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SNAPSHOTS FROM THE SEVENTH CIRCUIT:
CONTINUITY AND CHANGE, 1966–2007

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Good afternoon. It is an enormous honor and pleasure—albeit a somewhat bittersweet one—to be here with you today to deliver the nineteenth Thomas E. Fairchild Lecture. I had hoped very much that the extraordinary and distinguished man for whom this lecture is named would be with us, one more time, this year, but unfortunately that was not to be. Nonetheless, for anyone even remotely associated with the United States Court of Appeals for the Seventh Circuit, it will be a very long time before it will be possible to think of the court without thinking at the same time of Judge Fairchild. The court opened its doors on June 16, 1891,¹ almost 116 years ago. Judge Fairchild’s official commission was dated August 11, 1966.² He served and contributed actively to the court’s work literally up until the date of his death on February 14, 2007—that is, for a period spanning almost forty-one years. Put differently, for more than one-third of the time that the Seventh Circuit has been in existence, Judge Fairchild was part of it.

Judge Fairchild began his service on the court at a time when the federal courts as an institution were experiencing dramatic change. His colleague and mine, Judge Richard A. Posner, has suggested that the year 1960 was “a turning point in the history of the federal judiciary.”³ Perhaps that is when the ship began to turn, for reasons we can discuss. But the shift to the system we know today was still in its early stages in 1966, when Judge Fairchild left the Supreme Court of Wisconsin and joined his colleagues in Chicago. For that reason, the story of Judge
Fairchild’s career on the Seventh Circuit is, in many ways, a microcosm of the modern story of the federal judiciary as a whole. I therefore begin by reviewing some of the broader changes that have occurred in the federal courts from 1966 to the present. Because it would be impossible to review all of Judge Fairchild’s many contributions to that process, I then focus on some representative years in his tenure, beginning with the judge’s first year or so on the court, and then proceeding roughly by decades up until the present time. Because Judge Fairchild, by then in his nineties, had reduced his caseload down to a small fraction of that of an active judge by the midpoint of the 2000s, I complete the tour of the Seventh Circuit’s experience with a brief glance at my own published opinions from the year 2006.

The changes are indeed dramatic. In a small way they may help to explain why the process of choosing and confirming judges was not as contentious in the mid-1960s as it is today; why even less attention was paid to the courts of appeals than is the case now; and how the job of being a federal judge has changed, in some ways for the better and in some for the worse.

I. EVOLUTION OF THE FEDERAL COURTS IN GENERAL

Those who have followed the annual reports on the judiciary prepared by the Chief Justice of the United States know that federal judges today believe themselves to be overworked and underpaid. Both of those perceptions are contestable, of course, but it is helpful to look behind them and see what empirical data may support or refute them.

The first and easiest measure of workload is the number of cases commenced and terminated in each year. In 1960, for the entire country, that number was 3,899. Total terminations were somewhat less—3,713—of which about 1,000 were procedural terminations and about 2,700 were terminations on the merits. By 1966, the numbers were already swelling: there were 7,183 cases commenced and 6,571 terminated, of which 4,087 were terminations on the merits. Jumping ahead to 2005, however (the latest year for which complete statistics were available from the Administrative Office of the United States Courts), at the national level there were 68,473 filings (excluding those for the United States Court of Appeals for the Federal Circuit); the Seventh Circuit alone had 3,789, slightly fewer than the entire nation...
The termination number is equally large: 61,975 cases terminated nationally, 3,706 in the Seventh Circuit. Who has been doing all of that work? If you said, "The judges," you would be only partly right. Although the absolute number of federal judges (the only ones I am discussing here) has increased since 1960, or 1966, the number of judges as a percentage of the total workforce of the Judicial Branch has shrunk. In 1965, the Judiciary employed 6,461 people, of whom 393, or 6.1 percent, were Article III judges (that is, district-court judges and court-of-appeals judges—the data exclude the Supreme Court and what has become the Federal Circuit). In 2005, the total workforce of the Judicial Branch had mushroomed to 34,045, but the total number of Article III judges (including senior judges and assuming no vacancies) had expanded only a little more than threefold, to about 1,350 (4 percent of the total). Each circuit judge in 1960 was entitled to one law clerk; in 1970 the number went up to two, and in 1980 the number reached three, where it remains today for an active circuit judge. (Because circuit judges are also entitled to both a judicial assistant and a secretary, some judges choose to use the secretarial slot for a fourth law clerk. Other judges also have volunteer externs who perform roughly the same function as law clerks.) At the court-of-appeals level, there is no equivalent to the magistrate judges who have become essential to the district courts for the processing of their cases. In the field of bankruptcy, however, a new institution called Bankruptcy Appellate Panels, composed of Article I bankruptcy judges appointed by the circuit council, was created in 1984 to relieve the courts of appeals of certain bankruptcy appeals.

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8. Id.
The nature of the work has also changed greatly. Two examples will suffice to make the point: actions under federal civil-rights legislation and habeas corpus petitions from state and federal prisoners. While one could find some cases in the early 1960s that arguably fit within these categories, they were few and far between. Part of the first group, employment discrimination, is almost entirely a creature of statutes that began with Title VII of the Civil Rights Act of 1964 and continued through later laws prohibiting employment discrimination on the basis of age and disability. For almost a century, the law that was originally known as the Ku Klux Klan Act of April 20, 1871 lay almost dormant. Then, in 1961 the Supreme Court decided *Monroe v. Pape*, which held that the statute—by then codified as 42 U.S.C. § 1983—was meant to give a remedy to parties deprived of constitutional rights, privileges, and immunities by a governmental official’s abuse of his position. Professors Fallon, Meltzer, and Shapiro, now the authors of Hart & Wechsler’s *Federal Courts and the Federal System*, note that “[p]rior to Monroe, litigation under § 1983 was infrequent; one commentator reports that there were only 19 cases in the U.S.C.A. annotations under § 1983 in its first 65 years.” The number of cases initiated in the district courts, and thus also appeals, ballooned in later years. The *Hart & Wechsler* authors report that in 1961 only 296 civil rights cases were filed, according to the records kept by the Administrative Office of the United States Courts (AO). In contrast, the most recent Director’s Report, which gives data for the year ending September 30, 2005, shows a total of 36,096 private civil-rights cases filed and another 16,005 prisoner civil-rights petitions, for a total of about 52,000 cases. (Not all of these cases were filed under section 1983. The AO’s data does not give this detail; the trend,
however, is unmistakable.) The numbers for the courts of appeals follow this pattern. I was not able to find the number of civil-rights appeals for 1961, but if there were only 296 district-court cases nationally, the number of appeals must have been very low. Today, if one adds up civil-rights cases in which the United States is the defendant—including employment cases, prisoner cases, and “other” cases—and other civil-rights cases where a state or a private party is the defendant, the grand total reflected in the 2005 Director’s Report is 12,051 appeals. 23

