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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
1.personal data questionnaire	re Antonin Scalia (36 pp.)	n.d.	P6
2. paper	Judge Wallace (p. 9, partial)	n.d.	P5, P6

RESTRICTION CODES

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I. Philosophy

Judge Wallace has been a consistent advocate and practitioner of judicial restraint. That is the extent of his contribution to returning the courts to their proper role, and is obviously an extremely important contribution. On the other hand, he has not articulated a powerful underlying theory as to why courts should return to their historical role, and he has not written any landmark opinions taking important steps in that direction. Thus his commitment to judicial restraint is significantly undertheorized, and therefore perhaps lacking in persuasiveness.

This is not entirely for want of trying. Wallace has written several articles attempting to defend judicial restraint. In one, A Two Hundred Year Old Constitution in Modern Society, [Law Review Binder at Tab 1] he argues that interpretivism is superior to non-interpretivism because it leads to more stability. In another, The Jurisprudence of Judicial Restraint, [Law Review Binder at Tab 2] he contends that judicial restraint is preferable because it allows more room for democracy, which in turn promotes freedom by giving more people their first choice. Neither of these arguments is very interesting or persuasive. Moreover, Wallace's argument for democracy is presumptuous in its suggestion that it can resolve the key question of political philosophy -- what kind of government should a people choose -- in a quickly written paragraph. On the basis of these articles, in fact, one would probably get the unfair impression that Wallace is not very bright. That impression is not substantiated by Wallace's opinions, which show him to understand judicial restraint much better in practice.

A. Justiciability and Procedural Requirements

Judge Wallace generally takes an appropriately limited view of plaintiffs' standing. For example, in City of South Lake Tahoe [IV, Jurisdiction, 2], he ruled that City Councilmembers lacked standing to challenge the constitutionality of land use regulations adopted by the political subdivision. Supreme Court precedent made possible the opposite result, but Wallace found that the plaintiffs lacked the necessary personal stake.

Wallace also understands the limitations that the role of the courts imposes on the kinds of remedies they should order. In Zepeda v. United States [IV, Injunctions, 3] he reversed the district court's grant of a preliminary injunction prohibiting INS from taking certain enforcement measures against all Hispanics, on the ground that that remedy was inappropriate unless the court certified a class. An argument could be made that he should have gone further and vacated the injunction altogether, on the ground that courts ordinarily should not enjoin law enforcement activities, but on the basis of the uncontested allegations he probably did not have any choice. In United States v. Holtzman [IV, Injunctions, 2] he vacated an injunction prohibiting a defendant car importer from importing

cars into the indefinite future on the ground that courts should not ordinarily enjoin indefinitely otherwise legal conduct.

Wallace also generally uses other procedural requirements effectively to assure that the court of appeals is deciding cases rather than making broad policy choices. For example, he has a clear view of the proper limits of Rule 23, the class action rule. In McDonnell Douglas [I, Federal Procedure, 15], he declined to certify a class of victims of an air crash on the ground that mass torts generally should not be litigated through that vehicle, because they lacked common issues of fact. And in Pan Am, id., 20, he issued a writ of mandamus to prevent use of the class notice provisions to notify potential plaintiffs of actions in which they might want to join.

Although generally good, Wallace's views on jurisdiction and procedure are not flawless. His worst decision in this area is probably in Stuckey v. Weinberger [II, Government Regulation, 46], where he joined a terrible Merrill dissent from a majority en banc opinion which would have held denials by HHS of motions to reopen social security determinations to be judicially reviewable, despite a statutory provision to the contrary. And in Arizona v. Atchison [IV, Constitutional Law, 18] his finding of jurisdiction is not justifiable apart from his desire to reach the merits to make clear that the law at issue is constitutional. He also can miss jurisdictional issues not raised. For example, in J.R. Eikenberry [IV, Constitutional Law, 3] the question was the constitutionality of a state criminal statute on pornography. A key issue was what the statute intended by the term "lust." A movie theatre brought suit before it had been in any way threatened with prosecution. Wallace would have upheld the statute on the merits, whereas the real answer was that the suit was not ripe (or, as Rehnquist urged in the Supreme Court, that the federal courts should at least abstain). I also have qualms about his decision in Vincent [I, Federal Procedure, 21], in which he required plaintiffs in mass litigation to use and pay for partial services of a court-designated lead counsel rather than counsel of their own choosing.

B. Constitutional Law

Wallace's constitutional law opinions are on the whole reasonable but unremarkable. There is none in which he engages in departures from existing case law to create new rights. By the same token, however, there is none in which he takes any serious steps to curtail existing illegitimate doctrines. In the free speech area, he objected to a panel opinion creating a more restrictive test than the Ninth Circuit had previously applied to zoning ordinances regarding adult movies [Tovar, IV, Constitutional Law, 1]; would have upheld against constitutional challenge a Washington state law regarding pornography under the

Supreme Court's test [J.R. Eikenberry, id., 3]; and upheld the confiscation of signs for a school demonstration but not a suspension of students for bringing the signs onto the school's premises [Karp, id., 2]. There are perhaps troubling nuances in two free speech cases. In Guam Federation, id., 4, the panel devised a standard for summary judgment in libel cases much better than the one used by the D.C. Circuit, which the district court had applied. Wallace concurred specially to urge that the case should have been remanded to the district court for reconsideration of whether it could nevertheless grant summary judgment, rather than for trial. It is quite clear that summary judgment would have been improper under the panel's test, and it is important for that to be the case in practice as well in order to show that the standard has teeth. The direction to hold a trial was therefore an important practical feature of the case's preventing the further over-constitutionalization of libel law. And his opinion in FCC v. Scott, id., 5, contains a great deal of discussion of why the First Amendment standard for broadcasting permits the government to regulate it much more closely than other media, when that principle is not necessary for deciding the case. Finally, he and Kennedy split on an election law case, in which the question was whether Congress could limit the amount that individuals could contribute to candidate PACs. Kennedy ruled that it could, whereas Wallace would have ruled that it could not. Wallace's reasoning is fairly sloppy, however, relying heavily on the impact of the law on associational rights, which are themselves a penumbra of the First Amendment. Since the right to contribute money to a PAC in order to speak effectively is also a penumbra, Wallace's analysis would make that right a penumbra of a penumbra. The opinion also does not deal adequately or persuasively with the Supreme Court's authorization of limits on contributions in Buckley v. Valeo.

Wallace's opinion in a Fourth Amendment case, Balelo v. Baldrige [I, Environmental Decisions, 1], suffers from some of the same lack of sharpness. The issues there were whether a federal statute permitted Commerce to require tuna fishermen to bring along inspectors on their expeditions, and whether if it did that violated the Fourth Amendment's prohibition of unreasonable searches. Rather than deciding either question squarely, Wallace argued instead that the constitutional dubiousness of the practice required that Commerce have clear statutory authority for requiring it, which Wallace ruled it lacked. The difficulty is that while there is something to be said for placing saving construtions on statutes to avoid clear constitutional problems, and while there is also something to be said for avoiding constitutional issues by deciding statutory questions first, the two principles cannot be combined in this manner. Otherwise, a likely result is that the court will misconstrue the statute to avoid an apparent constitutional difficulty which would turn out not to be a real one if the constitutional analysis were actually

performed. This opinion was reversed en banc, by a panel on which, because of the peculiarity of the Ninth Circuit's en banc procedures, Wallace did not sit. Tang's dissent made a much better argument for Wallace's result than Wallace's opinion.

Wallace's procedural due process opinions generally take a narrow view of that clause, although in Devine v. Cleland, id., 11, he permitted veterans to challenge benefits decisions on due process grounds despite a statutory bar on challenging benefits decisions at all. That is the view most courts of appeals have taken on this question, but Wallace's is one of the early and therefore lead opinions.

In the area of protecting property rights, Wallace has one somewhat troubling substantive due process opinion. In Purvis, id., 19, he urged in dissent that a retroactive tax should be invalidated on substantive due process grounds. While the tax is perhaps questionable on Fifth Amendment just compensation-type grounds, it works its deprivation as a legislative act and should not even therefore be analyzed in due process terms. Insofar as the caselaw requires such an analysis, however, it should be limited to standard rational basis scrutiny, which this law meets. On the other hand, in Weyerhauser, id., 21, Wallace gave arguably insufficient protection to property rights under the just compensation clause, refusing to compensate a landowner for the loss of income he had obtained from exercise of the eminent domain power through use of his property by the government. And in 156.81 Acres, id., he declined to allow either revaluation of land or interest for the time between the entry of a judgment of condemnation and the government's actual payment for the land. The Supreme Court was more generous, since it permitted revaluation if the owner could make a showing that there had been significant change.

One other case may be worth mentioning here although it does not fit into any obvious constitutional law subheading. In People of the Territory of Guam, id., 20, Wallace joined the dissenting view that under a Congressional statute giving the Guam legislature some authority to eliminate some of the federal district court's appellate jurisdiction over local disputes, the Guam legislature could shift all of that jurisdiction to its local court system. One of the consequences of the power to shift it all would be that there would be some cases presenting federal Constitutional defenses to local offenses that could not be reviewed in the U.S. Supreme Court, because there is no appeal from the Guam local courts to the Supreme Court. Hence, the interesting feature of this case is that the ground of disagreement between the majority and the dissent was in considerable measure whether, if the statute were construed to permit the shift, it would be constitutional. The constitutional doubts on the subject, raised by Judge Kennedy, focus on Congress's power to create exceptions to the Supreme Court's jurisdiction.

Kennedy seems to think that power very narrow indeed, since if this exception is constitutionally suspect, it is hard to imagine one that would pass muster. Wallace on the other hand does not seem to share that view. One other notable point about this issue is that the basis for Kennedy's narrow construction of the Exceptions power seems to be Hart's article on the subject, which adopted a balancing approach to structural constitutional questions. The test question for him is whether permitting a branch to exercise a particular power would infringe on a core function of another branch. That approach to structural issues is one which the Justice Department has been actively challenging, for example in the Gramm-Rudman litigation. Hence Wallace's implicit non-adherence to it is a point in his favor.

C. Criminal Law

Wallace's criminal law cases similarly suggest moderate judicial conservatism in that area. He generally adopts the sound view, but is not systematically pro-government, nor has he made any major contributions in doctrine.

Numerous Wallace cases illustrate his conventional conservatism. In Vandemark [VI, Criminal, 4], he emphasized the deterrence rationale of the exclusionary rule and rejected a Fourth Amendment argument on the ground that exclusion would not generate any additional deterrence. In Cahill [VI, Criminal, 15], his dissent argued that the rule of Massiah should not apply to post-conviction statements, correctly noting that so to apply it would tear the case away from its "textual and historical roots." Similarly, in Hendrix [VI, Criminal, 31], he resisted temptation and found that a seemingly compromising statement by a juror did not necessarily imply a failure to comply with the oath of impartiality; the case easily could have gone the other way.

One that probably should have gone the other way was Hudson [VI, Criminal, 27], in which Judge Wallace found admissible an unsigned government journal entry indicating that the defendant had not reported for induction. As Judge Lumbard pointed out in dissent, it is one thing to use the records exception to eliminate the hearsay rule and quite another to use it to eliminate the requirement of personal knowledge -- in this case, the need for good reason to believe that some identifiable person had first-hand knowledge of the thing asserted.

