cir. 1993) ("What all this has to do with the present case eludes our understanding, however."); Davis v. United States, 972 F.2d 869, 871 (7th Cir. 1992) ("But all this is an aside."); United States v. One Parcel of Land Located at 7326 Highway 45 N., 965 F.2d 311, 322 (7th Cir. 1992) (Posner, J., dissenting) ("I have strayed from the central point . . . .").

sort — from what appears to be the main point.[581] His opinions are not only lengthy, but they are also sometimes more difficult to follow than they ought to be.[582] The Council's investigation revealed that many readers find them confusing. In large part, this difficulty results from discussion of issues that need not be addressed and his stream-of-consciousness approach to legal reasoning.[583] Some readers of his opinions like these digressions but the Council has substantial concern about the amount of dicta. We believe that both he and the court seriously underestimate the confusion caused.

The rambling structure of his opinions has one more consequence — it is often very difficult to find the holding in the case. Lawyers and lower court judges have great difficulty drafting jury instructions from a Posner opinion — what is it that you quote? His opinions lack the certainty and predictability important for commercial activities, and for public officials and others who must conform their conduct to the law as announced in appellate decisions.[584] While

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

582. Chief Judge Posner's characterization of Judge Learned Hand's opinions is clearly also directed at his own. Posner wrote that "Hand's opinions are successful imitations of the judge's thinking process as he wrestles with a case. It twists and turns as the judge is pulled now hither, now yon, by the weight of opposing considerations as they present themselves to his mind." POSNER, STUDY IN REPUTATION, *supra* note 90, at 142; *see also id.* at 134-35 (discussing how Cardozo used short sentences to give his opinions power and many citations to give them an academic patina).

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

584. Easterbrook, *supra* note 320, at 877 (noting that "A good commercial judge prefers rules to standards, for even when a rule is flawed people may form contracts against a known background"). For an example of this tendency, see Rakovich v. Wade, 850 F.2d 1180, 1205 (7th Cir. 1988) (en banc) (holding that government officials performing discretionary functions are immune

Chief Judge Posner's literary structure is well designed for examining interesting questions and conducting discussions with the academy, it is not always well-suited for the practical needs of litigants and trial judges.

3. *Chief Judge Posner's Comments About Attorneys*

Chief Judge Posner's opinions lay out his suggestions or admonitions about the future and past behavior of litigants and judges.[585] Such "mini-lectures" may be intended to help improve the administration of justice or the quality of the bar. These lectures do, however, contain the potential for embarrassment; and while public embarrassment at this level may be good for the administration of justice, such criticism should always be fair and rest upon a complete record. The Council concludes that Judge Posner's criticisms of attorney behavior are often made too hastily, without a thorough record concerning the facts. Negative comments on the performance of lawyers and judges made without the benefit of full investigation tend to promote an impression of distance and a lack of respect. In order to set fair and high standards for the practicing bar, an appellate judge should convey a sensitivity to the demands placed upon trial lawyers and judges.[586]

Too often, Chief Judge Posner has admonished counsel or, even worse, recommended disciplinary proceedings without giving the lawyer an opportunity to be heard.[587] The most egregious recent ex-

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from damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known") (citation omitted); Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding that "unlawfulness must be apparent").

585. *See, e.g.*, Traylor v. Husqvarna Motor, 988 F.2d 729, 732-35 (7th Cir. 1993) (reversing a judgment for a corporate defendant in a products liability action and issuing elaborate instructions to the district court regarding the conduct of the retrial).

586. The *Chicago Lawyer* recently published an interesting comparison between the ways in which Judges Bauer and Posner respond to allegedly unethical behavior by lawyers. Harvey Berkman, *7th Circuit's Switch from Bauer to Posner Provides Study in Contrasts*, CHI. LAW., August 1993, at 63. *Compare* Dreis & Krump Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers, 802 F.2d 247, 254-55 (7th Cir. 1986) (Posner, J.) (reversing Judge Holderman's decision not to impose sanctions on plaintiff's lawyer) *with* National Wrecking Co. v. International Bd. of Teamsters, Local 731, 990 F.2d 957, 963 (7th Cir. 1993) (Bauer, J.) (reversing the imposition of sanctions on a lawyer).

587. *See* Hill v. Norfolk & W. Ry. Co,, 814 F.2d 1192, 1206-08 (7th Cir. 1987) (Parsons, J., dissenting) (arguing that statutory law requires a right to notice and the opportunity to be heard on a sanction proceeding); *see also* Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983), which has been criticized for affirming the imposition of a sanction for bringing an appeal without a colorable basis, when the losing party's position was supported by a dissent from one of the panel members. Hirshman, *supra* note 54, at 202-03.

ample of this seemingly impulsive reaction concerning claims of attorney misconduct is his panel opinion in *United States v. Best*.[588] In that case, the defendant alleged that an Assistant United States Attorney permitted the government's exhibit book, which contained exhibits that had been admitted into evidence, to go to the jury room without the knowledge of the judge or defense counsel.[589] The trial judge looked into the allegations and found harmless error.[590] On the basis of a clearly insufficient record and without giving the prosecutor a hearing, Judge Posner's panel opinion sharply criticized the prosecutor, stating that he was persuaded "[t]hat in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there."[591] The panel referred the prosecutor for disciplinary proceedings.[592] Judge Bauer, who wrote the en banc decision reversing Judge Posner, stated in a footnote:

> [W]e note that the findings of the original panel in this case that suggested that . . . the lead prosecutor in this case, had 'quite possibly' engaged in misconduct have been vacated. Had the district court believed an inquiry into . . . [the prosecutor's] conduct warranted, it could have conducted one; we should not perform that task in its stead.[593]

The panel opinion authored by Chief Judge Posner in the *Best* case was unacceptable. He should be careful to give counsel an opportunity to be heard before criticizing them in an opinion, because in the Council's view, public criticism of an attorney by an appellate opinion is a serious sanction.[594] The principles of notice and an opportunity to be heard now embodied in Circuit Rule 38 should be applied in future cases.

4. Chief Judge Posner's Procedural Opinions

Chief Judge Posner writes two distinctive types of procedural opinions: one strictly construes procedural rules, while the other ap-

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588. 913 F.2d 1179 (7th Cir. 1990), *rev'd*, 939 F.2d 425 (7th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 1243 (1992); *see also supra* notes 171-74 and accompanying text (discussing the decision in *Best*).

589. *Best*, 913 F.2d at 1182.

590. *Id.* at 1183.

591. *Id.*

592. *Id.*

593. *Best*, 939 F.2d at 431-32 n.3.

594. *See* Philips Medical Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 607 (7th Cir. 1993) (reversing sanctions against one side, but forwarding the opinion to the district court's Executive Committee to investigate the conduct of lawyers for the other side); Rooney, *Possible Misconduct*, *supra* note 70, at 1 (discussing a motion filed following the opinion in the *Philips* case).

plies law and economic principles to questions of procedure.

Chief Judge Posner has earned a reputation for being a stickler for procedural detail.[595] He regularly insists, for example, on a strict construction of the rule that appeals be from orders that are "final."[596] In this context, his concern for efficiency finds expression not only in the close examination of questions of appealability, but also in the imposition of sanctions on those who have allegedly used the appellate system frivolously.[597] Rules regarding waiver of issues on appeal are very strictly enforced by Chief Judge Posner. Thus, in *United States v. Kerley*,[598] he applied the waiver rule against a pro se defendant who had objected to a flawed jury instruction during the instruction conference but failed to state any grounds for the objection as required by Rule 30.[599]

In *United States v. Caputo*,[600] a case involving allegations of plain error, Chief Judge Posner applied cost/benefit analysis to the plain error rule:

> The benefit of departing from the ordinary processes of adversary justice is maximized when the departure is necessary to save an innocent person. The cost is minimized when the error can be picked out with relatively little difficulty. . . .
>
> If it is uncertain whether the trial court committed an error, it will be difficult to say that there is a *substantial* danger that an innocent man was convicted, unless the appellate court invests substantial resources in determining whether there was error.[601]

Caputo is an example of the second type of procedural opinion for which Chief Judge Posner is known — the application of "law and economics" principles to questions of procedure.[602] Perhaps the best

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595. *See, e.g.*, Connecticut Gen. Life Ins. Co. v. Chicago Title & Trust Co., 690 F.2d 115, 116 (7th Cir. 1982) (denying leave to file briefs instanter and regretting laxity in enforcement of this rule). *But see* Duff v. Marathon Petroleum Co., 985 F.2d 339, 340-41 (7th Cir. 1993) (reversing a summary judgment award and criticizing a district judge for a hypercritical procedural approach). For a well-reasoned, balanced discussion of when a district court should exercise its power to dismiss for want of prosecution, see Ball v. City of Chicago, 2 F.3d 752, 755-56 (7th Cir. 1993).

596. *See, e.g., In re* Fox, 762 F.2d 54, 55 (7th Cir. 1985) (discussing when a bankruptcy proceeding is final for purposes of appeal).

597. *See* Foy v. First Nat'l Bank, 868 F.2d 251, 258 (7th Cir. 1989) (imposing sanctions on a winning party for arguing that their opponents' losing contentions were frivolous).

598. 838 F.2d 932 (7th Cir.), *modified per curiam*, 838 F.2d 941 (7th Cir. 1988).

599. *Kerley*, 838 F.2d at 935-36; *see also* Hartmann v. Prudential Ins. Co., 9 F.3d 1207 (7th Cir. 1993).

600. United States v. Caputo, 978 F.2d 972 (7th Cir. 1992).

601. *Id.* at 974-75.

602. *See* Villanova v. Abrams, 972 F.2d 792, 796-97 (7th Cir. 1992) (applying an economic analysis to civil commitment proceedings); Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1203

known, and least successful, of his procedural opinions was his opinion for the court in *Roland Machinery Co. v. Dresser Industries, Inc.*[603] In that case, over a strong dissent, he applied his economic analysis approach to the standard for granting or denying a preliminary injunction.[604] In *American Hospital Supply Corp. v. Hospital Products, Ltd.*,[605] he followed *Roland* to create a mathematical formula to, in his view, make more precise the traditional discretionary standard.[606] The *Roland* and *American Hospital* opinions were widely criticized for creating the appearance of precision,[607] without advancing the substance of what a district judge must decide (or what an appellate court must review).[608] The two opinions were effectively overruled by *Lawson Products, Inc. v. Avnet, Inc.*[609]

Another well-known opinion applying economic analysis to procedure was Judge Posner's dissent in *Merritt v. Faulkner*.[610] There, he argued that if a prisoner had a good case, the market would provide counsel.[611] Accordingly, he dissented from the appointment of counsel in a prisoner's civil rights case.[612] Judge Cudahy's concurrence tartly noted that "the barriers to entry into the prison litigation market might be very high" for prisoners.[613]

(7th Cir. 1987) (Parsons, J., dissenting) (applying an economic analysis approach to a grant of sanctions).

603. 749 F.2d 380 (7th Cir. 1984).

604. *Id.* at 386-90.

605. 780 F.2d 589 (7th Cir. 1986).

606. *Id.* at 593-94.

607. *See* Silberman, *supra* note 428, at 287 (stating that "the value of a formula is either to assist in making a prediction or help to explain a result," and that Posner's "formula does neither").

608. *Id.* at 306.

609. 782 F.2d 1429 (7th Cir. 1986); *see also supra* notes 422-28 and accompanying text (discussing the *Lawson* decision).

610. 697 F.2d 761 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983).

611. *Merritt*, 697 F.2d at 769-70 (Posner, J., dissenting). *Merritt* built on Judge Posner's earlier opinion in McKeever v. Israel, 689 F.2d 1315, 1323-25 (7th Cir. 1982), which attacked the right of prisoners to receive counsel and questioning whether they should be allowed to file lawsuits against their jailors.

612. *Merritt*, 697 F.2d at 769-71 (Posner, J., dissenting).

613. *Id.* at 768-69 (Cudahy, J., concurring). Judges Posner and Cudahy have continued their disagreement on this issue in a series of subsequent opinions. *E.g.*, Farmer v. Haas, 990 F.2d 319, 321 (7th Cir.), *cert. denied*, 114 S. Ct. 438 (1993); Merritt v. Faulkner, 823 F.2d 1150, 1154 (7th Cir. 1987) (Cudahy, J., concurring); *Id.* at 1155 (Posner, J., concurring). In the Council's view, Judge Cudahy is correct. Whether or not the market will provide prisoners with lawyers if they have strong cases, the society should appoint counsel for prisoners with colorable claims. Prisoners are not in a position to seek counsel, and while they deserve to be punished, they also deserve legal help if the state is abusing its power over them.

5. *Chief Judge Posner's Substantive Opinions*

In many of his commercial opinions, Chief Judge Posner uses his law and economics analysis appropriately.[614] There have been cases, however, where his law and economics approach has led him to attempt to overturn established statutory policy with which he disagrees. The best known such case is *Roberts v. Sears*.[615] His panel panel opinion in *Roberts* denied patent protection to an invention because:

> The framers of the Constitution and the Patent Code would not have wanted patents to be granted where the invention would have been made anyway, and about as soon, without any hope of patent protection. The grant of a patent in such a case would confer no benefits that might offset the costs of monopoly.[616]

As the en banc opinion demonstrated, Judge Posner's analysis did not reflect the accepted construction of the statute. In the Council's view, he instead attempted to insert Judge Posner's own view of economic policy.[617]

In criminal cases, Chief Judge Posner is apt to defer to district court rulings, even when he has to recast the rationale for the ruling.[618] Thus in *United States v. Cardona-Rivera*,[619] he affirmed the

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614. *See, e.g.*, Market St. Assocs. Ltd. Partnership v. Frey, 941 F.2d 588, 593-97 (7th Cir. 1991) (using an economic analysis to discuss the "good faith" obligation).

615. Roberts v. Sears, Roebuck & Co. 697 F.2d 796 (7th Cir.), *rev'd en banc*, 723 F.2d 1324 (7th Cir. 1983).

616. *Roberts*, 697 F.2d at 797.

617. *Roberts*, 723 F.2d at 1335; *see* Mark F. Grady & Jay I. Alexander, *Patent Law and Rent Dissipation*, 78 VA. L. REV. 305, 312-13 n.37 (1992) (suggesting that the theory embodied in Judge Posner's opinion "fails to explain the [Supreme Court] cases" and criticizing it as "incoherent and impossible to apply to actual decisions"); *see also* Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 283 (7th Cir. 1992) (Cudahy, J., dissenting) (criticizing the majority's disregard of legislative intent and the trial court's findings in favor of "scholarly musings" and "the exhilarating alchemy of economic theory").

618. Chief Judge Posner is unlikely to reverse a conviction because of a procedural error unless the case is factually close, so that it is possible, in his view, that a grave injustice was done or an innocent person was convicted. *See, e.g.*, United States v. Fountain, 768 F.2d 790, 795-97 (7th Cir.) (holding that an improper cross-examination of a defendant was not unduly prejudicial, and that failure to subpoena the defense witness was not prejudicial in light of overwhelming evidence), *amended and reh'g denied*, 777 F.2d 345 (7th Cir. 1985), *cert. denied*, 475 U.S. 1124 (1986); United States v. Bruscino, 687 F.2d 938, 942 (7th Cir. 1982) (en banc) (reversing a panel decision which held that improper material in the jury room tainted the defendant's conviction), *cert. denied*, 459 U.S. 1228 (1983). Moreover, it is difficult to prove to Chief Judge Posner that a confession was involuntary. *See* United States v. Rutledge, 900 F.2d 1127, 1128-30 (7th Cir.) (holding that a suspect who confessed after being told that his confession would help him, but who was later given a sentence four to six times longer than if he had not confessed, was not misled into confessing), *cert. denied*, 498 U.S. 875 (1990).

trial court's denial of a motion to suppress where police testimony was "improbable" but not "incredible."[620] He affirmed the denial despite finding that the officers lied on the stand when they testified that the defendant was stopped for a traffic violation, and even though he chastised the government for arguing that drug dealers often violate traffic laws when, in an earlier case, the government had argued that probable cause can be established by a drug dealer's overly careful driving.[621] Commenting on the phenomenon of perjury by police officers in *Cardona-Rivera,* Judge Posner stated that:

> The problem of dishonest police testimony is a very old one, but drug dealers are not models of rectitude. The task of determining whose testimony is more truthful is a difficult one in such cases, and it is performed by the trier of fact with little effective power of intervention by the appellate court.[622]

He then went on to find that the arresting officers had probable cause to stop the defendant and search his car on grounds not advanced by either the government or the district court.[623]

Chief Judge Posner is willing to speak out forcefully when he identifies what he views as fundamental unfairness. Accordingly, in *United States v. Marshall,*[624] he dissented from a decision upholding a federal sentencing scheme for possession of LSD which took into account the weight of the medium in which the LSD was contained, rather than just the weight of the LSD itself.[625] Judge Posner struggled with the question of how judges should interpret statutes, whether it was permissible to depart from a positivist's "literal" interpretation of the statute, and whether a "naturalist" or

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619. 904 F.2d 1149 (7th Cir. 1990).

620. *Id.* at 1152-53.

621. *Id.* at 1153-54.

622. *Id.* at 1153.

623. *Id.* at 1153-54. In ruling on state habeas petitions, Chief Judge Posner frequently seeks to limit the federal courts' role in such proceedings. *See, e.g.,* Phillips v. Lane, 787 F.2d 208, 214, 217 (7th Cir.) (reversing a grant of habeas relief because the Illinois appellate court's consideration of the issue on direct appeal, in the exercise of its plain error jurisdiction, was not enough to save the defendant from a procedural default), *cert. denied,* 479 U.S. 873 (1986). Judge Posner spent no time describing or even referring to the district court's rationale for granting the petition. Chief Judge Posner is, however, willing to apply waiver rules to the state. *See* Thomas v. State of Indiana, 910 F.2d 1413, 1415 (7th Cir. 1990) (holding that the state waived a defense by failing to raise it in its appellate briefs).