The picture is similar for habeas corpus, despite a number of efforts on the part of the Supreme Court and Congress to rein in the number of petitions that state and federal prisoners file. (Habeas corpus petitions filed by persons whose custody is not the result of a criminal conviction pose significantly different problems. The data do not distinguish among cases on this basis, but one can say generally that many of the procedural devices designed to deter filings by convicted prisoners do not apply to the latter group.) Until the Supreme Court decided Brown v. Allen in 1953, 24 it was not clear whether a federal court considering a petition for a writ of habeas corpus from a state prisoner was entitled to reexamine the merits of federal constitutional claims that the state courts had considered. The Court there held that the answer was yes and thereby laid the groundwork for a vast increase in the habeas corpus business of the federal courts. 25 Later legislative developments have changed the rule in Brown but, interestingly, have not stemmed the tide of petitions, at least to the degree the drafters might have wished.

The other case that gave the green light for these claims was Fay v. Noia, 26 which took a very forgiving view—later rejected in legislation—toward so-called procedural default. 27 Only claims where the petitioner had “deliberately by-passed” a state procedural mechanism were foreclosed, the Court held. 28 Fay apparently had an immediate impact on prisoner filings at the district-court level: in 1960 there were only 871 petitions nationally, but by 1965 the number had jumped to 4,845. 29 Combining motions to vacate sentence, general habeas corpus, and death-penalty habeas corpus petitions, the

25. Id. at 485–87.
27. Id.
28. Id. at 438.
29. See Fallon, Meltzer & Shapiro, supra note 19, at 1312.
corresponding number for 2005 was 35,234. The courts of appeals had almost 4,000 appeals from habeas corpus cases in 2004, in 2005 the number jumped to 6,362, but that surge was probably attributable in part to the effect of the Supreme Court’s decisions in *Apprendi v. New Jersey* and *United States v. Booker*, which, taken together, suggested that prisoners might be able to reduce their sentences significantly. (That hope was dashed when the courts decided that neither decision could be applied retroactively on collateral review, but it took some time for the effect of the latter rulings to be felt.) The point, whether or not the numbers subside again, is clear. For both civil-rights cases and habeas corpus petitions, the business of the federal courts changed dramatically over the years of Judge Fairchild’s service.

Perhaps all of this growth would have been absorbed easily if the number of judges had grown proportionally to the caseload. (Perhaps it would not have; the ability of any group to interact collegially and efficiently will suffer as it grows larger, and an ever-greater number of courts or judges would make it more difficult to maintain uniformity of the law.) But the number of judges did not grow proportionally. In 1965, there were 407 Article III judgeships in the United States, including the nine on the Supreme Court. By 2006, there were 875 Article III judgeships, including eleven temporary slots. The total number of judges serving is higher than that, thanks to the dedicated service of senior judges like Judge Fairchild. But even with the approximately 450 senior judges who donate some or all of their time to the judiciary, it is easy to see that the number of judges has grown much more slowly than the number of cases.

The only responsible reaction to this kind of squeeze is to become more efficient. The alternative is ever-lengthening queues of cases awaiting decision, which is a result that no one wants. Indeed, to the extent that litigants wish to avoid these queues, they are opting out of the judicial system altogether and turning to arbitration and mediation.

35. See, e.g., *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005).
37. *Id.*
The demand for court services nevertheless remains high. For that reason, procedures have changed as courts search for ways to cope with their heavy caseloads.

Many of the steps courts have taken to maximize the contributions of their judicial personnel are familiar. When Judge Fairchild first sat on the Seventh Circuit, oral argument was a given, even for pro se appellants. Today, even though the Seventh Circuit is among the more generous in the country with argument and in principle hears argument in every fully counseled case, that still leaves more than a third of the docket to the strictly written procedures allowed by Federal Rule of Appellate Procedure 34. In the Seventh Circuit, a panel of three judges, assisted by the staff attorneys, convenes in chambers or in a conference room to discuss the nonargued "Rule 34" cases and decide what to do with each one. The cases are typically resolved with a nonprecedential order, rather than a full published opinion. When Judge Fairchild joined the court there was no such animal as an unpublished or nonprecedential disposition. Although they were not formally made part of the Seventh Circuit's set of options until the late 1970s, as early as 1973 the court was beginning to experiment with this device. 38

The larger number of law clerks, both in chambers and in central staff attorneys' offices, has helped the judges manage their growing workload, as have developments in technology that make it possible to do more and better research in the same amount of time and to work at locations far from the courthouse. I sometimes wonder what it was like back in the mid-1960s, as I wade through the piles of briefs that never seem to get smaller. We can all get a glimpse of that if we now turn to what Judge Fairchild was actually doing during the representative periods of time that I have selected.

