

Bench Briefs

Retired Justice Sandra Day O'Connor Visits Eighth Circuit



Justice O'Connor with the Clerk's staff

Retired United States Supreme Court Justice Sandra Day O'Connor sat with the Eighth Circuit on February 12 and 13, 2007. Chief Judge Loken extended an invitation to Justice O'Connor last year, and she agreed to sit two days in February. Justice O'Connor heard 10 cases over her two-day visit and sat with Chief Judge Loken, Judge Roger L. Wollman,

Judge Lavenski R. Smith, Judge Raymond W. Gruender, and Judge Duane Benton. Two of the most notable cases orally argued before Justice O'Connor were: (1) a challenge to a provision of the Missouri Constitution governing voting by persons declared mentally incompetent and (2) an appeal from a Southern Iowa district court's decision holding that the use of state funds to support a faith-based rehabilitation program in Iowa prisons violated the Establishment Clause of the First Amendment. Justice O'Connor also took part in a number of other events, including a reception for Eighth Circuit staff, a luncheon with the judges of the court and the judges of the United States District Court for the Eastern District of Missouri, and a reception at Washington University School of Law.

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Justice Clarence Thomas Gives Second Annual Arnold Lecture

United States Supreme Court Justice Clarence Thomas visited the University of Arkansas at Little Rock William H. Bowen School of Law on February 25, 2007, to give the second annual Arnold Lecture. The Bowen School of Law hosts the Arnold Lecture in memory of Judge Richard S. Arnold and in honor of Judge Morris S. Arnold. Justice Thomas's address

was a tribute to the Arnold family and focused primarily on the distinguished life and career of the late Judge Richard S. Arnold.



Justice Thomas, Judge Smith, and the Justices of the Arkansas Supreme Court

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In his lecture, Justice Thomas told an “apocryphal story” about Judge Arnold’s law school career, noting that he would pass the story along “[e]ven though it may not be entirely true.” Amber Davis-Tanner, *Supreme Court Justice Clarence Thomas Remembers Richard Arnold*, THE DAILY RECORD, Feb. 2, 2007, at 2. According to Justice Thomas:

Apparently when the time came for Judge Arnold and his classmates to interview for jobs, leading law firms posted notices around the law school [that] X Firm will be interviewing candidates from the top quarter of the class, or Y firm will be interviewing candidates from the top 10 percent of the class. Richard set up a folding table, sat down, and read a book. Hanging from his table was a sign, “The firm of Arnold and Arnold, Texarkana, will be interviewing THE top student in the class.” Which, of course, was Richard.

Id.

As to Judge Arnold’s tenure as a federal district judge and federal appellate judge, Justice Thomas commented that Judge Arnold was “the liberal’s favorite conservative and the conservative’s favorite liberal,” as all sides of the legal spectrum respected him. *Id.* Justice Thomas then discussed two opinions that Judge Arnold authored during his tenure on the Eighth Circuit. First, Justice Thomas noted that Judge Arnold’s opinion in *Anastasoff v. United States*, 223 F.3d 898, *rev’d as moot* 235 F.3d 1054 (2000) (en banc), spurred debate in legal circles. In *Anastasoff*, Judge Arnold, writing for the court, declared that unpublished opinions, as a matter of constitutional law, had precedential value.

Second, Justice Thomas discussed what some of Judge Arnold’s supporters have deemed the “sole blot” on his distinguished career—*United States Jaycees v. McClure*, 709 F.2d 1560, *rev’d sub nom.*, *Roberts v. United States v. Jaycees*, 468 U.S. 609 (1984). In that case, the Jaycees brought an action challenging

the Minnesota Department of Human Rights’s application of the Minnesota public-accommodations law in ordering the Jaycees to admit women to its local chapters in Minnesota. The district court—the Honorable Diana E. Murphy—upheld the application of the Act to the Jaycees. The Eighth Circuit, in an opinion authored by Judge Arnold, reversed, holding that the law, which prohibited sex discrimination, was not sufficient to infringe on the Jaycees’ First Amendment right of association. *McClure*, 709 F.2d at 1569–78. According to Judge Arnold, “[I]f, in the phrase of Justice Holmes, the First Amendment protects ‘the thought that we hate,’ it must also, on occasion, protect the association of which we disapprove.” *Id.* at 1561. Justice Thomas, referencing Richard W. Garnett’s article, *Tribute to the Honorable Richard S. Arnold for His Service as Chief Judge of the United States Court of Appeals for the Eighth Circuit*, 1 J. APP. PRAC. & PROCESS 204 (1999), noted that some have tried to dismiss Judge Arnold’s “erroneous” opinion in *Jaycees* by concluding that even the most brilliant minds are entitled to one error in judgment. Justice Thomas, however, pointed out that while the Court unanimously reversed the Eighth Circuit in *Jaycees*, it has since implicitly adopted Judge Arnold’s reasoning. Justice Thomas cited *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to support his contention.

