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## Foreword: The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties

Adam H. Kurland

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FOREWORD:  
THE SEVENTH CIRCUIT AS A CRIMINAL COURT:  
THE ROLE OF A FEDERAL APPELLATE  
COURT IN THE NINETIES

ADAM H. KURLAND\*

I. INTRODUCTION

In the spring of 1991, a highly publicized debate ensued over whether United States District Court Judge Kenneth Ryskamp should be elevated to sit on the United States Court of Appeals for the Eleventh Circuit. The nomination was defeated in the Senate Judiciary Committee amidst echoes of partisan recrimination.<sup>1</sup> Some Republican Senators protested loudly that Ryskamp's rejection was grounded in the most base form of partisan politics—that the Eleventh Circuit was perhaps the last federal court that, despite a steady infusion over the last decade of conservative appointments, had not yet obtained a solid conservative majority, and that Ryskamp's rejection was designed solely to delay that eventuality.<sup>2</sup>

The battle over the ideological shape of the Eleventh Circuit, which culminated in Ryskamp's defeat, has unique historical roots that can be traced back to the disputes that ultimately led to splitting the former Fifth Circuit. That split, in turn, can be traced back to the Fifth Circuit's role in carrying out the historical desegregation mandate of *Brown v. Board of Education*.<sup>3</sup> Fortunately, this type of exhausting circuit battle is rare today. In contrast, the United States Court of Appeals for the Seventh Circuit appears on a judicial stage that lacks the grand historical or urgent political eloquence possessed by the offspring of the Fifth Circuit. The Seventh Circuit has long since been "redeemed" by a solid conservative majority. As such, no ideological struggle, at least in its most base partisan form, exists.<sup>4</sup> Compared to the historical backdrop

\* Associate Professor of Law, Howard University School of Law. Former Assistant United States Attorney, Eastern District of California. B.A., J.D., University of California, Los Angeles.

1. See Don J. DeBenedictis, *Ryskamp Rejected*, 77 A.B.A.J. 26 (June 1991).

2. See Sharon LaFraniere, *Ryskamp Nomination is Rejected*, WASH. POST, Apr. 12, 1991, at A1 (quoting Republican Judiciary Committee members Hatch and Grassley).

3. 347 U.S. 483 (1954). For an excellent discussion of the issues surrounding the split of the former Fifth Circuit, see DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* (1988).

4. As of 1991, the Seventh Circuit is comprised of 11 active judges, the last seven of whom were appointed by President Ronald Reagan. See *Judges of the Federal Courts, Seventh Circuit*, 926

that frames Eleventh Circuit nominations like that of Judge Ryskamp, the recent controversies surrounding the Seventh Circuit nominations seem trite.<sup>5</sup> Yet as the Seventh Circuit moves into the last decade of the twentieth century, the presence of a solid conservative majority has not necessarily translated into the sea of calm that some might have imagined.

In several criminal law cases, deep and unusually personal divisions within the court have surfaced on more than one occasion. Spearheaded largely by Judges Richard A. Posner and Frank H. Easterbrook, a segment of the court appears willing to fundamentally alter its approach in confronting issues that reside on the fence line of established Supreme Court precedents by boldly stepping beyond those precedents.

At present, this emerging doctrinal approach has been confined largely to key constitutional procedural issues, most notably having to do with determining the appropriate standard of review for various constitutional claims. These issues are transformed into the larger issue of whether constitutional doctrine should be altered as a caseload management technique. In an era where only a handful of Seventh Circuit cases are reviewed by the Supreme Court each term, the circuit's approach to these issues could have a significant impact. Is this an "innovation" that can be productively channelled into a coherent doctrinal approach to resolve criminal law issues? Or is it the manifestation of a dismal type of law and economics run amok?<sup>6</sup> If nothing else, Judges Posner and Eas-

F.2d xx (1991). Only two active judges were appointed by a Democratic president. *Id.* (Judge Cummings in 1966 (by President Johnson) and Judge Cudahy in 1979 (by President Carter)). In contrast, a decade ago, the Seventh Circuit had four active judges appointed by Democrats and four appointed by Republicans. See *Judges of the Federal Courts*, 620 F. 2d xviii-xix (1980).

5. The nomination of Judge Daniel Manion to a seat on the Seventh Circuit captured national attention when opponents challenged the nomination on the grounds that he lacked sufficient intelligence and judicial experience. The Washington Post, covering the hearings, concluded that "Mr. Manion's legal briefs demonstrate a pervasive lack of technical ability, craftsmanship, attention to detail, and reasoning." *Daniel Manion: Arguments Pro and Con*, WASH. POST, June 24, 1986 at A17. After reviewing what Manion considered to be his five best briefs, a panel of the American Bar Association found that Manion's writing fell far short of the standard that should be expected of a judge. *Id.* Democrats criticized Manion as unqualified because he had never been a lead attorney in a federal case and had listed an automotive repair case as one of his most noteworthy cases. Richard Cohen, *Keep That Bench Warm*, WASH. POST, July 1, 1986, at A15. The Senate Judiciary Committee voted 9-9 on the confirmation, sending the nomination to the full senate without a recommendation. Howard Kurtz, *Senate Casts 50-59 Vote for Manion: Controversial Choice for Appellate Court Wins Confirmation*, WASH. POST, July 14, 1986, at A1. Manion was eventually confirmed by a 50-49 vote, with then Vice-President Bush casting the tie-breaking vote in favor of confirmation. *Id.*

6. Both Judge Posner and Judge Easterbrook have offered a comprehensive analysis of criminal law. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (economic analysis of substantive criminal law). Posner contends that "although judges and legislators do not often speak the language of economics, they often do reason implicitly in economic terms." *Id.* at 1230. See also Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983). In at least one area of federal criminal law—corporate criminality—

terbrook are, at times, advocating the development of a federal court prudential doctrine of an unusual stripe.<sup>7</sup>

Once the genie is out of the bottle, it will be difficult to confine such an approach to issues of constitutional dimension. How might this affect the Seventh Circuit's approach to the resolution of several other vital federal criminal law issues of less than constitutional dimension? Given the structure of the federal court system, many of these issues are practically insulated from Supreme Court review altogether. To say that, based on Judge Posner's and Judge Easterbrook's impetus, the Seventh Circuit sits on the threshold of developing a type of aberrant decisional law distinctive from the other circuits is an overstatement. Nonetheless, even if their views do not command a consistent majority of the Seventh Circuit, it is not premature to consider how Judge Posner's and Judge Easterbrook's approach has affected several aspects of the Seventh Circuit's criminal law jurisprudence. In at least one opinion, Judge Posner has already noted that the concerns expressed in the *Report of the Federal Courts Study Committee*,<sup>8</sup> of which he was a member, are significant enough to be cited as authority.<sup>9</sup> That same Report expresses serious concerns about intercircuit conflicts and the apparent inability of the Supreme Court to resolve enough of these conflicts.<sup>10</sup> Thus, whether the Seventh Circuit is formulating an approach that may have an impact on the frequency of intercircuit conflicts, either positive or negative, is worthy of exploration.

Judge Posner's approach would radically alter federal criminal law. He explicitly states that "since corporate criminal punishment is purely monetary, it is not clear why the corporation should be entitled to the elaborate procedural safeguards of the criminal process . . . [t]hose safeguards make economic sense only on the assumption that criminal punishments impose heavy social costs rather than merely transfer money from the criminal to the state." Posner, *supra* at 1229.

7. Abstention is the most widely recognized prudential doctrine. See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 13 (1989). Although grounded in federalism and comity concerns, abstention is used as a vehicle to keep entire issues out of federal court. As discussed *infra*, Judges Posner and Easterbrook have advocated the use of more deferential standards of review on many criminal law constitutional claims. This serves the purpose of expediting appellate dockets. Although it does not entirely eliminate a particular case from federal court consideration, the practical effect of applying deferential standards of review is much the same—a judge-made doctrine is used to, in effect, limit the full resolution of issues in federal court. Unlike abstention, the use of more deferential standards of review creates the additional effect of insulating possibly incorrect decisions from significant judicial scrutiny.

8. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, April 2, 1990 [hereinafter REPORT].

9. *United States v. McKinney*, 919 F.2d 405, 420 (7th Cir. 1990) (Posner, J., concurring) ("Because the dramatic increases in federal judicial workloads in recent years have fallen so heavily on the federal courts of appeals, it is no surprise that there has been a steady trend toward limiting the scope of appellate review of determinations of fact-specific issues." (citing REPORT)). Judge Flaum took serious issue with Judge Posner's claimed detection of a "steady trend." See *infra* note 83 and accompanying text.