II. JUDGE FAIRCHILD ON THE SEVENTH CIRCUIT

A. In the Beginning: 1966-67

Judge Fairchild's commission was signed by President Lyndon B. Johnson on August 11, 1966. He took the oath of office on August 24 and immediately took up his duties on the court. 39 The first opinion that I was able to find that he authored was an appeal in a case called Green v. Commissioner 40 from a decision of the United States Tax Court. In that opinion, the court ruled that certain transfers of corporate stock to

38. Interview with Collins Fitzpatrick, Circuit Executive to the Seventh Circuit Court of Appeals, in Chicago, Ill. (Apr. 24, 2007).
39. SOLOMON, supra note 1, at 177.
40. 367 F.2d 823 (7th Cir. 1966).
an attorney yielded money that was properly characterized as interest income, not a capital gain.41 Interestingly, Judge Fairchild was not the junior judge on the panel. The person with that spot was Judge Walter Cummings, whose commission was also dated August 11, 1966 but who was a few years younger than Judge Fairchild and thus "junior" to him as a result of the court's use of birthdays as a tie-breaking device for determining order of seniority.42 The opinion is not particularly notable: this was no Chicago Seven case, for which the Judge later rightly became famous. Instead, it is a concise, workmanlike treatment of a straightforward tax issue, wrapped up in less than two pages. In the end, the case was resolved with the use of two principles that are still as familiar and as important today as they were then: first, that a court must look at "the substance rather than the form of a transaction" in order to determine its tax consequences, and, second, that factual decisions of a lower court should not be overturned unless they were clearly erroneous.43

In all, between Green, which was released on October 21, 1966, and the end of 1967, Judge Fairchild authored twenty-eight signed opinions. Of that group, an astonishing 29 percent—eight opinions—were in diversity cases, that is, suits between citizens of different states in which the governing law was state law rather than federal law.44 These must have seemed quite familiar to him since he had just spent nine years on the Supreme Court of Wisconsin. Another seven cases were criminal appeals.45 Four opinions dealt with patent law46—an area

41. Id. at 824–25.
43. Green, 367 F.2d at 825.
44. The statute authorizing diversity jurisdiction is 28 U.S.C. § 1332. Fleck Bros. Co. v. Sullivan, 385 F.2d 223 (7th Cir. 1967); Mowatt v. 1540 Lake Shore Drive Corp., 385 F.2d 135 (7th Cir. 1967); Doyle v. Nels Johnson Constr. Co., 382 F.2d 735 (7th Cir. 1967); Spurr v. LaSalle Constr. Co., 385 F.2d 322 (7th Cir. 1967); Dorin v. Equitable Life Assurance Soc'y, 382 F.2d 73 (7th Cir. 1967); Jacobson v. Equitable Life Assurance Soc'y, 381 F.2d 955 (7th Cir. 1967); Jonaitis v. General Motors Acceptance Corp., 374 F.2d 867 (7th Cir. 1967); Crown Cork & Seal Co. v. Hires Bottling Co. of Chi., 371 F.2d 256 (7th Cir. 1967).
45. United States v. Dichiarinte, 385 F.2d 333 (7th Cir. 1967) (involved heroin); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967) (involved Hobbs Act and extortion); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967) (involved mailing threatening letters); Ware v. United States, 376 F.2d 717 (7th Cir. 1967) (motion to vacate sentence); United States v. Dillard, 376 F.2d 365 (7th Cir. 1967) (involved heroin); United States v. England, 376 F.2d 381 (7th Cir. 1967) (involved a criminal tax offense); United States v. Bitter, 374 F.2d 744 (7th Cir. 1967) (involved mail fraud).
the Judge singled out as one of his favorites in the Oral History he
prepared with Collins Fitzpatrick, the Circuit Executive of the Seventh
Circuit. 47 (Congress removed patent cases from the jurisdiction of the
regional courts of appeals in 1982 when it assigned exclusive
jurisdiction for this class of cases to the Federal Circuit. 48 But that was
far in the future when Judge Fairchild came to the court.) Two cases
each came from the National Labor Relations Board, 49 the Tax Court, 50
and prisoner complaints 51 and one each from the fields of antitrust, 52
securities regulation, 53 and Social Security benefits. 54 Particularly when
one keeps in mind the fact that in 1966 there was no such thing as the
unpublished or nonprecedential order and that Federal Rule of
Appellate Procedure 34 had not yet been amended to permit courts to
dispose with oral argument, the difference between Judge Fairchild’s
first year and the present is striking. (Indeed, in 1967 the Advisory
Committee on Rules of Procedure was worrying about whether thirty
minutes a side was too stringent a limitation for oral argument—it
thought not, as long as courts were willing freely to grant additional
time.) 55

Time does not permit a close look at all of these opinions, but a
few comments about each group are warranted. Throughout every
subject matter, one consistent theme is that parties are entitled to a full
hearing and that jury verdicts should not be overturned lightly. For
example, in Crown Cork & Seal Co. v. Hires Bottling Company, 56 the
Judge’s opinion reversed a district-court decision dismissing a
complaint by a buyer of goods who pleaded fraudulent
misrepresentation and remanded the case for further proceedings. 57

Packaging Corp., 376 F.2d 384 (7th Cir. 1967); Williams v. V. R. Myers Pump &
Supply, Inc., 371 F.2d 192 (7th Cir. 1966).

47. Interview by Collins T. Fitzpatrick, Circuit Executive, with Thomas E.
Fairchild, Circuit Judge, United States Court of Appeals for the Seventh Circuit, in
Madison, Wis. (Sept. 15, 1992).


49. NLRB v. Clark Products, Inc., 385 F.2d 396 (7th Cir. 1967); Macomb
Pottery Co. v. NLRB, 376 F.2d 450 (7th Cir. 1967).

50. Klarkowski v. Comm’r, 385 F.2d 398 (7th Cir. 1967); Green v. Comm’r,
367 F.2d 823 (7th Cir. 1966).

51. The two prisoner cases were issued on the same day. Cooper v. Pate, 382
F.2d 518 (7th Cir. 1967); Jackson v. Pate, 382 F.2d 517 (7th Cir. 1967).


53. SEC v. Inv. Corp. of Am., 369 F.2d 383 (7th Cir. 1966).

54. Hopkins v. Gardner, 374 F.2d 726 (7th Cir. 1967).

55. See Fed. R. App. P. 34 (advisory committee’s notes from the 1967
adoption).

56. 371 F.2d 256 (7th Cir. 1967).