624. 908 F.2d 1312 (7th Cir. 1990) (en banc), *aff'd sub nom.* Chapman v. United States, 111 S. Ct. 1919 (1991).

625. *Marshall,* 908 F.2d at 1331.

"pragmatic" interpretation was permissible.[626] In *Marshall,* Judge Posner opted for the "naturalist" approach, one which "leads to a freer interpretation, one influenced by norms of equal treatment; and let us explore the interpretive possibilities here."[627] That approach, he argued, would have permitted him to correct an injustice without declaring the statute unconstitutional.[628] The *Marshall* opinion is instructive because it conveys the tension between Chief Judge Posner's willingness to correct an injustice and his reluctance to declare an act of Congress unconstitutional.

Chief Judge Posner is loathe to reverse convictions involving Fourth Amendment issues. In *United States v. Cerri,*[629] he upheld a warrantless search of the gun dealer defendant's home on the basis that the home was actually the defendant's place of business under a federal statute, even though the defendant's registered place of business was different from his home.[630] The case that best illustrates his guarded approach to the Fourth Amendment arose in the civil context. In *Soldal v. County of Cook,*[631] he ruled for a divided court that deputy sheriffs who assisted the seizure and removal of an entire motor home without a warrant or probable cause did not violate the Fourth Amendment.[632] Taking the entire house rather than of entering it, Judge Posner ruled, did not implicate the Fourth Amendment.[633] This decision was reversed in a sarcastic opinion by Justice Byron White, joined by a unanimous Supreme Court.[634]

In civil rights cases, as in other areas of the law, Chief Judge

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626. *Id.* at 1335-36 (Posner, J., dissenting).

627. *Id.* at 1335 (Posner, J., dissenting).

628. *Id.* at 1337 (Posner, J., dissenting).

629. 753 F.2d 61 (7th Cir.), *cert. denied,* 472 U.S. 1017 (1985).

630. *Cerri,* 753 F.2d at 64 (involving 18 U.S.C. § 923(g) (1988)); *see* Hessel v. O'Hearn, 977 F.2d 299, 302 (7th Cir. 1992) (developing a creative view of the warrant requirement and the plain view doctrine that was influenced by efficiency theory); Llaguno v. Mingey, 763 F.2d 1560, 1565-66 (7th Cir. 1985) (en banc) (developing a creative view of probable cause, exigent circumstances, and the warrant requirement).

631. 923 F.2d 1241 (7th Cir.), *aff'd in part and rev'd in part,* 942 F.2d 1073 (7th Cir. 1991) (en banc) *rev'd,* 113 S.Ct. 538 (1992).

632. *Soldal,* 923 F.2d at 1249.

633. *Id.* at 1250.

634. *Soldal,* 113 S.Ct. at 538. As was noted by one writer in the Supreme Court Report column in the October 1993 ABA Journal, Justice White's use of the words "interesting and creative" in describing Judge Posner's *Soldal* opinion was a euphemism. David O. Stewart, *Supreme Court Report,* A.B.A. J., Oct. 1993, at 60. Stewart described "interesting and creative" as "judicial synonyms for 'totally wrong.'" *Id.*; *see also* Dimeo v. Griffin, 943 F.2d 679, 685 (7th Cir. 1991) (en banc) (holding that the Illinois Racing Board's drug testing program did not violate the Fourth Amendment).

Posner often goes to great lengths to reach the merits of a case.[635] Thus he often finds ways to decide issues that others think should be remanded or otherwise deferred.[636] Chief Judge Posner typically does not use justiciability grounds to avoid decision. In *Tucker v. Department of Commerce*,[637] he adopted a narrow view of the political question doctrine.[638] He has also rejected the use of the abstention doctrine where others might have invoked it. For example, in an interesting pro-civil rights use of efficiency theory, he rejected the *Pullman* abstention doctrine,[639] calling it a "great time waster."[640] He has been similarly critical of the *Younger* abstention doctrine,[641] especially as it interacts with the ripeness doctrine to make constitutional challenges difficult.[642]

In *Reed v. Gardner*,[643] a failure to protect case, he dissented from Judge Flaum's remand, and asked the court of appeals to direct summary judgment.[644] In *Visser v. Packer Engineering Associates*,[645] Judge Posner affirmed a grant of summary judgment and

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635. United States v. Cicero, 786 F.2d 331, 334-35 (7th Cir. 1986) (Posner, J., concurring in part and dissenting in part) (arguing that the court should have issued an injunction itself rather than remanding, due to the strength of case); Duran v. Elrod, 760 F.2d 756, 759-63 (7th Cir. 1985) (reversing a ban on double bunking in jail cells and modifying a consent decree immediately after oral argument).

636. *See Duran*, 760 F.2d at 763-64 (Flaum, J., dissenting) (criticizing the majority for engaging in fact-finding unsuited to an appellate court). Judge Posner has also gone to some length in refusing to defer to district court decisions in other civil rights cases. *See, e.g.*, EEOC v. Madison Community Unit Sch. Dist. No. 12, 818 F.2d 577 (7th Cir. 1987) (retrying an equal pay case in which the district judge found for the plaintiffs); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984) (allowing the Justice Department to wiggle out of a voluntarily-entered consent decree on novel grounds).

637. 958 F.2d 1411 (7th Cir.), *cert. denied*, 113 S. Ct. 407 (1992).

638. *Tucker*, 958 F.2d at 1415.

639. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (holding that where a federal constitutional claim may be disposed of by the adjudication of an unsettled question of state law, the federal court *must* temporarily abstain in order to give the state court a chance to dispose of the state law question).

640. Lynk v. La Porte Superior Court No. 2, 789 F.2d 554, 568 (7th Cir. 1986). *But see* Waldron v. McAtee, 723 F.2d 1348, 1354-55 (7th Cir. 1983) (suggesting a very questionable use of a *Pullman* abstention to send a First Amendment vagueness challenge back to state court).

641. *See* Younger v. Harris, 401 U.S. 37 (1971) (holding that where a defendant in a state criminal proceeding in which a constitutional claim may be raised subsequently seeks a federal court injunction against allegedly unconstitutional state conduct, the federal court *must* deny the injunction).

642. *See* Illinois v. General Elec. Co., 683 F.2d 206, 212-13 (7th Cir. 1982) (criticizing the *Younger* doctrine for making constitutional challenges to state statutes virtually impossible), *cert. denied*, 461 U.S. 913 (1983).

643. 986 F.2d 1122 (7th Cir.), *cert. denied*, 114 S. Ct. 389 (1993).

644. *Reed*, 986 F.2d at 1129 (Posner, J., dissenting).

645. 924 F.2d 655 (7th Cir. 1991) (en banc).

essentially made his own credibility findings.[646] The opinion was issued over Judge Flaum's dissent, which argued that the plaintiff was entitled to a trial by jury and that Judge Posner had ignored a genuine factual dispute by ignoring relevant testimony in the trial record.[647] In *Kawitt v. United States*,[648] a suit for reinstatement into the Navy, he failed to order exhaustion of remedies through the board for correction of naval appeals, holding that "since it is also apparent that Kawitt has no substantive basis for this lawsuit, it seems better to terminate the proceeding once and for all, rather than require Kawitt to pester the board en route to the eventual but certain doom of this lawsuit."[649] Judge Cudahy dissented from this opinion.[650]

Chief Judge Posner's substantive civil rights views are not easily categorized. For example, he has written several opinions facilitating the prosecution of sexual harassment claims.[651] On affirmative action matters, however, his strong personal views on the social utility of affirmative action frequently shape his decisions. In *Britton v. South Bend Community School Corp.*,[652] in which the majority upheld a collective bargaining agreement prohibiting layoffs of minority teachers, Judge Posner dissented.[653] He was obviously offended by the idea of "tak[ing] away a public employee's job because of his racial identity . . . ."[654] Likewise, in *Billish v. City of Chicago*,[655] he dissented from the panel opinion upholding summary judgment against a challenge by white firefighters to the Chicago fire department's affirmative action plan.[656] He then prevailed in a 5-4 en banc

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646. *Id.* at 657-60.

647. *Id.* at 662-63 (Flaum, J., dissenting).

648. 842 F.2d 951 (7th Cir. 1988).

649. *Id.* at 953.

650. *Id.* at 954 (Cudahy, J., dissenting).

651. *See* International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 902-04 (7th Cir. 1989) (en banc) (Posner, J., dissenting) (arguing for a "bona fide occupational qualification" analysis when an employer restricts employees by sex as part of a fetal protection policy), *rev'd*, 499 U.S. 187 (1991); Forrester v. White, 792 F.2d 647, 664 (7th Cir. 1986) (Posner, J., dissenting) (arguing against absolute immunity for a judge's sex-based personnel decision), *rev'd*, 484 U.S. 219 (1988); *cf.* Bohen v. City of East Chicago, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring) (suggesting potential limits to the majority's ruling in a hostile workplace case).

652. 775 F.2d 794 (7th Cir. 1985), *rev'd*, 819 F.2d 766 (7th Cir.) (en banc), *cert. denied*, 484 U.S. 925 (1987).

653. *Britton*, 775 F.2d at 814 (Posner, J., dissenting).

654. *Id.*

655. 962 F.2d 1269 (7th Cir. 1992), *rev'd*, 989 F.2d 890 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 290 (1993).

656. *Billish*, 962 F.2d at 1302 (Posner, J., dissenting).

decision, in which he reversed the summary judgment, commenting: "There is concern and resentment about the use of policies of affirmative action or (more bluntly) reverse discrimination to practice a form of racial politics that is the mirror image of discrimination against blacks and other minority persons."[657]

Chief Judge Posner is also extremely critical of the "ubiquitous oxymoron 'substantive due process,' "[658] and indeed he is reluctant to even concede its existence.[659] He is one of the most influential jurists in the country on the subject of whether due process should give rise to a cause of action for the state's failure to protect its citizens. He wrote the appellate decision in *DeShaney v. Winnebago County Department of Social Services,*[660] as well as in *Jackson v. City of Joliet,*[661] and *Bowers v. DeVito.*[662] He concurred in *Archie v. City of Racine,*[663] and dissented in *Reed v. Gardner.*[664] Through these cases he articulated a jurisprudence which sees the Constitu-

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657. *Billish,* 989 F.2d at 897. Judges Flaum and Rovner both recused themselves from the en banc court, presumably because they had worked on the case in the 1970s when they worked at the U.S. Attorney's Office. If they had participated, a 5-4 decision against the City might well have become a 6-5 decision in its favor.

Chief Judge Posner's discomfort with the concept of affirmative action has not always led to the rejection of a discrimination claim. *See* United States v. Board of Sch. Comm'rs, 677 F.2d 1185, 1188 (7th Cir.) (holding that the state but not the suburbs should pay the cost of school desegregation), *cert. denied,* 459 U.S. 1086 (1982). "Judge Posner wrote a scathing dissent that not only revealed limits to his reliance on economics . . . but also showed his political courage." James G. Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter,* 40 U. MIAMI L. REV. 1171, 1238 (1986). Essentially, Judge Posner argued that the wealthy white suburbs should not be subsidized by the rest of the state for their discrimination. *Board of Sch. Comm'rs,* 677 F.2d at 1193-94 (Posner, J., dissenting).

658. Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir.), *cert. denied,* 459 U.S. 1069 (1982).

659. *See, e.g.,* Schroeder v. City of Chicago, 927 F.2d 957, 961 (7th Cir. 1991) (noting that substantive due process is better tied to provisions of the Bill of Rights, like the Takings Clause); *see also In re* Edwards, 962 F.2d 641, 644 (7th Cir. 1992) ("[A] denial of due process is for the most part treated like any other legal error, and is thus waived if not pressed."). Chief Judge Posner's views towards procedural regularity may be different, however, when business property is involved. *See* Penn Cent Corp. v. United States R.R. Vest Corp., 955 F.2d 1158, 1161-63 (7th Cir. 1992) (holding that railroads are entitled to a predeprivation hearing because of due process before land is taken away).

660. 812 F.2d 298, 301 (7th Cir. 1987) (holding that welfare authorities are not constitutionally liable for a reckless failure to protect a child from a parent's abuse), *aff'd,* 489 U.S. 189 (1989).

661. 715 F.2d 1200, 1203-05 (7th Cir. 1983) (holding that there is no § 1983 remedy for negligent rescue by state officers), *cert. denied,* 465 U.S. 1049 (1984).

662. 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen.").

663. 847 F.2d 1211, 1225-26 (7th Cir. 1988) (en banc) (Posner, J., concurring), *cert. denied,* 489 U.S. 1065 (1989).

664. 986 F.2d 1122, 1128 (7th Cir. 1993) (Posner, J., dissenting) (suggesting that the court should not have reached the "failure to protect" issue).

tion, in his words, as "a charter of negative liberties."[665] He believes that "failure to protect" claims, by his definition an expansive category, are not constitutionally based and are better left to state tort law.

Chief Judge Posner's opinions regarding procedural due process seem to be heavily influenced by his law and economics views. Several times he has found that a hearing would be inefficient because the outcome of the hearing seemed obvious to him.[666] But in *Marozsan v. United States*,[667] he did call for a hearing, saying: "It is natural to be concerned lest the federal courts be inundated with run-of-the-mine procedural challenges dressed up as constitutional claims. . . . However, federal courts are not only empowered but directed by Rule 11 . . . to levy sanctions on persons who file frivolous suits."[668]

Chief Judge Posner's law and economics theory influences his decisions in civil rights cases, as well. In *Davenport v. DeRobertis*,[669] Judge Posner upheld an injunction requiring five hours of exercise per week for inmates at Statesville prison but struck down the portion of the injunction requiring three showers a week,[670] stating: "[T]he necessity to make painful tradeoffs between competing public projects in an era of governmental fiscal scarcity counsels caution in the formulation of equitable relief requiring public expenditures."[671]

6. *Conclusion*

Chief Judge Posner is unquestionably one of the most influential legal thinkers in the country. He is a man of high personal integrity;

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665. Bohen v. City of E. Chicago, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

666. *See* Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988) ("[S]ince it is also apparent that Kawitt has no substantive basis for this lawsuit, it seems better to terminate the proceeding . . . rather than require Kawitt to pester the Board . . . ."); *In re* Special March 1981, Grand Jury, 753 F.2d 575, 580 (7th Cir. 1985) (refusing to grant a new hearing because it would not have been successful).

667. 852 F.2d 1469 (7th Cir. 1988) (en banc).

668. *Id.* at 1483 (Posner, J., concurring).

669. 844 F.2d 1310 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988).

670. *Davenport*, 844 F.2d at 1316.

671. *Id.*; *see also* Patton v. Przybylski, 822 F.2d 697, 701 (7th Cir. 1987) (dismissing a § 1983 suit that alleged an eight-day stay in custody without being taken to a magistrate on the ground that the official policy allegations had to be alleged with greater specificity in light of the burden on federal courts). Judge Ripple wrote a stinging dissent accusing Judge Posner of determining credibility and reasonableness issues on his own. *Id.* at 702 (Ripple, J., dissenting).

Chief Judge Posner is also a controversial judge. The Council believes the controversy centers primarily around five characteristics of his decision-making. The first is his use of economic theory in decisionmaking, especially concerning traditionally noneconomic issues. The second source of controversy is the report by lawyers that he tends to give short shrift to the facts. His opinions are often attacked by lawyers who feel that he did not take important facts into account, that he ignored facts which would have changed the result had they been acknowledged, or that he simply did not care that much about the actual facts before him. The third criticism is that Chief Judge Posner often looks for ways to modify or overturn settled precedent when he does not care for the outcome that precedent might dictate. Fourth, the Council believes that Chief Judge Posner's opinions could be better structured and that his digressions into dicta should be severely restricted. Fifth, the Council believes that Chief Judge Posner must follow the spirit as well as the letter of Circuit Rule 38 and not continue to impose de facto sanctions in the form of scathing language about the purported inadequacy of attorney performance without notice and a chance to be heard.

In the end, the Council concludes that Chief Judge Posner is too complex a figure to be easily categorized. He has many of the qualities of our finest judges. He is hard working, brilliant, productive, and scholarly. As noted, his decision-making also has characteristics to which the Council takes strong exception. Some of Chief Judge Posner's weaknesses, in the Council's view, might stem from his lack of a background in the practice of law, and specifically his lack of a significant litigation and trial background. Some come from his preoccupation with economic analysis. Others may come from his difficulty in cabining himself within the role of an appellate judge. In order to retain an appellate court's legitimacy, appellate judges must be bound by the institutional constraint of precedent and must limit decisions to the matters presented before them. Chief Judge Posner has strayed beyond these limits too often.

M. Kenneth F. Ripple

Kenneth F. Ripple, 50, is a 1968 graduate of the University of Virginia Law School. In 1968 he worked as an attorney for IBM, and from 1968 to 1972 he served with the United States Navy's Judge Advocate General Corps. From 1972 to 1973 he was a legal officer of the United States Supreme Court, and from 1973 to 1977

he was a special assistant to Chief Justice Warren Burger. From 1977 to 1985, Judge Ripple served as a professor of law at Notre Dame University. Judge Ripple was appointed to the Seventh Circuit by President Reagan in 1985.

Judge Ripple is reported to be exceptionally well-prepared for oral argument, sometimes referring to matters in the record not directly apparent from the parties' briefs. He considers every issue in the case thoroughly and focuses carefully on each. He is described to be both intelligent and very hard-working.