This is not to suggest that Wallace is an automatic vote for the government. In Balelo [VI, Criminal, 17], a close Fourth Amendment case on which he is probably correct, he resisted an opportunity to stretch the plain view doctrine in order to uphold a search. Slightly troubling is his dissent in Thierman [VI, Criminal, 2], in which a police conversation that took place in Thierman's presence after he had claimed his right to remain

silent provoked a statement from the defendant. Although the opinion is a bit worrisome, it seems clear that Judge Wallace was doing his best to apply the Supreme Court's cases as he understood them, and that his expressions of unease with those cases were sincere. Honesty of this sort is a substantial virtue.

As in other areas, although Wallace seems to be searching for the right result under the law and common sense, he does so without displaying great technical virtuosity, and sometimes his conceptual carelessness is annoying. In Chanen [VI, Criminal, 39], for example, he somewhat gratuitously characterized district court error as an intrusion into the Executive's function. More distressing is the discussion in Carlson [VII, Criminal, 53], another Fifth Amendment/tax protester case, where he again reached the right result but purported to "balance" the defendant's self-incrimination rights against "society's" interest in collecting the revenue. That approach combines intellectual laziness -- balancing is a popular substitute for thinking -- and unfortunate instrumentalist, collectivist concepts. The whole point of putting a right in the Constitution is to make it prevail against society's interests as expressed by the political branches.

Judge Wallace's performance in this area on appeal is worth noting. The Supreme Court has vindicated a number of his dissents, as in Peltier [VI, Criminal, 1], Mac Collum [VI, Criminal, 43], and Loud Hawk [VII, Criminal, 59]. The Court affirmed a thoughtful Wallace Fifth Amendment/tax protester opinion in Garner [VI, Criminal, 44] and, when it reversed Wallace's view on the habeas "deliberate bypass" rule in Mann [VII, Criminal, 61], it probably was wrong (at least, that's what Burger, Powell, White and Rehnquist thought).

D. Deference to Agencies

In general Wallace is reasonably deferential to agencies' substantive decisions, but a little too willing to regulate their procedures. For example, in Patel and Ruanswang, [II, III, Government Regulation, 44, 45], he held that the Bureau of Immigration Appeals erred by changing a rule through adjudication rather than rulemaking, when the proper result was simply that the adjudication was wrong on its merits. And in Grolier, id., 12, he took an overly rigid approach to the separation of functions between an attorney advisory and an administrative law judge. As Rehnquist recognized in Vermont Yankee, courts are unlikely to accomplish anything other than create inefficiency by requiring agencies to engage in a great deal of additional procedure. He made a similar mistake in Marathon Oil [I, Environmental Law, 12], where he found that it was a violation of due process for a Regional Administrator to bypass the administrative law judge stage of review of a permit.

Wallace also had an insufficiently strong reaction to an argument advanced by an environmental group as to why it should be allowed to intervene in a law suit challenging the Interior Department's decision to withdraw public acres from private selection. Sagebrush Rebellion, I, Environmental Law, 4. The group urged that the government would not adequately defend its actions in withdrawing the land because the plaintiff was a group called the Sagebrush Rebellion, of which Secretary Watt, one of the main defendants in the suit, had been a member. This argument is outrageous -- it may be ground for seeking to disqualify the Secretary from participation in the decision, but surely is not grounds for entertaining charges that he will throw a law suit, therefore requiring "qui tam"-type actions. Wallace, however, defended against the claim by explaining that the Justice Department rather than the Interior Department would have control of the litigation, and therefore there was no problem. That appears to have troubling implications for the court's role vis-a-vis the executive in that it seems improper for the court to involve itself in which government agency would play which role in the conduct of litigation.

E. Deference to States

Wallace has not written many opinions bearing on this question. The only one that clearly falls within this category is Shell Oil Co., [II, Environment, 11], but it is a peculiar case. The issue there was whether a decision made by a state agency on the "advice" of EPA (which had the statutory authority to bar the state from further participation in the program) was reviewable in federal court as agency action under the APA. The majority held that it was not, although Wallace urged in dissent that there should be federal judicial review. Although Wallace is probably wrong, there is already so much federal involvement in the program that it is hard to quarrel with his view on federalism grounds. One other case somewhat relevant to Wallace's view on federalism is Oregon Liquor Control Commission [V, Antitrust, 7], in which he ruled that a state's laws on liquor regulation violated the antitrust laws, and was not within a special exemption for certain types of state laws. That result, however, appears to be dictated by the Supreme Court precedents.

F. Commitment to Strict Principles of Non-Discrimination

This is a comparatively weak area for Wallace. The most significant case is Johnson, [III, Civil Rights, 3], a post-Stotts case where the majority accepted a quota system for hiring by a state agency. Wallace's dissent contends that the system can be defended as an affirmative action program, but has to satisfy Weber's standards on the subject. After Stotts, however, there is certainly ground to question whether that is adequate where a public agency is involved. Wallace, however, seems to

regard Stotts as a seniority case. There are several other instances where Wallace is too tolerant of quota-type affirmative action programs. Davis, id., 4; La Riviere, id., 8.

On the other hand, Wallace wrote a key opinion rejecting a comparable-worth-type claim, Spaulding, id., 22, and has written a number of good school desegregation cases, e.g. Spangler, id., 25.

G. A Disposition Toward Less Government Rather Than More

Wallace has not voiced that preference expressly anywhere. His willingness to dispose of frivolous antitrust [V, Antitrust, 1-6, 8-14] and civil rights suits [III, Civil Rights, 1, 6, 9, 10, 19], as well as his construction of NEPA in environmental suits [I, Environment, 2, 3, 14], however, indicates that he thinks citizens should not have to put up with unnecessary government burdens.

II. Legal Competence

Wallace is quite a good technical judge. He does not tend to make mistakes in complicated areas. He is also a reasonably good writer, although he occasionally uses an inappropriate turn of phrase. (An example of this: "Analyzing the abstention doctrine is reminiscent of a voyage on uncharted seas. Indeed, it can be concluded that there is not one abstention doctrine, but several.")

He sometimes is a little insensitive to the costs imposed by litigation in remanding cases that probably could be disposed of at the appellate stage with a little more work. He is also opposed to dictum to the point of fanaticism, causing him to write concurrences pointing out that he does not join portions of opinions or even paragraphs. This is frequently necessary in the Ninth Circuit, but Wallace carries it a little too far. He is probably also a little too respectful of precedent, although he can distinguish cases or come up with arguments for disregarding them if he really wants to.

He has not been that much of a leader in any particular area of law, with the possible exception of immigration law, where he has written a number of opinions deferring to the immigration authorities and finding their activities constitutional that the Supreme Court has substantially adopted. Plasencia, Wang, Lopez-Mendoza, [IX, Immigration Law, 1, 2, 14]. His record is about even in the Supreme Court, although Rehnquist has generally taken positions agreeing with him in result and frequently in analysis.

One other point worth noting: Wallace is very interested in court administration. One issue on which he has taken the lead is in opposing the Intercircuit Tribunal, on the ground that it is unnecessary.

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J. Clifford Wallace

Circuit Judge
Ninth Circuit
4N25 U.S. Courthouse
San Diego, CA 92189
(714) 293-6114
Appointed in 1972
by President Nixon

Born: 1928

Education San Diego State Univ., B.A., 1952; Univ. of Cal., Berkeley, LL.B., 1955

Military Service Navy, 1946-49, 2d cl. PO

Private Practice Partner, Gray, Cary, Ames & Frye, San Diego, 1955-70

Academic Positions Adjunct Professor, San Diego State Univ., 1975-present

Previous Judicial Positions U.S.D.C., S.D. Cal., 1970-72

Professional Associations A.B.A.; American Law Institute; American Board of Trial Advocates; Federal Bar Assn.

Pro Bono Activities Board of Visitors, J. Reuben Clark Law Sch., Brigham Young Univ., 1974; former Vice Pres., Executive Board, San Diego County Council, Boy Scouts of America

Honors and Awards Cal. News Publishers Assn., Distinguished Service Award, 1979; Boy Scouts of America, Silver Beaver Award, 1981

Publications
"The Jurisprudence of Judicial Restraint: A Return to the Moorings," 50 Geo. Wash. L. Rev. 1 (1981); "American Inns of Court: A Way to Improve Advocacy," 68 A.B.A.J. 282 (1982); "Working Paper: Future of the Judiciary," 94 F.R.D. 225 (1982); "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?," 71 Cal. L. Rev. 913 (1983); "A Two Hundred Year Old Constitution in Modern Society" (address delivered at the Vinson and Elkins Lecture, Univ. of Tex. Sch. of Law), 61 Tex. L. Rev. 1575 (1983)

Judicial Committees & Activities 9th Cir. Committee on Reorganization of the Circuit Conference and Circuit Conference Commissions, 1974; Judicial Conference: Subcommittee on Federal Jurisdiction, 1975-76; Committee to Consider Standards for Admission to Practice in the Federal Courts, 1976-79; Committee on the Judicial Branch, 1980-present

Lawyers' Comments

Courteous, conservative, an active questioner, smart, prepared, articulate.

Additional comments: "Conscientious, scholarly, asks many questions and good ones, is conservative, works very hard, and writes well." "Good, competent, doesn't reveal himself during argument." "Very bright, one of the best minds on the court, but is result-oriented and stretches—or misconstrues—precedents. He can pin attorneys to the wall." "Asks a lot of questions. Doesn't let go if he wants to make a point. Good writer." "Insensitive to government abuse of power." "Very smart. Can get impatient and sarcastic with lawyers. Relatively conservative. Strong on antitrust law. Very well prepared. Writes well." "Can be be very tough. Follow procedures or expect a tongue lashing." "His writing is effective, not colorful." "I did not find him aggressive in argument. His opinions are solid, not brilliant." "Very sharp. Lots of ideas. Articulate."

Miscellany

In his article, "The Jurisprudence of Judicial Restraint: A Return to the Moorings," 50 Geo. Wash. L. Rev. 1 (1981), Judge Wallace discussed his jurisprudence of judicial restraint, asserting that it is premised upon his belief that liberty is intrinsically valuable because liberty is necessary for a realization of what makes human beings human. The extension of liberty into the realm of social decisionmaking results in democracy. Thus democracy, like liberty, is intrinsically valuable.

The opposing theory is that democracy is simply an instrumental value. Under the instrumental theory, democracy is valuable only to the extent that it produces substantively "better" decisions than would any other available decisionmaking process. If one believes that the value of democracy is only instrumental and if one comes across a statute that is clearly unwise, then one has a duty to "correct" the statute, if possible. Correction is often made by "finding" the required constitutional argument or statutory construction. The rationale is that a democratic decision that is corrected in an undemocratic fashion when clearly wrong is better, instrumentally speaking, than the same decision without the correction.

Judge Wallace asserts that his approach, on the other hand, necessarily places value in the democratic process, even when its decisions are stupid, irrational, or completely wrong. Given the intrinsic value of the democratic process, judges must be extremely careful in taking decisions away from duly elected officials. The intrinsic value of democracy thus provides a jurisprudential underpinning for judicial restraint.

Having established the jurisprudential underpinnings of judicial restraint, Judge Wallace then discusses its practice. Specifically, he considers judicially restrained approaches to statutory interpretation, common law, and constitutional law. Judicial restraint in statutory interpretation counsels the following principles: "(1) Clarify only as much of the statute as is necessary to

J. Clifford Wallace (cont.)

decide the case before the court. (2) Clarify the statute in the fashion that the legislature probably would have, had the ambiguity been brought to its attention. (3) Follow common law rules of statutory construction. (4) Clarify the statute in a manner that innovates the least against the background of prior law, especially in regard to extending causes of action." Id. at 9.

Judicial restraint in extending common law principles counsels the following considerations: (a) whether extending the principles protects or undermines the proper authority of elected state and federal lawmakers; and (b) whether extending the principles tends to remove from the courts disputes better resolved in a nonjudicial setting.