57. Id. at 257, 259.
Similarly, in *Fleck Bros. Co. v. Sullivan*, the court gave the plaintiff a second chance in a libel case that the district court had rejected, sending it back for further proceedings. Three other cases upheld jury verdicts for plaintiffs: *Doyle v. Nels Johnson Construction Co.* (personal injury at the place of employment), *Spurr v. LaSalle Construction Co.* (personal injury at the place of employment), and *Dorin v. Equitable Life Assurance Society of the United States* (a defamation action). One, *Jonaitis v. General Motors Acceptance Corp.*, upheld a jury verdict for a defendant in a case charging assault and battery in connection with the repossession of the plaintiff's station wagon. In the last two cases, however, the Judge wrote for panels that upheld verdicts in favor of defendants: in one, *Mowatt v. 1540 Lake Shore Drive Corp.*, the question was whether a co-op apartment's board of directors had acted arbitrarily in rejecting a tenant's request to sublet, and in the other, *Jacobson v. Equitable Life Assurance Co. of the United States*, the question was whether an insurance company correctly refused to pay on two life-insurance policies. The Judge's opinions tend to be short and to the point—in fact, they are a joy to read, compared with the tomes that I and my colleagues sometimes produce today.

There is nothing alien about the law that was being discussed in 1966 and 1967 in the diversity cases. Quite the opposite is true when we turn to the criminal decisions. For one thing, the sheer number is very low—seven, if one counts a collateral attack on a sentence as criminal, as opposed to what we would now call a federal habeas corpus case, or briefly a "2255." To put it mildly, no judge presently sitting on the Seventh Circuit, or any other court of appeals for that matter, could honestly claim to have had only one habeas case over the last year. Both of the drug cases involved heroin—one charged the unlawful importation of heroin and the other charged the violation of

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58. 385 F.2d 223, 225 (7th Cir. 1967).
59. Id.
60. 382 F.2d 735, 736-37, 739 (7th Cir. 1967).
61. 385 F.2d 322, 325, 331-32 (7th Cir. 1967).
62. 382 F.2d 73, 75, 79 (7th Cir. 1967).
63. 374 F.2d 867 (7th Cir. 1967).
64. Id. at 868-69.
65. 385 F.2d 135 (7th Cir. 1967).
66. Id. at 136, 138.
67. 381 F.2d 955 (7th Cir. 1967).
68. Id. at 956, 961.
the statute prohibiting the sale or distribution of narcotic drugs except in the original stamped package.\footnote{71} Not a single cocaine case! Not a single case about methamphetamine! Nothing about marijuana!

Yet there were still, notwithstanding those glaring omissions, some common threads. One of the drug cases, \textit{United States v. Dillard},\footnote{72} posed the familiar questions whether the defendant's association with others was enough to sweep him into the criminal conduct and whether he had constructive possession of the drugs.\footnote{73} Those are garden-variety issues today. In the other, \textit{United States v. Dichiarinte},\footnote{74} Judge Fairchild, writing for the court, rejected a trial court's instruction to the jury telling them that "every witness is presumed to speak the truth, but this presumption may be outweighed by [various factors]."\footnote{75} There was also a mail-fraud case in which Judge Fairchild, over Judge Schnackenberg's dissent, upheld the defendant's conviction in the face of a claim that his trial was unfair because the marshal kept him in custody throughout the trial.\footnote{76} A criminal-extortion case, brought under the Hobbs Act,\footnote{77} and a criminal-tax prosecution\footnote{78} both resulted in convictions that the court of appeals affirmed.

Lastly, Judge Fairchild wrote an opinion for the en banc court that was published exactly a year after he took the oath of office. The case was \textit{United States v. Shapiro},\footnote{79} and the question that occasioned the convening of the en banc court had to do with the proper formulation of the insanity defense in a federal criminal prosecution (in the particular case, a prosecution for mailing threatening letters).\footnote{80} After a scholarly discussion of the evolution of the insanity defense, Judge Fairchild turned to the proposed official draft of the American Law Institute's Model Penal Code. This should not have surprised anyone who knew him well. The Judge was a lifelong member of the ALI and served with distinction for many years on its Council. (This is another point in common that I share with him; I have been privileged to sit on the ALI's Council since 2003.) The full court decided to adopt the ALI's definition, which had the following advantages that Judge Fairchild identified: First, instead of talking about a person's "perverted and deranged condition," it referred to "mental disease or defect." Second,
instead of saying "incapable of distinguishing between right and wrong, or incapable of knowing the nature of the act," it spoke of "one who 'lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct.'" And third, rather than looking for the "complete destruction" of the person's will, the ALI definition referred to "one who 'lacks substantial capacity . . . to conform his conduct to the requirements of law.'” The case was obviously controversial within the court. Nine judges sat on the en banc court; four wrote separately, objecting in various ways to the adoption of the Model Penal Code definition.

There is little that needs to be said about the Judge's four patent cases aside from the fact that they exist at all. Each one falls squarely within the area of jurisdiction that is now reserved for the Federal Circuit: Was the patent valid? Was it infringed? If validity was challenged, the court had to decide whether the subject matter was "obvious"—a topic that dominated three of the four cases. The other case dealt with the obscure patent doctrine of "file wrapper estoppel," under which a patentee who changed the scope of its claims during the process of obtaining the patent is prevented from now claiming that the patent covers material that it abandoned.

The remaining cases include two Labor Board matters in which the court enforced Board orders under the National Labor Relations Act; two appeals from decisions of the Tax Court, in both of which the court was affirmed; the two prisoner cases, both dealing with aspects of a prisoner's right to exercise his religion in prison (a very familiar topic to today's judges); and the miscellaneous federal claims mentioned earlier. The securities case yielded an opinion solely on matters of federal procedure; the court found that it lacked appellate jurisdiction.

