FOREWORD: THE CHANGING ROLE OF THE CIRCUIT JUSTICE

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AS Circuit Justice for the Sixth Circuit, I was invited by the Board of Editors of the University of Toledo Law Review to introduce this year's Survey of Sixth Circuit Law. I accepted in order to comment upon the changing role of a Circuit Justice.

Justices of the Supreme Court historically have had a close relationship with judges on the federal district and circuit courts. Article III of the Constitution provides only for a Supreme Court and for such inferior courts as Congress may establish. The Judiciary Act of 1789, which established the first federal courts other than the Supreme Court, did not create a separate federal court of appeals with its own judges. Instead, the Act required that Supreme Court Justices sit with local district judges twice a year in each district of the three circuits then in existence. Circuit panels consisted of two Supreme Court Justices and one district judge. The circuit panel had original jurisdiction in some civil matters, concurrent jurisdiction with the district courts in federal criminal cases, and appellate jurisdiction over decisions of the district courts in civil cases in which the matter in controversy exceeded fifty dollars and in admiralty and maritime cases in which the matter in controversy exceeded three hundred dollars. The duty to hold court in the various districts, commonly referred to as "riding the circuits," was intended to keep the Justices in tune with local communities and, for that reason, was considered of paramount importance to the newly created judicial system.[1]

The circuit-riding responsibility was so arduous, however, that Thomas Johnson, then fifty-nine years old and the oldest justice appointed to the first Supreme Court, accepted his appointment to the Court only after President Washington and Chief Justice John Jay assured him that Congress would soon eliminate the circuit

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1 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 58 (rev. ed 1926).

duties.[2] Congress failed to act as predicted, despite the urgent plea of all the Justices to be relieved of their excessive burdens as circuit-riders. In 1793, only sixteen months after his appointment, Justice Johnson resigned because of Congress' inaction.[3]

The Justices received a brief respite from their circuit riding duties by the midnight passage of the Judiciary Act of February 13, 1801, which provided for additional federal judges, eliminated the circuit riding for Supreme Court Justices, and reduced their number from six to five. The Federalists, who had lost the 1800 elections, passed the Act in a last ditch effort to save the judiciary from the Jeffersonians who were taking office. The relief was short-lived. The newly elected Congress repealed the bill in March 1802, and the Justices resumed their former duties.[4]

By 1839, more than forty-five years after Justice Johnson had been promised that the next Congress would do away with circuit riding, it had become a way of life for the Justices. Justice James Moore Wayne, the Sixth Circuit Justice, travelled in excess of 2,300 miles that year as part of his appellate duties.[5] Although today 2,300 miles is not considered a particularly long journey, during the early years of our nation's history travel was rigorous indeed. Chief Justice John Marshall received injuries in a stage coach crash while on circuit that were said to have hastened his death.[6] Occasionally, poor road conditions or illness made it impossible for a Justice to attend the scheduled circuit court panels. In 1793, the National Gazette reported that several pirates were forced to remain confined in a "loathsome dungeon" throughout the winter when the Circuit Justice became ill at Augusta, Georgia, and could not attend the session.[7] Several witnesses were similarly confined because they were unable to give security for their appearance at trial.

The early members of our Court were occasionally subjected to indignities beyond the physical hardships of travel. Chief Justice Marshall sometimes travelled by a horse-drawn stick gig, a wooden

2 *Id.* at 57

3 *Id* at 86

4. J GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 569 (1971). *See also* M HARRELL & B ANDERSON, EQUAL JUSTICE UNDER LAW 22–24 (rev ed. 1982)

5 Senate Judiciary Committee Records of 1839, *reprinted in* Baker, *The Circuit Riding Justices*, 1977 SUP CT HIS SOC'Y Y B 63, 66.