10. REPORT, *supra* note 8, at 124-30.

## II. THE SEVENTH CIRCUIT'S JUDICIAL PERSONALITY

Depending on which factors one emphasizes, the Seventh Circuit Court of Appeals is arguably now the most important federal appellate court in the nation.<sup>11</sup> In Judge Posner, a principal proponent of the Law and Economics movement, the Seventh Circuit boasts one of the most prolific and controversial judges in the nation.<sup>12</sup> Similarly, the presence of Judge Posner's former University of Chicago faculty colleague, Judge Easterbrook, bears mention.<sup>13</sup> Presumably, opinions authored by either Judge Posner or Judge Easterbrook (even dissenting opinions), caustically insightful and intellectually rich, carry with them substantial persuasive weight with the other circuits.<sup>14</sup> They are amongst the intellectual giants of the federal judiciary. So controversial and prolific is this duo, that the cottage industry of critiquing their scholarly works has practically become an academic discipline in and of itself.<sup>15</sup> Sometimes it

11. The Ninth Circuit is the largest federal appellate court in the nation in terms of numbers and geographic area. See 28 U.S.C. § 44 (1990) (authorizing 28 active Ninth Circuit judges). The Second Circuit is of special importance because of the volume of sophisticated criminal securities fraud litigation. See, e.g., *United States v. Regan*, 937 F.2d 823 (2d Cir.) (Princeton Newport securities fraud case), *as amended*, 946 F.2d 188 (2d Cir. 1991); *United States v. Chestman*, 903 F.2d 75 (2d Cir. 1990), *vacated in part*, 947 F.2d 551 (2d Cir. 1991) (discussion of criminal insider trading law), *cert. denied*, 112 S. Ct. 1759 (1992). The United States Court of Appeals for the District of Columbia is sometimes thought of as the most important federal appellate court because of its primary role in adjudicating issues regarding federal agencies. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 273 (1990) (U.S. Court of Appeals for the District of Columbia has a heavy workload of reviewing the decisions of federal agencies, which may arise from disputes anywhere in the United States); *id.* at 292 (D.C. Circuit "commonly said to be second most important court [behind only the Supreme Court] in the nation"). The D.C. Circuit's caseload of administrative agency appeals is of relatively minor import with respect to federal criminal prosecutions. The D.C. Circuit is of some importance in criminal law because it is the primary home of most, but not all, Independent Counsel prosecutions. It is not the exclusive home because of the vagaries of the federal venue provisions which require some Independent Counsel prosecutions to be brought in neighboring Maryland and Virginia, which bring those appeals within the ambit of the Fourth Circuit. See, e.g., *United States v. Fernandez*, 913 F.2d 148 (4th Cir. 1990).

12. His prolificness is not confined to published opinions. For a small sampling, see, e.g., RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (3d ed. 1986); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990).

13. Judges Posner and Easterbrook have co-authored *THE WORKLOAD OF THE SUPREME COURT* (1976).

14. See, e.g., *Murray v. City of Austin, Tex.*, 947 F.2d 147, 163-70 (5th Cir. 1991) (Goldberg, J., dissenting)(repeated favorable references to Judge Easterbrook and his dissenting opinion in *Harris v. City of Zion*, 927 F.2d 1401, 1425 (7th Cir. 1991) (Easterbrook, J., dissenting), *cert. denied*, 60 U.S.L.W. 3878 (1992)).

15. See, e.g., Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302 (1991) (reviewing *THE PROBLEMS OF JURISPRUDENCE*); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988) (reviewing *Law and Literature: A Relation reargued*, 72 VA. L. REV. 1351 (1986); J.M. Balkin, *Too Good to be True: The*

seems that only Siskel and Ebert have yet to critique their work.

And make no mistake about it. Significant aspects of "law and economics" have made their way into the lexicon of Seventh Circuit criminal law jurisprudence. For example, the Seventh Circuit has undertaken an economic analysis of fourth amendment searches,<sup>16</sup> as well as an economic analysis of bank robbery.<sup>17</sup> Certainly, the presence of law and economics jargon in a federal criminal law opinion does not mean that the outcome has been determined exclusively by economic analysis. After all, "efficiency" has been a powerful force in the determination of many legal issues long before law and economics was in vogue.<sup>18</sup> However, law and economics may have influenced the result in at least one case, with a resulting split in the circuits.

In *United States v. Keane*,<sup>19</sup> the Seventh Circuit, speaking through Judge Easterbrook, denied the petitioner's requested relief for a writ of coram nobis, largely on economic efficiency grounds. Judge Easterbrook admitted to some "unease" that our legal system tolerated erroneous convictions, but observed that we live in a world of "scarcity." Here, the petitioner was old, his conviction was old and his sentence had long been served. In a world of limited resources, it made no sense to clutter up the federal courts with reviewing these cases, Judge Easterbrook reasoned.<sup>20</sup>

The coram nobis issue is of considerable importance in today's federal criminal law climate because dozens of individuals have sought coram nobis relief in order to have their public corruption mail fraud convictions vacated in light of the Supreme Court's decision in *McNally v. United States*.<sup>21</sup> The Fourth Circuit, applying a more traditional (and less economic) analysis, reached a result in direct conflict with the Seventh Circuit. The Fourth Circuit allowed coram nobis relief "in order to achieve justice" and thus upheld the district court decision vacating the

*Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447 (1987) (reviewing WILLIAM M. LANDIS & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)); Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)). For a scathing analysis of an opinion by Judge Easterbrook, see Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503 (1991).

16. *United States v. Koeing*, 856 F.2d 843 (7th Cir. 1988).

17. *United States v. Jackson*, 835 F.2d 1195 (7th Cir. 1987), cert. denied, 485 U.S. 969 (1988).

18. Some of the seminal works on the economic analysis of criminal law include Jeremy Bentham, *Principles of Penal Law*, in 1 WORKS OF JEREMY BENTHAM 365 (John Bowring ed., 1843); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). See also DAVID J. PYLE, *THE ECONOMICS OF CRIME AND LAW ENFORCEMENT* (1983).

19. 852 F.2d 199, 206 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989).

20. *Id.*

21. 483 U.S. 350 (1987). For an overview of *McNally's* confusing aftermath, see Deborah Sprenger, Annotation, *Effect Upon Prior Convictions of McNally v. United States Rule that Mail Fraud Statute is Directed Solely at Deprivation of Property Rights*, 97 A.L.R. Fed. 797 (1990).

public corruption mail fraud conviction of former Maryland Governor Marvin Mandel.<sup>22</sup>

Economic efficiency analysis also seems to present itself in other areas of the court's provocative criminal law jurisprudence. Judge Posner's and Judge Easterbrook's frontier attempts to use constitutional doctrine as a caseload management technique certainly have "efficiency" dimensions. And even when the "efficiency" principles admittedly have nothing to do with the outcome of the case, the economic dimension of the issue proves too irresistible to ignore. For example, in *United States v. Reynolds*,<sup>23</sup> Judge Easterbrook observed that the prosecution's decision to bring a federal conspiracy charge was "pointless" given the manner in which the Federal Sentencing Guidelines "group" offenses and the manner in which the evidentiary benefit of conspiracy law could be obtained without charging a conspiracy.<sup>24</sup>

The possible influx of efficiency analysis into the resolution of criminal law issues is but one way to gauge the magnitude of the importance of the Seventh Circuit. On a practical level, the Seventh Circuit is the appellate home of Greylord and a myriad of other public official corruption prosecutions.<sup>25</sup> Thus the Seventh Circuit develops a constant flow of significant cutting edge public corruption caselaw. As a consequence of the brazen corruption for which Chicago is notorious, perhaps only in the federal district courts of the Seventh Circuit could one expect to hear testimony (from an attorney no less) that: [I] bribed judges, assistant state's attorneys, public defenders, sheriff's deputies, police officers, court clerks, assistant corporation counsels or aldermen *virtually every day* [I] practiced law in Chicago.<sup>26</sup>

22. *United States v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989). The Seventh Circuit noted the conflict in *United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989), and noted that the Supreme Court denied certiorari in both *Mandel* and *Keane*, but that "[e]ventually these disputes must be put to rest [by the Supreme Court]." *Id.* at 1149.

23. 919 F.2d 435, 439 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991).

24. Judge Easterbrook took further steps to rid the Circuit of unnecessary and inefficient conspiracy charges in *United States v. Baker*, 905 F.2d 1100 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 206 (1991). There he disagreed with seven other circuits, and determined that a continuing series of violations in the CCE statute meant two, not three violations, but that a conspiracy could not be used. The end result was that the conviction was affirmed, but a significant inter-circuit conflict had been created. See discussion at note 98 *infra*.

25. For a review of the Greylord Prosecutions, see JAMES TUOHY & ROB WARDEN, *GREY-LORD: JUSTICE, CHICAGO STYLE* (1989).

26. *United States v. National On Leong Chinese Merchants Ass'n*, 90 CR 760, 1991 U.S. Dist. LEXIS 2341 (N.D. Ill. Feb. 15, 1991) (testimony of Robert Cooley, reported in Matt O'Connor, *Cooley Hints He Was Weary of Corruption*, CHI. TRIB., July 4, 1991, § 2, at 2 col. 3 (emphasis added)). In later testimony, defense counsel told Cooley that "[y]ou wouldn't know an ethical lawyer if you saw one," to which Cooley replied, "[t]hat makes two of us." See Mary Wisniewski, *Helped Fix 2 Murder Trials, Cooley Testifies*, CHI. DAILY L. BULL., July 3, 1991, at 1, 16.

Beginning with the Hobbs Act, Congress began to enact complex criminal statutes to address the concern with public corruption. These statutes now cover a range of conduct far broader than public corruption, and the Seventh Circuit is positioned to develop significant case law on these issues. Recent examples of issues percolating in the district courts within the Seventh Circuit include the procedural issues surrounding mega-trials, which almost invariably include RICO or CCE counts, or both,<sup>27</sup> and the new kid on the federal block, the federal death penalty.<sup>28</sup> When these issues reach the Seventh Circuit, it will be interesting to see whether an identifiable Posner-Easterbrook approach will have evolved and will have influenced the development of these areas of the law.