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81. *Id.* at 684–85.
84. *NLRB v. Clark Prods., Inc.*, 385 F.2d 396 (7th Cir. 1967); *Macomb Pottery Co. v. NLRB*, 376 F.2d 450 (7th Cir. 1967).
85. *Klarkowski v. Comm'r*, 385 F.2d 398 (7th Cir. 1967); *Green v. Comm'r*, 367 F.2d 823 (7th Cir. 1966).
86. *Cooper v. Pate*, 382 F.2d 518 (7th Cir. 1967); *Jackson v. Pate*, 382 F.2d 517 (7th Cir. 1967).
because the order appealed from merely interpreted a preliminary injunction; it did not grant, deny, or modify one.88

All in all, the cases that Judge Fairchild authored during his first year or so on the court paint a picture of an institution with a far-different menu of cases and a much lighter workload. Even so, it is doubtful that the judges were sitting around wondering what to do with their spare time. It is a rare case even now on which one could not spend a little more time, and these judges, with only one law clerk apiece, were operating with much less assistance than judges now receive. Things were changing rapidly, however. As of the mid-1960s, President Johnson’s Great Society programs were multiplying, the civil-rights revolution was in full swing, environmental legislation was creating new rights and expectations, and courts were recognizing private rights of action at a fast clip. By the mid-1970s, we can see those changes reflected at the Seventh Circuit.

B. Chief Judge: 1976

On February 7, 1975, Judge Fairchild became Chief Judge of the Circuit, succeeding Judge Luther M. Swygert.89 A search for the opinions he authored during the next calendar year, 1976, turns up nineteen of them. The mix had changed dramatically over the course of the Judge’s first decade of service. By this time, cases dealing with employment discrimination and the civil rights of state employees had moved into the leading place, numerically speaking, for Chief Judge Fairchild, who wrote five opinions that year in this area.90 The Judge wrote two opinions each in the areas of criminal law,91 diversity,92 prisoners’ rights,93 and intellectual property (one patent case and one

88. Inv. Corp. of Am., 369 F.2d at 384.
90. Murphy v. Mount Carmel High School, 543 F.2d 1189 (7th Cir. 1976); Colaizzi v. Walker, 542 F.2d 969 (7th Cir. 1976); Malone v. Delco Battery-Muncie, 540 F.2d 297 (7th Cir. 1976); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); United States v. City of Chicago, 534 F.2d 708 (7th Cir. 1976).
91. United States v. Jacobs, 543 F.2d 18 (7th Cir. 1976); United States v. Auler, 539 F.2d 642 (7th Cir. 1976).
92. Hebel v. Ebersole, 543 F.2d 14, 15 (7th Cir. 1976), was brought under the federal interpleader statute, 28 U.S.C. § 1335 (2000). It dealt with the rights of competing claimants to proceeds of cattle sold at an auction. Id. at 15. DeSantis v. Parker Feeders, Inc., 547 F.2d 357, 360 (7th Cir. 1976), was a personal injury action in which the minor plaintiff claimed that he was injured by a defective machine.
93. Duran v. Eliod, 542 F.2d 998 (7th Cir. 1976); Moeck v. Zajacekowski, 541 F.2d 177 (7th Cir. 1976).
The remainder of the cases came from a wide variety of areas: one habeas corpus petition, a petition for enforcement of an order of the NLRB, one appeal from an adverse decision on Social Security benefits, an appeal from a district-court order reducing an allowance for bankruptcy legal fees, an appeal from an order permitting the Commodity Exchange Authority to pursue an administrative proceeding, and, finally, a decision allowing the Federal Trade Commission to continue with an investigation and postponing ruling on any possible res judicata defense until after the Commission issued a complaint.

There is a hint in one of these opinions—Belasick v. Dannen, the bankruptcy case—that the court was already starting to think about which opinions should be published and which did not deserve such broad circulation. At the end of the opinion, Judge Fairchild added the following note: “We have cast this decision as a published opinion for future guidance in the Northern District of Illinois, and because some past opinions of this court have been silent as to the procedural issues associated with automatic review of attorneys’ fees in bankruptcy cases.”

Otherwise, the only remarkable thing about the cases from this period is the low number. In the single habeas corpus petition that came before Judge Fairchild, the panel voted to reverse and remand a decision denying issuance of the writ without an evidentiary hearing. The prisoner had, in the panel’s view, come forward with enough evidence to warrant a hearing on his Sixth Amendment claim. Numbers, or lack thereof, is also the notable point about the Social Security appeal. Today, to the extent there is a lawyer involved (and there usually is), those appeals usually show up on the Seventh Circuit’s “short-argument day” calendars. Translated, that means that the advocates are limited to ten minutes per side to present their case, and the decision usually appears as an order, meaning that it is published only in the computer databases and on the court’s Web site and is regarded as nonprecedential.

94. *Ill. Tool Works, Inc. v. Foster Grant Co.*, 547 F.2d 1300 (7th Cir. 1976) (patent); *Bell v. Combined Registry Co.*, 536 F.2d 164 (7th Cir. 1976) (copyright).
100. *FTC v. Feldman*, 532 F.2d 1092 (7th Cir. 1976).
101. *Belasick*, 542 F.2d at 41.
102. *Id.* at 43.
In the copyright case, Judge Fairchild’s panel affirmed a decision by then-district judge Joel M. Flaum (later to serve as one of Judge Fairchild’s successors as chief judge and still today an active judge on the court). In the course of explaining why the panel had concluded that the copyright in question had been forfeited, Judge Fairchild alluded to and applied the “new” Federal Rules of Evidence. The patent case is notable for its length—it ran fifteen pages in the Federal Reporter. Substantively, the opinion reflected a typically careful resolution: the court ruled that the plaintiff’s patents were valid and infringed, but it denied the plaintiff’s request for the added benefit of treble damages and attorneys’ fees.