Judge Ripple writes with a very effective, logical, straightforward style. His opinions for the court typically begin with a short paragraph setting forth the district court or administrative agency decision to be reviewed and the decision reached by the panel, followed by discussions of the facts or factual allegations, the proceedings in the district court or before the agency, and then the panel or majority's analysis. He often, but not always, includes a section setting forth the parties' principal contentions. His numerous concurring and dissenting opinions, although often relatively brief, typically set forth his view of the case and the rationale for that view in sufficient detail to make clear the nature and basis of his concerns with the panel or majority opinion.

Judge Ripple's opinions generally are concise but thoughtful, dealing with "easy" issues with relative dispatch,[672] and dealing with more difficult issues in a manner reflecting their legal complexity or challenging facts.[673] Judge Ripple appears to be more concerned about getting the facts and the result of a case right than in stating broad or original principles of law. His opinions are cited with relative infrequency compared to other Seventh Circuit judges.[674]

Judge Ripple's opinions generally are courteous to the parties, counsel, the district court or administrative agency, and the other members of the panel. Judge Ripple does not hesitate to express his differences with other members of the court, however, as demonstrated by the frequency with which he writes concurring or dissent-

672. *See, e.g.*, Alexander v. Erie Ins. Exch., 982 F.2d 1153, 1160 (7th Cir. 1993) (deciding an insurance coverage case on summary judgment).

673. *See, e.g.*, Government Suppliers Consolidating Servs., Inc. v. Bayh, 975 F.2d 1267, 1280 (7th Cir. 1992) (striking state statutes regulating the trucking of municipal waste as violative of the Commerce Clause), *cert. denied*, 113 S. Ct. 977 (1993).

674. *See infra* Appendix A, at A-9 to A-12.

ing opinions.[675]

Judge Ripple is faithful to precedent, he is careful to decide only the issues before the court, and he will write separately to challenge the scope or reasoning of a panel or majority opinion. A good example of Judge Ripple's approach can be found in *United States v. Martin*.[676] *Martin* involved a defendant's challenge to his drug conviction on the ground that he was prejudiced by being forced to appear at trial in prison garb, consisting of a blue jumpsuit, and that he had initially appeared with two co-defendants (who subsequently pled guilty), also dressed in identical prison jumpsuits.[677] The established constitutional rule, under *Estelle v. Williams*,[678] is that it violates the right to a fair trial to compel a defendant to stand trial before a jury in prison attire.[679] Notwithstanding this rule, the conviction could have been affirmed on the ground of harmless error in light of overwhelming evidence of Martin's guilt.[680] Judge Coffey, for the majority, concluded it to be harmless error[681] but he went further and found no reason to believe the jury was able to identify the identical jumpsuits worn by the co-defendants as prison garb.[682] The majority determination had an air of unreality about it. In response, Judge Ripple wrote separately to express his disagreement:

> Yet, a jury sufficiently intelligent to comprehend the government's case against the defendant was also able to understand the significance of this attire. I therefore find it disturbing that the majority seems to limit the Supreme Court's holding in *Estelle v. Williams*, to situations where the prisoner designation on the clothing is more graphic. I certainly hope that prison authorities and trial courts within this circuit view this intimation with prudence and caution. *Estelle* is still the law of the land. It recognizes that trial in prison garb is a "constant reminder of the accused's condition implicit in such distinctive, identifiable attire." Trial courts are obliged under its mandate to ensure that the defendant's prison clothing is not "a continuing influence throughout the trial." In implementing this rule, "reason, principle, and common human experience," are to be the guide.[683]

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675. *See infra* Appendix A, at A-38.

676. 964 F.2d 714 (7th Cir. 1992).

677. *Id.* at 716.

678. 425 U.S. 501 (1976).

679. *Martin*, 964 F.2d at 719 (citing Estelle v. Williams, 425 U.S. 501 (1976)).

680. *Id.* at 721.

681. *Id.*

682. *Id.* at 720 n.5.

683. *Id.* at 722 (Ripple, J., concurring) (citations omitted). Judge Ripple also questioned the majority's reliance on a waiver theory, noting his "substantial doubt" that full responsibility for the situation lay with defense counsel, rather than with the lack of a more "cooperative atmosphere" between the district court and all counsel. *Id.* at 722-23 (Ripple, J., concurring).

Another good example of Judge Ripple's approach can be found in *United States v. Nichols*,[684] regarding the applicability of law to gender. There, Chief Judge Bauer's majority opinion upheld a conviction stating that *Batson v. Kentucky*[685] is limited to a racially-based discriminatory use of peremptory challenges and does not reach gender-based discrimination.[686] The defendant in Nichols, according to Chief Judge Bauer, contended not that the government discriminated against all women in the venire but only against black women.[687] Judge Ripple's one paragraph concurrence stated:

> The record amply supports the district court's finding that the prospective jurors were excused by the government not because they were black nor because they were female. They were excused because of the instability of their lifestyles. Accordingly, I would not announce definitively and gratuitously that the rationale of *Batson* is not applicable to gender based discrimination. That difficult question should wait for another day and be decided only when necessary to our decision. In all other respects, I join the majority's comprehensive and well-reasoned opinion.[688]

Judge Ripple has written many other useful concurring opinions.[689]

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684. 937 F.2d 1257 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992).

685. 476 U.S. 79 (1986).

686. Id. at 82.

687. *Nichols*, 937 F.2d at 1262.

688. *Id.* at 1264 (Ripple, J., concurring); *see also* Holstein v. Brill, 987 F.2d 1268, 1271-72 (7th Cir. 1993) (Ripple, J., dissenting) (advocating a remand to a bankruptcy judge to obtain a full explanation of why amendment to claim was allowed); Ron Tirapelli Ford v. NLRB, 987 F.2d 433 (7th Cir. 1993) (deferring to the board's discretion, but ordering a narrow remand for the board to consider correct principles of law before implementing a remedy).

689. *See, e.g.*, Graff v. City of Chicago, 9 F.3d 1309, 1333-35 (7th Cir. 1993) (en banc) (Ripple, J., concurring) (suggesting that the majority opinion might have been inconsistent with Supreme Court cases and calling for further review by the Supreme Court); United States v. Lallemand, 989 F.2d 936, 941 (7th Cir. 1993) (Ripple, J., concurring) (pointing out that the majority misanalyzed a sentencing guidelines case and used an unfortunate stereotype); Harris v. Board of Governors, 938 F.2d 720, 724 (7th Cir. 1991) (Ripple, J., concurring) (criticizing the majority for giving an advisory opinion after finding the case to be moot); Toulabi v. United States, 875 F.2d 122, 126 (7th Cir. 1989) (Ripple, J., concurring) ("I write separately only because I cannot see the need for, nor do I agree with, the [majority's] suggestion that the government should have limited its presentation . . . ."); Archie v. City of Racine, 847 F.2d 1211, 1227 (7th Cir. 1988) (en banc) (Ripple, J., dissenting) (suggesting that the Supreme Court had granted certiorari in a case which "will undoubtedly provide important and, in all likelihood, controlling guidance with respect to the final disposition of this case," as well as dissenting on the merits), *cert. denied*, 489 U.S. 1065 (1989); Barrington Press, Inc. v. Morey, 816 F.2d 341, 344 (7th Cir.) (Ripple, J., concurring) ("I write separately simply to emphasize that our holding today leaves undisturbed the settled law of this circuit . . . ."), *cert. denied*, 484 U.S. 906 (1987).

Occasionally, Judge Ripple's brevity goes too far. In several cases, Judge Ripple has issued one-sentence opinions concurring in the result. *E.g.* United States. v. Kopshever, 6 F.3d 1218, 1224 (7th Cir. 1993) (Ripple, J., concurring); United States v. Castillo, 965 F.2d 238, 244 (7th Cir.) (Ripple, J., concurring), *cert. denied*, 113 S. Ct. 212 (1992); Concast, Inc. v. AMCA Sys.,

Moreover, his willingness to dissent has also proven productive. In a variety of contexts, Judge Ripple has written persuasive dissents that cast substantial doubt on the result reached by the majority.[690]

Our review of Judge Ripple's opinions did not demonstrate any tendency to favor the government over the individual. For example, in *Harris v. Davis*,[691] which involved an appeal from a jury verdict against a prisoner who claimed he had been subjected to cruel and unusual punishment by forcible administration of an emetic and denial of necessary medical care, Judge Flaum's majority opinion affirming the verdict held that various evidence unfairly prejudicial to the plaintiff was erroneously admitted, but harmless.[692] Judge Flaum noted that several witnesses contradicted the plaintiff's testimony and stated that the plaintiff's credibility was reduced by his failure to introduce medical evidence.[693] Judge Ripple dissented, stating in part:

> The most essential ingredient of any trial in any American courtroom is fairness — fairness for all the litigants. When one of the litigants comes to the trial process marked with a stigma that creates a significant barrier to rational evaluation of the evidence, the trial court faces one of its most difficult tasks. In such a situation, the trial judge is obligated to exercise extreme caution to ensure that the process is a fair one, and that the ultimate determination is based on an objective assessment of the evidence and not upon passion or prejudice. . . .
>
> My disagreement is limited to the court's determination that, on this record, the errors were indeed harmless. As is often the case in prisoner litigation, the plaintiff was required to rely largely on the testimony of adverse

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Inc., 959 F.2d 631, 633 (7th Cir. 1992) (Ripple, J., concurring). While the Council believes that separate opinions need not be long, a paragraph or two stating the ground for the separate opinion seems more reasonable than a single sentence. *See, e.g.*, United States v. Johnson, 999 F.2d 1192, 1198-99 (7th Cir. 1993) (Ripple, J., concurring) (discussing, in two paragraphs, the reasons for narrowly circumscribing the majority holding).

690. *See, e.g.*, Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1400-01 (7th Cir. 1992) (Ripple, J., concurring in part and dissenting in part) (criticizing the majority's decision of Illinois state law issue and its refusal to certify an issue to the Illinois Supreme Court, or to wait for the decision in another case already pending in that court); United States v. Berkowitz, 927 F.2d 1376, 1399-1400 (7th Cir. 1991) (Ripple, J., dissenting) (charging that majority opinion misstated the facts and the law in order to evade a Supreme Court decision enforcing the right to counsel); United States v. Chaidez, 919 F.2d 1193, 1203 (7th Cir. 1990) (Ripple, J., dissenting) (disagreeing with the court's affirmance of a criminal conviction), *cert. denied sub nom.* Chavira v. U.S., 111 S. Ct. 2861 (1991), *cert. denied sub nom.* Chaidez v. U.S. 112 S. Ct. 209 (1991); Patton v. Przybylski, 822 F.2d 697, 702 (7th Cir. 1987) (Ripple, J., dissenting) (disagreeing with the court's holding that an eight-day delay in bringing a wrongfully arrested person before a magistrate does not state a cause of action).

691. 874 F.2d 461 (7th Cir. 1989), *cert. denied*, 493 U.S. 1027 (1990).

692. *Harris*, 874 F.2d at 464-65.

693. *Id.*

> witnesses and fellow prisoners. Since he is complaining about the absence of medical assistance at the time he allegedly was suffering from the ingestion of the emetic, we hardly can fault him with respect to the quality of the medical evidence. Under these circumstances, the plaintiff had to rely on his own testimony to support his claim. Here, the defendants impermissibly eroded whatever credibility the plaintiff may have been able to project despite his status. Under these circumstances, the errors clearly cannot be characterized as harmless.[694]

Perhaps Judge Ripple's major fault is his slow speed in rendering opinions. He is far slower than the court's average,[695] and it is a substantial problem.[696] While the Council commends Judge Ripple's painstaking approach to cases, it must be more evenly balanced with a concern for keeping the court's docket prompt.

Overall, Judge Ripple has been a very good judge. His rigorous adherence to procedural regularity and precedent, tempered with a real concern for the fairness of court proceedings, has been a valuable addition to a court that sometimes loses its bearing on these issues. In addition, his willingness to write separate opinions has been a useful corrective to the excesses of some of his colleagues.

N. Ilana Diamond Rovner

Ilana Diamond Rovner, 55, is a 1966 graduate of the IIT-Chicago Kent Law School. She served as a law clerk for a district judge from 1972 to 1973, then as an Assistant United States Attorney in Chicago from 1973 to 1977. She served as Deputy Governor in the Chicago office of former Governor Jim Thompson from 1977 to 1984. In 1984, Judge Rovner was appointed by President Reagan to the U.S. District Court for the Northern District of Illinois. President Bush appointed Judge Rovner to the Seventh Circuit in 1992.

Judge Rovner is the newest member of the Seventh Circuit. The Council has evaluated Judge Rovner twice within the past two years, first as part of its 1991 report on the Northern District of Illinois and then in connection with Judge Rovner's 1992 nomination for the Seventh Circuit. Initial indications from Judge Rovner's

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694. *Id.* at 466 (Ripple, J., dissenting); *cf.* United States v. Bell, 969 F.2d 257, 259-60 (7th Cir. 1992) (Ripple, J., concurring) (casting substantial doubt on a police officer's story, but not dissenting from an acceptance of that story by the trial court); *see also* United States v. Watkins, 983 F.2d 1413 (7th Cir. 1993) (reversing the trial court's determination that a defendant had waived his right to be present at trial).

695. *See infra* Appendix A, at A-28, A-29.

696. *See, e.g.*, Shakman v. Dunne, 829 F.2d 1387 (7th Cir. 1987) (a seventeen-month delay between argument and decision), *cert. denied*, 484 U.S. 1065 (1988).

first year of service on the Seventh Circuit are that she has made a fairly smooth transition to the appellate bench, is performing well, and is maintaining her commendable personal style as an appellate judge.

Judge Rovner was praised on the district court for being an extremely hard-working, careful, and caring judge. She seemed aware of the limits of her experience as a practitioner and worked hard to develop the expertise needed to be a trial judge. She clearly grew into the position and was a respected member of the district court before her elevation.

It is too soon to fully evaluate Judge Rovner's performance as a member of the Seventh Circuit. Nonetheless, a few early conclusions can be drawn. Judge Rovner continues to be a hard-working judge committed to her preparation. Attorneys appearing before Judge Rovner in her early oral arguments found her uniformly to be prepared for argument and interested in the arguments of counsel. She clearly has worked hard with her law clerks to prepare detailed questions about each case, and she actively questions counsel from both sides in almost every matter. One well-informed attorney questioned Judge Rovner's facility in discussing complicated matters once the topic varied from her preparation, but other attorneys did not report that problem.

Judge Rovner's early opinions are straightforward, readable, and well-reasoned.[697] Counsel we contacted in several early cases were satisfied with written decisions and found the results reasonable and well-supported by governing authority.

Judge Rovner also shows an early indication of being a prolific writer of dissenting and concurring opinions, a role the Council commends. Although it is statistically dubious to assign too great a weight to the small number of cases in which she has written so far, Judge Rovner appears to be one of the most active writers of separate opinions in the circuit. Based on these early cases, she is willing to take on the extra work to write separately to clarify or distinguish points made by the majority.[698]

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697. *See, e.g.*, Edward E. Gillen Co. v. City of Lake Forest, 3 F.3d 192 (7th Cir. 1993) (discussing the issues raised in a damages suit between a public contractor and a municipality); Wells v. Vincennes University, 982 F.2d 1147 (7th Cir. 1992) (discussing claims under the Illinois Wrongful Death Act).

698. *See, e.g.*, U.S. v. Ross, 9 F.3d 1182, 1195-97 (7th Cir. 1993) (Rovner, J., concurring) ("If we are able to resolve an appeal without reaching a difficult constitutional question, we certainly should do so."); Unterreiner v. Volkswagen of America, Inc., 8 F.3d 1206, 1213-17 (7th Cir.

The early indications are also that Judge Rovner's personal style has travelled well to the appellate bench. She was praised by attorneys contacted for being respectful, courteous, gracious, and friendly at argument. She is non-confrontational, on occasion reasoning with counsel rather than lambasting any error or overreaching in an argument. One novice appellate advocate praised Judge Rovner for putting her at ease during argument. Judge Rovner's somewhat informal or supportive judicial style is a welcome addition to the Seventh Circuit, and the attorneys interviewed believe it works well in an appellate context.

Judge Rovner, as during her trial court tenure, was commended for her evenhandedness and sense of fairness. She has no apparent biases and continues to be singularly respectful of litigants.[699] Judge Rovner demonstrates no predisposition to favor or oppose governmental or institutional interests, for example, in criminal or civil matters.

One concern raised about Judge Rovner is her speed in issuing opinions. Her initial opinions appear to be arriving slowly. However, given the inevitable transition period and the relatively small sample size, it is too early to draw any conclusions about this issue.

If Judge Rovner follows the path she took as a trial court judge, we can expect very good to excellent performance from her on the Seventh Circuit. The Council hopes that her command of the law will continue to grow, but that her approach to the law, and to judging, will stay the same. She appears to be an excellent addition to the court.

O. Harlington Wood, Jr.

Harlington Wood, Jr., 73, is a 1948 graduate of the University of Illinois Law School. From 1948 to 1969, Judge Wood practiced law in Springfield. He was U.S. Attorney for the Southern District of Illinois from 1958 to 1961, and from 1969 to 1973 he held high-

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1993) (Rovner, J., dissenting) (arguing that the majority opinion "shows confusion as to the personal knowledge requirement of FED. R. EVID. 602"); Mayall v. Peabody Coal Co., 7 F.3d 570, 574-77 (7th Cir. 1993) (Rovner, J., dissenting) (setting forth the court's position on age discrimination claims); Richardson v. Gramley, 998 F.2d 463, 468 (7th Cir. 1993) (Rovner, J., dissenting) (discussing the definitional finality and disagreeing with the majority's analysis), *cert. denied*, 114 S. Ct. 1072 (1994); United States v. Price, 995 F.2d 729, 732 (7th Cir. 1993) (Rovner, J., concurring) (discussing the court's barring of opinion testimony and its value to the case at bar).