Judicial restraint in constitutional interpretation counsels the following principles: "(1) Stand by the clear language of the constitution unless doing so is manifestly counter to the framers' intent. (2) Clarify unclear constitutional language in line with the Framers' intent if that intent is ascertainable with reasonable certainty. (3) If neither of the prior principles applies, clarify unclear constitutional language by selecting the alternative that least restricts the discretion of elected lawmakers. (4) If none of the prior principles applies, clarify unclear constitutional language in line with the best estimate of the Framers' intent or in the manner most congruent with prior expectations." Id. at 11-12.

In his article, "American Inns of Court: A Way to Improve Advocacy," 68 A.B.A.J. 282 (1982), Wallace claims that often trial attorneys do not meet minimum standards of quality in advocacy. He therefore proposes that inns of court be established in the United States. He suggests that, in order to assist in the development of competent trial advocates, some judges and experienced members of the trial bar should voluntarily become members of a small inn. They would be joined by a limited number of inexperienced lawyers and law students. Judge Wallace believes that inns of court have "the potential of providing excellent practical educational opportunities for potential trial lawyers most in need, while at the same time creating group pressure to participate and learn." Id. at 283.

In his article, "The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or Molehill?," 71 Cal. L. Rev. 913 (1983), Wallace rejects the idea of a national court of appeals, which was presented in 1975 by the Hruska Commission. The primary purpose of this court would be to resolve conflicts among the circuits, thus ensuring uniformity of federal law. But, asserts Wallace, creation of uniformity was historically only a secondary justification for Supreme Court review. Therefore, given the lack of study on the nature and extent of intercircuit conflict, proponents of a national court of appeals have not proved their case and the call for such a court is premature at best, according to Wallace.

Wallace then proposes three modifications to the present three-tier system of review, which he asserts might resolve intercircuit conflicts. First, he calls for an ad hoc delegation to an en banc circuit court, to which the Supreme Court could certify intercircuit-conflict issues on a random or rotating basis. The resulting decisions would be binding on all circuit and district courts, unless reversed by the Supreme Court.

Second, Wallace proposes establishment, on a case-by-case basis, of a national en banc court. This court, comprised of one judge from each circuit, would resolve intercircuit conflicts on an ad hoc basis. It would be convened in one of two ways: either by majority vote of the Justices of the Supreme Court, or by majority vote of the circuits. Decisions of the national en banc court would be binding on all circuit and district courts, unless reversed by the Supreme Court.

Third, Wallace proposes a reduction in the numbers of circuits. Although such a proposal sounds radical, he noted, "it seems radical only because it suggests consolidating the courts of appeals and changing their boundaries. Structurally and jurisprudentially, it is considerably less radical than the proposed fourth tier national court of appeals." Id. at 940-41.

MEMORANDUM

TO: Edwin Meese III
Attorney General

FROM: Supreme Court Nominee Evaluation Committee

SUBJECT: Candidate: Ralph K. Winter

In the four years that Ralph Winter has been on the Second Circuit Bench, he has proven to be an able judge with a strongly interpretivist approach to constitutional law. Doubtless, Judge Winter was one of the Reagan Administration's best judicial appointments of the first term and his decisions have by and large reflected a sound jurisprudential philosophy. Certain opinions, however, suggest a minor, but not insignificant, note of caution.

Judge Winter's non-judicial writings, as well as a number of his opinions, firmly establish that his ideology on many important substantive issues is closely in line with the President's policies. He is acutely aware of the limited institutional competence of the courts in both legislative fact-finding and policy-making. He is also especially sensitive to the dangers for our constitutional system if "courts are perceived to stand ready to consider tempering [unwise] legislation, [because] the path of least political resistance will always be for the Congress to avoid serious consideration of the actual consequences" of its legislative follies. Finally, the Judge believes that constitutional interpretation is properly a search for original intent, measured by "a variety of factors including the Framers' expectations, the nature of our constitutional structure, and our experience with it." This statement was made in defense of the constitutional legitimacy of executive privilege, and is readily squared with strict constructionism. Other statements, however, indicate that there may be more play in the joints of his interpretative philosophy than necessary. For example, he

describes constitutional interpretation as a "multidimensional task" informed by "[t]he development of governmental institutions, the experience gained through years of adjudication, and the growth of competing principles . . . ." The discomfort inspired by this statement is aggravated by his observation that "constitutional language, structure, and history ought to be the main sources of constitutional law."

Insight into the meaning of these statements may be provided by Judge Winter's defense of Shelley v. Kramer, which held that judicial enforcement of private restrictive (racially) covenants violated the Equal Protection Clause. In an article in which he attempted to construct a working theory of state action, Judge Winter argued that purely private activity may be brought within the Fourteenth Amendment's sweep when "the power exercised is literally monopolistic and similar to the kind of foreclosure exercise by the state . . . ." Shelley represented "a paramount case for the court to hold that private activity is, in effect, state action when it so closely resembles a government." This understanding of the state action doctrine, while certainly more defensible than the Shelley Court's, is quite troubling.

Nonetheless, Judge Winter has repeatedly demonstrated that he is not shy about his strong commitment to conservative principles. In his short service on the Bench, he has written several stinging dissents attacking misguided Second Circuit decisions. Perhaps the best to date is his dissent in the Baby Jane Doe case, United States v. University Hospital, 729 F.2d 144 (1984). He took the majority to task for engaging in judicial legislation in order to save Congress from its own questionable judgment. Similarly, Judge Winter has rejected the Second Circuit majority's narrow reading of Stotts in EEOC v. Local 638, 753 F.2d 1172 (1985). Judge Winter also dissented in Parent Ass'n v. Ambach, 738 F.2d 574 (1984). In this school desegregation case, he would have allowed the Board of Education to escape the continuing court oversight of its operations, that had been ongoing for five years.

Yet, a comprehensive survey of Judge Winter's opinions counsels caution in evaluating his candidacy for elevation to the Supreme Court. Although his judicial writings are uniformly excellent, there is some inconsistency in Judge Winter's approach to several important legal issues. For example, in National Wildlife Federation v. Goldschmidt, 677 F.2d 259 (1982), Judge Winter took a very strong position on Article

III's threshold requirements and dismissed the plaintiffs' premature environmental claims. In NAACP v. Town of Huntington, 689 F.2d 391 (1982), however, the Second Circuit granted standing to a group that was precluded by an allegedly discriminatory zoning ordinance from building a low income housing project. Writing for the majority, Judge Winter found standing despite the absence of federal funding, without which the parties and the court conceded the project could not begin. Although not palpably wrong, this decision fails to appreciate fully the importance of "redressability" in determining Article III standing.

In a broad spectrum of cases, Judge Winter has demonstrated a sensitivity to the prerogatives of the states. Judge Winter's opinion in Global Int'l. Airways v. Port Authority of New York, 727 F.2d 246 (1984), held that local airport noise restrictions are not preempted by the Federal Fleet Compliance Program. In another opinion with federalism implications, Judge Winter held that the Commerce Clause does not invalidate a Connecticut debt collection agency licensing requirement, as applied to out-of-state agencies. Silver v. Woolf, 694 F.2d 8 (1982). Yet, in a dissent in Battipaglia v. N.Y. Liquor Authority, 745 F.2d 166 (1984), Judge Winter disagreed with Judge Friendly's deference to the states' authority to immunize regulated activity from the federal antitrust laws. Furthermore, Judge Winter reached this conclusion in the context of state regulation of alcoholic beverages -- an area of traditional state concern expressly sanctioned by the Twenty-first Amendment.

Also somewhat distressing is Judge Winter's record with regard to judicial deference to administrative decisionmaking. In a good number of cases, Judge Winter has demonstrated that he will respect the reasoned judgment of an administrative agency in matters of discretion and will give suitable weight to an agency's construction of the statutes it is charged to enforce. On the other hand, there are two significant exceptions to this general statement. In Stevic v. Sava, 678 F.2d 401 (1982), Judge Winter rejected the INS interpretation of Section 243(h) of the Immigration and Naturalization Act. The Supreme Court reversed unanimously. INS v. Stevic, 104 S. Ct. 2489 (1984). Similarly, in Franklin Mint Corp. v. TWA, 690 F.2d 303 (1982), Judge Winter refused to accord deference to the CAB decision to use the price of gold as a standard of conversion in valuing lost foreign cargo under an International Convention. While affirming the judgment on other grounds, Justice O'Connor wrote an 8-1 opinion of the Court ruling that the CAB standard was within the agency's discretion.

In the area of criminal law, Judge Winter has authored a pair of eloquent and persuasive dissents against the undisciplined expansion of federal mail and wire fraud statutes. United States v. Margiotta, 688 F.2d 108 (1982); United States v. Siegal, 717 F.2d 9 (1983). However, he also wrote the majority opinion in Martin v. Strasburg, 689 F.2d 365 (1982), striking down the New York juvenile preventive detention statute as unconstitutional on its face. Judge Winter reasoned that, because statistics show that most juveniles are ultimately released, the purpose of the detention statute was more punitive than preventive. The Supreme Court reversed in a 6-3 opinion by Justice Rehnquist. 1/ Schall v. Martin, 104 S. Ct. 2403 (1984). The Court noted that all fifty states had such laws and found that they served a "legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause."

The pattern of occasional ideological inconsistency outlined is not to suggest that Judge Winter is not an outstanding jurist and an enormously valuable addition to the Second Circuit. Instead, this analysis of his judicial decisions most likely exposes the natural difficulty experienced by a new Judge in adjusting to the Bench. On balance, he is very bright, and jurisprudentially conservative. Inasmuch as his philosophical orientation is strong, the few troubling decisions noted above might be viewed simply as an inevitable part of the ongoing evolution of his judicial personality.

1/ It bears noting that in four instances in which the Supreme Court has reviewed a decision written by Judge Winter, it has reversed him three times. Moreover, these reversals have typically been penned by a conservative Justice and joined by a substantial majority of the Court. This record might present an easy target at confirmation hearings.

April 10, 1986

MEMORANDUM

TO: Chuck Cooper
Assistant Attorney General

FROM: Greg Walden
Deputy Associate Attorney General

Attached is my summary of my literature review of Ralph K. Winter. The lengthier analysis, from which this summary is excerpted and adapted, was sent to you.

I am in the process of cleaning up that report, and will provide you a copy when finished. I found it impossible to do justice to this subject in 10 pages, as requested. If the summary must be reduced further (or if you deem the format, structure, or contect in need of revision), please let me know.

Judge Ralph K. Winter Literature Review: Summary

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A. Constitutional Law and Interpretation

1. Theory and approach

Much of Judge Winter's theory of constitutional law and of constitutional adjudication can be gleaned from a rather heated exchange that took place a decade ago between Raoul Berger and Ralph Winter concerning executive privilege. Professor Winter reviewed the book, Executive Privilege: A Constitutional Myth, published by Berger during the apex of the constitutional crisis that grew out of Watergate. The review is written in a style that politely may be labeled as bordering on the ad hominum. "The Seedlings for the Forest," 83 Yale L.J. 1730 (1974).

Professor Berger, of course, enjoys a popular reputation as an apostle of strict constructionism, the doctrinal precursor to interpretivism. Professor Winter's interpretivism would thus seem to share much with Berger's theory. But according to Winter, Berger's treatment of the Constitution suggests more "a poorly drafted debenture bond than an enduring charter of government." Berger's "view of the presidency, drawn entirely from the bare words of article II and pre-Convention 'history,' is so arid and constricted that one wonders why anyone would bother to have elections to choose who would serve in such a mechanical and powerless post. This analytic framework does not permit one to view Congress and the presidency in their political as well as legal dimensions and his work thus displays a lack of any sense of the political process."