The prisoner cases look much like the ones that still make their way to the Seventh Circuit. (That may or may not be a positive comment; people who view glasses as half empty may think that it means that society has not made much progress in this area.) In one, a class of pretrial detainees in Cook County alleged that they were subjected to constitutionally inadequate facilities for recreation, exercise, and reading; that they should not have been deprived of visiting privileges with family and friends; and that they should be permitted to earn money for bond and defense purposes. The district court had thrown these claims out, but the court of appeals reversed. Judge Fairchild emphasized the fact that pretrial detainees were in a different position than people serving a prison sentence after conviction. “Strictly speaking,” he wrote, “pre-trial detainees may not be punished at all because they have been convicted of no crime. The sole permissible interest of the state is to ensure their presence at trial.” Holding that “as a matter of due process, pre-trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial,” the court sent the case back for further proceedings. The other case involving prisoners’ rights raised the question whether a state-prison warden was entitled to issue an order that effectively prevented a prisoner in his custody from attending the trial in a civil suit the prisoner had brought against a guard at the prison. In this instance, the district court had enjoined the warden

103. Bell v. Combined Registry Co., 536 F.2d 164 (7th Cir. 1976).
104. Id. at 167.
105. Ill. Tool Works, Inc. v. Foster Grant Co., 547 F.2d 1300 (7th Cir. 1976).
106. Id. at 1302, 1314.
108. Id. at 999.
109. Id. at 999–1000.
110. Id. at 999.
111. Id. at 999, 1001.
112. Moeck v. Zajackowski, 541 F.2d 177, 178, 180, 182 (7th Cir. 1976).
from enforcing his order, but the court of appeals reversed. On one hand, Judge Fairchild wrote, courts should give appropriate weight to the state's interest in safe administration of the prisons. On the other hand, it appeared that the state here was giving more favorable treatment to prisoners whose civil actions were in state court than to their federal-court counterparts. No rational basis supported that distinction. For that reason and others, the court reversed the district court's decision and remanded for reconsideration of the question whether the prisoner's presence in his federal civil trial was "reasonably necessary."

Only one of the diversity cases looks like the group Judge Fairchild had decided a decade earlier. It was a personal-injury suit brought by a minor and his father against the manufacturer of a cattle-feeder machine, which had injured the boy when he became entrapped in it. The court affirmed a jury verdict in the boy's favor. The other case in which substantive rights depended on state law took advantage of a federal procedural device called interpleader. This provides a way in which everyone who has a claim to a certain fund may litigate at the same time; it assures the stakeholder that it will not have to pay (or even fight about paying) multiple damages. This particular decision sorted out the rights of competing claimants to the proceeds of a cattle auction.

The last two areas are criminal law and employment discrimination. One of the criminal cases involved wire fraud, and the other involved the crime of making false declarations before a grand jury that was investigating possible Hobbs Act violations. (Again, where are the drug cases?) The employment cases also have a familiar look in everything but numbers. In one case, Malone v. Delco Battery-Muncie, the plaintiff complained that his employer should have reinstated him; the court rejected his position as inconsistent with his pension plan. Other cases involved complaints about employment

113. *Id.* at 182.
114. *Id.* at 180.
115. *Id.* at 181.
116. *Id.*
117. *Id.* at 182.
118. *DeSantis v. Parker Feeders, Inc.*, 547 F.2d 357 (7th Cir. 1976).
119. *Id.* at 360, 367.
120. *Hebel v. Ebersole*, 543 F.2d 14 (7th Cir. 1976).
123. 540 F.2d 297 (7th Cir. 1976).
124. *Id.* at 298.
discrimination in the Chicago police department, complaints that the Governor of Illinois had violated due process when he discharged some state employees without adequate process, charges of racial discrimination in hiring for Milwaukee jobs, and claims that were dismissed of two broad-ranging civil-rights conspiracies—one relating to a high school's firing of a tenured teacher who had criticized the school's dress code and its policies regarding the hiring of minority faculty and the other relating to an effort to unionize a hospital in Chicago. By the mid-1970s, in short, the court was beginning to have a docket more like the one we have today.

C. Senior Status Begins: 1986

On August 31, 1981, when he was sixty-eight years old and statutorily entitled to do so, Judge Fairchild took senior status and passed the reins of the chief judgeship to his colleague Walter J. Cummings. As the 1980s went on, his caseload was reduced somewhat. Still, the accumulated record for 1986 shows a judge at the top of his game, entrusted with some of the most important opinions that had to be written. That year, he authored opinions in four criminal cases, four diversity cases, one habeas corpus matter, one Title VII case involving religious discrimination, and one case involving the duty to arbitrate various issues under a collective-bargaining agreement.

Of this group, the case that stands out is the Judge's lengthy opinion in *United States v. Kimberlin*, which runs forty-four pages in

128. *See Murphy v. Mount Carmel High School*, 543 F.2d 1189, 1190 (7th Cir. 1976).
129. *See id.* at 1191.
131. *United States v. Chiattello*, 804 F.2d 415 (7th Cir. 1986); *United States v. Kimberlin*, 805 F.2d 210 (7th Cir. 1986); *United States v. Strawser*, 800 F.2d 704 (7th Cir. 1986); *United States v. Pendegraph*, 791 F.2d 1462 (11th Cir. 1986).
132. *Am. Ins. Corp. v. Sederes*, 807 F.2d 1402 (7th Cir. 1986); *Gavcus v. Potts*, 808 F.2d 596 (7th Cir. 1986); *Concrete Structures of the Midwest, Inc. v. Fireman's Ins. Co.*, 790 F.2d 41 (7th Cir. 1986); *Young v. Colgate-Palmolive Co.*, 790 F.2d 567 (7th Cir. 1986).
133. *United States ex rel. Reese v. Fairman*, 801 F.2d 275, 276 (7th Cir. 1986).
134. *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351 (7th Cir. 1986).
135. *Torrington Co. v. Local Union 590*, 803 F.2d 927 (7th Cir. 1986).
136. 805 F.2d 210 (7th Cir. 1986).
the Federal Reporter. It presented a cornucopia of criminal-procedure issues. Included among them were the following: (1) the validity of admitting the testimony of six witnesses who had been hypnotized during the government’s investigation of certain bombings in Indiana, (2) jury issues concerning voir dire and sequestration, (3) the defendant’s right to a speedy trial, (4) the use of an allegedly suggestive photographic array for identification, (5) various Fourth Amendment issues in connection with searches, (6) permissible procedures after a mistrial was declared, (7) evidentiary issues, and (8) alleged perjury of a governmental witness. After a painstakingly careful examination of countless claims of error, the court concluded in the end that Kimberlin’s conviction had to be affirmed.