699. *See, e.g.*, De Souza v. INS, 999 F.2d 1156, 1160 (7th Cir. 1993) (Rovner, J., concurring) (refusing to join in the majority's characterization of the plaintiff's claim as "almost trivial").

level positions at the Justice Department, including Assistant Attorney General for the Civil Division. Judge Wood was appointed by President Nixon to the U.S. District Court for the Southern District of Illinois in 1973, and President Ford appointed Judge Wood to the Seventh Circuit in 1976. Judge Wood took senior status in 1992.

Overall reports suggest that Judge Wood is a good judge and a solid performer on the Seventh Circuit. He is considered to be thoughtful, careful, experienced, and fair. Our reports indicate that Judge Wood is well-prepared for oral arguments but is fairly quiet and asks few questions. He is reportedly polite to attorneys and does not attempt to embarrass them. He also usually takes the time to thank lawyers handling pro bono matters for their service.

Judge Wood's opinions tend to be well-organized and follow a fairly consistent pattern. In the first paragraphs, he generally summarizes both the legal issues involved and the procedural posture of the case. He usually ends this portion with the bottom line; that is, whether the court affirms or reverses the lower court's opinion. Following the introduction, Judge Wood provides a statement of the facts followed by a fair discussion of the law. He then applies the law to the facts. His written work does not draw attention to itself, but rather explains what his ruling is and how it is justified.

Judge Wood's experience as a former district judge serves him well in understanding the practicalities of litigation. Not surprisingly, his opinions give substantial deference to the trial court, without abdicating the review function. He also defers to the state court's interpretation of state law. Judge Wood usually goes out of his way to not unduly criticize either the trial court or counsel even when he discovers errors.[700] He sets forth the appropriate standard of review and generally follows it honestly. Occasionally, however, Judge Wood seems to stretch to reach an outcome because it seems fair, rather than because a neutral application of the law and the standard of review led to that conclusion.[701]

Judge Wood does not often write separately. From 1985 through March of 1993, a LEXIS search indicated that Judge Wood wrote sixteen dissenting opinions and seven concurring opinions. During

700. He can, at times, wittily comment on the foibles of the trial court or others. *See, e.g.*, Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1432 (7th Cir. 1992) (chiding a district judge for attempting to bypass rules in order to provide an agreed procedure for appellate review).

701. *See, e.g.*, Kotsilieris v. Chalmers, 966 F.2d 1181, 1187-88 (7th Cir. 1992) (granting deference to a lower court's finding that sanctions were appropriate, then adding that the award was too high and reducing it, without remanding, to an amount he believed was appropriate).

the same time period, he wrote 443 majority opinions. Thus, over 95 percent of Judge Wood's opinions are majority opinions. When he does write separately, he does not engage in the back-biting tactics of some dissents. Instead, he frequently appears to understate his disagreement with his colleagues, albeit with what seems to be a wry tinge of sarcasm. For example, he appears to be hesitant to join in Chief Judge Posner's economic analysis approach to cases, but does not criticize it directly.[702] Even where Judge Wood found that "Judge Posner's dissent necessitate[d] a majority response,"[703] Judge Wood's opinion was much more restrained than the dissent to which he was responding.[704]

Judge Wood, in most cases, treats pro se litigants fairly. For example, in *Hawkins v. Poole*,[705] he wrote the opinion reversing an entry of a summary judgment against a pretrial detainee in a Section 1983 case.[706] In doing so, Judge Wood stated that "summary judgment cannot be bent to so conveniently dispose of a prisoner case which may be viewed by some as having little import."[707]

In criminal cases, he rarely reverses a defendant's conviction.[708] This, however, is true for the Seventh Circuit in general. In *United States v. Lopez*,[709] Judge Easterbrook wrote the opinion dismissing a criminal defendant's appeal of his sentence for lack of jurisdiction

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702. *See* Rodi Yachts, Inc. v. National Marine Inc., 984 F.2d 880, 890 (7th Cir. 1993) (Wood, J., concurring) (noting that the analysis outlined in Judge Posner's majority opinion "may well be a more efficient approach, but unfortunately, not being the expert in economics as are my two colleagues, I would prefer, for now, to approach comparative fault determination on the more traditional basis"); Walgreen Co. v. Sara Creek Property Co., 966 F.2d 273, 279 (7th Cir. 1992) (Wood, J., concurring) ("I gladly join in the affirmance reached in Judge Posner's expert analysis."); *see also* Roberts v. Sears, Roebuck & Co., 723 F.2d 1324, 1329-30 n.5 (7th Cir. 1983) (en banc) (rejecting the economic analysis approach of Judge Posner's panel opinion in a patent case).

703. Tom v. Heckler, 779 F.2d 1250, 1257-58 n.12 (7th Cir. 1985).

704. Judge Wood joined in dissents in the *Marrese* and *Soldal* cases that were subsequently vindicated by the Supreme Court. *See supra* notes 365-66, 568-69, 631-34 and accompanying text (discussing the respective cases). He also wrote a strong concurrence in O'Rourke v. Continental Casualty Co., 983 F.2d 94, 98 (7th Cir. 1993) (Wood, J., concurring) (agreeing with the court's holding that an employee was not entitled to amend an age discrimination complaint to add a retaliation claim, but cautioning against strict application of the majority's opinion); *see also* Dimeo v. Griffin, 943 F.2d 679, 686 (7th Cir. 1991) (en banc) (Wood, J., dissenting) (disagreeing with the majority's approval of broad drug testing of racetrack employees).

705. 779 F.2d 1267 (7th Cir. 1985)

706. *Id.* at 1268.

707. *Id.*; *see* Harris v. Fleming, 839 F.2d 1232, 1238 (7th Cir. 1988) (reversing, in part, the entry of summary judgment against a pro se inmate who had been denied appointed counsel).

708. Moreover, a LEXIS search performed by the Council revealed very few dissents to opinions written by Judge Wood in criminal cases.

709. 974 F.2d 50 (7th Cir. 1992)

because the sentence was within the limits of the sentencing guidelines.[710] The defendant, who had pleaded guilty, appealed the sentence he received from district Judge Richard Mills because at the sentencing hearing Judge Mills had delivered, in the words of Judge Easterbrook, a "tirade [that] was inappropriate both in style and content."[711]

Judge Wood filed a concurring opinion in which he stated that he viewed the jurisdictional issue to be a close one.[712] He noted that a sentence that violated a defendant's due process rights to a fair trial could be reviewed by the court even if it was within the sentencing guidelines.[713] Judge Wood concluded that the comments by Judge Mills were inappropriate, but did not rise to the level of a due process problem sufficient to give the court jurisdiction to review the sentence.[714] Judge Wood then concluded:

> If we had jurisdiction, and I think it is a very close question, I would have suggested that this sentence be vacated and the resentencing be by another judge, not only because Judge Mills may have committed a fundamental error, but because I believe it would better serve the appearance of justice, a very important consideration even for a very guilty defendant.[715]

Despite his apparently substantial concerns about the fairness of the defendant's sentencing hearing, Judge Wood did not dissent and, instead, concurred with Judge Easterbrook.

While comments concerning Judge Wood were generally favorable, the Council did receive substantial criticism concerning Judge Wood in the areas of civil rights and employment discrimination law. The Seventh Circuit generally is viewed as inhospitable to civil rights claims and Judge Wood tends to rule in accordance with this general pattern, even where there is a dissenting opinion.[716]

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710. *Id.* at 53.

711. *Id.* at 52.

712. *Id.* at 53 (Wood, J., concurring).

713. *Id.* at 54 (Wood, J., concurring).

714. *Id.* at 53 (Wood, J., concurring).

715. *Id.* at 55 (Wood, J., concurring).

716. *See, e.g.*, McGill v. Duckworth, 944 F.2d 344, 352 (7th Cir. 1991) (overturning a jury verdict which found that prison officials were negligent in allowing the rape of a prisoner, based in part upon a finding that the prisoner had assumed the risk of rape), *cert. denied*, 112 S. Ct. 1265 (1992); Wallace v. Robinson, 940 F.2d 243, 244 (7th Cir. 1991) (en banc) (finding that no liberty or property interests were created by a rule limiting prison officials' discretion to act for disciplinary reasons), *cert. denied*, 112 S. Ct. 1563 (1992); Patton v. Przybylski, 822 F.2d 697, 700-01 (7th Cir. 1987) (finding that an eight-day delay in bringing a wrongfully-arrested person before a magistrate does not state a cause of action); *see also* Watkins v. Blinzinger, 789 F.2d 474 (7th Cir. 1986) (involving a major expansion of Eleventh Amendment doctrine in order to eviscerate

In the employment area, Judge Wood also seems to primarily rule for the defendants, and he frequently draws a dissenting opinion. In *Mozee v. American Commercial Marine Service Co.*,[717] he found that the Civil Rights Act of 1991[718] did not apply retroactively and Judge Cudahy dissented.[719] In *Box v. A&P Tea Co.*,[720] Judge Wood authored an opinion in a gender discrimination case, affirming a summary judgment in favor of the employer.[721] Judge Wood found that the plaintiff had failed to establish a prima facie case of discrimination because she failed to apply for an available position despite evidence that the employer had no system to ensure that employees could apply for a job and despite the fact that the plaintiff had repeatedly requested a promotion.[722] Judge Swygert dissented.[723]

Another of Judge Wood's more notable employment discrimination decisions is *EEOC v. Sears, Roebuck & Co.*[724] In *Sears*, Judge Wood affirmed the district court's judgment in favor of Sears and accepted Sears' argument that it did not have many women in higher paying commission sales positions because women were not as interested in commission sales positions as were men.[725] This opinion is often criticized because Judge Wood accepted anecdotal comments about what women desire, phrased in a stereotypical fashion, and found that testimony more convincing than compelling statistical evidence to the contrary. Judge Wood's opinion is criticized for allowing differences in the treatment of groups (blacks and whites, women and men) with equal qualifications to be explained away by suppositions that these groups want to be treated differently. Judge Cudahy's dissent is far more persuasive.[726]

In conclusion, Judge Wood is an experienced and careful judge who remains a solid appellate judge. One point, however, deserves

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Ex Parte Young and to limit suits brought against the state), *cert. denied*, 481 U.S. 1038 (1987).

717. 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992).

718. 42 U.S.C. §§ 2000e to 2000e-9 (Supp. IV. 1991).

719. *Mozee*, 963 F.2d at 938. Judge Cudahy dissented from Judge Wood's opinion. *Id.* at 940 (Cudahy, J., dissenting).

720. 772 F.2d 1372 (7th Cir. 1985), *cert. denied*, 478 U.S. 1010 (1986).

721. *Box*, 772 F.2d at 1374.

722. *Id.* at 1376-77.

723. *Id.* at 1380 (Swygert, J., dissenting).

724. 839 F.2d 302 (7th Cir. 1988).

725. *Id.* at 322.

726. *See also* EEOC v. General Tel. Co., 885 F.2d 575, 581 (9th Cir. 1989) (criticizing Judge Wood's opinion), *cert. denied*, 498 U.S. 950 (1990).

special mention. When Judge Wood notified President Bush that he intended to take senior status and a reduced workload, he made a plea for the appointment of a woman or member of a racial minority to the court to fill his position, observing that no women or members of a minority group had ever sat on the Seventh Circuit. Judge Rovner was subsequently appointed to fill Judge Wood's vacancy. The Council commends Judge Wood for his effort to encourage President Bush to add diversity to the Seventh Circuit.

APPENDIX A

By Professor Lawrence Lessig, University of Chicago Law School

Preface

The following represents the *preliminary* results of a more extensive research project that Professor William Landes and I are conducting, designed to gauge the productivity of federal judges. Our aim is to find a relatively cheap way to collect data on individual judges to evaluate both their productivity and the productivity of their circuit as a whole. I completed this preliminary analysis of the Seventh Circuit to aid the Chicago Council of Lawyers in their study of the Seventh Circuit, and was willing to provide this material to the Council with the understandings (1) that it is in a preliminary stage of development, and (2) that I make no representations about evaluations that flow from these data, or the completeness of the data set used. My aim at this stage of the project has been to find an automated routine to gather data of this type, using computer routines that parse Lexis data to extract the necessary statistical information. I have not yet had the opportunity to fully verify the completeness of the data or to corroborate the data with other published sources.

The data differ from the data offered by the Administrative Office of the U.S. Courts ("AO"), in that the AO does not provide information by individual judge. I have included all active Seventh Circuit judges, save Judge Rovner's tenure because of her short time on the bench.

The data I provide below is divided into two parts—one a study of the "citations" to opinions by Seventh Circuit judges, and the other a study of the "efficiency" of Seventh Circuit judges. The data for the citations analysis was collected by extracting Shepherds citations information for the whole of each judge's career; the data for the efficiency analysis was collected by gathering a *sample* of Seventh Circuit cases over the past five years (1988 to 1992). The sample is large (3175 cases) and represents a very large proportion of all *published* opinions in cases that were *argued* before the Seventh Circuit, excluding en banc cases. But because the sample was drawn from the Lexis database, and parsed from the Lexis text files, I cannot be certain that these are all the published opinions for this period. My intention in this part is to estimate relative statistics: each

says, relative to the other judges, this is where judge X stands.

A few notes on conventions: first, the data in the efficiency section measuring the time to publish an opinion has been adjusted by subtracting ten days from the published time. That means, if the *Federal Reporter* indicated ninety days from argument to decision, this statistic here is calculated as eighty days. The reason for this adjustment is that ten days is the regular time that the opinion is at the printers. Thus, all time measurements should be increased by ten days if an accurate measurement is to be given.

Second, where I refer to the Twelfth and Thirteenth Circuits, that refers to the DC, and Federal Circuits respectively.

Citation Analysis

The citation analysis is a study of the Shepard's citations to opinions written by every active Seventh Circuit judge. The following should explain each report.

One word of caution is required for a proper interpretation of these data. As a measure of influence, the raw number of citations to opinions by any judge is highly misleading. As full studies of citation influence suggest,[727] to measure influence these raw numbers would have to be adjusted by the number of years that a judge is publishing opinions. Thus, if a judge sitting for five years has the same number of cites as a judge sitting for ten, the judge sitting for five years, on average, would be more influential. The data that I provide here are not adjusted in any precise way to account for these differences. I have made one adjustment to provide a crude estimate of relative influence (by dividing the total number of citations by the years on the bench) but even this can be misleading.

Table A-9 is a summary of the citations to each individual judge's opinions. For each judge, it reports the total number of citations generated by that judge's opinions, from the beginning of that judge's career through July of 1993. It also reports the number of opinions generating those citations, the average citations generated per opinion written, and the average citations generated per opinion per year on the bench. The table breaks down the total citation by the number of cites in district court opinions and the number of courts of appeals opinions, and then within each of these categories,

727. E.g., William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. E. 385, 395-97 (1993).

the number of cites within the Seventh Circuit, and the number outside the Seventh Circuit. "Self-cite" indicates the number of citations within the Seventh Circuit that were in opinions written by that particular judge. For example, of the 3903 Seventh Circuit citations to an opinion written by Judge Bauer, 388 were in opinions that he wrote. The "treatment" section reports Shepard's treatment codes for each citation.

Table A-10 is the same table as the first, but this time indicating raw percentages. Thus it indicates, for each judge, what percentage of his citations are in district court opinions, and what percentage in court of appeals opinions; within each of those categories, what percentage comes from within the Seventh Circuit versus what percentage comes from without the Seventh Circuit. "Self-cite" indicates what percentage of the Seventh Circuit citations are self-generated. The treatment codes give the distribution of the treatment codes for each judge — for example, 47 percent of Judge Bauer's treatment codes are "Followed" codes.

Table A-11 is the first again, with each figure divided by the number of years on the bench. This is a rough attempt to get a comparable number of citations, since the number of citations is closely related to the time on the bench.

The first four graphs display various aspects of the tables, and are self-explanatory. The first, A-1, indicates the average cites per year on the bench in selected circuits (the Second, Ninth and D.C. Circuit). A-2 indicates the average cites in circuits other than the Seventh Circuit, again divided by years on the bench. In this graph, as in others, I indicate the average for the circuit, with one standard deviation above and below average. A-3 is the average cites in district courts, divided by the years on the bench, and A-4 is a comparison of self-citation rates.

The three growth graphs are attempts at measuring the influence of the judges *outside* the Seventh Circuit over time. Each counts the number of citations in ten *Federal Reporter* volume increments over the tenure of the judge. For comparative purposes, each judge is "started" at the same place, to allow a comparison of the difference in the growth of non-Seventh Circuit citations. The three graphs all do the same thing. For the sake of clarity, two other graphs with fewer judges on each are provided.

Table A-12 is the average citations per year on the bench in each circuit. This is a comparative circuit analysis, presented also in

A-11, but with average and standard deviation statistics added.

Tables A-13 through A-26 present detailed citation information for each judge. Finally, Table A-27 reports the ten most cited opinions for each judge.

Efficiency Analysis

The data used to calculate the numbers derive from a *sample* of all the argued and published panel opinions cases. Because the sample is quite large and I have detected no systemic or biased exclusion of cases, any omission in cases reported should have a small effect on the final numbers.

Table A-28 summarizes the circuit averages. Each figure is the actual time less ten days. Thus, for example, the average circuit time to write an opinion is 151 days (which is the statistic 141 plus ten). The other averages are for opinions with at least one concurring opinion, and opinions with a dissent. "P.C." indicates per curiam opinions.

Table A-29 reports the average time to publish an opinion by judge. This average is for the full five years of the sample. The column "number"indicates the number of opinions by this judge within the sample. Again, the time is the actual release date minus ten days.