6 M. HARRELL & B. ANDERSON, *supra* note 4, at 19

7. 1 C WARREN, *supra* note 1, at 87 n 3.

chair supported by two shafts and two wheels. The contraption was not particularly stable. On one trip, the gig ran over a sapling while the Chief Justice was asleep. When he awoke, he found himself sitting at a precarious angle, unable to right the vehicle in order to proceed on his journey. An elderly man came upon him in this sorry state and suggested that he back up the gig to stabilize it. This helpful advice saved the day, but the "Good Samaritan" later described the Chief Justice as "a nice old gentleman who wasn't too bright."[8]

Some members of Congress expressed continued concern over the problems with the circuit-riding system, but they were in the minority. Five bills aimed at eliminating circuit riding were introduced into Congress between 1816 and 1824 without success.[9] Some opponents of the bill disagreed for partisan political reasons with the creation of a separate category of judges. Others feared that the justices would become "completely cloistered with the City of Washington, and their decisions, instead of emanating from enlarged and liberalized minds, would assume a severe and local character."[10] Despite these misgivings, in 1869 Congress finally approved a reform of the judicial system which established a new circuit court system and provided for the appointment of circuit court judges.[11]

Congress, of course, did not completely eliminate the responsibilities of Supreme Court Justices with respect to the federal appellate courts. The Judiciary Act now provides that Supreme Court Justices will serve as Circuit Justices with the allotments among the circuits to be made by order of the Court.[12] By tradition, Associate Justices are assigned, when possible, to their home circuits. Justices Howell E. Jackson, William R. Day, and Potter Stewart served both as Sixth Circuit judges and, after appointment to the Supreme Court, as Circuit Justices for the Sixth Circuit. Alternatively, a new Justice may be assigned, as I was, to the Circuit vacated by the retiring Justice.

The responsibilities of the Circuit Justice have changed considerably since the days when Supreme Court Justices were required to

8. Baker, *supra* note 5, at 63

9 1 C. WARREN, *supra* note 1, at 672.

10 15th Cong , 2d Sess. 131 (1819).

11. 16 Stat 44–45 (1869).

12. 28 U S C. § 42 (1982).

preside over appellate panels. Supreme Court Justices no longer sit as judges on appellate panels in cases that they may be required to review as part of their Supreme Court duties. Today, individual Justices, acting alone, have the power to grant stays or injunctions in both civil and criminal cases, to arrange bail before and after conviction, and to provide other ancillary relief, such as extensions of time for various filings and other procedural variances.[13] Although Congress has provided that a Supreme Court Justice may grant a writ of habeas corpus, 28 U.S.C. § 2241, I am aware of no instance in which a Justice acting alone has granted such relief.[14] Thus, a single Justice alone will not take action which disposes of a case on the merits.

As an initial matter, motions for bail, stays, or extensions of time are filed with the Clerk, addressed to the Justice assigned to the Circuit within which the case arises.[15] If the Circuit Justice denies the motion, in some circumstances litigants may seek a favorable ruling from another Justice. Fifty-seven disappointed litigants sought approval by a second Justice in the 1983 Term. In the Circuit Justice's absence, the motions are referred to the Justice who is next junior to the Circuit Justice. The Chief Justice's turn follows the most junior Associate Justice. The Chief Justice therefore normally would act on motions filed from the Sixth Circuit in my absence.[16]

In the 1983 Term, over one thousand applications were filed with the Court for the attention of individual Justices. Eighty-three of these applications were filed that Term regarding cases arising in the Sixth Circuit. Fifty-four percent of the total applications, approximately 580 requests, were for extensions of time, and roughly a third, 338 petitions, were for stays. Ninety-five percent of the requests for extensions of time were granted while only sixteen percent of applications for stays were granted. All applications for bail were denied in both the 1982 and 1983 Terms. Bail was granted in only one of fifty-seven applications filed in the 1981 Term.