Does it even make sense to discuss whether a particular intermediate federal court is more "important" than any other? At first blush, the concept that any particular appellate court is more important than any other may seem a bit troubling. In theory, federal criminal law should be uniform in its applicability throughout the nation, and any substantial conflict in the circuits should be resolved by the Supreme Court. And while deviation on the application of any federal law is troubling, it is especially troubling when federal *criminal* statutes and rules are subject to divergent interpretations in different parts of the country.

The concern is certainly valid. Principles of federal prosecution are "designed to promote consistency in application of federal laws."<sup>29</sup> Similarly the Supreme Court has emphasized that: [A]bsent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide . . ."<sup>30</sup>

Not surprisingly, several high profile federal criminal law issues

27. A "mega-trial," as the term implies, refers to a trial with dozens of defendants and numerous counts in the indictment, sometimes well over one hundred counts. Because of the incredible burdens that such indictments place on the courts, jurors, and defense counsel, federal courts now tend to support a district court's authority to sever mega-trials into more manageable pieces. For a review of the El Ruk'n mega-trial in the Seventh Circuit, see George J. Cotsirilos & Matthew F. Kennelly, *Judge Aspen and the Case of the Severed Indictments*, 6 CRIM. JUST. 18 (Summer 1991) (discussing severing of "labyrinthine 305-page, 175-count indictment. . . nearly two inches thick and weighing almost four pounds, [having] 38 defendants").

28. The constitutionality of the new federal death penalty provision in 21 U.S.C. § 848(e) was upheld in *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990), which was the first reported decision on the subject. Seventh Circuit review was obviated when the jury convicted the defendants, but chose not to impose the death penalty, opting for life imprisonment instead.

29. *United States Attorneys' Manual* § 9-27.140 (1984 ed.), reprinted in 8 THE DEPARTMENT OF JUSTICE MANUAL, ch. 23A, § 140 (Supp. 1990). The Principles of Federal Prosecution continue to reflect a seminal statement of the Justice Department's general approach to federal prosecutions.

30. *Taylor v. United States*, 495 U.S. 575 (1990) (criminal case) (quoting *Dickerson v. New Banner Inst., Inc.* 460 U.S. 103, 119-120 (1983)).



make their way to the Supreme Court on the fast track, quickly resolving various intercircuit conflicts. Some constitutional federal criminal law issues, such as the validity of preventive detention,<sup>31</sup> the separation of powers aspects of the federal sentencing guidelines,<sup>32</sup> the independent counsel,<sup>33</sup> and federal anti-flag burning legislation<sup>34</sup> seem to skyrocket to the Supreme Court with unusual speed.<sup>35</sup> Other important federal criminal law issues, such as the pattern requirement under RICO,<sup>36</sup> and enhancements under various federal statutes<sup>37</sup> seem to make their way to the Court only after the conflicts in the circuits have gestated quite a while.

Other significant issues are not quickly resolved by the Supreme Court, and then sometimes haphazardly. For example, the "intangible rights" theory in mail fraud prosecutions gestated in the appellate courts for well over a decade before the Supreme Court decided to "resolve" the issue.<sup>38</sup> Its "resolution" in *McNally v. United States*<sup>39</sup> only opened the door to further conflict on how to deal with its aftermath.<sup>40</sup> What constitutes "extortion under color of official right" under the venerable Hobbs Act still vexes federal courts of appeals. Now, some twenty years later, the Supreme Court has renewed its interest in the statutory niceties of the Hobbs Act and will purportedly resolve these long simmering intercircuit conflicts.<sup>41</sup> Its belated interest in the Hobbs Act may create a similarly

31. *United States v. Salerno*, 481 U.S. 739 (1987).

32. *Mistretta v. United States*, 488 U.S. 361 (1989).

33. *Morrison v. Olson*, 487 U.S. 654 (1988).

34. *United States v. Eichman*, 496 U.S. 310 (1990).

35. Congress sometimes has a role in this. The Flag Protection Act of 1989 contained an unusual provision requiring that "[a]n appeal may be taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by a United States district court ruling upon the constitutionality of [the Act]" and that "[t]he Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal and advance on the docket and expedite to the greatest extent possible." 18 U.S.C. § 700(d) (1989). In *Mistretta*, with no statute specifically requiring fast track consideration of the issue, the Supreme Court took the unusual step of granting review of a case from the district court before judgment was rendered from the intermediate appellate court. See *Mistretta*, 488 U.S. at 371 (citing Supreme Court Rule 18, which allows for the expedited procedure based on "imperative public importance" of the issue). See also *Mistretta*, 486 U.S. 1054 (1988) (granting certiorari before judgment).

36. *H.J. Inc. v. Northwestern Bell Tel.*, 492 U.S. 229 (1989).

37. *Taylor v. United States*, 495 U.S. 575 (1990).

38. *McNally v. United States*, 483 U.S. 350 (1987).

39. *Id.*

40. Compare *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989) and *United States v. Bush*, 888 F.2d 1145 (7th Cir. 1989) (writ of coram nobis not available to defendant who was convicted under pre-*McNally* intangible rights mail fraud theory) with *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988) (writ of coram nobis granted to vacate "intangible rights" mail fraud conviction in light of *McNally*), cert. denied, 491 U.S. 906 (1989). See also Annotation, *supra* note 21.

41. See *McCormack v. United States*, 111 S. Ct. 1807 (1991) (quid pro quo necessary for Hobbs Act conviction of state legislator, regardless of whether money received was a legitimate contribu-

confusing aftermath as was the case with *McNally*.<sup>42</sup> Statutory issues concerning RICO lurk in the appellate courts, even though the Supreme Court periodically grants certiorari on RICO issues ostensibly to resolve these issues.<sup>43</sup> Whether the "exculpatory no" doctrine exists as a defense to a charge of making a false statement has led to a wide divergence of views in the circuits.<sup>44</sup> As the war on drugs moves from the local courts into the federal district courts, the number of cases raising important fourth amendment issues is certain to rise. Congress' fondness for enacting complex criminal statutes, coupled with generous use of federal conspiracy law and aiding and abetting liability under the Continuing Criminal Enterprise Statute, are leading to splits in the circuits. The Supreme Court seems willing to let these splits fester for the time being.<sup>45</sup> The list goes on and on.

Yet, these circuit splits, as troubling as they may be, should not surprise any serious student of the federal judicial system. The Federal Courts Study Committee has recognized that this is a serious problem, and has called for further study to identify its precise dimensions.<sup>46</sup> Meanwhile, only recently has the Supreme Court again given recognition to the fact there is such a thing as "the law of the Circuit."<sup>47</sup> However, as the Federal Courts Study Committee noted, "[a] federal judicial sys-

tion); *United States v. Evans*, 910 F.2d 790 (11th Cir. 1990), *aff'd*, 60 U.S.L.W. 4411 (1992) (question presented: whether "extortion under color of official right" prong of Hobbs Act requires proof that public official did something to "induce" the payment.) The Seventh Circuit continues to be active in the development of Hobbs Act public corruption doctrine. See *United States v. McClain*, 934 F.2d 822 (7th Cir. 1991); *United States v. Castor*, 937 F.2d 293, 299 (7th Cir. 1991).

42. For a discussion of the history of the Hobbs Act and the Supreme Court's belated interest in resolving various inter-circuit conflicts, see Dan K. Webb et al., *Limiting Public Corruption Prosecutions Under the Hobbs Act: Will United States v. Evans Be the Next McNally?*, 67 CHI.-KENT L. REV. 29 (1991).

43. See generally *Braxton v. United States*, 111 S. Ct. 1854, 1857 (1991) (principal purpose for Supreme Court's use of certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals).

44. For the latest circuit to set forth the circuit split on this issue, see *United States v. Steele*, 933 F.2d 1313 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 303 (1991).

45. Compare *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987) (aiding and abetting liability cannot be utilized under 21 U.S.C. § 848), *cert. denied sub nom. Abbamonte v. United States*, 24, 485 U.S. 1021 (1988) with *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.) (en banc) (aiding and abetting liability can be utilized under 21 U.S.C. § 848), *cert. denied*, 493 U.S. 901 (1989).

46. REPORT, *supra* note 8, at 125 (noting that in 1988 Supreme Court refused to review roughly 60-80 "direct" inter-circuit conflicts presented to it by petitions for certiorari, and that number did not include cases involving less direct conflicts (e.g., fundamentally inconsistent approaches to the same issue)).