A-8 is a graph of A-29. A-30 presents the same data, but broken out by year. With this table, one can evaluate whether a judge is "improving" or not over time. A-31 collects the average time for visiting judges to publish opinions. Visiting judges include all non-regular Seventh Circuit judges found in the sample. Note: if N is small, the average statistic is quite meaningless.

A-32 and A-33 are attempts to measure the average influence of a judge on the speed with which an opinion is issued, as a function of who is on the panel. These are the results of regressions, and while each statistic is significant, the error on each estimate is large as well. This indicates that the value of the statistics is not so much their particular level as their relative weight.

A-32 is an attempt to measure what effect the presence of a judge on a panel has on the total time it takes the panel to issue its opinion. So, for example, on average, the effect of having Judge Cummings on a panel is to reduce the time taken to publish an opinion by sixteen days. These numbers were calculated by specifying a dummy variable for each judge's presence on a panel and regressing

that dummy variable against the panel times.

A-33 is a highly speculative measure, but is offered for what it is worth. This is an attempt to calculate how long a panel will take to decide a case, as a function of who is on the panel. Thus, to calculate how long a panel of Judges Bauer, Coffey, and Cudahy will take to decide a case, add 38 + 86 + 52 + 10 to find a rough measure. Again, this is a *rough* measure. These numbers were calculated by creating a dummy variable for each judge in the circuit, setting the intercept for the model to zero, and regressing the set of variables on the panel times.

A-34, the Effect of Presiding Status, attempts to answer the following question: Does a judge when presiding assign himself or herself the "simpler" cases, thereby reducing the average time to write an opinion? Probably not. For each of the most likely presiding judges, there is an estimate of the effect of presiding status on the average time for the judge to issue a majority opinion. That is the statistic, e.g., "S:Cummings." If the statistic is negative, then that means it is likely that the judge assigns himself easier opinions when he is presiding. As it turns out, the only negative statistics are not statistically significant. Indeed, the evidence suggests judges take the more challenging opinions when presiding. (Easterbrook, for example, adds about eighteen days to his very short writing time when he is presiding, which might suggest that he is taking harder cases.) These numbers were estimated by constructing a dummy variable for presiding status (e.g., S:Cudahy), and a dummy variable for writing an opinion, (e.g., O:Cudahy), and then estimating an equation to find the average time with both variables.

A-35, "Average Panel Times," records the average time for various panels of judges, sorted by judge. "Number" is the number of panels of that composition. "&" judges are visiting judges, treated as fungible for these purposes.

Cross-tabs: These are rough attempts to track voting behavior. Read both the dissenting and concurrence cross tabs (A-36 and A-37) from column to row: It says, of the five dissenting opinions within this sample written by Judge Bauer, twenty percent were dissenting from Coffey opinions, twenty percent from Easterbrook opinions, etc. Again, where N is small, the percentages are not very significant.

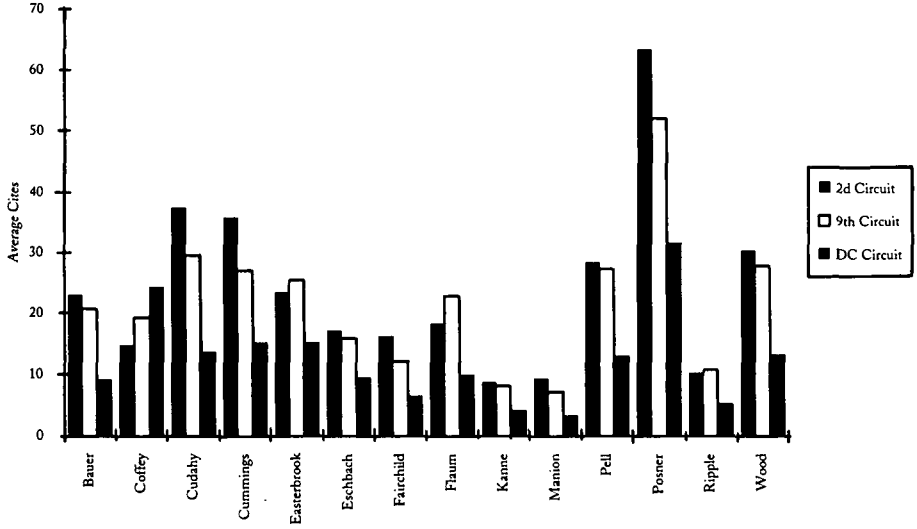
Distribution tables: This is an attempt to measure who dissents (A-38) or concurs (A-39) the most. They are distribution tables, not

absolute numbers. Each means, of all the Z type opinions, Judge X has Y percent.

Finally, A-40 tries to measure relative dispositions. This was by far the most difficult to measure accurately, since Lexis has very inconsistent ways of reporting disposition. This table takes all the cases where Lexis says "Reversed" in the first part of the disposition field, and shows the distribution of judges writing these opinions. Again, the only significance is relative, not absolute.

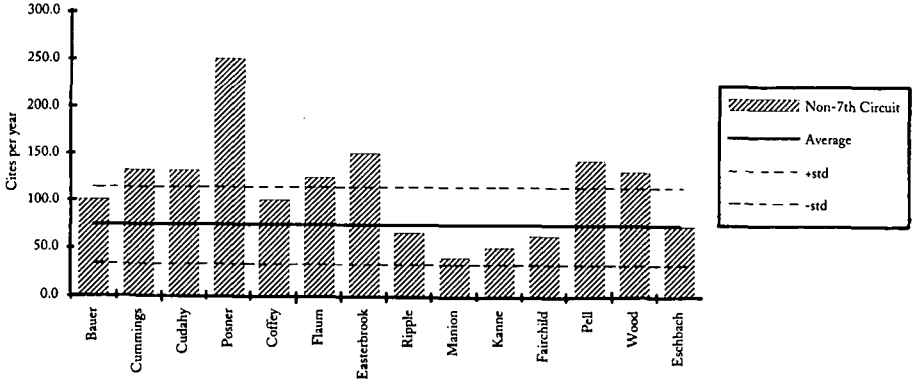
A-1

Average Cites in Selected Circuits per Year on Bench



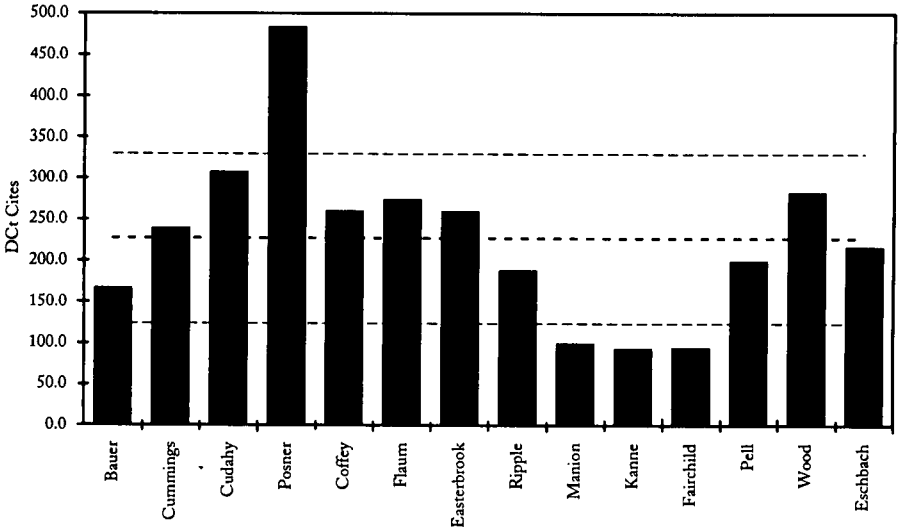
A-2

Average Non-7th Circuit Cites per Year on Bench



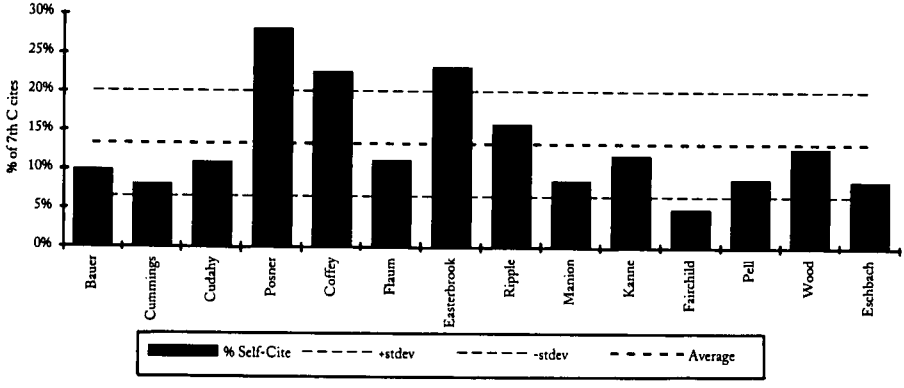
A-3

Average District Court Cites per Year on Bench



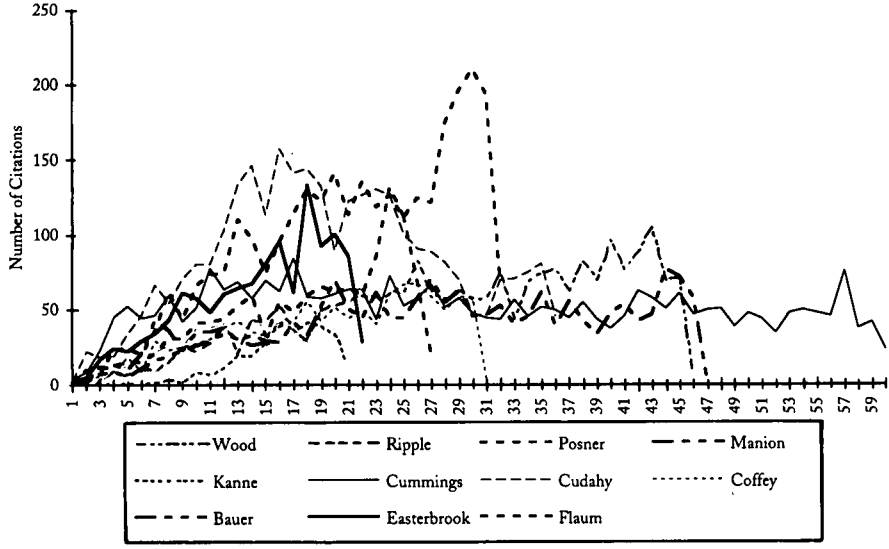
A-4

Self-Citation



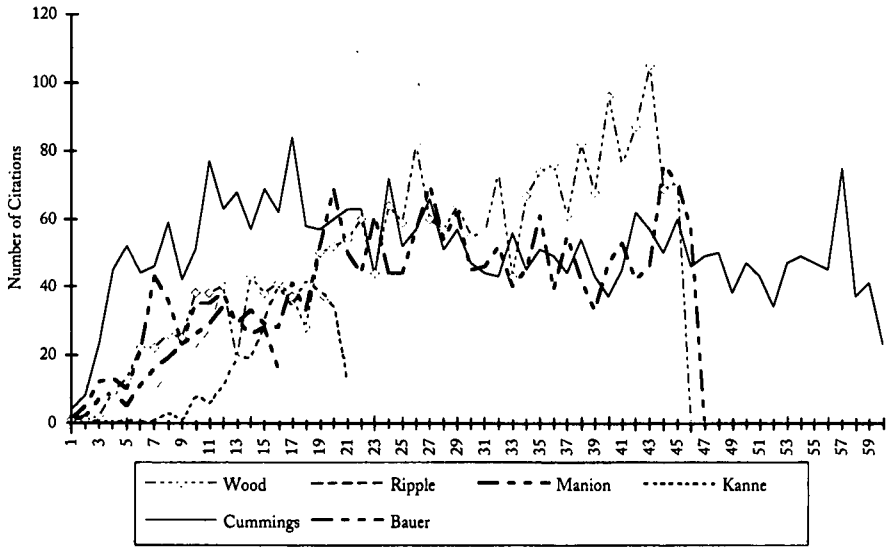
A-5

Growth of Non-7th Circuit Citations



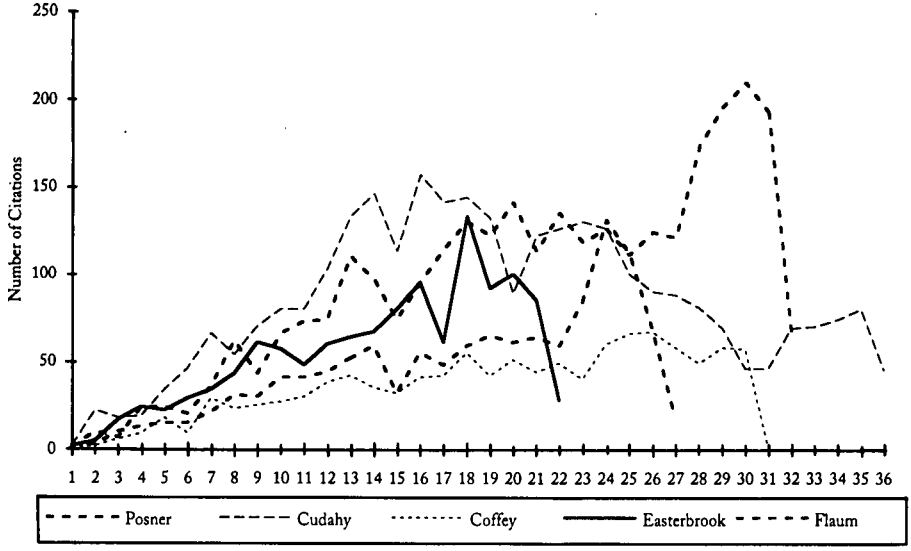
A-6

Growth of Non-7th Circuit Citations



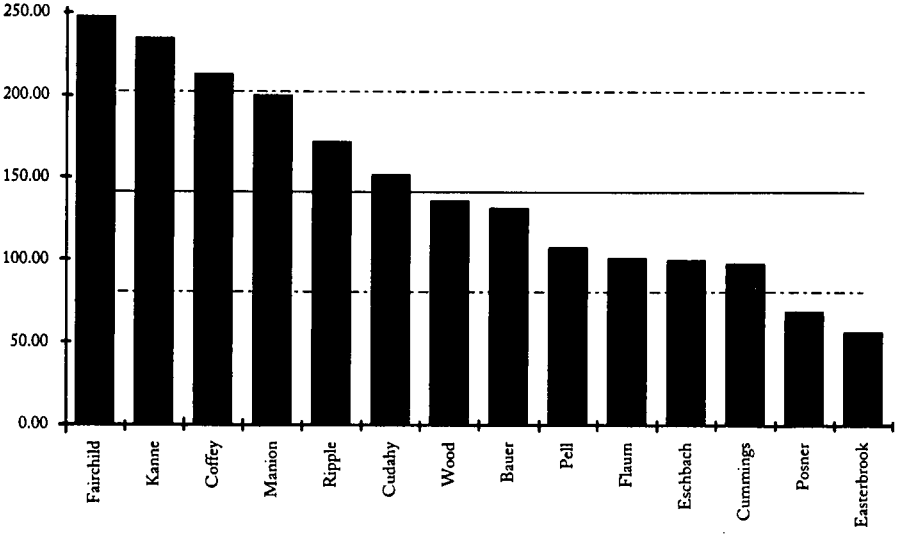
A-7

Growth of Non-7th Circuit Citations



A-8

Average Time to Write Majority Opinion



A-9

	Bauer	Cummings	Cudahy	Posner	Coffey	Flaum	Easterbrook	Ripple	Manion	Kanne	Fairchild	Pell	Wood	Eschbach
Appointed	1/3/75	8/11/66	9/26/79	12/4/81	3/27/82	5/5/83	4/4/85	5/10/85	7/24/86	5/20/87	8/11/66	4/24/70	5/28/76	12/11/81
Years on Bench	19	27	14	12	11	10	8	8	7	6	27	23	17	12
Total Cites	9,005	14,825	9,378	16,319	8,211	7,655	7,143	4,277	2,125	1,915	6,162	12,433	12,285	6,205
from X opinions	596	766	543	796	501	489	418	316	191	211	397	625	652	334
cites per opinion	15.1	19.4	17.3	20.5	16.4	15.7	17.1	13.5	11.1	9.1	15.5	19.9	18.8	18.6
per year on bench	0.8	0.7	1.2	1.7	1.5	1.6	2.1	1.7	1.6	1.5	0.6	0.9	1.1	1.5
District Courts	3179	6480	4323	5809	2868	2750	2084	1511	703	564	2572	4606	4820	2609
Non-7th	1179	2946	1583	2086	634	632	627	254	181	147	1321	2168	1679	672
7th	2000	3534	2740	3723	2234	2118	1457	1257	522	417	1251	2438	3141	1937
Court of Appeals	5826	8345	5055	10510	5343	4905	5059	2766	1422	1351	3590	7827	7465	3596
Non-7th	1923	3592	1853	3011	1107	1253	1207	530	282	304	1704	3302	2251	884
7th	3903	4753	3202	7499	4236	3652	3852	2236	1140	1047	1886	4525	5214	2712
Self Cite	388	385	350	2107	956	408	893	354	98	124	94	399	665	232
Treatment														
Criticized	35	90	44	94	40	47	46	21	8	24	30	43	65	36
Distinguished	342	677	324	584	214	224	221	103	67	44	345	515	389	162
Explained	287	472	274	500	161	196	229	86	70	47	224	343	348	166
Followed	821	1233	935	1272	779	729	573	460	207	218	439	891	1124	490
Harmonized	20	44	7	18	12	7	7	6	0	1	24	23	19	9
Dissenting	202	330	167	429	163	134	185	68	40	25	170	330	231	128
Limited	1	3	0	0	0	0	1	0	0	0	2	1	0	0
Overruled	4	11	2	1	2	0	0	0	1	0	2	10	2	1
Questioned	46	145	32	73	21	19	14	15	4	10	52	57	50	24
Vacated	0	0	0	0	0	0	0	1	0	0	0	0	0	0
Total	1758	3005	1785	2970	1392	1356	1276	760	397	369	1288	2213	2228	1016