Judge Richard D. Cudahy wrote a brief concurring opinion in which he stressed how close some of the calls were, but, he wrote, “Although these and a number of other problems are very troubling, I think the majority has addressed them conscientiously and in a fashion that sustains the result.”

Of the other criminal cases, two involved drug prosecutions, one a bank robbery, and one an appeal from a denial of habeas corpus. In United States v. Strawser, the focus of the opinion was not on the underlying conviction for dealing in marijuana; it was instead on the district court’s order that the attorney who had represented the defendant had to disgorge the excessive portion of the fee that he had collected. As the Judge pointed out in affirming the order, the case implicated not only the proper discipline for allegedly unethical conduct but also the constitutional right of a criminal defendant to competent representation. The other drug case (again arising from a marijuana

137. Id.
138. Id. at 216–23.
139. Id. at 223–24.
140. Id. at 224–27.
141. Id. at 227–28.
142. Id. at 228–30.
143. Id. at 230–31.
144. Id. at 231–43.
145. Id. at 246–47.
146. Id. at 254.
147. Id. at 254, 256 (Cudahy, J., concurring).
148. See United States v. Strawser, 800 F.2d 704, 705 (7th Cir. 1986); United States v. Chiattello, 804 F.2d 415, 417 (7th Cir. 1986).
149. See United States v. Pendegraph, 791 F.2d 1462 (11th Cir. 1986).
150. See United States ex rel. Reese v. Fairman, 801 F.2d 275 (7th Cir. 1986).
151. 800 F.2d at 704.
152. See id. at 704–05.
153. Id. at 708.
Snapshots from the Seventh Circuit

business) grappled with a claim of double jeopardy and an attack on the sufficiency of the indictment. The bank-robbery case presented recurring issues of constitutional criminal procedure, including the admissibility of a nontestifying defendant’s confession and the application of the harmless-error rule. Finally, in the habeas corpus case, Judge Fairchild authored a panel opinion holding that a county’s creation of a recidivist court did not violate the petitioner’s right to due process, nor did the petitioner suffer unconstitutional prejudice from a newspaper story.

On the civil side of the docket, the Judge handled one state-law tort action for trespass in which the court affirmed an award of nominal damages, one insurance dispute involving both agency questions and issues of the insurer’s right to rescind a policy, and a subcontractor’s untimely effort to recover on a public-works bond. A final diversity case took the form of a shareholder’s derivative suit in which the plaintiffs were trying to challenge a company’s adoption of a “poison-pill” antitakeover plan. Relying largely on procedural grounds, including a finding that the directors were not “doing business” in Illinois for purposes of personal jurisdiction, that the alleged tort occurred in New York, and that the action could not proceed in the absence of any defendant director, Judge Fairchild affirmed the district court’s decision dismissing the action. In his Title VII case, the Judge affirmed a judgment for Loyola University of Chicago, which had decided to reserve the next three vacancies in its philosophy department for Jesuits. The plaintiff had been employed in the department as a part-time lecturer, but, because he was Jewish, he was not eligible to be hired for any of the open slots. The panel majority, for whom Judge Fairchild wrote, found that being a Jesuit was a “bona

154. See United States v. Chiattello, 804 F.2d 415, 417, 420 (7th Cir. 1986).
155. See United States v. Pendegraph, 791 F.2d 1462, 1463-65 (11th Cir. 1986).
156. See United States ex rel. Reese v. Fairman, 801 F.2d 275, 276-77 (7th Cir. 1986).
157. Gavcus v. Potts, 808 F.2d 596 (7th Cir. 1986).
159. Concrete Structures of the Midwest, Inc. v. Fireman’s Ins. Co., 790 F.2d 41 (7th Cir. 1986).
160. Young v. Colgate-Palmolive Co., 790 F.2d 567 (7th Cir. 1986).
161. Id. at 569.
162. Id. at 570.
163. Id. at 572.
164. Id. at 574.
165. Pime v. Loyola Univ. of Chi., 803 F.2d 351 (7th Cir. 1986).
166. Id. at 353.
fide occupational qualification," and thus that the plaintiff's claim of religious discrimination had to be rejected. Judge Posner concurred on the narrower ground that the plaintiff was excluded, not because he was Jewish, but because he was not Jesuit, a status he shared with many Christians and members of other religions. In Judge Posner's view, this fact demonstrated that he had not been deprived of an employment opportunity because of his religion. The last civil case involved the arbitrability of a claim that had arisen under a collective-bargaining agreement between an employer and a union. Through Judge Fairchild's opinion, the panel upheld the district court's decision in favor of arbitrability.

D. Continuing Service to the Court: 1994

Perhaps this is a good point at which to recall the fact that senior Article III judges serve essentially for free. The reason for this is rooted in the fact that Article III, Section 1 of the Constitution says, "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Briefly put, this means that federal judges have the right, though not the obligation, to remain in office until they are carried out feet first, and if they do so, their pay cannot be diminished (at least in nominal dollars). In a system where there are no "sticks" available to persuade someone to step down from a position, the only things left are "carrots." The carrot that Congress has provided to make senior status or retirement attractive for federal judges (either one of which creates a vacancy for the incumbent President to fill) is continued salary protection: if the judge takes senior status and continues to perform work for the court, he or she continues to be paid exactly the same amount as the active judges, including any raises that might come along. If the judge retires and does no judicial work, he or she still receives 100 percent of the salary that applied at

168. Pime, 803 F.2d at 354.
169. Id. (Posner, J., concurring).
170. See id. at 354-55.
171. Torrington Co. v. Local Union 590, 803 F.2d 927 (7th Cir. 1986).
172. Id.
the date of retirement. So, in that sense, the people of the United States were privileged to have Judge Fairchild serve essentially for free for more than twenty-five years, from 1981 until his death earlier this year.