47. *Pierce v. Underwood*, 487 U.S. 552, 561 (1988); see also Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 490 (1986); Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 413 (1972); J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913 (1983).

tem . . . must be able within a reasonable time to provide a nationally binding construction [of federal law] needing a single, unified construction in order to serve their purpose."<sup>48</sup>

Is the Seventh Circuit developing an identifiable approach that contributes to the solution or is it adding to the problem by unnecessarily creating intercircuit conflicts? Or, even worse, is the Seventh Circuit creating conflicts with applicable Supreme Court precedent? If the recent past is any indication, the Supreme Court does not pay particular attention to the Seventh Circuit's criminal law jurisprudence—or at least has shown no clear and consistent inclination to explicitly or implicitly anoint it as some sort of first among equals or Supreme Court mind reader. To illustrate this point, in the calendar year ending June 1988, the Supreme Court granted only two petitions for writ of certiorari from the Seventh Circuit for criminal cases.<sup>49</sup> For the calendar year ending June 1989, the Court granted certiorari for *no* criminal cases from the Seventh Circuit.<sup>50</sup> As of the date of this writing, only two Seventh Circuit criminal cases are pending before the Court.<sup>51</sup> One could argue that the fact that the Supreme Court is leaving the Seventh Circuit criminal cases alone implicitly suggests that it approves of its decisions. But this conclusion is unwarranted. Statistically, the same could be said of every circuit. For the year ending June 1989, the Court granted certiorari in only 18 federal criminal cases, an average of less than two a circuit.<sup>52</sup>

Nor has the Supreme Court made extensive use of Supreme Court Rule 10(1)(c), which provides that, irrespective of a conflict in the circuits, certiorari may be granted, "when a . . . court of appeals has decided a federal question in a way that conflicts with applicable decisions of [the Supreme Court]," to reign in possible renegade circuits. Thus, the Supreme Court is letting stand virtually every federal appellate court criminal law decision, although there is a significant amount of conflict in

48. See REPORT, *supra* note 8, at 125.

49. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1989, at 531.

50. U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1990, at 532 [hereinafter CRIMINAL JUSTICE STATISTICS-1990].

51. As this article entered the final editing stages, the Court decided *Griffin v. United States*, 112 S. Ct. 466 (1991). In *Griffin*, the Court unanimously affirmed the Seventh Circuit decision holding that, in a federal prosecution, due process does *not* require a general verdict in a multiple-object conspiracy to be set aside when the evidence is inadequate to support conviction as to one object. *Griffin* represented no radical departure from established precedent. Perhaps the most interesting aspect of *Griffin* is Justice Blackmun's concurrence recommending the use of special interrogatories in complex federal criminal cases, even if they are not constitutionally required. *Id.* at 475. The Court also decided *Williams v. United States*, 112 S. Ct. 1112 (1992). For a brief discussion, see text accompanying notes 103-110 *infra*.

52. CRIMINAL JUSTICE STATISTICS-1990, *supra* note 50, at 532.

those decisions.<sup>53</sup>

Moreover, based on the criminal cases the Court chooses to review, no clear pattern emerges concerning how well the Supreme Court thinks the Seventh Circuit is doing at anticipating cutting edge issues and resolving them in a fashion consistent with the Supreme Court. For example, in *United States v. Cheek*,<sup>54</sup> an appeal arising from a criminal tax prosecution, the Court reversed the Seventh Circuit and held that a good faith misunderstanding of the law negates wilfulness, whether or not the claimed belief or misunderstanding was objectively reasonable. On the other hand, the Court upheld the Seventh Circuit's decision in *Chapman v. United States*<sup>55</sup> on the issue of whether the carrier medium for drugs was to be counted in the weight for sentencing enhancement purposes. For those interested in "keeping score" and see how the Supreme Court tracks the supposedly monolithic Posner/Easterbrook position (and vice versa), the Court's affirmance of the Seventh Circuit's *Chapman* decision is unsatisfying. The Seventh Circuit heard the issue en banc, and split 6-5, with Judge Easterbrook writing for the majority<sup>56</sup> and Judge Posner writing one of the two dissents.<sup>57</sup>

The end result is that the Seventh Circuit, like all other circuits, has substantially free reign to develop its circuit caselaw, including substantial reign to venture out into the "fenceline areas" of constitutional interpretation. Accordingly, a systemic respect for binding precedent — judicial self-control if you will — is an intermediate appellate court's only real check on the creeping development of subtle, but significant shifts away from established Supreme Court precedent. The Supreme Court will only be able to provide a sporadic brake at best.

For this reason the emerging issue of whether Judges Posner and Easterbrook are intentionally championing a jurisprudence ahead of the Supreme Court wave is interesting. The systematic limitations inherent in the federal court system will leave many of these decisions intact (at least for a while), which, in turn, will put significant strain on the workings of the entire federal court system. As a counterweight, other Seventh Circuit Judges, most notably Judge Joel Flaum and Judge Kenneth Ripple have emerged as a sort of moderating influence. They have tried to keep the development of Seventh Circuit caselaw within recognizable

53. See *supra* notes 49-50 and accompanying text (Supreme Court refused to review 60-80 direct inter-circuit conflicts in 1988 term).

54. 111 S. Ct. 604 (1991), *vacating and remanding* 882 F.2d 1263 (7th Cir. 1989).

55. 111 S. Ct. 1919 (1991).

56. *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (Easterbrook, J.) (en banc).

57. *United States v. Marshall*, 908 F.2d 1312, 1331 (7th Cir. 1990) (Posner, J., dissenting). Judge Posner also joined in Judge Cummings' dissent. *Id.* at 1326.

Supreme Court parameters with several carefully considered and learned opinions.<sup>58</sup>

Before too quickly consigning Judges Easterbrook and Posner to the netherworld of blatant and unrestrained Supreme Court interlopers (as some have done),<sup>59</sup> consider the Supreme Court's recent decision in *Rutan v. Republican Party of Illinois*.<sup>60</sup> *Rutan* was a 5-4 decision holding that the Illinois patronage practice of hiring only those in a particular political party was unconstitutional. The majority consisted of Justices Brennan, White, Marshall, Blackmun, and Stevens. Justices Scalia, Rehnquist, Kennedy and O'Connor dissented. Justice Stevens, attempting to add a moderating voice, authored a separate concurrence where he sought to draw on his former experiences of a Seventh Circuit judge to explain that, contrary to Justice Scalia's propositions advanced in the dissent, the majority opinion was a simple extension of long established precedent.<sup>61</sup> The dissent was not the least bit assuaged.<sup>62</sup> Two members of the *Rutan* majority are no longer on the Court, having been replaced by Justices with a judicial outlook presumably much more like Scalia (and Posner and Easterbrook) than Stevens (or Flaum for that matter). As a consequence, a shift in the Supreme Court may in time override the moderating efforts emanating from the former Supreme Court and the Seventh Circuit. Thus, the current Seventh Circuit debate must be viewed through a prism that encompasses not only current Supreme Court precedents, but also one which catches a glimpse of the future Supreme Court landscape as well.

### III. THE CONSTITUTIONAL STANDARD OF REVIEW DEBATE

As set forth above, when confronted with a constitutional issue grounded in procedural and caseload management dimensions, in some cases Judge Posner and Judge Easterbrook are quite willing to go out on a limb and, in the face of some startling disagreement, go several steps beyond existing Supreme Court precedent.

58. See, e.g., *United States v. Townsend*, 924 F.2d 1385 (7th Cir. 1991) where Judge Flaum authored an opinion which contained a scholarly analysis of the sprawling and elastic boundaries of federal conspiracy law.

59. Professor Albert Alschuler, commenting on recent opinions by Judge Easterbrook, observed that the Supreme Court has clearly rejected Easterbrook's thinking, further stating "[i]t does seem to be that Posner and Easterbrook are ignoring the fact that there's a Supreme Court out there." Bill Grady, Merrill Goozner, John O'Brien, *A Judicial War of Words and More*, CHI. TRIB., Nov. 27, 1990, at C3.

60. 497 U.S. 62, 110 S. Ct. 2729 (1990).

61. *Id.* at —, 110 S. Ct. at 2740 (Stevens, J., concurring).

62. See, e.g., *id.* at —, 110 S. Ct. at 2749 n.2 (Scalia, J., dissenting) (criticizing Justice Stevens' concurrence); *id.* at 2754 n.4 (same).

To fully appreciate this point, one need only contrast it to how the court properly yields to Supreme Court precedent when it wants to. It is axiomatic that settled constitutional doctrine cannot, or should not, be changed at the intermediate appellate court level. The Seventh Circuit knows that rule well. Indeed, it can even be a docile adherent to century-old and arguably obsolete Supreme Court authority when it wants to. *Risser v. Thompson*<sup>63</sup> is illustrative. There, in an opinion written by Judge Posner, the court dismissed a constitutional challenge based on the guarantee of republican government clause,<sup>64</sup> on the grounds of nonjusticiability, because guarantee clause jurisprudence "is too well entrenched to be overturned at our level of the judiciary."<sup>65</sup> Although *Risser* was a civil case, because of the potential criminal law application of the guarantee clause,<sup>66</sup> the court's treatment of the guarantee clause is instructive on how it may handle criminal law issues with a constitutional dimension.

Another Posner opinion, *United States v. Masters*,<sup>67</sup> provides another example. There, the court was surprisingly quiet when it declined an opportunity to strike down RICO as unconstitutional on vagueness grounds.<sup>68</sup> The court certainly had an opening provided by the Supreme Court, as at least four Supreme Court Justices appear to support that view.<sup>69</sup> However, as will be discussed in a moment, Judge Posner and Judge Easterbrook are not bashful about enunciating "new" constitutional doctrine under far less certain circumstances.