On all but the most routine matters, the Circuit Justice takes into account the probable view of the Court in ruling on a motion. For example, in cases involving stays of civil proceedings pending action

13 SUP CT. R 43, 44 *See also* R STERN & E GRESSMAN, SUPREME COURT PRACTICE, ch 17 (5th ed. 1978).

14 *See* Locks v. Commanding General, Sixth Army, 89 S. Ct. 31 (1968)

15. SUP. CT R. 43

16. *Id*

on a petition for certiorari, the obligation of the Circuit Justice is to determine whether four Justices would vote to grant certiorari, to balance the "stay-equities," and to give some consideration to predicting the final outcome of the case.[17] In extraordinary cases, a Justice may refer a motion to the entire Court. Justice Black chose to follow this course of action in *Meredith v. Fair*.[18] In that case, the Court of Appeals for the Fifth Circuit had ordered the admission of James Meredith to the University of Mississippi, but a single circuit court judge had stayed the mandate of the Court of Appeals. Justice Black, with the concurrence of all the members of the Court, vacated the stay. In a still rarer instance, a Justice may order oral argument in chambers.[19] Perhaps the most significant responsibility of a Justice acting as Circuit Justice is in connection with stays of executions in capital cases. At one time, Justices were said to grant a stay application in a capital case whenever there was the slightest chance of plenary review.[20] In 1962, Justice Douglas took a significant step toward the development of the Justices' current practice. The petitioner in *McGee v. Eyman*,[21] filed a second petition for certiorari and a stay application in the Supreme Court less than two days before his execution date. The execution was scheduled to occur just hours before the next Court Conference at which the petition for certiorari could be considered by the whole Court. Although the petition raised issues identical to those which had been denied earlier, Justice Douglas—perhaps reluctant to deny the stay unilaterally, yet unconvinced that the petition was meritorious—circulated the petition to his brethren. Justice Douglas ultimately denied the stay, but only after each Justice stated that he would not vote to grant certiorari.

The Court has continued to follow Justice Douglas' practice in capital cases. The Circuit Justice is responsible for initiating review of applications for stays of execution, but the applications generally are referred to the whole Court. The Court received eighty-six

17. *See* Heckler v Blankenship, 465 U S. 1301 (1984) (O'Connor, J., in chambers); Gregory-Portland Indep. School Dist v United States, 448 U.S. 1342 (1980) (Rehnquist, J., in chambers).

18. 83 S. Ct. 10 (1962) (Black, J., in chambers)

19 *See, e.g*, DiCandia v United States, 78 S. Ct. 361 (1958) (Harlan, J , in chambers) (request for bail)

20. *See* Note, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV 981, 1006 (1964).

21. 83 S. Ct. 230 (1962)

applications for stays of execution during the 1983 Term, eighteen of which were received less than forty-eight hours before the scheduled execution. For some prisoners, the last-minute stay request was their third petition before the Court. The Court's usual practice since I have been an Associate Justice has been to deny a stay of execution unless (1) at least four of the Justices are persuaded either that there is a real probability that the case warrants plenary review by the Court or that the case should be held for another case raising the same issue on which review has already been granted; or (2) the application arises from the Court of Appeals' denial of the applicant's first federal habeas petition.

In essence, the duties of the Circuit Justice typically range from consideration of routine requests for relief from formal filing requirements to stays of a lower court's mandate in controversial civil cases and of capital sentences. Of course, not all duties of the Circuit Justice are onerous. Some, such as the attendance at the Circuit Conference, are very enjoyable, and may serve, as Daniel Webster recommended, to "keep [the Justices] in touch with local law and local customs."[22] As Justice for the Sixth Circuit, I follow its many and varied activities with great interest. As Justice Stewart noted, "To [the Sixth Circuit] for decision come admiralty cases from the Great Lakes, moonshine cases from Appalachia, labor cases from Cleveland, patent cases from Detroit, tax cases from Memphis—criminal cases and civil cases of every conceivable kind from almost everywhere within the circuit's broad borders."[23] I commend the editors of the University of Toledo Law Review for providing an opportunity for legal scholars to comment on the decisions of the Sixth Circuit.

22. Baker, *supra* note 5, at 67

23 Stewart, *The Sixth Circuit Review 1968–69*, 1970 U TOL L. REV 49