A-10

	Bauer	Cummings	Cudahy	Posner	Coffey	Flaum	Easterbrook	Ripple	Manion	Kanne	Fairchild	Pell	Wood	Eschbach
District Courts	35%	44%	46%	36%	35%	36%	29%	35%	33%	29%	42%	37%	39%	42%
Non-7th	37%	45%	37%	36%	22%	23%	30%	17%	26%	26%	51%	47%	35%	26%
7th	63%	55%	63%	64%	78%	77%	70%	83%	74%	74%	49%	53%	65%	74%
Court of Appeals	65%	56%	54%	64%	65%	64%	71%	65%	67%	71%	58%	63%	61%	58%
Non-7th	33%	43%	37%	29%	21%	26%	24%	19%	20%	23%	47%	42%	30%	25%
7th	67%	57%	63%	71%	79%	74%	76%	81%	80%	77%	53%	58%	70%	75%
Self Cite	10%	8%	11%	28%	23%	11%	23%	16%	9%	12%	5%	9%	13%	9%
Treatment														
Criticized	2%	3%	2%	3%	3%	3%	4%	3%	2%	7%	2%	2%	3%	4%
Distinguished	19%	23%	18%	20%	15%	17%	17%	14%	17%	12%	27%	23%	17%	16%
Explained	16%	16%	15%	17%	12%	14%	18%	11%	18%	13%	17%	15%	16%	16%
Followed	47%	41%	52%	43%	56%	54%	45%	61%	52%	59%	34%	40%	50%	48%
Harmonized	1%	1%	0%	1%	1%	1%	1%	1%	0%	0%	2%	1%	1%	1%
Dissenting	11%	11%	9%	14%	12%	10%	14%	9%	10%	7%	13%	15%	10%	13%
Limited	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Overruled	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Questioned	3%	5%	2%	2%	2%	1%	1%	2%	1%	3%	4%	3%	2%	2%
Vacated	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%

A-11

	Bauer	*Cummings*	*Cudahy*	*Posner*	*Coffey*	*Flaum*	*Easterbrook*	*Ripple*	*Manion*	*Kanne*	*Fairchild*	*Pell*	*Wood*	*Eschbach*	Average	Std Dev
District Courts	167.3	240.0	308.8	484.1	260.7	275.0	260.5	188.9	100.4	94.0	95.3	200.3	283.5	217.4	226.87	102.88
Non-7th	62.1	109.1	113.1	173.8	57.6	63.2	78.4	31.8	25.9	24.5	48.9	94.3	98.8	56.0	74.10	40.95
7th	105.3	130.9	195.7	310.3	203.1	211.8	182.1	157.1	74.6	69.5	46.3	106.0	184.8	161.4	152.77	70.13
Court of Appeals	306.6	309.1	361.1	875.8	485.7	490.5	632.4	345.8	203.1	225.2	133.0	340.3	439.1	299.7	389.09	190.45
Non-7th	101.2	133.0	132.4	250.9	100.6	125.3	150.9	66.3	40.3	50.7	63.1	143.6	132.4	73.7	111.73	54.32
7th	205.4	176.0	228.7	624.9	385.1	365.2	481.5	279.5	162.9	174.5	69.9	196.7	306.7	226.0	277.36	145.80
Self Cite	20.4	14.3	25.0	175.6	86.9	40.8	111.6	44.3	14.0	20.7	3.5	17.3	39.1	19.3	45.20	48.00
Treatment																
Criticized	1.8	3.3	3.1	7.8	3.6	4.7	5.8	2.6	1.1	4.0	1.1	1.9	3.8	3.0	3.42	1.83
Distinguished	18.0	25.1	23.1	48.7	19.5	22.4	27.6	12.9	9.6	7.3	12.8	22.4	22.9	13.5	20.41	10.20
Explained	15.1	17.5	19.6	41.7	14.6	19.6	28.6	10.8	10.0	7.8	8.3	14.9	20.5	13.8	17.34	8.94
Followed	43.2	45.7	66.8	106.0	70.8	72.9	71.6	57.5	29.6	36.3	16.3	38.7	66.1	40.8	54.45	23.04
Harmonized	1.1	1.6	0.5	1.5	1.1	0.7	0.9	0.8	0.0	0.2	0.9	1.0	1.1	0.8	0.86	0.45
Dissenting	10.6	12.2	11.9	35.8	14.8	13.4	23.1	8.5	5.7	4.2	6.3	14.3	13.6	10.7	13.23	8.01
Limited	0.1	0.1	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.0	0.1	0.0	0.0	0.0	0.03	0.05
Overruled	0.2	0.4	0.1	0.0	0.2	0.0	0.0	0.0	0.1	0.0	0.1	0.4	0.1	0.1	0.13	0.14
Questioned	2.4	5.4	2.3	6.1	1.9	1.9	1.8	1.9	0.6	1.7	1.9	2.5	2.9	2.0	2.51	1.47
Vacated	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.01	0.03
Total	92.5	111.3	127.5	247.5	126.5	135.6	159.5	95.0	56.7	61.5	47.7	96.2	131.1	84.7	112.38	50.68

A-12

Average Citations per Year on Bench

Circuit	*Bauer*	*Coffey*	*Cudahy*	*Cummings*	*Easterbrook*	*Eschbach*	*Fairchild*	*Flaum*	*Kanne*	*Manion*	*Pell*	*Posner*	*Ripple*	*Wood*	*Average*	*Std Dev*
1	15	13	20	18	21	11	8	18	5	8	21	35	9	20	16	7.72
2	23	15	37	36	24	17	16	18	9	10	28	63	10	30	24	14.64
3	18	18	30	30	27	14	15	19	11	7	26	44	9	26	21	10.27
4	14	10	20	18	17	8	10	13	7	5	19	29	8	18	14	6.52
5	13	11	23	30	20	11	15	17	7	6	27	38	8	20	18	9.40
6	17	20	28	25	19	15	12	19	5	11	24	44	9	23	19	9.72
7	328	588	457	319	664	423	121	577	244	277	303	1,020	437	491	446	222.42
8	16	15	23	23	22	13	11	18	8	7	23	43	11	20	18	9.06
9	21	20	30	27	26	16	12	23	8	7	27	52	11	28	22	11.58
10	15	0	19	19	22	16	6	18	8	8	17	42	10	18	15	9.78
11	11	11	19	9	15	9	3	15	5	5	10	35	8	13	12	7.98
12	9	24	14	15	15	10	7	10	4	4	13	32	5	13	13	7.77
13	0	2	1	1	2	1	0	1	0		1	6	1	2	1	1.58
	500	746	721	570	893	564	237	766	319	354	541	1,484	535	723	639	305.62

A-13

Chief Judge Bauer

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	158	164	147	150	196	195	3903	204	285	187	115	115	7	5826
F.Supp.	106	250	182	100	43	117	2000	84	90	76	81	50	0	3179
Grand total	264	414	329	250	239	312	5903	288	375	263	196	165	7	9005
Percentages	3%	5%	4%	3%	3%	3%	66%	3%	4%	3%	2%	2%	0%	100%
Per Year	15	23	18	14	13	17	328	16	21	15	11	9	0	500

A-14

Judge Coffey

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*11*	*12*	*13*	*Grand total*
F.2d	85	65	96	70	94	140	4236	115	148	86	189	19	5343
F.Supp.	57	98	100	43	31	79	2234	46	67	34	79	0	2868
Grand total	142	163	196	113	125	219	6470	161	215	120	268	19	8211
Percentages	2%	2%	2%	1%	2%	3%	79%	2%	3%	1%	3%	0%	100%
Per Year	13	15	18	10	11	20	588	15	20	11	24	2	746

A-15

Judge Cudahy

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	148	186	155	111	227	199	3202	160	256	137	145	113	16	5055
F.Supp.	113	301	241	149	75	169	2740	133	130	106	101	65	0	4323
Grand total	261	487	396	260	302	368	5942	293	386	243	246	178	16	9378
Percentages	3%	5%	4%	3%	3%	4%	63%	3%	4%	3%	3%	2%	0%	100%
Per Year	20	37	30	20	23	28	457	23	30	19	19	14	1	721

A-16

Judge Cummings

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	262	329	327	216	546	316	4753	360	491	293	146	274	32	8345
F.Supp.	206	604	460	251	224	325	3534	236	217	206	94	123	0	6480
Grand total	468	933	787	467	770	641	8287	596	708	499	240	397	32	14825
Percentage	3%	6%	5%	3%	5%	4%	56%	4%	5%	3%	2%	3%	0%	1
Per Year	18	36	30	18	30	25	319	23	27	19	9	15	1	570

A-17

Judge Easterbrook

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	107	75	109	74	120	106	3852	124	150	132	86	108	16	5059
F.Supp.	58	113	109	63	38	48	1457	54	55	43	32	14	0	2084
Grand total	165	188	218	137	158	154	5309	178	205	175	118	122	16	7143
Percentage	2%	3%	3%	2%	2%	2%	74%	2%	3%	2%	2%	2%	0%	100%
Per Year	21	24	27	17	20	19	664	22	26	22	15	15	2	893

A-18

Judge Eschbach

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	74	61	67	42	79	98	2712	91	122	111	55	74	10	3596
F.Supp.	44	129	88	50	43	70	1937	57	54	60	46	31	0	2609
Grand total	118	190	155	92	122	168	4649	148	176	171	101	105	10	6205
Percentages	2%	3%	2%	1%	2%	3%	75%	2%	3%	3%	2%	2%	0%	100%
Per Year	11	17	14	8	11	15	423	13	16	16	9	10	1	564

A-19

Judge Fairchild

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	119	183	153	122	258	167	1886	198	229	89	61	116	9	3590
F.Supp.	87	241	237	141	142	137	1251	95	88	76	22	55	0	2572
Grand total	206	424	390	263	400	304	3137	293	317	165	83	171	9	6162
Percentages	3%	7%	6%	4%	6%	5%	51%	5%	5%	3%	1%	3%	0%	100%
Per Year	8	16	15	10	15	12	121	11	12	6	3	7	0	237

A-20

Judge Flaum

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	125	76	107	60	133	131	3652	125	174	138	101	71	12	4905
F.Supp.	51	108	78	67	37	60	2118	59	55	44	44	29	0	2750
Grand total	176	184	185	127	170	191	5770	184	229	182	145	100	12	7655
Percentages	2%	2%	2%	2%	2%	2%	75%	2%	3%	2%	2%	1%	0%	100%
Per Year	18	18	19	13	17	19	577	18	23	18	15	10	1	766

A-21

Judge Kanne

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*Grand total*
F.2d	20	25	33	27	31	24	1047	37	39	33	16	19	1351
F.Supp.	12	28	30	13	9	5	417	8	11	12	12	7	564
Grand total	32	53	63	40	40	29	1464	45	50	45	28	26	1915
Percentage	2%	3%	3%	2%	2%	2%	76%	2%	3%	2%	1%	1%	100%
Per Year	5	9	11	7	7	5	244	8	8	8	5	4	319

A-22

Judge Manion

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*Total*
F.2d	26	23	21	20	20	35	1140	32	34	36	19	16	1422
F.Supp.	20	34	21	9	18	29	522	12	10	14	9	5	703
Grand total	46	57	42	29	38	64	1662	44	44	50	28	21	2125
Percentage	2%	3%	2%	1%	2%	3%	78%	2%	2%	2%	1%	1%	100%
Per Year	8	10	7	5	6	11	277	7	7	8	5	4	354

A-23

Judge Pell

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	300	261	248	235	444	334	4525	351	473	258	149	217	32	7827
F.Supp.	189	393	357	194	188	227	2438	177	158	124	78	83	0	4606
Grand total	489	654	605	429	632	561	6963	528	631	382	227	300	32	12433
Percentages	4%	5%	5%	3%	5%	5%	56%	4%	5%	3%	2%	2%	0%	100%
Per Year	21	28	26	19	27	24	303	23	27	17	10	13	1	541

A-24

Judge Posner

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	215	275	234	168	320	269	7499	299	400	288	232	241	70	10510
F.Supp.	168	423	252	150	100	214	3723	171	175	171	155	107	0	5809
Grand total	383	698	486	318	420	483	11222	470	575	459	387	348	70	16319
Percentages	2%	4%	3%	2%	3%	3%	69%	3%	4%	3%	2%	2%	0%	100%
Per Year	35	63	44	29	38	44	1,020	43	52	42	35	32	6	1,484

A-25

Judge Ripple

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Grand total*
F.2d	55	42	43	47	49	51	2236	67	61	53	29	27	6	2766
F.Supp.	19	41	26	18	16	18	1257	17	27	23	33	16	0	1511
Grand total	74	83	69	65	65	69	3493	84	88	76	62	43	6	4277
Percentage	2%	2%	2%	2%	2%	2%	82%	2%	2%	2%	1%	1%	0%	100%
Per year	9	10	9	8	8	9	437	11	11	10	8	5	1	535

A-26

Judge Wood

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*Total*
F.2d	207	191	195	152	247	210	5214	201	328	198	140	152	30	7465
F.Supp.	132	326	245	147	90	174	3141	146	147	109	89	74	0	4820
Grand total	339	517	440	299	337	384	8355	347	475	307	229	226	30	12285
Percentages	3%	4%	4%	2%	3%	3%	68%	3%	4%	2%	2%	2%	0%	100%
Per Year	20	30	26	18	20	23	491	20	28	18	13	13	2	723

A-27

Top 10 Cited Opinions

Bauer	*N*	*Coffey*	*N*	*Cudahy*	*N*	*Cummings*	*N*	*Easterbrook*	*N*	*Eschbach*	*N*	*Fairchild*	*N*
560 F.2d 0827	141	726 F.2d 1222	143	747 F.2d 0384	382	804 F.2d 097	234	888 F.2d 049	122	702 F.2d 0102	243	472 F.2d 034	167
803 F.2d 0322	119	754 F.2d 1336	122	708 F.2d 1081	226	421 F.2d 121	207	823 F.2d 1073	119	710 F.2d 0292	215	409 F.2d 0289	103
846 F.2d 0448	115	852 F.2d 1502	119	788 F.2d 0411	179	746 F.2d 1205	205	847 F.2d 1211	116	745 F.2d 1101	201	513 F.2d 0641	90
563 F.2d 0331	109	701 F.2d 1238	108	687 F.2d 0996	148	553 F.2d 1033	198	768 F.2d 1518	102	681 F.2d 1091	186	493 F.2d 0151	88
630 F.2d 1184	109	896 F.2d 1476	93	866 F.2d 0935	106	760 F.2d 0765	181	797 F.2d 049	99	790 F.2d 0589	100	670 F.2d 076	87
799 F.2d 118	107	748 F.2d 1142	92	729 F.2d 1114	106	444 F.2d 1194	178	880 F.2d 0928	99	786 F.2d 0268	97	494 F.2d 0914	80
537 F.2d 0922	106	754 F.2d 1324	88	715 F.2d 0299	103	548 F.2d 1277	155	784 F.2d 1325	94	737 F.2d 0594	96	527 F.2d 0071	79
615 F.2d 0441	106	795 F.2d 0591	85	727 F.2d 0113	90	410 F.2d 0135	138	762 F.2d 0522	92	830 F.2d 1453	77	643 F.2d 1281	79
581 F.2d 0595	98	860 F.2d 0779	74	668 F.2d 0276	87	398 F.2d 0287	130	766 F.2d 0284	91	779 F.2d 1191	71	382 F.2d 0518	76
670 F.2d 0675	86	689 F.2d 0715	73	629 F.2d 1226	81	603 F.2d 0007	129	824 F.2d 0557	87	811 F.2d 103	69	402 F.2d 0367	76

A-27 (con't)

Top 10 Cited Opinions

Flaum	*N*	*Kanne*	*N*	*Manion*	*N*	*Pell*	*N*	*Posner*	*N*	*Ripple*	*N*	*Wood*	*N*
754 F.2d 0683	195	881 F.2d 0412	62	878 F.2d 0997	95	531 F.2d 0366	239	749 F.2d 038	364	840 F.2d 0405	142	672 F.2d 0607	166
830 F.2d 1429	142	849 F.2d 1039	45	830 F.2d 0706	68	646 F.2d 0271	175	780 F.2d 0645	162	860 F.2d 0706	125	582 F.2d 1128	152
782 F.2d 1429	104	902 F.2d 0501	45	850 F.2d 1226	42	437 F.2d 1173	160	704 F.2d 0943	159	834 F.2d 0635	82	699 F.2d 0864	149
732 F.2d 0605	103	910 F.2d 1387	44	883 F.2d 1286	42	665 F.2d 0149	125	908 F.2d 0104	142	787 F.2d 1141	79	811 F.2d 0326	145
791 F.2d 0489	102	795 F.2d 0705	39	900 F.2d 1064	42	547 F.2d 1329	123	727 F.2d 0648	135	886 F.2d 0973	71	609 F.2d 0298	128
581 F.2d 1266	97	840 F.2d 0427	33	841 F.2d 0751	41	704 F.2d 0974	123	814 F.2d 1192	131	803 F.2d 0269	70	723 F.2d 1263	120
741 F.2d 016	92	888 F.2d 1161	32	859 F.2d 0534	40	542 F.2d 1283	119	797 F.2d 1417	130	786 F.2d 0758	55	850 F.2d 118	114
742 F.2d 035	91	901 F.2d 1394	30	883 F.2d 0505	40	500 F.2d 0993	118	746 F.2d 119	122	883 F.2d 1307	49	657 F.2d 089	111
769 F.2d 1251	89	905 F.2d 0986	30	896 F.2d 0246	40	626 F.2d 0549	109	686 F.2d 0616	121	900 F.2d 0101	49	711 F.2d 1343	109
803 F.2d 0917	86	850 F.2d 1244	29	859 F.2d 1265	38	685 F.2d 0196	109	763 F.2d 156	120	913 F.2d 0327	47	738 F.2d 0776	103