Okay, so much for Professor Berger's constitutional theory. What of Winter's? The answer a conservative jurist gives to the question, "What does it mean to be an interpretivist?" is likely to be more enlightening when, as here, the subject of discussion purports to be an example of the Real interpretivist McCoy but may in fact be an imposter. (For another example, see Judge Bork's defense of his theory of constitutional interpretation in Dronenberg, statement on denial of rehearing, from charges of "judicial activism" leveled by the D.C. Circuit activists.) Judicial activism is an often and easy target. More difficult is to defend from the charge of judicial activism a constitutional theory that locates some of its sources outside the text yet still claims the label interpretivist.

The Framers' intent, Winter acknowledged, is not only relevant but often will be dispositive. But the discernment of constitutional intent is a "multidimensional task," informed by "[t]he development of governmental institutions, the experience gained through years of adjudication, and the growth of competing principles . . . . . I willingly stand with Berger as rejecting as the principal source of constitutional law the idiosyncratic views of those who happen to be in power at a particular time. Indeed, one major difference between constitutional and

nonconstitutional rules is that the former create and define political power and are themselves subject to it only when certain requirements are met, such as the amending procedure. In general, then, constitutional language, structure and history ought to be the main sources of constitutional law." This is the easy part.

"Constitutional interpretation, however, is more than the assembly of historical minutiae from which inferences of intent may be drawn . . . . [T]here are several levels of legislative intent relevant to any examination of a constitutional provision. There are, of course, the specific, immediate expectations of the Drafters as to the legal effect the provision would have on the existing laws and practices of the day. But "[c]onstitutional language is usually more general than is warranted by the specific expectations of the Framers and it has thus long been thought that the boundaries of legitimate interpretation extend beyond those immediate expectations." For example, "The establishment of separation between the branches and the adoption of a representative form of government . . . have implications for the question of executive privilege." Thus, "[i]ntent in this broader sense can be determined only by resort to implications drawn in light of a variety of factors including the Framers' expectations, the nature of our constitutional structure, and our experience with it."

And what of the Epstein-Siegan school of conservative juridical thought, which calls for a recrudescence of judicial protection of economic liberties by constitutional interpretation? It appears that Winter, although sympathetic with the policy prescriptions of this school, would not join in their constitutional approach. Elsewhere he has criticized the Lochner era activism. Professor Winter groups together the substantive Equal Protection enthusiasts of the present day and the champions of substantive due process era of Lochner. Both suffer from the same defect, he concluded. Each "finds sustenance solely in its alleged wisdom as public policy. Whatever its wisdom, however, it is the kind of policy one concerned with institutional competence would leave to the judgment of the legislative branch."

2. Specifics

a. Separation of powers and the structure of our Constitution

Ralph Winter has not as a judge had much opportunity to display his theory of the separation of powers doctrine, and there is also not much in his academic writings. Thus, there is not a clear indication of his view of the constitutional status of so-called independent agencies, although there is much in the

literature of his criticism of them on policy and good government grounds, which may be somewhat helpful to know.

Professor Winter's congressional testimony on the reconstituted FEC following the Supreme Court's decision in Buckley v. Valeo is relevant here. He favored giving the Commission only powers to administer reporting and disclosure requirements. All law enforcement power ought to be taken away. According to Winter, it is undesirable to place law enforcement power in an independent commission, which will expand its role and constantly be rewriting the law through administrative interpretation. He expressed serious doubts as to the constitutionality of Congress giving law enforcement responsibility to independent agencies, expressing his reservations in terms of a delegation of excessive discretion in the First Amendment area to an administrative body. In an article scoring the welfare state, Professor Winter revealed what he thinks of independent agencies. He concluded that this "mainstay of regulation . . . reduces even this limited accountability to the vanishing point. . . . How can we truly say we care about consumer protection while we permit the ICC to continue to exist?"

In debating with Berger the merits of the question whether executive privilege of constitutional dimension, Professor Winter answered in the affirmative. His analysis is based both on separation of powers concerns, and less obviously on our form of representative government. Concerning separation of powers, he noted that the "unrestrained legal power to probe at will into the affairs of the executive branch can severely weaken the executive branch and perhaps subordinate it to Congress. Some form of executive privilege may be essential to the independence of the Executive."

Our form of government also sheds light on whether executive privilege is constitutionally based. "Those who clamor for total exposure simply do not like representative government. . . . Representatives are expected to exercise independent judgment and to defend their decisions at periodic elections. This calls for them to lead rather than follow and implies that they may establish whatever decisional processes they believe are appropriate. These processes themselves, of course, must be defended to the people."

Professor Winter then turned to the most vexing problem in this area: In a constitutional impasse between Congress and the President, who decides? Professor Winter distinguished between disputes that arise out of congressional subpoenas and disputes that arise out of civil or criminal litigation. As for the former, "political accommodation is the best way to resolve

conflicts between Congress' 'need' to know and the President's 'need' for confidentiality. . . . 'How much secrecy?' is the people's business and we should not discourage their attention to that business by acting as though a final and infallible decision is available in the courts." Indeed, these disputes are "a paradigm case of the [political question] doctrine's continued usefulness." Although the President wins as a legal matter, Congress has at its disposal powerful political checks to obtain the privileged information.

b. The Fourteenth Amendment and civil rights

An analysis of the meaning and reach of the Equal Protection Clause must begin with a theory of state action.

Professor Winter first wrote on state action during a time the Supreme Court and constitutional scholars were attempting to find a theory of state action that embraced Shelley v. Kraemer and yet was faithful to the text and the purpose of the Fourteenth Amendment. He provided a fuller explanation some years later. Although many commentators (gleefully) gave up the search (about that, more later), Professor Winter recognized that, however imprecise a concept, state action is an essential element of the Fourteenth Amendment.

Winter interpreted the Equal Protection Clause the way it was written and intended. This means that it is only state action that contravenes the Constitution, not purely private conduct and not state tolerance of private conduct either. This also means that the equality mandated by the Constitution is one of process and not result.

Professor Winter attempted to construct a working theory of state action. "First, state action cannot mean toleration of all conduct that the state may constitutionally regulate. Second, some formal governmental acts . . . are not covered. Only those acts by which government uses its unique powers . . . are within its scope. Third, whenever government grants an exclusive franchise to a private business, . . . this protection must carry with it fourteenth amendment restrictions. . . . Fourth, a small number of private activities will be covered by the fourteenth amendment because the power exercised is literally monopolistic and similar to the kind of foreclosure exercised by the state under the fourteenth amendment. . . . The Civil Rights Act of 1866, which the fourteenth amendment was intended to validate, was directed at 'any law . . . or custom.' 'Custom' suggests something more than formal acts of the state, such as private concerted action that forecloses individual choice in a manner similar to government."

Shelley fits gently under this theory as "a paramount case for the Court to hold that private activity is, in effect, state action when it so closely resembles a government." Well, you be the judge.

In a far-reaching article entitled "Poverty, Economic Equality, And The Equal Protection Clause," Professor Winter defended the Constitution as written and intended from an attack by Professors Michelman, Karst, Van Alstyne, Henkin and others. The goal of the professoriat was some sort of constitutional recognition or mandate for redistributionist theory. The vehicle chosen was the Equal Protection Clause. If only the Supreme Court were to sound the death knell of the state action doctrine and pronounce freedom from poverty as a fundamental interest; the federal courts would do the rest!

But not so fast. In a long and sometimes esoteric passage, Winter took on Michelman's "just wants" theory on its own terms and logically, empirically and philosophically devastated it. He lamented the legal profession's poor understanding of "how unformulated the theoretical case for redistribution is and the inadequacy of the empirical support on which it rests." In his examination of redistributionist theory and experience, he anticipated Charles Murray's Losing Ground in its indictment of the welfare state. (And he knew the players: "[A]lthough income redistribution in the form of the provision of goods and services parades as an egalitarian undertaking, it has a distinctive elitist case-- noblesse oblige if you will-- because it necessarily entails regulating the life style of the poor.")

As for the Equal Protection Clause, Professor Winter called for the Court to put a stop to recognizing "fundamental interests." "So long as the Court continues to engage in th[is] ad hoc process [], the number of interests can be endlessly expanded through argument by analogy, whichin turn depends almost entirely on the value preferences of individual Justices." And the Court is not competent to identify, much less shape the contours of, a "fundamental interest" concerning income redistribution. Professor Winter displayed a keen understanding of the limitations of the Supreme Court as both a fact-finding and policy-making institution.

When Professor Winter testified before Congress in support of a bill to restrict mandatory busing of school children to achieve integration, he found the bill to be constitutional, as it required nothing more than does the Fourteenth Amendment: discriminatory purpose or intent. Absent this, Winter testified, busing for racial purposes is itself unconstitutional. The Constitution does not compel any sort of ethnic or racial balance in educational facilities that is the product of demographics and not governmental action. "The proposition that busing can be utilized only to redress a proven constitutional violation is

merely the converse of the rule that no particular racial balance is required by the 14th amendment. If a court cannot command a particular racial balance in the absence of a constitutional violation, it follows that it may not command it simply because a constitutional violation unrelated to racial imbalance is present." This testimony suggests that Judge Winter believes only victim - specific relief for civil rights violations is constitutional.

Judge Winter's Title VII opinions are on the whole encouraging. One opinion written by Judge Winter is a minor disappointment, however. In EEOC v. Local 638, 753 F.2d 1172 (1985), the Second Circuit rejected this Administration's reading of Title VII and the Stotts decision: "Defendants argue that Stotts eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We do not accept defendants' expansive interpretation of that opinion." The majority did not really meet head on this argument of victim specificity; rather it purported to distinguish the case before it from the facts of Stotts. The court then proceeded to uphold the district court's order of contempt for violating an affirmative action plan.

Judge Winter's lengthy dissent concentrated on the record in demonstrating amply that a finding of contempt was utterly uncalled for. "My disagreement with the majority stems largely from its failure to address the fact that Local 28 had the approval of the administrator [of the affirmative action plan] for every act it took that affected the number of minority workers entering the sheet metal industry." Judge Winter is right, of course, that the court transformed the 29% goal of nonwhite membership into a quota, because the contempt order could be supported only on a finding that the 29% figure was not met.

Judge Winter did not take on the majority's "reading" of Stotts, however, other than to criticize it for indirectly violating the spirit of Stotts: "[R]eactive fingerpointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis. This is at odds with [Stotts], which rejected such a use of racial preference as a remedy under Title VII." (my emphasis). Given the majority's flip discussion of Stotts, Judge Winter should have at least performed the pedagogic role of parsing Stotts; having done so, he then could have proceeded to find invalid the affirmative action plan itself, even without the benefit of the majority's construction, because (as the defendants argued) it plainly is not victim-specific. Worthy of some note is the very next sentence of the dissent: "Resort by a federal court to such a strict racial quota in circumstances such as this seems to me also to be of questionable constitutional validity [citing Justice Powell's opinion in Bakke]. (But count

the qualifiers: (1) "such a strict"; (2) "quota"; (3) "in circumstances such as this"; (4) "seems"; (5) "to me"; (6) "questionable constitutional validity").

