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Decision-Making in the United States Court of Appeals

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I am very pleased to have this opportunity to address the distinguished faculty of my alma mater. I know that it is a distinguished faculty, because it was so difficult to become a part of it. The screening process was more stringent than the one I went through to become a United States Circuit Judge. The faculty applied the strict scrutiny test to me. Recently, I underwent a retention election. The Professor who evaluated me said my teaching technique was okay but that I needed more practical experience. He also said that it would look better if I could have some writings published.

This faculty, as well as the students and alumni, owe a lot to the Dean -- ulcers, headaches and similar ailments. The Dean is writing a book -- "How to Win Friends and Influence the Chief Justice of the United States." He recently said that the new Chief Justice would not be an effective leader of the court and, if he were effective, we should all be frightened. What frightens me is that people who graduated from Yale in the 60's now are law school deans. Jim Simon comes to us after a successful career in Uttar Pradesh, India. We are most fortunate to have as Dean a man who has become a legend in his own mind.

Seriously, I do wish to congratulate the faculty. I think that this school is fortunate to have first-rate scholars but,

more importantly, first-rate teachers. You have trained some magnificent young lawyers, and I have reaped the benefit of your work. Last year, in my Circuit Chambers, I had Michael Roffer and Phil Essig, who were of great help to me during my first year on the Circuit Court. Michael now is with Skadden Arps and Phil is with Cahill Gordon. Both earn more than I do. This year, I am fortunate to have two especially brilliant people you have trained -- Charles Sullivan and Holly Januszkiewicz. As I travel around to participate in seminars, symposia and moot courts, I have had the opportunity to meet and speak with law professors from all over the country. These meetings and conversations convince me that the best law faculty in the nation is right here at New York Law School. All that you need is more visibility, and I shall do everything I can to help you in that regard.

I have been asked what life really is like behind the scenes at the Second Circuit Court of Appeals. I shall therefore take some time before my discussion of decision-making to give you some "brethren"-type information. My brothers and sister are, of course, a fascinating group. I could say that we all are kind, warm, friendly people; I could say it, but it wouldn't be true. A district judge, I'll call him Judge "X," once compared us to soldiers who come onto the battlefield after the battle and shoot the wounded. He said that, because we once wrote an opinion reversing one of his decisions in the following words: "This is an appeal from a decision by Judge X, and we reverse for other reasons as well."

One of my colleagues dissented from one of my decisions in these words: "I dissent, substantially for the reasons given in the majority opinion." He later changed it to a concurrence: "I concur in so much of the majority opinion as is supported by the reasoning therein and dissent from the remainder." One of our judges told another that his clerks had done most of the work on a particular decision. The second judge then quoted a portion of the bible that he said pertained to law clerks: "Methusaleh leaned on his staff -- and died."

My colleagues really shine during oral argument. A lawyer began his argument: "I represent a very unfortunate client." He started again: "I represent a most unfortunate client." The Presiding Judge said: "Keep going. We agree with you so far." A pro se litigant started her argument by saying: "God is my lawyer." I think it was Judge Kaufman who told her: "You should have someone locally."

Sometimes, we talk to each other on the bench. During one oral argument by very distinguished counsel, a colleague leaned over and said: "When they made him, they threw away the shovel." Recently, a lawyer opened his argument with these words: "May it please the Court, my client sustained severe injuries when he fell from the loading dock at the post office. Because of these injuries, he is unable to have marital relations more than five times a week." A colleague whispered to me: "Where the hell is that loading platform?" The same judge described the talents of

one overrated appellate advocate in these words: "He can take any dry case and make it dull and boring."

I now turn to my discussion of decision-making in the United States Court of Appeals for the Second Circuit. I paraphrase Bismarck when I say that judicial decision-making is like sausage: It's better not to know what goes into it. However, because some of you have expressed some interest in the subject, I shall undertake a brief discussion of the mechanical, as well as the intellectual ingredients of appellate decisions in my Court. Following that, I shall describe how a specific case, involving a claim of age discrimination in employment, gave rise to a rule of law in our circuit. If anybody is awake thereafter and time permits, I shall then take some questions.