My representative year for the mid-1990s is 1994, when the Judge authored four opinions in cases dealing with different issues of federal civil law, five habeas corpus opinions, two criminal matters, and two diversity cases. In terms of balance, this is a docket that looks familiar to today's judge. Once again, Judge Fairchild was assigned to write the lead opinion for the en banc court in one of the civil cases, *United States v. Hynes.* The question before the court was whether Cook County was entitled to collect general property taxes on property that the United States was in the process of purchasing through installment payments. Had the United States already owned the property, the answer would have been no. But a majority of the full court decided that the tax was permissible and that Illinois was not unconstitutionally discriminating against the federal government even though it did not impose similar taxes on the property of state and local governments. The key point was whether the government in question permitted the taxation. Because the federal government did, Cook County was free to impose and collect the tax.

The habeas corpus decisions all dealt with the question whether an error in instructing the jury on murder and voluntary manslaughter could be (and was) harmless. The court grouped together five such cases, all of which were assigned to Judge Fairchild to write. In the

175. See id. § 371(b)(2).
176. *Peabody Coal Co. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor,* 40 F.3d 906 (7th Cir. 1994); *Becker v. IRS,* 34 F.3d 398 (7th Cir. 1994); *United States v. Hynes,* 20 F.3d 1437 (7th Cir. 1994) (en banc); *Richardson v. Consol. Rail Corp.*, 17 F.3d 213 (7th Cir. 1994).
177. See *Green v. Peters,* 36 F.3d 602 (7th Cir. 1994); *Carter v. DeTella,* 36 F.3d 1385 (7th Cir. 1994); *Cuevas v. Washington,* 36 F.3d 612 (7th Cir. 1994); *Rosa v. Peters,* 36 F.3d 625 (7th Cir. 1994); *Everette v. Roth,* 37 F.3d 257 (7th Cir. 1994).
178. See *United States v. Nelson,* 29 F.3d 261 (7th Cir. 1994); *United States v. Huebner,* 16 F.3d 348 (9th Cir. 1994).
179. See *Jones v. Coleman Co.,* 39 F.3d 749 (7th Cir. 1994); *Michael J. Neuman & Assocs. v. Florabelle Flowers, Inc.,* 15 F.3d 721 (7th Cir. 1994).
180. 20 F.3d 1437 (7th Cir. 1994).
181. *Id.* at 1438–39.
182. See *id.* at 1439.
183. *Id.* at 1441.
184. See *id.* at 1443.
185. *See supra* note 177.
186. See *supra* note 177.
opinions, the Judge carefully worked through the developing Supreme Court jurisprudence on habeas corpus—easily one of the most complex areas of federal law even then (and it has only gotten worse)—and analyzed whether an instructional error should be characterized as a "trial error" subject to the harmless-error rule or if it is "structural error" that is so fundamental that the only way to correct it is to start over again. 188 He concluded that it was trial error—a conclusion that has been vindicated by later Supreme Court decisions. 189

In the area of criminal law, we see the Sentencing Guidelines make an appearance in one of the Judge’s opinions, United States v. Nelson. 190 The Guidelines had taken effect in 1987, and so by 1994 courts were becoming accustomed to working their way through the myriad issues that defendants can raise under them. The other case, United States v. Huebner, 191 arose in the Ninth Circuit, illustrating the fact that Judge Fairchild sat from time to time with other courts around the country. The question in the case was whether the filing of a petition in bankruptcy for the purpose of causing an IRS levy on thefiler's wages to be lifted could amount to a criminal violation of the tax laws. 192 Judge Fairchild thought that it was not attempted tax evasion, 193 over the dissent of another judge who saw the plaintiffs as tax protesters who were deliberately abusing the system. 194 The Judge explained that the bankruptcy filings “produced delay, but would not defeat, or result in escape from, the tax.” 195 On the other hand, the majority concluded that the taxpayers’ convictions for conspiracy to defraud the United States had to be upheld. 196 The care and precision with which he drew the distinctions here were typical of his work, up until the very end.

**EPILOGUE**

Judge Fairchild continued to participate actively in the court’s work until literally days before he passed away. In the last couple of years, he chose to limit himself to the court’s Rule 34 docket, which (as I mentioned earlier) applies to cases in which at least one party is pro se

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188. See supra note 177.
189. See supra note 177.
190. 29 F.3d 261 (7th Cir. 1994).
191. 16 F.3d 348 (9th Cir. 1994).
192. Id. at 350.
193. Id. at 351.
194. See id. at 354–55.
195. Id. at 351–52.
196. Id. at 354.
and thus that the court designates for decision without oral argument. The number of filings, the balance of cases, and the diversity of the docket continued to grow throughout that time, and I personally can attest to the fact that Judge Fairchild kept up with these developments as well as anyone on the court.

For purposes of completing the story of the court’s evolution over the period of Judge Fairchild’s service, I took a look at the cases in which I was the authoring judge during the calendar year 2006. Criminal appeals, immigration cases, civil-rights cases, habeas corpus petitions, and diversity cases were all roughly equal in number—in each, I had authored five to seven published opinions. Other areas in which I had published opinions included securities law, the Truth in Lending Act, Title VII of the Civil Rights Act (employment discrimination), administrative law, bankruptcy, and the Americans with Disabilities Act. This list illustrates an important fact about the change in the work of the courts of appeals since the mid-1960s: much of our work now arises under federal statutes that Congress has passed over this period of time. From time to time, the judiciary asks Congress to take into account the impact that new legislation is likely to have on the courts when it considers creating new federal crimes, new federal administrative regimes, or new federal rights of action. Sometimes these pleas are heeded; sometimes they seem not to be.

What has remained constant over the years is the challenge and privilege of serving on a court like the Seventh Circuit. Those of us who were fortunate enough to work with Judge Fairchild, as I was for more than eleven years, had a stellar example to follow. We all miss his deep commitment to justice, his empathy for the parties before the court, his scrupulous attention to the governing law, and his cheerful companionship with his colleagues. This lecture meant a great deal to him, and I thank the Fairchild clerks and the University of Wisconsin for inviting me to deliver it this year. It is, without a doubt, the best way for all of us to carry on Judge Fairchild’s legacy.