Another example of obedient adherence to even arguably unclear Supreme Court precedent is *Hanrahan v. Theiret*.<sup>70</sup> There, the district court granted habeas corpus relief on the ground that incriminating statements of a non-testifying codefendant had been erroneously admit-

63. 930 F.2d 549 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 180 (1991).

64. U.S. CONST. art. IV, § 4.

65. *Risser*, 930 F.2d at 552.

66. See Adam H. Kurland, *The Guarantee Clause As A Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989).

67. 924 F.2d 1362 (7th Cir. 1991), *cert. denied*, 111 S. Ct. 2019 (1991).

68. 924 F.2d at 1367.

69. See David W. Fassett, *Mother of Mercy, Is This the End of RICO?*, 6 CRIM. JUST. 12 (Spring 1991) (four sitting Justices are inclined to invalidate RICO and others have admitted that the pattern requirement defies definition, author suggests that RICO's fate is uncertain). In light of the Seventh Circuit's apparent lack of interest in trail blazing on this issue, two Seventh Circuit practitioners hold out little hope that the Seventh Circuit will strike down RICO on vagueness grounds. Patrick A. Tuite & John L. Hines, Jr., *RICO's Pattern Requirement in the Seventh Circuit*, CBA RECORD 18 (March 1991). In a later case, Chief Judge Bauer, joined by Judges Posner and Manion, acknowledged Justice Scalia's "invitation" to strike down RICO, but summarily rejected the contention and relegated the "discussion" of the issue to a footnote. *United States v. Glecier*, 923 F.2d 496, 497 n.1 (7th Cir.), *cert. denied*, 112 S. Ct. 209 (1991).

70. 933 F.2d 1328 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 209 (1991).

ted. The Seventh Circuit reversed, and reinstated the conviction after applying a very straight-laced harmless error analysis as ostensibly required by *Chapman v. California*.<sup>71</sup> Judge Wood, writing for a unanimous panel, acknowledged that the "Supreme Court has not always been precise in choosing words to articulate the *Chapman* standard"<sup>72</sup> and implied that there was a certain "looseness" concerning the applicable state of the law. In finding any error harmless beyond a reasonable doubt and reinstating the conviction, the Seventh Circuit stated, "[t]he Supreme Court has yet to overrule or formally modify *Chapman*, however, and we must continue to respect its holding until that day."<sup>73</sup>

The above pronouncements are somewhat comical when contrasted with other Seventh Circuit pronouncements in areas where some members of the court may be getting ahead of the Supreme Court wave on some constitutional law issues. This debate has surfaced in at least three opinions, and suggests that a disturbing split exists within the court.

In *United States v. Chaidez*,<sup>74</sup> the majority opinion, authored by Judge Easterbrook, alters fourth amendment "arrest" jurisprudence in an area where the Supreme Court has spoken clearly and often. Judge Easterbrook claimed that the law concerning probable cause determinations was in a state of "transition,"<sup>75</sup> citing his own concurring opinion as support.<sup>76</sup> Judge Ripple, in dissent, took serious issue with the characterization that the law was "in transition," calling Judge Easterbrook's pronouncements both "premature and presumptuous."<sup>77</sup>

The trend was again evident in *United States v. McKinney*,<sup>78</sup> where the three judge panel yielded three separate opinions. All three judges concurred in the result affirming the conviction, but there was a spirited colloquy between Judge Posner and Judge Flaum concerning the applicable standard of review for whether a magistrate had correctly concluded that probable cause for a search had been established. Judge Flaum, writing the majority opinion, recounted Supreme Court precedents and determined that the issue of whether probable cause existed for a magistrate to issue a search warrant should be reviewed under a moderately invigorating "substantial basis" standard.<sup>79</sup>

71. 386 U.S. 18, 24 (1967).

72. *Hanrahan*, 933 F.2d at 1336 n.17.

73. *Id.* at 1337 n.17.

74. 919 F.2d 1193 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 209 (1991).

75. *Chaidez*, 919 F.2d at 1196.

76. *Id.*

77. *Id.* at 1203, n.1 (Ripple, J., dissenting).

78. 919 F.2d 405 (7th Cir. 1990).

79. *Id.* at 408-416.

In concurrence, Judge Posner vigorously argued that the issue, indeed all “fact based” constitutional issues, should be reviewed under a more deferential “clearly erroneous” standard, and thus appeared willing to extend past settled Supreme Court jurisprudence on the vital issue of the applicable standards of review of district court determinations of various constitutional claims.<sup>80</sup> He concluded by noting that a trend was afoot supporting this position and that “we should not fear to reject [the prevailing standard of review] for fear of being called innovative.”<sup>81</sup>

Responding to Judge Posner, Judge Flaum exclaimed that, when weighed against the need to safeguard constitutional rights, “expediency is a weak substitute for meaningful appellate review.”<sup>82</sup> He further denied that the “steady trend” purportedly identified by Judge Posner even existed and “suggest[ed], instead, that it is primarily an initiative of two very learned and, in this instance, overly innovative, jurists displeased with the state of the law.”<sup>83</sup>

The importance of this issue is belied by its seemingly semantic and technical nature. Judge Posner puts a great premium on appellate case load efficiency. In his concurrence, Posner cited the *Report of the Federal Courts Study Committee*<sup>84</sup> to support his position. He claimed that “because the dramatic increases in federal judicial workloads in recent years have fallen so heavily on the federal courts of appeals, it is no surprise that there has been a steady trend toward limiting the scope of appellate review of determinations of fact-specific issues.”<sup>85</sup>

Here, Judge Posner has exposed his agenda. Without clear direction from the Supreme Court, Posner appears quite willing to alter significant constitutional doctrine in order to achieve the “greater goal” of appellate caseload management. This is troubling for at least three reasons. First, the practical effect of more deferential standards of review is to insulate incorrect decisions from meaningful review. Judge Flaum noted how skewed this goal can be when weighed against the vindication of constitutional rights. Apparently, Judge Posner is untroubled by this prospect. Second, while the overt manipulation of any legal doctrine to effect caseload management is troubling to begin with, it becomes grotesque when the Constitution is being manipulated.

80. *Id.* at 418-23 (Posner, J., concurring).

81. *Id.* at 423 (Posner, J., concurring).

82. *Id.* at 412.

83. *Id.* at 411 n.4. Judge Flaum also added that Judge Posner had even acknowledged in an earlier opinion that “the Supreme Court has stubbornly refused to yield to his [Posner’s] logic.” *Id.* at 411 n.6.

84. REPORT, *supra* note 8, at 5.

85. *McKinney*, 919 F.2d at 420 (Posner, J., concurring).



Third, Judge Posner's advocacy of this type of caseload management represents a curious permutation of separation of powers principles emanating from a judicial quarter that usually pays significant respect to that cornerstone constitutional doctrine. Congress has been given the constitutional role of defining the appellate jurisdiction of the federal courts. Judge Posner's approach appears in tension with that role. Nevertheless, a few months after *McKinney* was decided, the Supreme Court decided *McClesky v. Zant*.<sup>86</sup> There, in a 6-3 decision, the Supreme Court effectively reinterpreted the habeas corpus rules to limit severely a habeas petitioner's right to seek federal habeas corpus review. The dissent characterized the majority opinion as a "[radical departure] from the norms that inform the proper judicial function."<sup>87</sup> The dissent further observed that Congress had recently rejected the identical proposed statutory change that the majority had imposed through judicial fiat and caustically remarked that "it is axiomatic that this Court does not act as a backup legislature of failed attempts to amend existing statutes."<sup>88</sup>

Judge Posner may have read his Supreme Court tea leaves correctly. In *Zant*, a majority of the Supreme Court has apparently implicitly endorsed the principle that — at least with respect to statutory issues — caseload management is a proper principle to guide the judicial function. Thus, if Congress won't heed the call to limit the caseload of the federal judiciary, the judiciary will do it itself.<sup>89</sup>

In all likelihood, this will be the defining federal courts issue in the nineties. Recently, Chief Justice Rehnquist has been extremely vocal in asking Congress to take responsible measures to *decrease*, and not *increase*, the case loads of the federal courts.<sup>90</sup> Given that Congress' political objectives are not necessarily compatible with the Chief Justice's concerns, this will likely become a flashpoint issue, if it hasn't already.<sup>91</sup>

86. 111 S.Ct. 1454 (1991).

87. *Id.* at 1477 (Marshall, J., dissenting).

88. *Id.* at 1482.

89. *Zant* cannot be read as clearly endorsing Judge Posner's approach in *McKinney* because *Zant* concerned a statutory issue rather than an issue of constitutional interpretation.

90. In 1989, Chief Justice Rehnquist took an unusual step and wrote an editorial asking Congress to enact Civil RICO Reform. William H. Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 10, 1989, at A10 col. 4. More recently, concerned that Congress was endangering the quality and credibility of the federal courts, the Chief Justice opposed legislative proposals under consideration in Congress that would allow federal prosecution of virtually any case in which a gun was used to commit a murder, and voiced significant caseload concerns about the proposed Violence Against Women Act. See *Expanding Federal Court Role Opposed*, WASH. POST, Jan. 1, 1992, at A29.