The Supreme Court granted cert in this case and heard argument in February 1986.

c. The First Amendment

Ralph Winter has long been an advocate of a political process unfettered by governmental constraints. In his view, the purposes behind the First Amendment are better served when the democratic process, including the rough-and-tumble, the ward politics, and money disparities, is allowed to run its course. A fair election does not require equal expenditures; indeed, such a forced equality redounds almost always to the benefit of the incumbent. Rather, Judge Winter sees as legitimate only those governmental acts (1) to ensure the integrity of the electoral process (i.e., restrictions on vote fraud) and (2) to inform the electorate (i.e., disclosure requirements; even here, however, Winter as professor expressed serious constitutional reservations). He is wary of the well-intentioned efforts of those who, either because they are intolerant of the inequalities begot by money or simply because they dislike the messiness of politics, always turn to regulation of politics, like economic regulation, and call it "reform".

Were he a legislator, Ralph Winter would have voted against the public financing of Presidential campaigns, the creation of the Federal Election Commission, and any and all limits on the amount of money voters can donate and candidates can receive. Because his policy views are informed, if not controlled, by his construction of the First Amendment, however, his testimony before Congress during the 1970's when these issues were debated gives us an excellent prediction as to how he would approach First Amendment issues concerning political speech that come before the Court.

In 1971, Professor Winter spoke in opposition to bills that would set limitations on the media expenditures of candidates to certain elective offices. Although his opposition was based in part on his view that such limits would diminish party discipline, seriously hurt the two-party system, and perhaps reduce voter turnout, he stated a more fundamental objection: "Any limitation on spending in political campaigns, whether limited to spending for certain media or encompassing spending generally, violates the first amendment. This applies to any limitation on the amount of money that a person can contribute as an individual contribution to a campaign." Professor Winter contrasted the extravagent First Amendment claims now in vogue with this most basic constitutional protection: "No matter what else the rights

of free speech and association do, they protect explicit peaceful political activity from regulation by the Government."

Following the Supreme Court's decision in Buckley v. Valeo, where Professor Winter represented Senator Buckley, Congress turned to reconstituting the FEC and tinkering otherwise with what remained of the Federal Election Campaign Act of 1971. Although some Senators believed the Court had decimated the Act, Professor Winter, invited to testify, believed of course that the Court had not gone far enough.

On the Second Circuit, Judge Winter has been involved several times with issues concerning the freedom of the press. Judge Winter's participation in these cases shows that he is less concerned with the initial decision whether there is a constitutionally protected interest (he is not hesitant to recognize the First Amendment's application) than with the scope of that right where where are important countervailing interests in limiting that right. Although this functional (or dynamic) approach to First Amendment questions, as opposed to a historical (or static) approach, may lead to more litigation concerning the reasonableness of this or that restriction, I do not believe it can be labeled a non-interpretivist approach. Aside from the obscenity cases, interpretivist judges do not always agree on what the First Amendment was intended to protect (see defamation, commercial speech, campaign finance law cases).

In 1984, Cable News Network sought to televise the Westmoreland libel trial. The district court denied the networks request for a waiver of the district court's local rule prohibiting the presence of television cameras in the courtroom. On an expedited appeal, a panel of the Second Circuit affirmed. Westmoreland v. CBS, Inc., 752 F.2d 16 (1984), cert. denied, 105 S. Ct. 3478 (1985). Judge Oakes' majority opinon held that the network lacked a First Amendment interest in televising the trial sufficient to override a facially valid local rule. Judge Oakes' opinion distinguishes access cases, and seems to dare the Supreme Court to fiddle with the scope of the First Amendment: "[U]ntil the First Amendment expands[!] to include television access to the courtroom as a protected interest, television coverage of federal trials is a right created by consent of the judiciary, which has always had control over the courtrooms . . . ."

Judge Winter concurred in a solid and insightful opinion. He found correctly that the First Amendment is implicated, but he voted to uphold the local rule as a reasonable time, place and manner restriction. That the First Amendment is implicated seems clear. Judge Winter rejected CNN's argument that a case-by-case approach be used, foreseeing the many traps of such an approach. It was enough for Judge Winter to uphold the local rule upon findings that "television is thought to impinge on the adjudicatory process in an undesirable fashion and a per se rule is necessary to guard against such undesirable effects . . . ."

d. Federalism

In the only preemption case in which Judge Winter has written an opinion, the Second Circuit held that local airport noise restrictions are not preempted by the Federal Fleet Compliance Program. Global Intern. Airways v. Port Authority of New York, 727 F.2d 246, on reh'g, 731 F.2d 127 (1984). Judge Winter first determined precisely what the federal policy is--measured change in the fleet composition in order to reduce the aggregate amount of noise--and then determined that on the bare record before the court the local rules do not amount to an obstacle to the accomplishment of this federal goal. In a carefully written opinion (which nevertheless had to be explained further on rehearing), Judge Winter left open the possibility that the local rules would be deemed preempted upon a showing that their implementation interfered with federal policy. It is on the whole a good opinion on federalism grounds.

In another opinion with federalism implications, in Silver v. Woolf, 694 F.2d 8 (1982), cert. denied, 460 U.S. 1070 (1983), Judge Winter held that the Commerce Clause does not invalidate a Connecticut debt collection agency licensing requirement, as applied to out-of-state debt collection agencies. Judge Winter's opinion is strong and favorable from a federalism standpoint. He does a fine job of distinguishing a questionable Justice Douglas opinion.

B. The Art of Judging

1. Coherence, cogency and standards

One might expect a lifelong professor, and one from Yale at that, to be prone to lengthy, scholarly, and extended opinions on a federal appellate court. This has not occurred with Judge Winter, however. His opinions are on the whole refreshingly crisp, to the point, largely uncluttered by footnotes or string-cites, and with only a few exceptions, they are grounded in common sense and reality. Also, one does not see in his decisions the professorial on-the-one-hand, on-the-other-hand type of discussion, but instead a quick jump to the decision, buttressed by sufficient yet not excessive authority and reasoning, and whatever is needed to distinguish or disapprove cases relied upon by the losing party or dissent. This is no mean feat.

One does discern the professor, however, in Judge Winter's penchant for matters of procedure, his desire to formulate standards or guidelines to guide district judges and litigants, and his tough approach to litigants and counsel who put forward specious arguments or who have contravened established procedures.

Several general observations may be made from a review of Judge Winter's opinions. First, he performs a searching review

of the district court record on appeals from a grant of summary judgment. Second, he observes strictly all jurisdictional and procedural requirements, which sometimes means resuscitating a case wrongfully dismissed by the district court for want of jurisdiction. Third, his opinions often provide guidance to district courts and litigants. Fourth, where a case permits it, he is apt to decide upon the rule of law that promotes judicial economy and efficiency while meeting minimum standards of fairness and preserving maximum discretion of the parties to conduct litigation as they wish.

2. The limited role of courts: the scope and nature of judicial review

a. Article III

In National Wildlife Federation v. Goldschmidt, 677 F.2d 259 (1982), Judge Winter affirmed the dismissal of NEPA claims because they were unripe for judicial review. The holding that these claims were unripe turned on the fact that the Secretary's approval of the Connecticut segment of I-84 was contingent upon completion of a connecting Rhode Island segment. Judge Winter's language is worth quoting at some length: "So long as the decision is in effect . . . the ultimate decision to build is in great doubt. A decision by us at this stage would resolve a dispute about a hypothetical highway. Courts have no business adjudicating the legality of non-events. . . . Issues which at that time seemed crucial may well become irrelevant while newly contested matters may arise. Review now might well adjudicate matters which are ultimately immaterial and would by no means put the matter to rest . . . . For us to review [environmental impact statements] now, only to review supplementations later, would unnecessarily intrude on and delay the administrative process. It would also be a pointless use of judicial time."

Now contrast that strong opinion with an opinion Judge Winter wrote just six months later, on standing. In Huntington Branch, NAACP v. Town of Huntington, 689 F.2d 391 (1982), cert. denied, 460 U.S. 1069 (1983), the Second Circuit granted standing to a group that was precluded by an allegedly racially discriminatory zoning ordinance from building a multifamily low income project. The court granted standing despite the present unavailability of § 8 funds, without which the parties and court agreed the project could not go forward. This is a fairly liberal standing opinion; however faithful to the Supreme Court's decision in Arlington Heights, Judge Winter did not address the more restrictive "redressability" opinions of the Court. Admittedly, the Court has often split on precisely what degree of probability is necessary, but Judge Winter could have held plaintiffs' allegations of diligence and the purchase of an option legally insufficient so long as no funds existed for the project. Such a holding would have been at least consistent with

the Supreme Court's methodology and consistent with the proper philosophy of Article III he espoused in the ripeness case discussed above. Decisions on standing often can go either way, and certainly Judge Winter's decision in Huntington is defensible. Nevertheless, it is the black sheep in an otherwise admirable flock of opinions concerning Article III and its doctrines.

b. The role of courts vis-a-vis agency and Congress: statutory interpretation

In a good number of cases Judge Winter has shown that he will respect the reasoned judgment of an administrative agency in matters of discretion and will give suitable weight to an agency's construction of statutes it is charged to enforce. There are two notorious exceptions to this statement, Stevic and Franklin Mint, discussed below, and the Supreme Court caught him both times.

When Judge Winter rejected the INS's reasonable interpretation of § 243(h) of the Immigration and Naturalization Act, which provides authority to withhold the deportation of an alien upon a finding that the alien would be subject to persecution in his home country, the Supreme Court unanimously reversed. Stevic v. Sava, 678 F.2d 401 (1982), rev'd INS v. Stevic, 104 S. Ct. 2489 (1984). The question was whether the alien must demonstrate a clear probability of persecution, or whether some lesser standard applies. Judge Winter recognized the question as close, but misperceived the nature of the various asylum remedies and misread congressional intent. Perhaps a judge should not be faulted generally for making a mistake of statutory construction in a close case, but in this case Judge Winter failed to defer to the INS' consistent interpretation of the statute, and a judge can and should be criticized for that.

What is also objectionable in Stevic-- and a bit surprising for Judge Winter-- is that, having struck down INS' interpretation of the standard, he did not replace it with another. "It would be unwise to attempt a more detailed elaboration of the applicable legal test under the Protocol. . . . Its further development must await concrete factual situations as they arise." Of course, Judge Winter could not simply remand the matter back to INS for its construction, because he had just rejected the agency's reading. (Because the question is a matter of statutory construction, Chenery is inapposite.) But to leave open a standard as frequently litigated as this one is tantamount to abdication of the judicial role. A by-product of course is a plethora of appeals from administrative rulings by INS on motions to withhold deportation. If there is one area of statutory interpretation (apart from Social Security disability litigation) requiring fast and certain judicial resolution, it is the Immigration and Naturalization Act.

Perhaps the strangest decision of Judge Winter is his opinion holding the Warsaw Convention's limits on liability for lost cargo prospectively unenforceable in United States courts because there does not appear to be either an internationally agreed upon or congressionally determined unit of conversion to translate judgments into domestic currency. Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (1982), aff'd on other grounds, 104 S. Ct. 1776 (1984). In doing so, Judge Winter struck down the Convention's reference to the price of gold, concluding that since the United States abandoned the gold standard the reference was meaningless. Judge Winter also refused to accord deference to the CAB, which had adopted as the standard of conversion the last official price of gold. But there is no reason to conclude that, because Congress went off the gold standard in 1971, all uses of the gold standard in other contexts, such as the Warsaw Convention, are nullified, and Judge Winter did not point to any direct evidence that Congress intended to reject the Convention's reference to the gold standard. The opinion at times seems to go out the way to criticize the gold standard, and yet Judge Winter did not come up with a substitute. Having struck down any standard, he refused to select a new unit of conversion, announcing "We are without authority to do so. . . . Substitution of a new term is a political question, unfit for judicial resolution." The consequence of a standardless decision is, of course, that it can be prospective only, although it is beyond me how the parties and others subject to the Warsaw Convention are to conduct their conversions, absent congressional action. Frankly, Judge Winter's opinion in Franklin Mint crossed the border of judicial restraint and amounted to judicial abdication.