Finally, Justice Thomas discussed how close Judge Arnold came to being appointed to the Supreme Court, stating:

It has been widely reported that Bill Clinton strongly considered Judge Arnold for an appointment to the Supreme Court of the United States. In fact, it what was probably an unprecedented action, more than 100 federal judges signed a letter urging President Clinton to appoint him. If not for his health, Judge Arnold may well have taken the seat vacated by Justice Black which was later filled by my colleague, Justice Breyer.

Davis-Tanner, *supra*, at 2.

Justice Thomas closed his tribute to Judge Richard S. Arnold by acknowledging what an “outstanding person” he was. “He treated everyone with dignity, no matter the person’s station in life. More than one of his friends remarked that Judge Arnold would never pass a beggar without sparring some change.” *Id.* According to Justice Thomas, “It was a singular honor to know Judge Arnold. I admire him greatly both as a judge and as a person.” *Id.*

At the conclusion of Justice Thomas’s lecture, an audience consisting of more than 200 members of the bench and bar gave him a standing ovation. Following the address, the Justice and Judge Arnold greeted members of the audience at a reception in the library. Guests at the reception included Eighth Circuit Judge Lavenski R. Smith, Justice Conley Byrd of the Arkansas Supreme Court, Justice Annabelle Clinton Imber of the Arkansas Supreme Court, Chief Judge Jimm Hendren of the United State District Court for the Western District of Arkansas, and former United States Senator Tim Hutchinson.

Earlier in the day, Justice Thomas attended a reception hosted by the Arkansas Supreme Court. In attendance at the reception were Judge Lavenski R. Smith, Judge Morris S. Arnold, and the justices of the Arkansas Supreme Court. In addition, Justice Thomas met with students from the law school for a question-and-answer session. During his discussion with students, Justice Thomas discussed such issues as affirmative action and expressed his frustration at the Court’s current practice of asking too many questions of attorneys during oral argument instead of giving the attorneys adequate time to present their case.

The Investiture of Judge Bobby E. Shepherd

On December 7, 2006, the investiture of Bobby E. Shepherd to the United States Court of Appeals for the Eighth Circuit was held in the federal building in El Dorado, Arkansas. The United States Senate had confirmed Judge Shepherd on July 20, 2006.

Addressing a packed courtroom, Judge Shepherd credited his wife of 34 years, Bobbi Shepherd, with his success, stating, “Any successes I have enjoyed is because of her love and encouragement.” Sara Mitchell, *New Appeals Court Judge Takes Oath*, EL DORADO TIMES, Dec. 8, 2006. In addition, Judge Shepherd noted the encouragement and support of his children, stating, “My son Matthew is the first person who encouraged me to submit by name for consideration.” *Id.* He added that his daughter Sarah, son John Thomas, and daughter-in-law Alison also contributed to his achievements. *Id.*

Judge Morris S. Arnold, whose vacancy Judge Shepherd filled, administered the oath of office to Judge Shepherd. *Id.* Thereafter, members of Judge Shepherd’s family conducted the robing ceremony. Chris Oprison, Associate Council to President George W. Bush, read the Presentation of the Commission and stated that President Bush selected Judge Shepherd because of his character, expertise, and reputation. *Id.*

After the investiture, a reception was held at the McKinney-O’Connor House in El Dorado. *Id.*

Earlier in the day, two special court sessions were heard in El Dorado by two panels of the Eighth Circuit. *Id.* The Division I panel, consisting of Chief Judge James B. Loken, Senior Judge C. Arlen Beam, and Judge William Jay Riley, heard three cases at 9:00 a.m. in the Charles H. Murphy, Jr. Boardroom of the El Dorado Chamber of Commerce. *Id.* Those

cases were *Cox v. Sugg*, No. 06-2311, *Crossett Paper Mill Employees Federal Credit Union v. Cumis Insurance Society, Inc.*, No. 06-2888, and *Hillier v. Social Security Administration*, No. 06-2837. *Id.* The Division II panel, consisting of Judge Roger L. Wollman, Judge Kermit E. Bye, and Judge Michael J. Melloy, held court at 9:00 a.m. in the Library Auditorium of South Arkansas Community College. The panel heard three cases, which were *United States v. Miller*, 06-1699, *Hudson v. ConAgra Poultry Co.*, 06-2596, and *United States v. Akers*, 06-2804. *Id.*

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Judge Donald P. Lay Retires

Eighth Circuit Senior Judge Donald P. Lay took permanent disability retirement on January 3, 2007. President Lyndon B. Johnson appointed Judge Lay to the Eighth Circuit in 1966. At that time, he was the youngest person ever appointed to the Court of Appeals.