91. Some members of Congress have clearly stated that they do not care about the burden on the federal courts. The implication would seem to be that the federal courts' efforts to develop doctrine as a case load management technique is illegitimate in any form, and will be aggressively challenged by Congress. For example, in a discussion over a proposed federal statute that would

Thus, the emerging “innovative” caseload management doctrines of the Seventh Circuit could be subject to intense nationwide scrutiny.

Finally, the standard of review/caseload management issue was evident again in the Seventh Circuit’s en banc consideration of *Hunter v. Clark*.<sup>92</sup> There, Judges Posner and Easterbrook, in a separate concurrence, asserted that on collateral review, constitutional error need not be shown to be harmless beyond a reasonable doubt in order to preserve a conviction — that such a standard was too difficult.<sup>93</sup> Here, they did not even bother to try to cite controlling Supreme Court authority but were willing to gamble that apparently concurring views of two Justices would someday carry the day.<sup>94</sup> This is a rather brazen example of a new type of federal criminal appellate jurisprudence at work.<sup>95</sup>

And it contrasts sharply with the manner in which other circuits grapple with fenceline constitutional issues arguably “in transition.” For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>96</sup> the Third Circuit confronted whether Pennsylvania’s restrictive abortion legislation was constitutional. The court recognized that a series of recent Supreme Court abortion rights decisions and changes in the Court’s personnel had cast serious doubt on whether the *Roe* standard currently commanded a majority of the Supreme Court. After considered analysis of these cases, including all of the concurrences and partial concurrences,

effectively federalize every murder committed with a firearm, the Judicial Conference of the United States opposed the bill, claiming it could “flood the federal courts.” Michael Isikoff, *Crime Bill’s Costs Worry U.S. Judges*, WASH. POST, July 22, 1991, at A1. Senator Alphonse D’Amato, the bill’s sponsor responded:

I could care a hoot about the fact that it may create a burden for the [federal] courts . . . .

Better a burden for the courts than the continued killing and violence on our streets . . . .

When a woman gets shot and killed and loses three babies, you’re telling me I should be worried about whether the courts should take on additional cases?

*Id.* at A8. In a related vein, Jay Stephens, the U.S. Attorney in Washington, D.C., told the local federal district court bench that they should stop complaining about their allegedly crowded dockets and further suggested the judges don’t work very hard. Tracy Thompson, *Stop Complaining, Stephens Tells Judges*, WASH. POST, June 8, 1991, at B1.

92. 934 F.2d 856 (7th Cir.), *cert. denied*, 112 S. Ct. 388 (1991).

93. *Hunter*, 934 F.2d at 865 (Easterbrook, J., concurring with Posner, J.) (suggesting state need not surmount such a high [harmless beyond a reasonable doubt] hurdle).

94. *Id.* at 866 (citing *Duckworth v. Eagan*, 492 U.S. 195, 207-13 (O’Connor and Scalia, JJ., concurring)).

95. The resistance to having Supreme Court doctrine refashioned at the appellate level leads to some amusing unanimous opinions. In *Beringer v. Sheahan*, 934 F.2d 110 (7th Cir.), *cert. denied*, 112 S. Ct. 641 (1991), Judge Flaum authored an opinion joined by Judges Posner and Manion. In rejecting a defense contention concerning a questionable construction of Supreme Court precedent, Judge Flaum noted: “Inferior courts sometimes, it is true, wrench the words of the Supreme Court out of context or seize upon stray bits of dicta that occasionally find their way into even the most narrowly tailored of the Court’s opinions, but this is not such a case.” *Beringer*, 934 F.2d at 113 n.2. There is little doubt this passage was directed more toward the other members of the panel rather than toward the unsuccessful litigant.

96. 947 F.2d 682 (3d Cir. 1991), *aff’d in part and rev’d in part*, 60 U.S.L.W. 3715 (1992).

the Third Circuit attempted to cobble a reasoned estimate of the Supreme Court's current position and held that the controlling opinion in a splintered 5-4 decision of the Supreme Court is that of the justice or justices who concur on the "narrowest grounds."<sup>97</sup> Whether the Third Circuit's approach is ultimately determined to be correct is problematic. But right or wrong, its approach at least embodies a sincere effort to base its constitutional reasoning on what it believes to be a position that currently commands the support of a majority of the Supreme Court. Judge Posner's and Easterbrook's approach to some of these constitutional issues, "innovative" as it may be, does not appear to include that ingredient.

#### IV. CONCLUSION

Judge Posner's and Judge Easterbrook's views are undoubtedly firmly held and they will continue to influence the development of Seventh Circuit criminal law doctrine. However, until the Supreme Court clearly indicates those views command a majority of the Supreme Court, the likely result will be the continuing proliferation of various degrees of intercircuit conflicts. The innovative spirit of the Seventh Circuit, unchecked, could cause significant disruption to a federal court system already showing serious signs of strain.<sup>98</sup> This undoubtedly explains why

97. 947 F. 2d at 693-94.

98. The Circuit's recent experience with the Continuing Criminal Enterprise Statute ("CCE"), 21 U.S.C. § 848, provides an example. In *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir.), cert. denied, 493 U.S. 901 (1989), the Seventh Circuit, sitting en banc, declined to follow the Second Circuit's decision in *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir.), cert. denied sub nom. *Abbanmonte v. United States*, 485 U.S. 1021 (1988), which had held that, based on a review of the relevant legislative history, aider and abettor liability could not be imposed under the CCE statute.

In *United States v. Baker*, 905 F.2d 1100 (7th Cir.), cert. denied, 111 S. Ct. 206 (1990), the court had to define the term "continuing series of violations." Despite the fact that seven other circuits that had considered the issue had determined that a drug conspiracy could be included and the total number of violations had to be at least three to constitute the requisite "series" of violations, Judge Easterbrook determined drug conspiracies could not count, but held that only two violations were needed to establish a series. Judge Easterbrook concluded: "This brings us into harmony in result, although not in exposition, with the seven other circuits that set a minimum of three violations and allow the included conspiracy to serve as one. It also means that [the defendant's] conviction for the CCE crime stands." 905 F.2d at 1105. But the "disharmony in exposition" created a needless inter-circuit conflict. Judge Easterbrook's master stroke did not alter the result in the case. It is hard to gauge just why the Circuit is willing to develop an aberrant CCE case law. Perhaps this can be explained as another of Judge Easterbrook's attempts to rid the Circuit of unnecessary and "inefficient" conspiracy charges.

The seemingly needless creation of inter-circuit conflict becomes even more interesting for at least two other reasons. First, it flatly contradicts a recommendation of *The Report of the Federal Courts Study Committee*, which, as noted above, in other contexts, appears to carry uncommon persuasive weight. The REPORT recommended: "[W]hen a court of appeals reviews a case raising an issue already decided in another circuit, it should accord considerable respect to that earlier decision." REPORT, *supra* note 8, at 129. The REPORT further recommends that:

[i]ntercircuit conflict should be created only if a majority of the active judges of the court

Judge Ripple and Judge Flaum have responded in the unusually sharp manner that they have.

Productively channelled, the Circuit's innovative spirit will undoubtedly serve as an impetus for the Supreme Court to resolve key constitutional issues. It could also go a long way towards forcing a reevaluation of several significant federal criminal law issues not of constitutional dimension that are currently in a state of doctrinal confusion within the circuits and which are unlikely to reach the Supreme Court in the near future.<sup>99</sup> Thus, the Seventh Circuit should be expected to play a

are convinced that the earlier decision in another circuit is definitely wrong. Some inter-circuit conflicts could undoubtedly be prevented by more deference to prior decisions reached by other courts which are of equal rank, are part of the same national system, and have equal responsibility for interpretation of federal law.

*Id.*

Second, and even more instructive, the *Baker* court failed to comply with the Seventh Circuit's own Local Rule 40 (f). Rule 40(f) is not as extreme as the Study Committee recommendation set forth above. Nonetheless, it was promulgated largely to eliminate the needless creation of inter-circuit conflicts. Rule 40(f) provides:

Rehearing sua sponte before decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court *or create a conflict between or among* the circuits shall not be published unless circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows: "This opinion has been circulated among all of the judges of this court in regular active service. (No judge favored, or a majority did not favor) a rehearing en banc on the question of (e.g. overruling *Doe v. Roe*). (Emphasis added.)

Given the nature of the issues in *Baker* and the manner in which they were decided, compliance with the Rule 40(f) procedures was required. The Circuit's refusal in applicable cases to follow its own mandatory commands suggest the Circuit may not be as sensitive to the problems of inter-circuit conflicts as it might appear. A brief perusal of several Seventh Circuit decisions indicates that compliance with Rule 40(f) occurs most often where a proposed opinion would arguably overrule a prior decision of the Seventh Circuit, but adherence to the rule is more lax when the issue concerns the possible creation of an inter-circuit conflict. For an example where the court complied with Rule 40(f) with respect to a possible inter-circuit conflict, see *United States v. Canino*, 949 F.2d 928, 932 n.\* (7th Cir. 1991) (specifically noting compliance with Rule 40 (f) and Circuit's decision not to rehear case en banc on the question of possible inter-circuit conflict with decision of Third Circuit), *cert. denied*, 112 S. Ct. 1940 (1992).