A-28

Seventh Circuit Averages

Circuit Averages	*plus 10 days*
Average Time to Write an Opinion	141
Average with Concurring Opinion	173
Average with Dissenting Opinion	110
Average Per Curiam Opinion	101

A-29

Average Time to Publish Opinions by Judge: 1988-92

Mean Estimates			
Level	*number*	*Mean*	*Std Error*
Fairchild	46	247.80	12.83
Kanne	256	235.02	5.44
Coffey	249	213.15	5.51
Manion	213	200.42	5.96
Ripple	251	172.31	5.49
Cudahy	258	152.11	5.42
Wood	204	136.54	6.09
Bauer	251	131.80	5.49
Pell	21	108.14	18.98
Flaum	274	101.53	5.26
Eschbach	121	100.27	7.91
Cummings	207	98.26	6.05
Posner	298	69.10	5.04
Easterbrook	248	57.13	5.52
Average		141.1909	

A-30

Average Time to Write an Opinion by Year

	Bauer		Coffey		Cudahy		Cummings		Easterbrook		Eschbach		Fairchild		Flaum		Kanne	
YearT	Average	N	Average	N	Average	N	Average	N	Average	N	Average	N	Average	N	Average	N	Average	N
Y1988	117	42	215	59	142	49	117	31	49	48	170	25	407	4	142	49	167	37
Y1989	97	34	179	40	132	39	88	40	49	40	76	23	228	9	86	52	264	37
Y1990	167	53	208	43	133	52	69	33	50	55	82	26	176	8	68	52	291	44
Y1991	147	60	259	43	171	56	105	51	50	45	98	25	248	10	86	59	257	61
Y1992	117	61	206	64	172	62	108	51	81	59	70	22	255	15	125	62	205	77
Grand total	132	250	213	249	152	258	98	206	57	247	100	121	248	46	102	274	235	256

*Grand Total includes visiting judges

Average Time to Write an Opinion by Year

	Manion		Pell		Posner		Ripple		Wood		Grand total	
YearT	Average	N	Average	N	Average	N	Average	N	Average	N	Average	N
Y1988	286	42	112	4	77	53	153	52	157	37	154	574
Y1989	231	43	79	1	65	50	161	48	118	31	133	522
Y1990	151	45	81	8	65	66	179	46	129	53	130	645
Y1991	169	34	151	7	50	60	158	54	132	35	141	644
Y1992	167	49	35	1	84	67	212	51	145	48	148	784
Grand total	200	213	108	21	69	296	172	251	137	204	141	3169

A-31

Visiting Judges: Time to Write Opinion

Visiting Judge	*N*	*Average*	*Stdev*
Dumbauld	3	71.7	50.2
Shadur	5	73.0	38.9
Sharp	5	82.0	38.9
Lee	4	84.5	43.5
Noland	12	93.3	25.1
Zagel	2	95.0	61.5
Moran	3	98.7	50.2
Sneed	6	109.8	35.5
Shabaz	4	114.3	43.5
Engel	4	120.8	43.5
Wisdom	6	123.2	35.5
Gibson	8	130.4	30.8
Gordon	8	130.4	30.8
Crabb	7	130.6	32.9
Will	58	132.3	11.4
Vansickle	5	142.4	38.9
Moody	8	156.3	30.8
Burns	1	159.0	87.0
Reynolds	6	210.3	35.5
Dillin	1	214.0	87.0
Roszkowsi	4	237.0	43.5
Grant	40	238.9	13.8
Henley	5	265.8	38.9
Curran	1	320.0	87.0
Campbell	3	512.0	50.2

A-32

Judge's Presence Adds What to Panel

Judge	*Presence Adds*	*Std Err*	*t Ratio*	*Prob>t*
Coffey	44.05	4.26	10.33	0.00
Kanne	33.87	4.29	7.90	0.00
Manion	26.11	4.35	6.01	0.00
Ripple	22.14	4.31	5.13	0.00
Fairchild	21.52	7.98	2.70	0.01
Cudahy	3.35	4.36	0.77	0.44
Wood	-1.71	4.64	-0.37	0.71
Eschbach	-8.57	5.47	-1.56	0.12
Bauer	-11.32	4.34	-2.60	0.01
Cummings	-19.54	4.32	-4.52	0.00
Flaum	-25.31	4.29	-5.90	0.00
Pell	-31.26	13.24	-2.36	0.02
Easterbrook	-38.79	4.31	-9.01	0.00
Posner	-39.48	4.21	-9.39	0.00

A-33

To Calculate Panel Time

Judge	*Add*	*Std Err*	*t Ratio*	*Prob>t*
Coffey	85.52	3.79	22.57	0.00
Fairchild	79.58	7.44	10.70	0.00
Kanne	79.08	3.77	20.97	0.00
Ripple	67.02	3.77	17.76	0.00
Manion	66.81	3.82	17.47	0.00
Other	59.18	4.06	14.58	0.00
Cudahy	51.52	3.82	13.50	0.00
Wood	41.85	4.15	10.10	0.00
Eschbach	40.12	5.03	7.98	0.00
Bauer	38.40	3.81	10.09	0.00
Pell	32.18	12.42	2.59	0.01
Cummings	30.14	3.78	7.98	0.00
Flaum	26.14	3.77	6.93	0.00
Posner	10.30	3.71	2.78	0.01
Easterbrook	8.73	3.81	2.29	0.02

A-34

Effect of Presiding Status

Cummings					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		144.30817	2.05229	70.32	0
S:Cummings		-0.808927	5.09756	-0.16	0.8739
O:Cummings		-45.37514	8.20526	-5.53	0
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
S:Cummings	1	1	269.76	0.0252	0.8739
O:Cummings	1	1	327591.22	30.581	0

Cudahy					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		140.15035	2.00587	69.87	0
O:Cudahy		11.459488	7.44027	1.54	0.1236
S:Cudahy		0.7978804	5.91217	0.13	0.8927
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
O:Cudahy	1	1	25691.983	2.3722	0.1236
S:Cudahy	1	1	197.254	0.0182	0.8927

Coffey					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		132.83787	1.92508	69	0
S:Coffey		34.510074	6.60391	5.23	0
O:Coffey		66.593872	7.05479	9.44	0
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
S:Coffey	1	1	281575.67	27.3079	0
O:Coffey	1	1	918768.89	89.1046	0

Flaum					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		144.40096	1.94284	74.32	0
O:Flaum		-46.80236	6.80917	-6.87	0
S:Flaum		14.540339	8.24666	1.76	0.078
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
O:Flaum	1	1	504651.2	47.2441	0
S:Flaum	1	1	33207.55	3.1088	0.078

Posner					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		148.85804	1.95316	76.21	0
S:Posner		-2.470357	5.9751	-0.41	0.6793
O:Posner		-78.48075	6.703	-11.71	0
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
S:Posner	1	1	1760.9	0.1709	0.6793
O:Posner	1	1	1412192.3	137.0843	0

Easterbrook					
Term		*Estimate*	*Std Error*	*t Ratio*	*Prob>|t|*
Intercept		147.98802	1.88091	78.68	0
O:Easterbrook		-93.25582	6.81446	-13.68	0
S:Easterbrook		17.982234	11.2645	1.6	0.1105
Effect Test					
Source	Nparm	DF	Sum of Squares	F Ratio	Prob>F
O:Easterbrook	1	1	1916504.8	187.2788	0
S:Easterbrook	1	1	26078.8	2.5484	0.1105

A-35

Average Panel Times
(Sorted by Judge)

Level	*N*	*Mean*	*Std Error*
Bauer:Coffey:&	17	168.6	22.8
Bauer:Coffey:Cudahy	1	91.0	93.9
Bauer:Coffey:Easterbrook	9	127.8	31.3
Bauer:Coffey:Eschbach	8	238.5	33.2
Bauer:Coffey:Flaum	11	168.2	28.3
Bauer:Coffey:Kanne	11	230.6	28.3
Bauer:Coffey:Manion	11	251.5	28.3
Bauer:Coffey:Pell	3	90.0	54.2
Bauer:Coffey:Ripple	8	84.5	33.2
Bauer:Coffey:Wood	5	77.8	42.0
Bauer:Cudahy:&	16	144.4	23.5
Bauer:Cudahy:Coffey	11	187.8	28.3
Bauer:Cudahy:Easterbrook	14	112.3	25.1
Bauer:Cudahy:Flaum	4	151.0	47.0
Bauer:Cudahy:Kanne	18	142.1	22.1
Bauer:Cudahy:Manion	6	118.5	38.3
Bauer:Cudahy:Pell	5	147.8	42.0
Bauer:Cudahy:Posner	7	120.3	35.5
Bauer:Cudahy:Ripple	11	143.7	28.3
Bauer:Cudahy:Wood	6	191.3	38.3
Bauer:Cummings:&	13	112.8	26.0
Bauer:Cummings:Coffey	8	156.8	33.2
Bauer:Cummings:Cudahy	13	101.5	26.0
Bauer:Cummings:Easterbrook	20	86.2	21.0
Bauer:Cummings:Eschbach	9	103.3	31.3
Bauer:Cummings:Fairchild	3	61.3	54.2
Bauer:Cummings:Flaum	15	56.5	24.2
Bauer:Cummings:Kanne	10	114.9	29.7
Bauer:Cummings:Manion	6	138.0	38.3
Bauer:Cummings:Pell	6	131.0	38.3
Bauer:Cummings:Posner	10	77.2	29.7
Bauer:Cummings:Ripple	10	163.5	29.7
Bauer:Cummings:Wood	9	94.8	31.3
Bauer:Easterbrook:&	20	95.2	21.0
Bauer:Easterbrook:Eschbach	3	26.7	54.2
Bauer:Easterbrook:Fairchild	3	99.3	54.2
Bauer:Easterbrook:Kanne	11	189.5	28.3
Bauer:Easterbrook:Manion	9	120.1	31.3
Bauer:Easterbrook:Ripple	3	65.0	54.2
Bauer:Easterbrook:Wood	7	32.4	35.5
Bauer:Flaum:Easterbrook	11	114.7	28.3
Bauer:Flaum:Eschbach	10	77.4	29.7
Bauer:Flaum:Kanne	16	162.1	23.5
Bauer:Flaum:Manion	5	91.2	42.0

Average Panel Times

Bauer:Flaum:Pell	1	186.0	93.9
Bauer:Flaum:Ripple	12	143.3	27.1
Bauer:Flaum:Wood	11	80.4	28.3
Bauer:Kanne:&	6	242.8	38.3
Bauer:Kanne:Eschbach	8	218.8	33.2
Bauer:Kanne:Wood	4	125.3	47.0
Bauer:Manion:&	15	143.7	24.2
Bauer:Manion:Eschbach	5	94.2	42.0
Bauer:Manion:Kanne	10	206.3	29.7
Bauer:Posner:&	25	92.0	18.8
Bauer:Posner:Coffey	10	40.3	29.7
Bauer:Posner:Easterbrook	10	74.3	29.7
Bauer:Posner:Eschbach	9	57.0	31.3
Bauer:Posner:Fairchild	7	249.9	35.5
Bauer:Posner:Flaum	13	125.7	26.0
Bauer:Posner:Kanne	11	165.3	28.3
Bauer:Posner:Manion	10	158.1	29.7
Bauer:Posner:Pell	6	123.3	38.3
Bauer:Posner:Ripple	19	126.9	21.5
Bauer:Ripple:&	15	159.9	24.2
Bauer:Ripple:Eschbach	1	134.0	93.9
Bauer:Ripple:Fairchild	6	223.7	38.3
Bauer:Ripple:Kanne	10	195.5	29.7
Bauer:Ripple:Manion	11	190.5	28.3
Bauer:Ripple:Wood	10	91.2	29.7
Bauer:Wood:&	6	92.5	38.3
Bauer:Wood:Coffey	7	191.7	35.5
Bauer:Wood:Cudahy	6	123.3	38.3
Bauer:Wood:Eschbach	14	81.5	25.1
Bauer:Wood:Fairchild	6	185.5	38.3
Bauer:Wood:Flaum	10	101.7	29.7
Bauer:Wood:Kanne	19	174.7	21.5
Bauer:Wood:Manion	2	141.0	66.4
Bauer:Wood:Pell	5	113.4	42.0
Bauer:Wood:Posner	6	101.5	38.3
Bauer:Wood:Ripple	11	128.1	28.3
Coffey:Cudahy:Manion	1	73.0	93.9
Coffey:Easterbrook:&	12	127.7	27.1
Coffey:Easterbrook:Eschbach	12	124.5	27.1
Coffey:Easterbrook:Fairchild	9	205.4	31.3
Coffey:Easterbrook:Kanne	19	158.5	21.5
Coffey:Easterbrook:Manion	11	139.1	28.3
Coffey:Easterbrook:Ripple	20	141.4	21.0
Coffey:Flaum:&	13	182.2	26.0
Coffey:Flaum:Easterbrook	8	81.5	33.2

Average Panel Times

Coffey:Flaum:Eschbach	9	214.9	31.3
Coffey:Flaum:Kanne	8	115.4	33.2
Coffey:Flaum:Manion	13	169.4	26.0
Coffey:Flaum:Ripple	8	148.3	33.2
Coffey:Flaum:Wood	2	136.0	66.4
Coffey:Kanne:&	9	251.9	31.3
Coffey:Kanne:Eschbach	23	239.0	19.6
Coffey:Kanne:Ripple	1	259.0	93.9
Coffey:Kanne:Wood	6	150.2	38.3
Coffey:Manion:&	10	190.5	29.7
Coffey:Manion:Eschbach	4	264.5	47.0
Coffey:Manion:Fairchild	2	143.5	66.4
Coffey:Manion:Kanne	19	232.6	21.5
Coffey:Posner:Eschbach	1	216.0	93.9
Coffey:Ripple:&	17	254.6	22.8
Coffey:Ripple:Easterbrook	1	209.0	93.9
Coffey:Ripple:Eschbach	12	193.8	27.1
Coffey:Ripple:Fairchild	3	234.7	54.2
Coffey:Ripple:Flaum	2	363.0	66.4
Coffey:Ripple:Kanne	11	245.0	28.3
Coffey:Ripple:Manion	22	233.5	20.0
Cudahy:Coffey:&	11	162.5	28.3
Cudahy:Coffey:Easterbrook	12	135.3	27.1
Cudahy:Coffey:Eschbach	1	272.0	93.9
Cudahy:Coffey:Flaum	5	190.0	42.0
Cudahy:Coffey:Kanne	2	260.0	66.4
Cudahy:Coffey:Manion	18	154.6	22.1
Cudahy:Coffey:Ripple	11	218.3	28.3
Cudahy:Coffey:Wood	6	179.2	38.3
Cudahy:Easterbrook:&	15	90.9	24.2
Cudahy:Easterbrook:Eschbach	9	77.4	31.3
Cudahy:Easterbrook:Fairchild	7	156.6	35.5
Cudahy:Easterbrook:Flaum	1	120.0	93.9
Cudahy:Easterbrook:Kanne	21	147.9	20.5
Cudahy:Easterbrook:Manion	6	211.7	38.3
Cudahy:Easterbrook:Pell	6	45.5	38.3
Cudahy:Easterbrook:Ripple	13	132.9	26.0
Cudahy:Easterbrook:Wood	5	147.2	42.0
Cudahy:Flaum:&	12	136.3	27.1
Cudahy:Flaum:Coffey	1	194.0	93.9
Cudahy:Flaum:Easterbrook	8	101.4	33.2
Cudahy:Flaum:Eschbach	10	80.9	29.7
Cudahy:Flaum:Fairchild	5	204.4	42.0
Cudahy:Flaum:Kanne	9	127.1	31.3
Cudahy:Flaum:Manion	10	176.9	29.7

Average Panel Times

Cudahy:Flaum:Pell	5	169.4	42.0
Cudahy:Flaum:Posner	1	105.0	93.9
Cudahy:Flaum:Ripple	13	85.6	26.0
Cudahy:Kanne:&	2	319.5	66.4
Cudahy:Kanne:Eschbach	17	164.8	22.8
Cudahy:Kanne:Pell	1	272.0	93.9
Cudahy:Manion:&	29	176.6	17.4
Cudahy:Manion:Eschbach	7	109.6	35.5
Cudahy:Manion:Kanne	9	216.4	31.3
Cudahy:Manion:Ripple	1	294.0	93.9
Cudahy:Posner:&	10	105.3	29.7
Cudahy:Posner:Coffey	5	170.4	42.0
Cudahy:Posner:Easterbrook	15	72.6	24.2
Cudahy:Posner:Fairchild	5	88.4	42.0
Cudahy:Posner:Flaum	15	96.7	24.2
Cudahy:Posner:Kanne	14	149.2	25.1
Cudahy:Posner:Manion	5	169.6	42.0
Cudahy:Posner:Pell	4	80.8	47.0
Cudahy:Posner:Ripple	13	163.2	26.0
Cudahy:Ripple:&	13	195.9	26.0
Cudahy:Ripple:Easterbrook	1	88.0	93.9
Cudahy:Ripple:Eschbach	9	155.0	31.3
Cudahy:Ripple:Fairchild	3	138.3	54.2
Cudahy:Ripple:Kanne	21	126.0	20.5
Cudahy:Ripple:Manion	13	207.5	26.0
Cummings:Coffey:&	10	159.3	29.7
Cummings:Coffey:Easterbrook	11	126.2	28.3
Cummings:Coffey:Eschbach	4	130.0	47.0
Cummings:Coffey:Kanne	16	191.7	23.5
Cummings:Coffey:Manion	23	196.2	19.6
Cummings:Coffey:Ripple	12	183.8	27.1
Cummings:Coffey:Wood	4	161.8	47.0
Cummings:Cudahy:&	10	180.9	29.7
Cummings:Cudahy:Coffey	16	222.9	23.5
Cummings:Cudahy:Easterbrook	22	79.5	20.0
Cummings:Cudahy:Eschbach	1	102.0	93.9
Cummings:Cudahy:Flaum	8	121.6	33.2
Cummings:Cudahy:Kanne	12	205.5	27.1
Cummings:Cudahy:Manion	16	113.5	23.5
Cummings:Cudahy:Pell	4	82.8	47.0
Cummings:Cudahy:Posner	15	109.7	24.2
Cummings:Cudahy:Ripple	12	123.2	27.1
Cummings:Easterbrook:&	13	80.5	26.0
Cummings:Easterbrook:Eschbach	5	65.8	42.0
Cummings:Easterbrook:Fairchild	6	111.3	38.3