Benchmark's precis of this case celebrated Judge Winter's opinion as a model of the proper role of a federal judge. The writer of that assessment should have read closely the Supreme Court's opinion affirming the judgment in Franklin Mint, but discarding entirely Judge Winter's reasoning and ruling of prospective unenforceability. Justice O'Connor wrote the 8-1 opinion of the Court (Justice Stevens dissented), ruling that the CAB's standard (last official price of gold) was not inconsistent with the Convention. The following passages from Justice O'Connor's opinion utterly rebut Judge Winter's opinion and Benchmark's praise of it: "We are not called upon to '[s]ubstitut[e] a new term, but merely to determine whether the CAB's Order is inconsistent with the Convention. That determination does not engage the 'political question' doctrine. . . . The political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that they wish to do so. Accordingly, the Convention's cargo liability limit remains enforceable in the United States. . . . The courts are bound to respect [the CAB's judgment] unless [it] is exercised in a manner inconsistent with domestic or international law."

Another disturbing opinion of Judge Winter is in the case of Joy v. North, 692 F.2d 880 (1982), cert. denied, 460 U.S. 1051 (1983). In Joy, Judge Winter held that Connecticut courts would not apply the business judgment rule to limit the scope of judicial review of the recommendations of a special litigation committee convened to determine whether a shareholder's derivative suit should go forward. Again, Judge Winter's opinion sets standards for a court's review, and this would be all well and good if it were proper for the court to perform such an intensive calculus in the first place. But as Judge Cardamone pointed out in dissent, Judge Winter's opinion has a court second-guessing the judgment of the committee, making its own independent business judgment. There is absolutely no reason to suspect that courts are better equipped to make that judgment, a judgment better left to the corporation.

Truer to form, Judge Winter's opinion rejecting the sale of business doctrine was vindicated by the Supreme Court. In Golden v. Garafalo, 678 F.2d 1139 (1982), Judge Winter refused to recognize the sale of business doctrine as applied to the purchase of 100% of the stock from the sole stockholder, and thus held that conventional stock in a corporation is a "security" under the federal securities laws without regard to whether the underlying transaction involves the sale of the business to one who intends to manage it. As a matter of federal power, Judge Winter sided with the more expansive reading of the statutes. But as a matter of the proper judicial role, Judge Winter unquestionably and properly sided with Congress. This question had split evenly the eight circuits that had considered the matter until the Supreme Court rejected the doctrine by a vote of 8-1 in two opinions announced May 28, 1985. The Supreme Court's opinion tracks the reasoning of Judge Winter's opinion for the Second Circuit three years earlier. The following passages from Judge Winter's opinion can be picked up in Justice Powell's opinion for the Court: "[T]he contours of the sale of business doctrine are unclear. We attribute the lack of clarity not to the doctrine's infancy but to its inherent elusiveness as a legal concept. . . . The sale of business doctrine in the end turns upon the distinction between commercial and investment transactions[,] . . . a distinction . . . of most dubious value. . . . The dangers in creating uncertainty as to the scope of the Acts and in generating slippery legal and factual issues going to jurisdiction are substantial. We regard that as having been the legislative judgment, and we give it force."

Also commendable is Karl v. Board of Education, 736 F.2d 873 (1984), where Judge Winter reversed an order entered under the Education of the Handicapped Act that directed a student-adult ratio of 9-1 in a handicapped student's vocational class (instead of 12-1). Judge Winter properly reversed the district court's usurpation of the state authority's discretion and the court's failure to defer to the final decision of the administrator

because it differed from an opinion of the hearing officer. Judge Pratt dissented, arguing that Congress more-or-less intended that courts inject themselves into such minutia without deferring to the administrator's views. Judge Winter presented the better argument that the "due weight" standard has got to have some bite or else the court might as well write the plans itself. Although this case was a slow pitch, Judge Winter did hit it out.

Also illustrative of Judge Winter's view of the role of courts vis-a-vis legislation is his dissent in the Baby Jane Doe case, United States v. University Hospital, 729 F.2d 144 (1984), wherein he would have held that § 504 of the Rehabilitation Act extends to the provision of medical services to handicapped newborns.

Judge Winter's dissent in Baby Jane Doe is music: He began by acknowledging the conservative's dilemma: "It hardly needs stating that the underlying issues brim with political and moral controversy and portend to extend the hand of the federal government into matters traditionally governed by an interaction of parental judgment and state authority." This judgment, Judge Winter made plain, was made by Congress when it deliberately legislated the analogy of handicap: race. "Once Section 504's legislative heritage is acknowledged, the 'void' in the legislative history is eliminated and the many issues raised by the defendants with regard to medical decisions, parental judgments and state authority simply evaporate. . . . The logic of the government's position on these aspects of the case is thus about as flawless as a legal argument can be."

Judge Winter continued, predicting that the majority's ruling would lead to an "incoherent body of interpretive law under Section 504." For the failure of the majority to respect Congress' judgment, Judge Winter castigated the majority for its "unconstitutional act," reasoning that "we facilitate the democratic legislative process by applying the analogy to race as adopted by the Congress." He cautioned that "So long as the courts are perceived to stand ready to consider tempering such legislation where it leads to controversial results, the path of least political resistance will always be for the Congress to avoid serious consideration of the actual consequences of legislating particular analogies to race. Only an apprehension that such legislative analogies will be enforced by courts as written can provide a counter incentive to induce Congress to address its legislative responsibilities."

On June 17, 1985, the Supreme Court granted cert in another Baby Jane Doe case, Heckler v. American Hospital Ass'n, an unpublished Second Circuit decision affirming, on the strength of United States v. University Hospital, the district court's ruling

that HHS' Baby Doe regulations are without statutory authority under Section 504. Argument was heard earlier this year.

Ralph Winter's law review note is entitled, "Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia," 70 Yale L. J. 70 (1960). Worth nothing is his early understanding of the lack of judicial competence on matters of policy. Written in the context of labor relations, his discussion clearly suggests the inappropriateness of a court determining matters of policy as opposed to law.

Winter explained that Congress had created "severe problems of statutory interpretation. . . . The two principal statutes embodying these policies fail even to acknowledge each other's existence or the possbility of conflict. The Sherman Act allows no scope for countervailing considerations-- such as the need to protect and maintain collective bargaining relationships-- once the intent to restrain trade is proven. In short, application of Sherman Act standards would seriously-- and probably decisively-- impair collective bargaining.

"The [NLRA], on the other hand, is concerned entirely with regulating what it conceives to be a struggle between unions and employers. . . . [I]t contemplates that a clash between the interests of labor and the interests of management will protect the public by neutralizing the market power created by collective bargaining. This is utterly unrealistic, however."

What's a court to do? What they should do, according to Winter, is what the Supreme Court has not done; namely, keep the Sherman Act away from determining questions of labor policy. "Experience under the Sherman Act has demonstrated that fundamental questions of labor policy must be left to the political process. . . . Judicial intervention to the degree foreshadowed by Duplex [a 1921 Supreme Court decision "reaffirming the Sherman Act as an independent head of federal jurisdiction in labor disputes"] is not democratic, unlikely to establish satisfactory rules of law, and may ultimately undermine judicial prestige."

And Winter denied the courts the perrogative to step in the breach left by a timid or unwitting Congress. "[D]oesn't the fact remain that Congress has not acted and is unlikely to act and that this legislative abdication compels the courts to act in appropriate flagrant cases? In spite of the dangers, isn't this judicial activism at a small cost?" But the cost is not small, for when courts openly assume the legislative function, rather than "search[] for shared principles or engag[e] in interstitial legislation," the courts perform poorly in attempting a compromise between "political balance and judicial predispositions . . . ." Further, judicial legislating invites further political inaction and "tempt[s] interested parties to

avoid serious legislative proposals so long as they believe much of what they want can be achieved in court."

Winter charged the Court and Congress with resolving this mess. The Court must "emphasiz[e] and illuminat[e]" the legal problems for Congress; this "is a responsibility for which the Court, more than any other institution, is suited, but that is the very responsibility it has consistently abdicated." Congress, for its part, should amend the Sherman Act and NLRA and place labor antitrust policy under the rubric of the labor laws and the NLRB.

Perhaps the best clue as to Judge Winter's view of the proper relationship between agency and court may be found not in any of his opinions but in an article written fifteen years ago on the National Labor Relations Board. Although the conclusions the reader reaches should carry with it the caveat that Professor Winter wrote about the NLRB, Professor Winter himself framed his inquiry in terms that may be applied across the board.

Professor Winter described the NLRB in terms of its statutory purposes and what labor and management, as well as the Supreme Court, have come to expect from it. He found the Board to have strayed from the model in a number of respects. One function of the Board is to flesh out the generalities of the NLRA through adjudication. A board with greater and more balanced experience with these issues could fairly be expected to fashion realistic rules of law. But the Board no longer performs this function, in part because it is now largely unnecessary. "[T]he argument that the generality of the statute justifies the existence of the Board is easily overstated, because of the elaboration provided by case law and by legislative amendment."

Another function of an administrative agency is to experiment. "The Board is thus distinguished from a court . . . also in its relative freedom from the doctrine of stare decisis and from the need to appear to have found the one correct rule of law every time it adjudicates. . . . [T]his view does not permit the Board to abandon the duty to treat like cases alike, or to adjudicate on an ad hoc basis. It merely permits the Board to change from one general standard applicable to all litigants to another, and to do so openly. . . . It permits the exercise of discretion in an intelligent way and is a substantial aid to the legislative process."

Finally, the NLRB, like other agencies, is expected to be politically responsive, because it is not fettered by stare decisis and because its membership changes along political lines. Professor Winter said this is not all to the good. "[T]o say an agency is politically responsive is only to say it reacts to some political forces and not that it reacts to the relevant ones." Some Boards have been so "politically responsive" that they have failed to treat like cases alike. A more fundamental objection,

however, is that the Board may hamper the legislative process if it muddies rather than sharpens the issues appropriate for legislative treatment.

It is in the area concerning the reach of the federal criminal law that Judge Winter has taken a definite stand, and it is a stand a good distance from the Justice Department's. The most celebrated case is United States v. Margiotta, 688 F.2d 108 (1982), cert. denied, 461 U.S. 913 (1983), the successful mail fraud prosecution of the Republican Party Chairman of Nassau County, New York. The Second Circuit's holding, although difficult to capture precisely from Judge Kaufman's lengthy opinion, is that a mail fraud claim will lie against a powerful party leader (not a public official) who is found to have a fiduciary duty (under state or federal, statutory or common law, apparently) to the general citizenry to disclose material information or to give notice of a conflict of interest to those in government who rely upon him. Margiotta was found to have entered into a secret kickback scheme, whereby an insurance agency he "installed" as Broker of Record kicked back a portion of its compensation to Margiotta's political allies. Judge Winter dissented. (Margiotta was also convicted of extortion, a conviction affirmed by the Second Circuit without dissent.)