In any event, as more new complex criminal statutes make their way to the Seventh Circuit, there should be some concern that the Circuit may yet again go it alone, thus exacerbating the problems of inter-circuit conflicts. This kind of "innovation," appearing very much like rote academic exercise, in the larger scheme of things, is not particularly helpful to the efficient functioning a federal court system.

99. Two issues come to mind, but the list is far from exhaustive. The first issue concerns the availability of "theory of defense" jury instructions. Difficult analytical questions arise concerning the quantum of proof required to put a particular defense in issue, and the circumstances under which the court should give a particular theory of defense instruction. A significant amount of uncertainty and disagreement still exists throughout the circuits. See generally, Adam H. Kurland, *Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841 (1990). Here, the Seventh Circuit's inclination to be innovative in a productive manner would be welcome. To date, the Circuit's record on these issues is mixed.

## preeminent role as a federal appellate court in the nineties.

Many circuits, including the Seventh, have held that receipt of a specific good faith instruction is not required, as long as the other instructions make clear that specific intent to defraud must be found beyond a reasonable doubt. On the other hand, other Seventh Circuit cases have held that a defendant in a criminal case is entitled to have the jury consider any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous. Partly because of each circuit's reluctance or inability to resolve its own inherently irreconcilable authority, and to frankly resolve all of the related issues, reversals occur on this issue fairly often, but the decisions seem little more than ad hoc random judgments. See, e.g., *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990). The Supreme Court has recognized the conflict among the courts of appeals, but has not resolved it. See *Green v. United States*, 474 U.S. 925 (1985) (White, J., dissenting from denial of certiorari).

The Seventh Circuit has shown some interest to confront the thicket of quantum of proof problems for the presentation of the entrapment defense. In *United States v. Evans*, 924 F.2d 714 (7th Cir. 1991), the Seventh Circuit set down an exceedingly difficult test before a defendant may receive an entrapment instruction, holding that "extraordinary inducement" by the government was required before a jury question on entrapment was generated. The *Evans* approach to the availability of an entrapment instruction seems somewhat stricter than most of the other circuits. The Seventh Circuit's strict approach to the availability of defense theory of the case instructions also seems at odds with the more liberal principle that it implicitly endorsed in *Walters*.

Definitional problems with hearsay also present a hopelessly convoluted area where a coherent innovative doctrinal reevaluation would be particularly welcome. Hearsay issues relating to evidence of state of mind are of vital importance in criminal prosecutions, where state of mind evidence often is determinative on whether guilt can be established beyond a reasonable doubt. Because the myriad of evidentiary issues are subject only to appellate review for abuse of discretion, this tends to make Supreme Court resolution of a particular issue particularly uninviting. It also tends to hinder the development of a "correct" and balanced body of appellate case law. See, e.g., *United States v. Mokol*, 939 F.2d 436, 440 (7th Cir. 1991) (appellate court noting it "may not have decided issue of admissibility of [proffered evidence] in the same way as district court," but trial court determination was not an abuse of discretion). Here the Seventh Circuit could take a trail blazing role in the development of a more coherent, and correct, body of Federal Evidence Law.

An academic debate has been long brewing concerning whether "verbal conduct" which implies something other than what was explicitly said constitutes hearsay. A related definitional problem exists with statements ostensibly offered as "circumstantial evidence of state of mind." Several scholars have taken the position that such statements are not hearsay. See generally, Glen Weissenberger, *Hearsay Puzzles: An Essay on Federal Evidence Rule 803(3)*, 64 TEMP. L. REV. 145 (1991); James McElheny, *It's Not for Its Truth*, 77 A.B.A.J. 80 (Oct. 1991). Courts often fall for this trap, and admit evidence without exposing it to the hearsay gauntlet. On the other hand, other scholars have disagreed with that conclusion. See generally, PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 268-70 (2d ed. 1990). To make matters more confusing, Federal Rule of Evidence 803(3) excepts from hearsay exclusion statements of then existing state of mind, but that rule is itself deceptively confusing.

This hearsay maze is far too complicated to be sorted out here and no such effort has been attempted. Suffice it is to say that hearsay definitional issues have too long been the exclusive domain of law professors, and a case raising fundamental hearsay definitional problems is not likely to appear on the Supreme Court docket anytime soon. Accordingly, the time is ripe for an innovative intermediate appellate court to reevaluate this issue with vigor.

The Seventh Circuit has already made several promising recent forays into the hearsay definitional thicket. See, e.g., *United States v. Peak*, 856 F.2d 825 (7th Cir.) ("statement" by a non-testifying defendant that a plan was "crazy" was hearsay, but admissible under the state of mind exception to the hearsay rule), *cert. denied*, 488 U.S. 969 (1988); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991) (evidence (letters written by the donor expressing his love to the defendant) was not hearsay because it was offered not for the truth of the matter asserted, but was offered for the purpose of showing that she believed the things given to her were gifts—court acknowledges the possible unfair confusion of admission of evidence that would otherwise be excludable as hearsay, holding that fair trial concerns overrode any possible evidentiary bar to the admission of the evidence); *United States v. Heidecke*, 900 F.2d 1155 (7th Cir. 1990) (when the defendant sought to

This symposium does not pretend to present a comprehensive overview of every aspect of Seventh Circuit criminal law jurisprudence. The principal articles focus on several criminal law issues from different perspectives. Dan Webb, former United States Attorney for the Northern District of Illinois, Steven Molo, and James Hurst take a renewed look at an old issue—the Hobbs Act—which has a venerable history in the Seventh Circuit. Hobbs Act jurisprudence might be ripe for a fundamental reevaluation in light of the Supreme Court's decision to grant certiorari in *United States v. Evans*.<sup>100</sup>

This symposium also offers an analysis of the Seventh Circuit's approach to the Federal Sentencing Guidelines. The Guidelines constitute an enormous and evolving body of new federal criminal law whose development has been left largely to the federal courts of appeals.<sup>101</sup> Terence MacCarthy, Executive Director of the Federal Defender Program in the Northern District of Illinois, and Nancy Murnighan, analyze the Seventh Circuit's interpretation of the Federal Sentencing Guidelines. Compared to past federal sentencing practices, the Guidelines provide more avenues for both the defense and prosecution to appeal sentencing decisions. As a consequence, a potential for the development of a more "balanced" appellate caselaw is present. In the authors' view, the Circuit has failed, at least at this point, to develop the hoped-for balanced approach to the application of the Guidelines.

Next, the symposium offers a forward look at an emerging federal

admit his own statements via the state of mind exception to the hearsay rule, the court implied the argument had some merit, but dismissed the argument, holding that "[t]o a limited extent, Heidecke's arguments do raise possibly legitimate exceptions to the hearsay rule," but finding error harmless). *Id.* at 1163. However, even *Heidecke* is illustrative of the Seventh Circuit's willingness to confront the hearsay definitional problems, since the court at least recognized the dangers to the hearsay rule if too loose a standard was employed in defining statements as non-hearsay. *See id.* at 1163 (defendant's view that statements were not hearsay "would restyle the hearsay rule into an evidentiary presumption of admissibility"). It is worth noting that, often, prosecution efforts to admit evidence as non-hearsay when offered to show state of mind, often receive a warmer and less critical reception by the court. *See, e.g.,* *United States v. Colston*, 936 F.2d 312, 317 (7th Cir. 1991) (admission of prosecution offered evidence to show state of mind, and thus not hearsay, not an abuse of discretion), *cert. denied*, 112 S. Ct. 403 (1991).

The above cases are not necessarily consistent or all encompassing. Much more needs to be done. Accordingly, the Seventh Circuit should build on these cases and take the lead and continue to develop the comprehensive analysis of the hearsay definitional problems. No better use of the Circuit's tremendous intellectual firepower could be made.

100. 910 F.2d 790 (11th Cir. 1990), *cert. granted*, 111 S. Ct. 2850 (1991). As this symposium entered its final editing stages, the Supreme Court decided *Evans*. *See* Webb et al., *supra* note 42, at Postscript, 67 CHI.-KENT L. REV. at 50.

101. To date, the Supreme Court has decided a handful of Guidelines cases. In contrast, the American Bar Association Committee on Criminal Justice Reports that the twelve Circuit Courts of Appeals have published over 1,200 opinions interpreting the guidelines. *Federal Sentencing Guidelines: An Overview, Update and New Strategies* i (ABA Section on Criminal Justice 1991). That number has increased significantly in the one year since the publication of that study.

criminal law issue, the federal death penalty. Because of its political and election year overtones, this issue is likely to be emphasized to a degree far disproportionate to its real importance in the federal criminal justice system. As already noted, by happenstance, the Northern District of Illinois, within the Seventh Circuit, was home to the first federal prosecution where a federal death penalty was sought since the Supreme Court decided *Gregg v. Georgia*.<sup>102</sup> Professor Sandra Jordan, a former Assistant United States Attorney and former Iran-Contra Special Prosecutor, analyzes the federal death penalty law which puts the Seventh Circuit, along with its sister circuits, back in the federal death penalty business. This business will likely pick up as the Congress continues to grapple with proposed legislation that would expand the federal death penalty to cover over fifty additional offenses. Professor Jordan notes that the basic presumption that the federal courts will be able to find experienced death penalty defense lawyers may be put to a severe test in states where there is no state death penalty, and hence a dearth of experienced death penalty litigators. This issue will be of significant concern in the Seventh Circuit, where any federal death penalty prosecution in Wisconsin, a state that does not have a death penalty, will likely raise serious constitutional issues concerning the imposition of the federal death penalty.