Between 1952 and 1982, while the nation's population increased by 50%, appeals to the circuit courts grew by 808%. In 1985, more than 33,000 appeals were filed in the circuit courts nationwide, about 6% more than in 1984 and almost 44% more than in 1980. In 1985, 2,837 cases were filed in my Court in 1985, up from 2,153 in 1980. We issued 1,219 decisions last year, comprised of 508 signed opinions, 53 per curiam opinions and 658 summary orders. Decisions in the latter category are not published, are not uniformly available and cannot be cited because they are deemed to be with precedential value. There are 168 circuit judges serving in the 13 federal circuits. Twenty-four of those judges hold seats first established by

Congress in 1984. There are 13 seats in the Second Circuit, two of which were established in 1984.

I give you these statistics to demonstrate the caseload pressures and time constraints under which we labor. I offer this information to dispel the myth that circuit judges have sufficient time for study, reflection and writing. It is in fact almost impossible to give each case the consideration to which it is entitled, and the first reaction of new clerks is amazement at the speed with which we must do our work.

Two to three weeks before each scheduled sitting, boxes and cartons arrive at Chambers in Albany from the Clerk's office at Foley Square. Contained in these packages are the briefs and appendices containing relevant parts of the record in the twenty-seven or twenty-eight cases to be heard by the three-member panel to which they are assigned. The cases will be sorted into files by the two secretaries and three clerks who comprise the Chambers staff. Before the sitting, I will have read each one of the briefs and skimmed each one of the appendices. In addition, the pro se law clerks employed by the Court will have provided a bench memorandum with recommendations as to each pro se appeal, and my clerks will have done the same as to all the other cases.

As we work along toward the sitting week, I discuss with my clerks the cases they have been assigned. Although the responsibility for writing bench memos is divided, each clerk receives a copy of the memos written by the other clerks. In

this way, I can have input from each clerk on all the cases prior to argument. In addition, it is a tradition in my Chambers that the clerks have dinner with me one evening a week. We take that occasion to have some far-ranging discussions about the cases coming up at the next sitting as well as the progress of the opinions being drafted. It should be apparent that the decision-making process is in a very advanced posture by the time I arrive at my New York City chambers for the sitting. By that stage, I have formed at least a tentative opinion in each case, subject to persuasion by oral argument or by discussion with my colleagues.

The Second Circuit is the last federal court of appeals to maintain the tradition of oral argument in each case. Although all the other circuits pre-screen cases for oral argument, we continue the practice of allowing argument to all who request it, including pro se litigants. The judge presiding sets the time limits, which range from five to twenty minutes per side. A recent exception was the Agent Oranges cases. I was a member of the panel hearing those cases, and we had two days of argument, the longest since the Learned Hand Court heard the Jones & Laughlin Steel case.

In spite of what some may think, oral argument continues to be a vital part of the decision-making process. Quite often, a judge will remark, following oral argument, that his perception of the case was turned completely around by the oral exchange. That being true, it is a source of increasing concern to me that the state of appellate advocacy in general, and appellate oral

advocacy in particular, is so poor. Dean Jonakait has been quoted as saying that advocacy courses should be part of the core curriculum. To that, I say "Amen." The best appellate advocacy today is in the law school moot court competitions.

Final decision-making occurs in the robing room following oral argument in some of the cases. Tentative votes are recorded in other cases, and voting memos will be exchanged in the remainder. Voting memos are a long standing tradition in the Second Circuit and customarily are exchanged on the day of oral argument or on the following day. These memos provide a written record of a judge's vote as well as a brief summary of rationale. They are of great value to the judge ultimately assigned to write the opinion. Some appeals are determined to be of so little merit that summary orders of affirmance are drawn and signed on the day of argument.

The sitting week includes intense concentration on decision-making. The two clerks and one secretary who accompany me to New York are busy in drafting summary orders and assisting with bench memos and research. In addition, a number of substantive motions require the attention of the staff during the week. At week's end, the judges meet and review all the cases heard during the week, discuss the voting memoranda and describe any additional thoughts they may have had since the memoranda were exchanged. The votes are then taken and recorded, and opinions are assigned by the senior active judge, unless that judge is the dissenter. In the latter case, the next senior

active judge assigns. Thus ends the decision-making process. Or does it? It does not, because the circulation of opinions may lead to shifts in position as the judges reconsider the positions they have taken right up to the filing of the opinion. This will be illustrated in the actual case I intend to discuss later.