As Judge Winter noted, the majority's holding, although novel, follows logically from the judicial precedents ever extending the scope of the mail fraud statute without congressional demurrer. The holding in Margiotta is nevertheless open-ended, despite repeated assurances from Judge Kaufman that its standards will limit the application of mail fraud to this type of de facto government official and this type of odious conduct. Judge Kaufman's discussion of what facts may give rise to a public official's or a party leader's fiduciary duty to the public is remarkable in its potential for mischief. The following hypothetical cases, in Judge Winter's view, describe conduct that is covered by the mail fraud umbrella the Second Circuit has opened: "[A] candidate who mails a brochure containing a promise which the candidate knows cannot be carried out is surely committing an even more direct mail fraud than what Margiotta did here. An elected official who for political purposes performs an act imposing unnecessary costs on taxpayers is guilty of mail fraud if disclosure is not made to the public. A partisan political leader who causes elected officials to fail to modernize government to retain jobs for the party faithful is guilty of mail fraud unless that fact is disclosed."

Judge Kaufman's opinion does not answer this criticism, except to state in conclusory fashion that "[t]he necessity of meeting our restricted tests for the existence of a duty as a government ficudiary on the part of those who technically hold no public office precludes the use of [the mail fraud statute] for dragnet prosecutions of party officials." The tests, however, are not really restrictive. In dissent, Judge Winter expressed

his fear that the majority's construction of the mail fraud statute "as a catch-all prohibition of political disingenuousness" creates a genuine danger of prosecutorial abuse for partisan political purposes. "Every such accusation [of corruption] is now potentially translatable into a federal indictment. I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly disturbs me is the potential for abuse through selective prosecution and the degree of raw political power to the freeswinging club of mail fraud affords federal prosecutors."

Judge Winter and Judge Kaufman debated whether Congress intended the mail fraud statute to cover this sort of conduct. Here, the ordinary principles of statutory construction do not avail: the Second and other circuits have held that the mail fraud statute cannot mean exactly what it says, for its language is "limitless" in its scope. Judge Kaufman was comfortable with concluding that Congress intended the law to be "sufficiently flexible to cover the wide range of fraudulent schemes mankind is capable of devising . . . ." Judge Winter, however, looked in vain for specific evidence that Congress considered that a party official of Margiotta's influence (and there were many more such party leaders in this country at the time of the statute's enactment) would be guilty of mail fraud for failing to disclose material facts relating to his political participation and influence.

Judge Winter explained that the courts' recent expansion of the mail fraud statute is based on "an erroneous analogy between fiducuary relationships involving private parties based on express or implied contract and relationships between politically active persons and the general citizenry in a pluralistic, partisan, political system. . . . For all one can find in the case law, no distinction is made between fiduciary obligations of a civil servant, political appointee, elected official, candidate or partisan political leader. Juries are simply left free to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes. . . . While there is talk of a line between legitimate partronage and mail fraud, there is no description of its location. . . . [Here, the partisan distribution of insurance commissions was apparently statewide practice.] [T]he quest for legal standards is not furthered by reference to 'the right to good government' and the duty 'to act in a disinterested manner.'"

Judge Winter's view of the reach of the substantive criminal law generally and as applied to this case is a good example of his philosophy of the relationship of the criminal law to our democratic system of government. "Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than

criminal sanctions. Where Congress has not passed legislation specifying particular acts by the politically active as criminal, our reliance rather should be on public debate, a free press and an alert electorate. In a pluralistic system organized on partisan lines, it is dangerous to require persons exercising political influence to make the kind of disclosure required in public offerings by the securities laws."

One year later, Judge Winter found himself again in dissent over the meaning of the mail and wire fraud statutes. In United States v. Siegel, 717 F.2d 9 (1983), Judge Pratt (joined by Judge Pierce) held that the wire fraud statute covers a breach by corporate officials of corporate fiduciary duties owed the corporation's shareholders. The majority found that there was sufficient evidence from which the jury could have concluded that the two corporate officials received cash proceeds from the sale of company assets and used them for non-corporate purposes in breach of their fiduciary duties "to act in the best interest of the corporation and to disclose material information to [the corporation] and its stockholders." Although the evidence was thin, the court held that the jury could have inferred that some of the cash was used for self-enrichment.

Judge Winter dissented on the facts and law. Judge Winter characterized the government's prima facie case as merely "a showing of improper corporate record keeping." Judge Winter would have taken the case from the jury: "[T]here is no evidence-- again, none-- that the transactions in question harmed the corporation. By allowing an inference of diversion to personal use to be drawn solely from the lack of proper records, the majority has in effect dropped the element of scheme to defraud from the offense. . . . In effect, a new crime-- corporate improprieties-- which entails neither fraud nor even a victim, has been created."

Judge Winter criticized the majority for creating a federal law of fiduciary obligations outside of the securities laws. "There is no pretense that the source of the fiduciary duty at issue in this case was anything but federal law. There is no reference in the majority opinion to state law or even to Mego's state of incorporation. The jury simply was told that it was up to it to decide whether, as part of the obligation 'to act in the best interest of the corporation,' the defendants were under a duty to disclose the off-book transactions to shareholders. . . . Notwithstanding the lack of even a hint of relevant Congressional intent in enacting the wire fraud laws, notwithstanding Congress' repeated rejection of pleas to strengthen the fiduciary obligations imposed on corporate directors and officers by state law, and notwithstanding the existence of precise federal legislation requiring disclosure of particular corporate matters, we read the wire fraud statute to embody a federal law of fiduciary

obligations, including an undefined duty of yet further disclosure, enforceable by the sanctions of the criminal law."

As in Margiotta, Judge Winter decried the "elasticity" of the court's holding and the "potential for infinite expansion." "It requires little imagination to foresee future application of the theory of this case to the use of corporate airplanes, the size of executive salaries, expense accounts, etc." And as in Margiotta, Judge Winter expressed his fear that the protean nature of the court's construction of the law carries with it the potential for prosecutorial abuse, a potential that was realized in this case. "The government's argument brims with innuendo of other crimes . . ., all of which go to prove only that the criminal charges in issue are a surrogate for ones which the prosecutor lacked either evidence or jurisdiction to make. The overtones of the majority opinion suggest that the defendants here have been convicted essentially of stealing or embezzling funds from Mego. Had those been the crimes actually charged, however, verdicts would likely have been directed in their favor, for there was no evidence that the cash in question was diverted to any purpose other than increasing the profits of the corporation."

Judge Winter's dissent ended with an interesting infusion of cost-benefit analysis, picking up where the majority's criticism left off. "[T]here is a real question as to whether the costs in resources equal the benefits achieved. . . . Ill-defined crimes which are necessarily prosecuted on an infrequent basis probably have little deterrent value." Before the reader comes to conclude that Judge Winter is usurping the judgment of Congress or the prosecutor's discretion, he returns to his limited judicial role of discerning congressional intent: "Were we to restrict the mail and wire fraud statutes to swindling and fraud, as originally intended, rather than extend them to perceived political or corporate improprieties, we would not only perform the judicial function correctly but probably also make a sensible policy judgment in terms of costs and benefits." Quere whether this is a policy judgment a court should make.

Judge Winter's dissents in Margiotta and Siegel are eloquent pleas for a tight reading of the "seemingly limitless" mail and wire fraud statutes. In this judgment, of course, he stands apart from the Justice Department's construction of these laws. Time will tell whether Congress or the Supreme Court validates his or the Department's reading. For present purposes, however, these dissents offer the reader a good view of Judge Winter's judicial philosophy.

Judge Winter's most famous opinion on criminal law is in Martin v. Strasburg, 689 F.2d 365 (1982), where the Second Circuit held unconstitutional on its face New York State's juvenile preventive detention statute. The Supreme Court reversed, Schall v. Martin, 104 S. Ct. 2403 (1984), in an opinon

by Justice Rehnquist and joined by five other Justices. It is the most visible blot on his report card in criminal law.

The New York law authorizes detention of a juvenile upon a Family Judge's determinations of a "serious risk that (the juvenile) may before the return date do an act which if committed by an adult would constitute a crime." Judge Winter's holding in Martin was predicated upon a factual finding that "the period of pre-trial detention is used principally to impose punishment before adjudication of the alleged criminal acts." He found it "critical" that "the vast majority of juveniles detained . . . either have their petitions dismissed before an adjudication of delinquency or are released after adjudication." Oddly, Judge Winter claimed not to reach the abstract constitutional propriety of preventive detention by concluding that this statute is used principally to punish and not prevent (and therefore violates the Due Process clause of the Fourteenth Amendment). In a curious exercise in hindsight concerning the many juveniles who are not adjudicated guilty following their detention, he stated, "Crime prevention is not a sufficiently compelling governmental interest as to any of these detainees to justify shortcutting the fundamental procedural requirement that imprisonment follow, rather than precede, adjudication."

Judge Winter thus struck down New York's law on the basis of statistics, and unwittingly opened the door to similar facial constitutional challenges around the country: "We hold only that pre-trial detention may not be imposed for anti-crime purposes pursuant to a substantively and procedurally unlimited statutory authority when, in all likelihood, most detainees will either not be adjudicated guilty or will not be sentenced to confinement after an adjudication of guilt. In such circumstances, the detention period serves as punishment imposed without proof of guilt established according to the requisite constitutional guarantees." Despite Judge Winter's assurances, this holding does not at all seem narrow.

In reversing the court of appeals and upholding the law, the Supreme Court first blessed preventive juvenile detention in principal, noting that all fifty states have such laws. This is important, because Justice Rehnquist concluded, "[i]n light of the uniform legislative judgment that pretrial detention properly promotes the interests both of society and the juvenile," preventive detention "serves a legitimate regulatory purpose compatible with the 'fundamental fairness' demanded by the Due Process Clause in juvenile proceedings." (my emphasis). The Court then considered the statute's purpose and structure, disagreeing completely with Judge Winter's analysis. The Court found no indication in the statute that preventive detention is used or intended as a punishment. Even assuming that a significant number of juvenile detainees will never be adjudged delinquent, these statistics do not establish, as Judge Winter believed, the law's punitive element. "[W]e find that to be an

insufficient ground for upsetting the widely-shared legislative judgment that preventive detention serves an important and legitimate function in the juvenile justice system. We are unpersuaded by the Court of Appeals' rather cavalier equation of detentions that do not lead to continued confinement after an adjudication of guilt and 'wrongful' or 'punitive' pretrial detentions."

The Court did not rule out the possibility of a successful constitutional claim asserted against a particular application of the law. "But the validity of those detentions must be determined on a case-by-case basis. . . . We find no justification for the conclusion that, contrary to the express language of the statute and the judgment of the highest state court, [New York's law] is a punitive rather than a regulatory measure."

C. The Way the World Works: Intelligence, Common Sense, and Public Policy

If all there were to judging on the Supreme Court was interpreting the law as written and intended, the reader might safely quit here. But our grade school civics lessons did not prepare us for a Supreme Court that regularly makes (and from some quarters is expected to make) policy, finds all sorts of facts (legislative as well as adjudicative), rests holdings (and colors holdings with dicta) based on unproven and often incorrect assumptions of economics, politics, social policy, and human nature. The nature of the disputes that reach the Court, in addition to its composition, has made that so. Thus, what the Court needs is an interpretivist who doubles as an intellectual giant, one who can defeat the claims of the activists on their own terms, and one who can through sheer reason discipline the Court into observing its limited role.

The following pages demonstrate that Ralph Winter understands well the way the world works.

1. Economics, regulation and the welfare state

In a number of articles, Ralph Winter has scored the modern welfare state. "[T]he modern welfare state is little more than a mechanism by which politically powerful groups vote themselves subsidies. That social discontent rather than satisfaction has resulted should come as no surprise. . . . The growing lack of confidence in the democratic political process is nowhere better demonstrated than in the calls for the judiciary to address virtually every perceived social or economic problem. . . . That these calls come from those who have consistently supported the development of our present welfare state demonstrates its utter failure to achieve its stated goals."