Judge Lay, who maintained his chambers in St. Paul, Minnesota, served as the chief judge of the court from 1979–1992. He assumed senior status on January 7, 1992.

Judge Lay received his bachelor’s degree and juris doctor from the University of Iowa. Prior to his appointment to the court, Judge Lay served as a United States Navy Seaman (1944–1945) and was in private practice in Omaha, Nebraska, and Milwaukee, Wisconsin (1951–1966). In addition, Judge Lay taught law at the University of Minnesota, Creighton University, William Mitchell College of Law, and the University of Uppsala, in Uppsala, Sweden.

Judge Lay is the receipt of several awards, including the American Trial Lawyers’ Outstanding Federal Appellate Judge of the Year (1982); the American Judicature Society’s Herbert Harley Award (1988), the University of Iowa’s Hancher-Finkbine Award, and the

University of Iowa’s Alumni Achievement Award (1992).

Judge Lay has the unique distinction of having sat on the Eighth Circuit with his former law clerk, Judge William Jay Riley.

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Judge Duane Benton Speaks on Dred Scott

Eighth Circuit Judge Duane Benton spoke on “Lessons Learned from the Missouri Supreme Court’s Role in the *Dred Scott* Case” on March 2, 2007, at Washington University’s symposium commemorating the 150th anniversary (March 6, 2007) of the *Dred Scott* Case, which originated in St. Louis, Missouri. The following day, Judge Benton moderated a Judicial Roundtable, that featured judges of the Missouri Supreme Court.

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“High Hopes” for Judge Lavenski R. Smith

Presidential hopeful and former Arkansas Governor Mike Huckabee, in discussing the appointments of Hope, Arkansas natives to key leadership positions in both state and federal government, recalled the nomination and confirmation of Hope native Judge Lavenski R. Smith to the Eighth Circuit. Governor Huckabee stated, “I hope that, one day, Vince Smith is on the U.S. Supreme Court; it would not surprise me, and it would thrill me.” Ken McLemore, *Huckabee and Hope—A Love Affair*, HOPE STAR, Jan. 9, 2007.

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“Brief” Tips from Retired Judge George Fagg

Retired Eighth Circuit Judge George Fagg recently shared timeless tips to better briefs with a continuing legal education audience in Des Moines, Iowa.

Quoting his former Eighth Circuit colleague, the late Richard S. Arnold, Judge Fagg said the important question in writing a brief is not whether the brief will decide the case but whether the brief will be a useful tool for the judges in deciding the case.

The five elements that determine whether the brief will be useful, Judge Fagg said, are brevity, simplicity, reliability, candor and intellectual honesty.

An attorney should always remember that the judges—not the authoring attorney are the audience for the brief, said Judge Fagg. The brief is not the place to indulge personal feelings about a case.

One key to keeping a brief short is issue selection. Judge Fagg said it is the role of counsel, rather than the court, to “separate the wheat from the chaff.” He suggested that an appeal brief generally should contain only two, three, or possibly four issues.

Another key to keeping a brief short is simplicity. Judge Fagg said that a brief that gives a “complex” answer to the issue presented on appeal does not help the court, and he advised counsel particularly to avoid offering an excessive number of alternative arguments.

Judge Fagg stressed the importance of making clear to the judges where the brief and arguments are headed and suggested that counsel would write shorter briefs if they drafted the conclusions to their briefs first. He further noted that the more an attorney writes, the greater the chance the attorney will say something that hurts rather than helps the client’s position.

To emphasize the importance of keeping briefs short, Judge Fagg described the amount of reading required of Eighth Circuit judges in general. He also explained his own approach to reading briefs: He would compare the issue statements and argument summaries from both the appellant’s and appellee’s briefs to see that they covered the same points, and then he would read the shortest brief first.

In addition to keeping briefs short, counsel also should be concerned with

“readability,” said Judge Fagg. “Readability” includes avoiding sentences with too many words and avoiding words with too many syllables. The period should be used properly, to show the end of a thought and focus the judges’ attention.

Counsel also should avoid legal jargon and terms such as “hereby,” “herewith,” and “therein.” Any phrasing that slows the judge down or requires the judge to re-read the sentence increases the risk that the judge will not take from the passage the meaning intended by counsel.