Usually, there are between five and ten cases assigned to me for written opinions in various stages of completion in my chambers. Although I would prefer to do the first draft of each opinion, time constraints make that impossible, so I share first draft responsibilities with the Clerks. I do insist on doing my own first drafts in all concurring and dissenting opinions, all voting and other memoranda and in all other correspondence addressed to my colleagues. Sometimes, I seek comments from my Clerks on extracurricular articles and speeches I have written. All first drafts of opinions undergo extensive revisions at my hands. Finally, I conduct a conference, with all Clerks present, to review penultimate draft of the opinions. Fine tuning occurs at that time, and the opinion is ready for circulation to my colleagues on the panel.

The decision-making process continues. Our tradition is to put aside all other work on receipt of a colleague's opinion in order to review and comment immediately. If a Judge is satisfied with a colleague's opinion, a small tab with the words "I concur" will be returned to the writer to attach to the original opinion when it is filed. Sometimes, the concurring tab is accompanied by a memo suggesting, but not requiring, certain changes in the

opinion. On occasion, a memo comes in unaccompanied by any tab. The memo might say: "I intend to concur if you change this paragraph or that sentence or this rationale. If you do not, I shall be constrained to concur or dissent, or something." It is at this point that I begin to think that I should have remained a trial judge. In any event, the decision-making process continues in an effort to accommodate the views of all panel members -- "hunting for the elusive tab," as I call it. Of course, the tab may come in with the words: "I concur in a separate opinion" or "I dissent in a separate opinion," accompanied by an appropriate concurrence or dissent.

The decision-making process becomes very intense as the opinion circulates. The panel members may confer by telephone in an effort to reach consensus as perceptions of the case shift. The panel may be realigned as to rationale or as to the bottom line of the decision. When it all shakes out, the writer has in hand the finally revised opinion and possibly one or two concurrences or a dissent. If a dissent, the two judges in the majority will confer to decide whether any refutation of the dissent should be included in the majority opinion. The dissenter may wish to refute the refutations of the majority. Eventually, the opinion gets filed. But filing is not the end of the decision-making process.

In a great number of cases, a petition for rehearing with a suggestion for a rehearing in banc is filed. The panel members thereby get another crack at the decision-making process.

Recently, a panel of which I was a member was constrained to grant such a petition because we had granted relief in favor of a non-appealing party. If there is a vote to deny rehearing, the petition then is circulated to the entire court along with the panel vote. Any judge may then call for a vote on a rehearing in banc. A majority vote of the active judges is needed to convene the court for such a rehearing. Although that is rare, we did sit in banc earlier this month to hear a case involving the Hobbs Act. After such a sitting, the decision-making process continues, with the exchange of voting memoranda and the assignment of the case to a judge who will have the great good fortune of pulling together the voting memoranda of a majority of the court in a way that will satisfy all. With the filing of the majority opinion and the concurrence and dissents, if any, of the in banc court, the decision-making process is concluded -- until, of course, the case is remanded from the Supreme Court for further proceedings.

Reflecting on the intellectual process of appellate decision-making in the Second Circuit after a year on the job, I am impressed by the narrow constraints by which we are bound. For example, we are required to accept the factual findings of the Trial Judge, unless they are clearly erroneous. I have long held the belief that in most cases, a statement of the facts dictates the legal conclusion. Although it sometimes seems apparent to me that the facts are different from those found by the Trial Judge, I cannot say that the findings are <u>clearly</u>

erroneous. So in a number of cases where it is apparent to me that the result should be different, there is nothing I can do about it. I recall the words of Professor Ivan Soubbotitch, who said: "In the practice of law, you will deal with fect much more than with law." Students should continue to be aware of that.

Precedent and stare decisis also constrain the intellectual process of decision-making. If there is a precedent in the Second Circuit, it is not easily overruled by our Court. If a panel considers it necessary to depart from circuit precedent, the opinion is circulated to the entire court for comment. If there is precedent in another circuit, we must distinguish it, agree with it or give it careful reason why we disagree. Always, we must make sure that our decisions are consistent with Supreme Court doctrine.