His arguments on the consequences of the welfare state, made in the 1970's, are by now so well-accepted that the articles read in 1985 seem to be a little superfluous. Yet they illustrate how attentive Professor Winter is to legal and political developments that damage or distort the political process and subvert our constitutional structure. The welfare state, he wrote, will reach a point in size where "a partial paralysis of the political process is likely to occur[,]" where "government cannot be controlled by normal democratic processes and confidence in electoral politics will decline."

"Although the welfare state bureaucracy is not democratically responsive, each component of that bureaucracy tends to view itself as a representative of a particular interest group. . . . All concerned, whether they benefit or suffer from acts of the bureaucracy, tend to regard it-- rather than the Congress and the electoral process-- as the focus of the political struggle over a number of critical issues." This results in the "paradox that the more the government is involved in our lives, the less relevant elections seem, a mood which is clearly anti-democratic."

Ralph Winter's theory of the legitimate areas of governmental regulation is best shown in two articles written contemporaneously a little over a decade ago. In 1972, Professor Winter emphasized that the costs of reform or regulation must be considered along with benefits. With a shot of reality, he declared that "[h]owever the norm is established[,] it cannot be no risk of accidents, absolutely total information and completely accurate advertising."

Regulation is appropriate only in clear cases of market failure. And in view of regulation's failure, the presumption ought be against more of it. Professor Winter noted that "market failure does not automatically call for regulation," but only where "benefits clearly exceed the costs." And he provided a good insight that the cure of regulation may well be worse than the disease of market failure. "Careful scouting of regulatory proposals is particularly necessary since many of the alleged causes of market 'imperfections' seem inherent characteristics of government regulation. . . . The clamor for regulation ignores this because it is based on the naive view that 'the people' exercise continuing control over government. This is, of course, contrary to both the theory and practice of representative democracy, which provides only for periodic and very general accountability."

Without measuring costs, it is too easy to justify regulating almost any sort of economic activity in the service of health and safety. Without cost-benefit analysis, regulation just becomes another name for a policy preference.

Judge Winter's opinions on antitrust come as no surprise for any student of Professor Winter's antitrust writings. Along with Robert Bork, also a former Professor of Law at Yale, Ralph Winter helped turn the antitrust debate back to the moorings of common sense and economic reality, and away from an identity of bigness with badness.

In United States v. Waste Management, 743 F.2d 976 (1984), Judge Winter reversed a district court finding that that Clayton Act was violated by a merger which resulted in a 48.8% market share in the Dallas waste collection market. With all due respect, I believe Judge Winter applied the Justice Department's 1984 merger guidelines more faithfully than did the Antitrust Division. Essentially, the Second Circuit held that the ease of entry in the waste collection market rebuts the showing of prima facie illegality, a holding concededly made without direct precedential support from the Supreme Court. The court's holding can be summed up in three sentences of its opinion: "If [DOJ] routinely considers ease of entry as relevant to determining the competitive impact of a merger, it may not argue to a court addressing the same issue that ease of entry is irrelevant. We conclude, therefore, that entry by potential competitors may be considered in appraising whether a merger will 'substantially lessen competition.' . . . [W]e believe that entry into the relevant product and geographic market by new firms or by existing firms in the Fort Worth area is so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation [citing Bork's The Antitrust Paradox]."

In a very complicated challenge to New York's ABC law, Judge Friendly upheld the law over a dissent by Judge Winter. Battipaglia v. N.Y. State Liquor Authority, 745 F.2d 166 (1948), cert. denied, 105 S. Ct. 1393 (1985). Judge Friendly characterized the law as merely calling for an exchange of price information; Judge Winter pointed out that the law requires wholesalers to adhere to a publicly announced price for 30 days after notice is given of a new price. The import of the latter is that the law should be deemed a per se violation of the Sherman Act if accomplished privately, according to Judge Winter. The question then becomes whether the local law is in furtherance of an articulated state policy so as to exempt the law from the federal antitrust laws. Judge Winter dissented from the majority's holding that it is. Because the majority did not answer Judge Winter's dissent on this point, it is difficult to quarrel with his application of the Supreme Court's test of state antitrust immunity. Suffice it to say, however, that there are strong policy reasons for an expansive view of state antitrust immunity. Although the conservative wing of the Supreme Court and most conservative academics tend to an expansive view, Judge Winter found that New York's ABC law simply fails the test laid out by the Supreme Court. Quere whether Judge Winter's statement that

"the fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the supremacy clause" is consistent with the expansive view.

2. Racial discrimination

Articles written by Professor Winter and opinions he has written contain a mother lode of insights into his judicial and political philosophy. Together they reveal his views to be fully consistent with the President's and the Administration's on matters such as the scope and construction of the Fourteenth Amendment, and the wisdom and efficacy of preferential treatment of minorities and of affirmative action.

In one respect, however, Professor Winter went further than this Administration has gone to date. In "Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply to Professor Sovern," 34 U. Chi. L. Rev. 817 (1967), Professor Winter responded to a book that recommended tougher antidiscrimination laws and stricter enforcement of nondiscrimination provisions. This article, written in the aftermath of the 1964 Civil Rights Act and the beginnings of the federal contractor executive order, is a calm, cogent, prescient, even courageous piece of work. It also could be used as fodder, either taken within or without its context, for the organized opposition of the Civil Rights Lobby.

Professor Winter did not pull punches in writing this article: "It is my contention that because of the complex nature of employment discrimination and the problems of proof involved in proving that discrimination, the [goals of improving the economic status of blacks and of achieving color-blindness in employment] are in fact inconsistent ends of coercive law and that we cannot [do both] through laws against discrimination. . . . [T]he economic harm generally attributed to discrimination either need not result from it or is not amenable to the kind of regulation fair employment programs provide. This being the case, I have grave doubts about the wisdom of fair employment programs generally."

Like Hubert Humphrey testifying in support of the Civil Rights Act, Professor Sovern assured his readers that tough antidiscrimination laws do not mean quotas or preferential treatment. But Professor Winter predicted that in order to prove most cases of discrimination, plaintiffs, bereft of direct evidence of racial animus, will come to rely on circumstantial or statistical evidence of disparity in numbers. "In the main, if anti-discrimination programs are to result in a substantial increase in Negro employment and income, enforcement tribunals must rely upon the lack of Negroes in certain firms of job classifications within those firms to prove violations." An employer, faced with the "cost of making a particularistic

individual assessment of each applicant, the cost of proving to the trier of fact that the assessment was made, that it was correct or at least made in good faith, and the cost of adverse publicity[,]" will often turn to "hiring some Negroes, that is, by establishing a quota."

The only type of antidiscrimination ruling that will have significant effect will be the result of coercion, in Professor Winter's words, "an 'effective' program, [which] will do so by inducing employers to engage in quota or preferential hiring."

Throwing cold water on all antidiscrimination laws which seek to do more than educate, Professor Winter wrote, "[O]ver-emphasis on resort to coercive machinery may well destroy the symbolic value of anti-discrimination programs as appeals for civilized conduct. For one thing, vigorous enforcement would lead to preferential rather than non-discriminatory hiring, and if that was generally appreciated by the body politic, as it eventually would be, the educative value of these laws on the basic moral issue would be destroyed. . . . Unless society faces th[e] basic issue [of the morality of racial discrimination] and resolves it against prejudice, laws against discrimination in employment . . . will in any event fail to achieve their purpose."

On the federal contractor executive order, his words were prophetic. He noted the affirmative duty imposed on contractors was meant somehow to be different than simply an injunction not to discriminate: "Beyond this all that is clear is that an imaginative lawyer can take these words and run and run and run. . . . Thus, with one stroke of the presidential pen, a program ostensibly aimed at the elimination of racial discrimination in employment begins to appear as a program compelling such discrimination. . . . The principle of color-blindness in employment is abandoned for the hidden subsidization of Negro hiring by the federal government. . . . Once the special interests of racial and ethnic groups in such employment are recognized, will our political leaders have the courage to abandon the program, particularly since it is called a 'fair employment practice' program . . . ? Professor Winter recommended rescission of the executive order.

The only curious aspect of this article is its total absence of constitutional analysis. For forty pages he refrained from discussing these matters in constitutional terms. Writing in a law review this may seem more than a bit strange. It could be either that Professor Winter purposefully confined his article to the efficacy and wisdom of antidiscrimination laws and programs or that he did not then (1967) hold a firm view of what governmental action was consistent with the Fourteenth Amendment.

In the only reported school desegregation case on which

Judge Winter has sat, he dissented from a panel's remand for a factual justification of a racially restrictive aspect of a voluntary desegregation plan designed to thwart white flight. Parent Ass'n of Andrew Jackson High School v. Ambach, 738 F.2d 574 (1984). The disputed provisions provided for a tipping point of 50% (point at which minority enrollment would lead to significant decrease in white enrollment) and a 4% maximum allowable change in racial composition. Judge Winter in dissent would have let the Board of Education out of the court's grasp (after 5 years). His reasoning is cogent: "[An earlier panel] opinion held that the de facto segregation . . . resulted solely from residential demographics and was thus not unconstitutional. Therefore, the Board was not then, and is not now, under any federal legal obligation to do anything to alter the racial composition of Andrew Jackson High." Acknowledging the bona fides of the Board's effort to achieve integration via a transfer plan with racial quotas, Judge Winter concluded that "there is no federal constitutional imperative to require more than a showing that the factual basis for the quotas' formulae is sufficient to ensure that the plan actually decreases segregation." The majority's decision "creates a legal rule that such a plan be clearly demonstrated to be the best available to reduce segregation," a rule neither wise nor constitutionally compelled. Judge Winter found the majority's remand ruling quixotic at best: "One cannot determine a "tipping point" predicting human behavior as scientists predict the movement of planetary objects. I fear the majority's quest will result only in this case returning to us in 198? with more recent but equally equivocal statistics."

In 1977, Congress considered a bill to restrict the forced busing of schoolchildren, and Professor Winter spoke in support of it. The bill confined busing as a remedy only to the extent necessary to remedy a particular constitutional violation proven. Professor Winter's testimony considered both the constitutionality and the wisdom of such legislation.

Concerning whether the bill was good policy, Professor Winter discussed at length reasons often asserted in support of racial busing. For example, busing has been promoted as a means to improve the quality of education. Professor Winter responded: "[T]he safest observation probably is that the quality of education is most likely to increase, or least likely to decrease, where racial balance is reduced through voluntary programs and most likely to decrease, or less likely to increase, as the amount of coercion employed arises. This is so because where volunteerism exists, both the education mobility of families and the distractions of overt racial strife are likely to be reduced."

Also, proponents of busing want to eliminate the racial insult of a de factor segregated educational system. But, unlike the "separate but equal" dual school system, "racial imbalance is

not accompanied by the systematic denial of voting rights of the segregation of public accommodations. I cannot accept, therefore, the generalization that racial imbalance, wherever found, is a calculated racial insult. To the contrary, the suggestion that blacks cannot make it without substantial help from whites may be the insult."

D. Conclusion

Ralph Winter is a solid interpretivist. He understands the proper role of the courts in our system of government. He is a democrat: for the most part he would rather countenance a legislative embarrassment than usurp the legislature's role. He is also very smart, however; the few times he has erred as a judge may well have been the result of not suffering a legislative or regulatory mess. On the great constitutional issues of our day, his theory and writings are solid.

Finally, he is no Johnny Come Lately. Ralph Winter's theory of constitutional law and judging have been clearly expressed in the law journals and before Congress for the last quarter century. Although the better proof may be in his opinions over the past four years, where his scorecard is laudable but not perfect, he is not weak and he is not without an accurate compass. What you have seen up to now is what you would get from here on out.