Average Panel Times

Cummings:Easterbrook:Kanne	7	121.0	35.5
Cummings:Easterbrook:Manion	16	144.5	23.5
Cummings:Easterbrook:Ripple	12	103.0	27.1
Cummings:Eschbach:Wood	1	109.0	93.9
Cummings:Flaum:&	20	161.9	21.0
Cummings:Flaum:Easterbrook	15	80.8	24.2
Cummings:Flaum:Eschbach	8	79.1	33.2
Cummings:Flaum:Fairchild	5	103.8	42.0
Cummings:Flaum:Kanne	16	122.8	23.5
Cummings:Flaum:Manion	9	88.3	31.3
Cummings:Flaum:Ripple	14	141.1	25.1
Cummings:Flaum:Wood	6	103.5	38.3
Cummings:Kanne:&	11	262.9	28.3
Cummings:Manion:&	16	115.3	23.5
Cummings:Manion:Eschbach	6	111.0	38.3
Cummings:Manion:Fairchild	6	180.2	38.3
Cummings:Manion:Kanne	12	144.6	27.1
Cummings:Posner:&	16	81.8	23.5
Cummings:Posner:Coffey	6	51.5	38.3
Cummings:Posner:Cudahy	1	87.0	93.9
Cummings:Posner:Easterbrook	5	58.4	42.0
Cummings:Posner:Eschbach	5	89.4	42.0
Cummings:Posner:Flaum	20	52.2	21.0
Cummings:Posner:Kanne	11	158.2	28.3
Cummings:Posner:Manion	14	81.6	25.1
Cummings:Posner:Pell	5	31.6	42.0
Cummings:Posner:Ripple	12	110.6	27.1
Cummings:Posner:Wood	4	18.8	47.0
Cummings:Ripple:&	16	197.3	23.5
Cummings:Ripple:Eschbach	5	134.8	42.0
Cummings:Ripple:Fairchild	6	177.7	38.3
Cummings:Ripple:Kanne	6	149.3	38.3
Cummings:Ripple:Manion	9	132.2	31.3
Cummings:Wood:&	5	140.4	42.0
Cummings:Wood:Coffey	16	150.2	23.5
Cummings:Wood:Cudahy	9	96.4	31.3
Cummings:Wood:Easterbrook	4	93.3	47.0
Cummings:Wood:Eschbach	5	179.0	42.0
Cummings:Wood:Flaum	14	63.7	25.1
Cummings:Wood:Kanne	11	142.0	28.3
Cummings:Wood:Manion	8	270.5	33.2
Cummings:Wood:Pell	1	107.0	93.9
Cummings:Wood:Ripple	10	126.9	29.7
Easterbrook:Kanne:&	7	84.4	35.5
Easterbrook:Kanne:Fairchild	2	34.0	66.4

Average Panel Times

Easterbrook:Kanne:Manion	1	13.0	93.9
Easterbrook:Kanne:Pell	1	22.0	93.9
Easterbrook:Manion:&	10	90.1	29.7
Easterbrook:Manion:Eschbach	12	112.3	27.1
Easterbrook:Manion:Kanne	13	142.8	26.0
Easterbrook:Ripple:&	5	209.8	42.0
Easterbrook:Ripple:Eschbach	6	117.7	38.3
Easterbrook:Ripple:Fairchild	1	7.0	93.9
Easterbrook:Ripple:Flaum	1	59.0	93.9
Easterbrook:Ripple:Kanne	9	153.8	31.3
Easterbrook:Ripple:Manion	13	193.2	26.0
Easterbrook:Ripple:Wood	5	136.0	42.0
Flaum:Easterbrook:&	10	163.7	29.7
Flaum:Easterbrook:Fairchild	5	62.4	42.0
Flaum:Easterbrook:Kanne	12	92.8	27.1
Flaum:Easterbrook:Manion	17	144.6	22.8
Flaum:Easterbrook:Ripple	9	117.9	31.3
Flaum:Easterbrook:Wood	1	23.0	93.9
Flaum:Kanne:&	14	163.0	25.1
Flaum:Kanne:Easterbrook	2	258.0	66.4
Flaum:Kanne:Eschbach	2	156.5	66.4
Flaum:Kanne:Fairchild	4	130.5	47.0
Flaum:Kanne:Pell	5	35.8	42.0
Flaum:Manion:&	12	189.6	27.1
Flaum:Manion:Easterbrook	1	98.0	93.9
Flaum:Manion:Eschbach	15	107.3	24.2
Flaum:Manion:Kanne	11	199.6	28.3
Flaum:Ripple:&	15	159.3	24.2
Flaum:Ripple:Eschbach	18	100.1	22.1
Flaum:Ripple:Fairchild	4	72.0	47.0
Flaum:Ripple:Kanne	14	202.4	25.1
Flaum:Ripple:Manion	10	139.8	29.7
Kanne:&:&	2	40.0	66.4
Kanne:Wood:&	6	119.5	38.3
Manion:&:Eschbach	1	60.0	93.9
Manion:Fairchild:Wood	5	141.8	42.0
Manion:Kanne:&	17	173.4	22.8
Manion:Kanne:Eschbach	1	94.0	93.9
Manion:Kanne:Fairchild	9	310.1	31.3
Manion:Kanne:Flaum	1	173.0	93.9
Posner:Coffey:&	16	109.9	23.5
Posner:Coffey:Cudahy	1	143.0	93.9
Posner:Coffey:Easterbrook	20	98.4	21.0
Posner:Coffey:Eschbach	10	129.8	29.7
Posner:Coffey:Fairchild	1	57.0	93.9

Average Panel Times

Posner:Coffey:Flaum	10	195.6	29.7
Posner:Coffey:Kanne	18	163.8	22.1
Posner:Coffey:Manion	7	162.4	35.5
Posner:Coffey:Ripple	11	110.6	28.3
Posner:Coffey:Wood	1	44.0	93.9
Posner:Easterbrook:&	11	82.2	28.3
Posner:Easterbrook:Eschbach	12	63.5	27.1
Posner:Easterbrook:Fairchild	5	118.8	42.0
Posner:Easterbrook:Kanne	5	145.4	42.0
Posner:Easterbrook:Manion	10	86.9	29.7
Posner:Easterbrook:Ripple	12	101.3	27.1
Posner:Flaum:&	15	110.7	24.2
Posner:Flaum:Easterbrook	10	57.1	29.7
Posner:Flaum:Eschbach	5	93.2	42.0
Posner:Flaum:Fairchild	14	90.4	25.1
Posner:Flaum:Kanne	34	118.6	16.1
Posner:Flaum:Manion	15	78.4	24.2
Posner:Flaum:Ripple	23	87.7	19.6
Posner:Kanne:&	21	143.9	20.5
Posner:Kanne:Easterbrook	1	99.0	93.9
Posner:Kanne:Eschbach	2	40.0	66.4
Posner:Kanne:Ripple	2	48.5	66.4
Posner:Kanne:Wood	5	110.6	42.0
Posner:Manion:&	10	142.4	29.7
Posner:Manion:Easterbrook	1	117.0	93.9
Posner:Manion:Eschbach	6	65.5	38.3
Posner:Manion:Fairchild	6	128.8	38.3
Posner:Manion:Flaum	1	39.0	93.9
Posner:Manion:Kanne	16	141.8	23.5
Posner:Ripple:&	4	205.8	47.0
Posner:Ripple:Coffey	1	144.0	93.9
Posner:Ripple:Eschbach	12	112.0	27.1
Posner:Ripple:Kanne	16	160.5	23.5
Posner:Ripple:Manion	17	119.8	22.8
Ripple:Kanne:&	4	201.8	47.0
Ripple:Kanne:Eschbach	3	157.7	54.2
Ripple:Manion:&	11	229.2	28.3
Ripple:Manion:Easterbrook	1	129.0	93.9
Ripple:Manion:Eschbach	6	265.0	38.3
Ripple:Manion:Fairchild	4	194.5	47.0
Ripple:Manion:Flaum	1	191.0	93.9
Ripple:Manion:Kanne	9	200.9	31.3
Ripple:Wood:Eschbach	1	796.0	93.9
Wood:Coffey:&	16	173.2	23.5
Wood:Coffey:Easterbrook	5	93.4	42.0

Average Panel Times

Wood:Coffey:Eschbach	6	151.3	38.3
Wood:Coffey:Flaum	5	184.8	42.0
Wood:Coffey:Kanne	5	310.0	42.0
Wood:Coffey:Manion	6	253.0	38.3
Wood:Coffey:Ripple	6	254.5	38.3
Wood:Cudahy:&	11	227.2	28.3
Wood:Cudahy:Coffey	4	240.3	47.0
Wood:Cudahy:Easterbrook	9	112.8	31.3
Wood:Cudahy:Eschbach	8	200.5	33.2
Wood:Cudahy:Fairchild	6	165.7	38.3
Wood:Cudahy:Kanne	9	200.8	31.3
Wood:Cudahy:Manion	4	68.0	47.0
Wood:Cudahy:Posner	6	84.7	38.3
Wood:Cudahy:Ripple	7	128.3	35.5
Wood:Easterbrook:&	11	96.1	28.3
Wood:Easterbrook:Eschbach	9	106.4	31.3
Wood:Easterbrook:Fairchild	5	69.6	42.0
Wood:Easterbrook:Kanne	7	102.4	35.5
Wood:Easterbrook:Manion	3	43.0	54.2
Wood:Easterbrook:Ripple	5	52.0	42.0
Wood:Fairchild:Kanne	1	530.0	93.9
Wood:Flaum:&	11	109.9	28.3
Wood:Flaum:Easterbrook	4	79.8	47.0
Wood:Flaum:Eschbach	6	89.8	38.3
Wood:Flaum:Fairchild	2	178.5	66.4
Wood:Flaum:Kanne	5	103.6	42.0
Wood:Flaum:Manion	3	99.7	54.2
Wood:Flaum:Ripple	3	67.3	54.2
Wood:Kanne:&	5	94.0	42.0
Wood:Kanne:Eschbach	6	124.5	38.3
Wood:Kanne:Fairchild	5	199.4	42.0
Wood:Kanne:Pell	5	233.0	42.0
Wood:Manion:&	6	190.7	38.3
Wood:Manion:Eschbach	13	152.6	26.0
Wood:Manion:Fairchild	5	139.4	42.0
Wood:Manion:Kanne	12	144.1	27.1
Wood:Posner:&	4	159.3	47.0
Wood:Posner:Coffey	10	195.4	29.7
Wood:Posner:Easterbrook	8	54.1	33.2
Wood:Posner:Eschbach	17	101.1	22.8
Wood:Posner:Fairchild	6	154.0	38.3
Wood:Posner:Flaum	5	72.8	42.0
Wood:Posner:Kanne	2	83.0	66.4
Wood:Posner:Manion	5	234.0	42.0
Wood:Ripple:&	6	115.5	38.3

Average Panel Times

Wood:Ripple:Eschbach	18	150.3	22.1
Wood:Ripple:Fairchild	8	277.8	33.2
Wood:Ripple:Kanne	1	220.0	93.9
Wood:Ripple:Manion	7	237.3	35.5

A-36

Dissenting Cross-Tab

	Bauer	*Coffey*	*Cudahy*	*Cummings*	*Easterbrook*	*Eschbach*	*Fairchild*	*Flaum*	*Kanne*	*Manion*	*Pell*	*Posner*	*Ripple*	*Wood*	*Grand total*
Bauer	0%	8%	10%	0%	9%	20%	0%	0%	0%	0%	25%	21%	11%	0%	15
Coffey	20%	0%	10%	0%	0%	0%	0%	14%	0%	17%	0%	0%	9%	17%	13
Cudahy	0%	15%	0%	0%	18%	0%	0%	7%	20%	17%	25%	0%	3%	0%	11
Cummings	0%	15%	5%	0%	0%	0%	0%	7%	0%	25%	25%	0%	3%	17%	12
Easterbrook	20%	0%	10%	0%	0%	20%	40%	0%	0%	0%	0%	0%	11%	0%	14
Eschbach	0%	15%	0%	100%	0%	0%	0%	7%	0%	0%	0%	0%	9%	17%	8
Fairchild	0%	0%	0%	0%	0%	0%	0%	7%	20%	8%	0%	7%	6%	0%	6
Flaum	0%	0%	7%	0%	18%	20%	0%	0%	0%	8%	0%	21%	11%	17%	16
Kanne	0%	0%	17%	0%	18%	0%	20%	0%	0%	0%	0%	7%	6%	0%	15
Manion	0%	0%	10%	0%	9%	0%	20%	14%	20%	0%	0%	14%	6%	0%	14
Pell	0%	0%	2%	0%	0%	0%	0%	0%	0%	0%	0%	7%	0%	0%	2
Posner	40%	0%	17%	0%	0%	0%	0%	21%	20%	8%	0%	0%	20%	0%	23
Ripple	20%	15%	0%	0%	9%	20%	0%	0%	20%	0%	0%	7%	0%	17%	10
Wood	0%	8%	5%	0%	9%	20%	20%	14%	0%	8%	25%	7%	3%	0%	13
Others	0%	23%	7%	0%	9%	0%	0%	7%	0%	8%	0%	7%	3%	17%	184
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	
N	5	13	41	1	11	5	5	14	5	12	4	14	35	6	

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Concurrence Cross-Tab

	Bauer	*Coffey*	*Cudahy*	*Cummings*	*Easterbrook*	*Eschbach*	*Fairchild*	*Flaum*	*Kanne*	*Manion*	*Pell*	*Posner*	*Ripple*	*Wood*	*Grand total*
Bauer	0%	11%	12%	0%	14%	0%	0%	0%	0%	8%	0%	10%	11%	0%	15
Coffey	33%	0%	8%	0%	5%	100%	10%	17%	0%	0%	0%	0%	9%	0%	13
Cudahy	0%	22%	0%	0%	9%	0%	0%	8%	20%	0%	0%	0%	2%	0%	11
Cummings	0%	22%	6%	0%	0%	0%	0%	8%	0%	15%	0%	0%	4%	0%	12
Easterbrook	0%	0%	20%	0%	0%	0%	30%	25%	20%	8%	0%	10%	15%	0%	14
Eschbach	0%	0%	2%	0%	14%	0%	0%	8%	20%	0%	0%	0%	7%	0%	8
Fairchild	0%	0%	0%	0%	0%	0%	0%	0%	20%	8%	0%	20%	0%	0%	6
Flaum	33%	0%	6%	0%	9%	0%	0%	0%	0%	31%	0%	10%	2%	0%	16
Kanne	0%	0%	10%	0%	5%	0%	20%	0%	0%	0%	0%	20%	4%	0%	15
Manion	0%	11%	4%	0%	0%	0%	10%	8%	0%	0%	0%	0%	4%	0%	14
Posner	0%	11%	12%	0%	5%	0%	10%	17%	0%	8%	0%	0%	24%	50%	2
Ripple	0%	0%	4%	0%	9%	0%	10%	0%	20%	0%	0%	20%	0%	50%	23
Wood	0%	0%	10%	0%	5%	0%	10%	0%	0%	8%	100%	0%	0%	0%	10
Others	33%	22%	6%	100%	27%	0%	0%	8%	0%	15%	0%	10%	17%	0%	13
N	3	9	50	1	22	1	10	12	5	13	1	10	46	2	184

A-38

Distribution of Dissents

	% of Dissents
Cudahy	22%
Ripple	19%
Flaum	8%
Posner	8%
Coffey	7%
Other	7%
Manion	7%
Easterbrook	6%
Wood	3%
Bauer	3%
Eschbach	3%
Fairchild	3%
Kanne	3%
Pell	2%
Cummings	1%
Total	100%

A-39

Distribution of Concurrences

Judge	*% of Concurrences*
Cudahy	24.6%
Ripple	22.7%
Easterbrook	11.3%
Other	8.9%
Flaum	6.9%
Manion	6.4%
Fairchild	4.9%
Posner	4.9%
Coffey	4.4%
Kanne	2.5%
Bauer	1.5%
Wood	1.0%
Cummings	0.5%
Eschbach	0.5%
Pell	0.5%

A-40

% of Reversals Written by Each Judge

Judge	*% of Reversals*	
Posner	16%	
Cudahy	12%	
Bauer	11%	
Ripple	9%	
Easterbrook	8%	
Coffey	7%	
Kanne	7%	
Other	6%	
Eschbach	5%	
Flaum	5%	
Manion	5%	
Wood	5%	
Cummings	3%	
Fairchild	1%	
Pell	0%	