In the interpretation of statutes, the various rules of construction establish the parameters of decision-making. Always, there is the temptation to apply judicial gloss and to fill in that which Congress has omitted, a temptation I am happy to avoid in the Frankfurter tradition. "Divining Congressional intent" is the term that is used, because the skills of a fortune teller are called for. In connection with the interpretation of a criminal statute, I recently asked my class why it was necessary for the Court to read into a statute something that Congress did not put there -- why the Judiciary was any better than the Congress to deal with the problem. A student answered: "More able minds," an answer I found flattering but a very poor

reason for judicial law-making. At any rate, my point is that, although the courts sometimes have gone afield in statutory interpretation, they are constrained by many rules of limitation.

There are other limits upon the intellectual decision-making process in the form of rules we must abide by: that federalism counsels restraint when passing upon state action; that evidence in a criminal case is viewed on appeal in the light most favorable to the government; that generally, error cannot be assigned on appeal unless there are proper objections in the trial court; that matters cannot be raised for the first time on appeal. This is a work in progress and I am sure that there are many more limitations. My thesis simply is that appellate judges work within a very narrow compass indeed.

Working within that compass, however, there is room for some flexibility and creativity in both the reviewing for correctness and law-making functions in the Courts of Appeals. This brings me to my illustration of a case that brings the whole process together. The case is Hyland v. New Haven Radiology Associates, and the final decision is found in 794 F.2d 793 (2d Cir. 1986). Dr. Hyland was a radiologist and a founder, officer and equal shareholder in the defendant professional corporation. The corporation was formed to conduct the practice of radiology and performed all such services for a local hospital. All the founding members contributed the same amount of capital, drew the same salaries and benefits, had equal voices in management and shared equally in profits and losses. They each executed

customary shareholders' agreements as well as agreements governing their employment by the corporation.

Apparently, certain problems arose and the plaintiff was asked to resign his position. He entered into an agreement relating to the termination of employment and then sued in the United States District Court, claiming, among other things, that the corporation had discriminated against him because of age, in violation of the Age Discrimination in Employment Act.

The issue before us was whether the plaintiff was entitled to the benefits of the Act as an employee of the corporation or whether the district court was justified in holding that he should be considered a partner and therefore not entitled to the benefits. The district court held that the enterprise was managed and operated like a partnership and that the corporate entity was chosen merely to gain advantageous tax and civil liability treatment.

My initial impression was to affirm, since I agreed that the so-called economic realities test should be applied. The test had been developed in a number of cases as a means of distinguishing employees from independent contractors or partners in other contexts, including anti-discrimination litigation. In the original exchange of voting memoranda, the Presiding Judge voted to affirm on the basis of the economic realities test; the other member of the panel voted to reverse on the application of a per se rule. In my voting memorandum, I agreed with the Presiding Judge that the economic realities test should be

applied but voted to reverse on a finding that the plaintiff was an employee under that test on the facts of the case.

We continued to discuss the case after returning to our home chambers and finally agreed that there should be no per se rule but that the plaintiff qualified as an employee. The Presiding Judge assigned himself to write the opinion. When the opinion came to me, I agreed with the ultimate conclusion but decided that I could not go along with the rationale and so indicated in a memorandum. The writing Judge weighed in with his memorandum to the effect that his proposed opinion was a compromise anyway, and that he would revert to his original position in favor of affirmance, essentially for the reasons given by the trial court. The other Judge wrote a memo that he too would revert to his original position, the position with which I had come to agree.

Following a telephone conference, we decided that we could not arrive at a consensus in this case, and the original writer became the dissenter. The majority opinion was assigned to me by the third Judge, who had seniority. The result, a per se rule in the case of corporate employees who sue for ADEA violations, is now the law of the circuit. In writing the opinion, I was required to disagree with a Seventh Circuit case that held, without further analysis, that the role of a shareholder of a professional corporation is more analogous to a partner in a partnership than it is to the shareholder of a general corporation. I wrote, however, that "[i]t is one thing to apply an economic realities test to distinguish an employee from an

independent contractor or partner, but it is quite another to apply the test in an attempt to identify as partner one associated with a corporate enterprise." The dissent applied the realities test and found the plaintiff to be a partner and therefore not an employee entitled to the benefits of the ADEA. In any event, the judgment of the district court was reversed and the matter "remanded for further proceedings consistent with the foregoing."

I told you it was like sausage.