Finally, given that much of the undercurrent of the direction of the Seventh Circuit derives from whether Judges Posner and Easterbrook are so impatient that they are ignoring existing Supreme Court precedent, a careful look at one issue where the Circuit may be getting ahead of the Supreme Court is in order. Stepping into this abyss is Professor Anne Bowen Poulin, former Assistant United States Attorney in the Northern District of Illinois. Professor Poulin explores the Seventh Circuit's fourth amendment "arrest" jurisprudence, and rather politely concludes that the Circuit is moving beyond the parameters enunciated by the Supreme Court. Some of the larger themes that may emanate from that analysis have been highlighted in this Foreword.

Given the relatively short fuse that accompanies many federal criminal law issues, (and the relatively long fuse attached to law review production schedules), it is possible that some of the issues addressed herein may have been "resolved" by the Supreme Court by the time this symposium goes to print. But that really is not relevant. By focusing on the spectrum of a decision-making process—be it the past (Hobbs Act analy-

102. 428 U.S. 153 (1976). In *Gregg* the Supreme Court upheld the constitutionality of various statutory procedural safeguards which the Court determined were sufficient to ensure that the death penalty would be imposed in a just and rational manner.

sis); the present (the Circuit's approach to the Sentencing Guideline and fourth amendment arrest jurisprudence), and the future (the likely issues arising from the federal death penalty statute)—the symposium is meant to transcend particular resolution, by the Supreme Court or by legislation, of any particular issue. After digesting these several perspectives, perhaps the reader can taste a directional flavor of the Seventh Circuit as a Criminal law court.

## V. POSTSCRIPT

On March 6, 1992, the Supreme Court decided *Williams v. United States*.<sup>103</sup> In *Williams*, a case arising out of the Seventh Circuit, the Court held, 7-2, that where a district court incorrectly applies a guideline and relies on an improper ground in departing upward from a guideline range under the Federal Sentencing Guidelines, a reviewing court may not affirm the sentence based solely on its independent assessment that the departure was reasonable.<sup>104</sup> Rather, a remand is required unless the reviewing court can ascertain that the district court would have imposed the same sentence had it not relied on the improper factor or factors. Thus, the Court vacated the lower court opinion, which had held that a remand was unnecessary if the reviewing court's independent assessment of the valid factors concluded that the sentence was "reasonable."<sup>105</sup> Justice O'Connor, writing for the seven Justice majority, sternly admonished the Seventh Circuit:

The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence." . . .

[I]t is the prerogative of the district court, not the court of appeals, to determine in the first instance, the sentence that should be imposed in light of certain factors properly considered by the Guidelines.<sup>106</sup>

*Williams* is, at bottom, a decision concerning the scope of appellate review and use of judicial resources. The Seventh Circuit's decision below was the obverse of the more common situation where an appellate court applies cursory, harmless error review to affirm the lower court,

103. 112 S. Ct. 1112 (1992) (*vacating and remanding* 910 F.2d 1574 (7th Cir. 1990)).

104. 112 S. Ct. 1112. Justice O'Connor wrote the majority opinion. Justices White and Kennedy dissented.

105. *United States v. Williams*, 910 F.2d 1574 (7th Cir. 1990). The panel consisted of Judges Wood, Ripple and Senior Judge Eschbach. *Id.* at 1576.

106. *Williams*, 112 S. Ct. at 1121-22 (citations omitted).



thereby obviating the need for a remand for further judicial proceedings. Here, the Seventh Circuit had endorsed a type of hyper-appellate review, an independent assessment of reasonableness, to achieve the same result — affirmation of a district court result that would obviate the need for a remand for further judicial proceedings.

Read narrowly, *Williams* is a technical decision concerning statutory interpretation.<sup>107</sup> Thus, one must be careful not to read too much into the decision. Nonetheless, *Williams* presented the Court with an opportunity to review a Seventh Circuit decision containing implicit, yet significant caseload management ramifications, and the Court rather resoundingly declined to endorse the Seventh Circuit's relatively moderate approach.<sup>108</sup> For those Seventh Circuit members who advocate an even more radical approach to resolving issues imbued with caseload management and standard of review ramifications, *Williams* hardly suggests that the dawn of their new day is imminent.<sup>109</sup> In the aftermath of *Williams*, the manner in which the Seventh Circuit confronts caseload management and standard of review issues merits even more scrutiny. Stay tuned.<sup>110</sup>

107. The case centered around whether departure decisions are properly reviewed under 18 U.S.C. § 3742 (f)(1) or are to be reviewed exclusively under section 3742 (f)(2).

108. It is interesting to note that the Seventh Circuit panel that decided *Williams* did not include either Judge Posner or Judge Easterbrook. See *Williams*, 910 F.2d at 1576 (panel consists of Judges Wood, Ripple, and Senior Judge Eschbach).

109. If the "radical" approach to caseload management is limited solely to advocating deferential standards of review for virtually all trial court decisions, *Williams* conceivably may be seen as not inconsistent with that approach. However, if the concept of "caseload management" is viewed more broadly, then *Williams* cannot easily be interpreted as placing a super priority on caseload management concerns of the federal court system.

110. Two recent cases further illustrate the escalating tensions within the Seventh Circuit on constitutional standard of review issues in criminal cases. First, in *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991), the court returned to the vexing issue of determining the appropriate standard of "harmless error" review on collateral review of state court judgments. Bucking its own precedents, the law in many other circuits, and arguably the Supreme Court as well, the court, per an opinion by Judge Easterbrook, held that "the standard of harmlessness on collateral enforcement of prophylactic rules is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 1375. Under this standard, establishing that an error was harmless is not as difficult as having to establish that the error was "harmless beyond a reasonable doubt." The practical effect is that more errors will be deemed harmless and the habeas relief will be less available to remedy admitted errors below. The *Brecht* opinion is replete with references to federalism and court efficiency concerns. See *id.* at 1372-73. This position was foreshadowed in Judge Easterbrook's and Judge Posner's en banc concurrence in *Hunter v. Clark*, 934 F.2d 856, 865 (7th Cir.) (concurring opinion), *cert. denied*, 112 S. Ct. 388 (1991). See discussion at text accompanying notes 92-95 *supra*.

Unlike the Third Circuit's efforts to predict Supreme Court doctrine in light of subsequent Supreme Court opinions and changes in the Court's personnel, see text accompanying notes 96-97 *supra*, *Brecht* seems grounded in a naked reevaluation of existing precedent. This shunting aside of controlling precedent by an intermediate appellate court was not accepted quietly. Five Seventh Circuit judges, including Judges Flaum and Ripple, voted in favor of a rehearing in banc, but fell one vote short. *Brecht*, 944 F.2d at 1376 n.\*. Judge Cudahay, the third panel member, concurred in the judgment but also voted to rehear the case in banc. *Id.* at 1376. In his concurrence, he indicated that he believed the panel majority improperly overruled the existing Supreme Court "harmless

beyond a reasonable doubt" standard required by *Chapman v. California*, 386 U.S. 19 (1967). The Supreme Court granted certiorari in *Brecht*, 60 U.S.L.W. 3827 (1992), thus insuring that the Court will confront at least one Seventh Circuit generated constitutional standard of review issue during the 1992-93 Term.

Second, in *United States v. Spears, et al.*, 1992 App. Lexis 12298 (7th Cir. (as amended) June 9, 1992), a panel of the Seventh Circuit (which included Judge Posner) elevated a prior Judge Posner concurrence to the law of the circuit at the expense of other Seventh Circuit precedent. This time, *United States v. McKinney*, 919 F.2d 405 (7th Cir. 1990), was the casualty. In *Spears*, the panel adopted a deferential clearly erroneous standard of review for reviewing probable cause determinations in warrant and non-warrant cases. *Spears*, 1992 App. Lexis 12298, at \*26. The *McKinney* majority had held that such determinations in warrant cases were subject to some intermediate level appellate scrutiny more deferential than *de novo* but less deferential than clear error. As with *Brecht*, the end result is the development of doctrine that removes classes of constitutional issues from significant appellate review.

This time, four members of the court (including Judges Flaum and Ripple) dissented from a denial of a rehearing en banc. The four judges criticized the panel for demeaning the status of the Circuit's fourth amendment jurisprudence and of "scuttling searching appellate review in this crucial area." *Spears*, 1992 App. Lexis 12298, at \*65. (Flaum, J., dissenting from denial of hearing en banc). The dissent further decried the panel's "rush to extinguish [McKinney]" without benefit of full briefing and argument," *id.* at \*60, and further lamented that the "unfortunate consequences [of the panel's decision] will be the curtailment of th[e] dialogue" of meaningful appellate review of magistrates' probable cause determinations which had served to promote accuracy and uniformity of the application of the fourth amendment. *Id.* at \*63. Finally, for good measure, Judge Flaum appeared to mock the law and economics jargon for which Judge Posner is famous by contending that the "clear error" standard would herald a "new 'unregulated' marketplace of probable cause." *Id.* at \*64.

The judicial pyrotechnics of the Seventh Circuit are really only beginning. The Seventh Circuit in the nineties will certainly be interesting.