Judge Fagg advised counsel to take essentially the same approach with oral argument as with briefs: They should answer questions honestly and should not be afraid to sit down early because, by saying too much, they could “snatch defeat from the jaws of victory.”

Judge Fagg made his remarks as luncheon speaker at the December 2006 Federal Practice Seminar sponsored by the Iowa State Bar Association.

Eighth Circuit Senior Judge David R. Hansen introduced Judge Fagg, whom he described as having been, year in and year out, the most prolific judge on the court.

Judge Hansen also shared some insights into Judge Fagg’s pre-Eighth Circuit judicial service, quoting a former Chief Justice of the Iowa Supreme Court for the proposition that Judge Fagg, in 10 years as an Iowa state trial judge, was never reversed.

Judge Hansen noted that, even as a state trial judge, Judge Fagg had a habit of rising early; in fact, he had the keys to every courthouse where he sat because he made it a practice to arrive before the custodians.

Judge Fagg assumed the Eighth Circuit bench in October 1982 and took senior status in May 1999 before retiring completely in July 2006.

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Visiting Judges

District Court Judge Patrick J. Schiltz sat with the Eighth Circuit in November 2006 for a

special session held at the University of St. Thomas School of Law in Minneapolis, Minnesota. Judge Schiltz, who serves in the District of Minnesota, was nominated by President George W. Bush to fill the vacancy left by Judge Richard H. Kyle, was confirmed by the United States Senate on April 26, 2006, and received his commission on April 28, 2006.

Before becoming a judge, Judge Schiltz served as a law clerk to Justice Antonin Scalia, practiced law in Minnesota, was an associate professor of law at the University of Notre Dame Law School, and was a professor and associate dean at the University of St. Thomas School of Law.

This was the first time for Judge Schiltz to sit with the Eighth Circuit.

Senior District Court Judge John F. Nangle of the Eastern District of Missouri sat with the Eighth Circuit in January 2007 in St. Louis. Judge Nangle assumed the bench in 1973 and took senior status in 1990.

Prior to his judgeship, Judge Nangle served as a United States Army Sergeant and a United States Army Reserve Captain, JAG Corps. He was in private practice in St. Louis, Missouri, and Clayton, Missouri, from 1948 to 1973. During this time, he served as the city attorney for Brentwood Missouri. In 1963, Judge Nangle worked as the special legal advisor to the government of St. Louis County, Missouri.

Judge Nangle has sat with the Eighth Circuit approximately 20 times as a visiting judge, most recently in May 2003.

Chief Judge Linda R. Reade of the Northern District of Iowa sat with the Eighth Circuit in January 2007. Chief Judge Reade's tenure as district court judge began in 2002, and she became the chief judge of the Northern District of Iowa in 2006.

Before her appointment to the district court, Chief Judge Reade served as an assistant United States attorney and an Iowa district court judge for Polk County, Iowa.

This is Chief Judge Reade's second time to sit with the Eighth Circuit. She first sat with the court in May 2003.

Senior Judge Richard W. Goldberg of the United States Court of International Trade, located in New York, New York, sat with the Eighth Circuit in January 2007.

Before becoming a judge, Judge Goldberg served, *inter alia*, as an assistant states attorney in Fargo, North Dakota, Air Force Judge Advocate General, and the deputy undersecretary for International Affairs and Commodity Programs in the Department of Agriculture.

Judge Goldberg has sat with the Eighth Circuit approximately 12 times, most recently in May 2004.

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Time/Place/Manner Rule Changes

Amendments to the Federal Rules of Appellate Procedure (FRAP) went into effect December 1, 2006. There were two amendments of note. First, FRAP 25 on Filing and Service was amended to provide that a court may only require electronic filing if it allows reasonable exceptions for filers who are unable to comply with the court's requirements. It is likely that the Eighth Circuit's CM/ECF program will be a mandatory program for attorney-filers, and the court's rules will provide reasonable exceptions.

Of more interest to the bar is Rule 32.1—"Citing Judicial Dispositions." This new rule provides that the court may not prohibit or restrict the citation of unpublished federal judicial opinions, orders, or judgments issued after January 1, 2007. The rule goes on to provide that if a party cites an unpublished opinion which is not available in a publicly accessible electronic database, the party should provide a copy with the filing and serve a copy on opposing counsel. This rule amendment has been much debated over the last few years, and the pros and cons of citing unpublished opinions can be found in the Judicial Conference report on the amendments at www.uscourts.gov/rules/congresso406.html. This amendment went into effect on December 1, 2006, and permits citations to only those opinions issued after January 1, 2007. The amendment reflects a compromise between the proponents of no restrictions on the citation of unpublished opinions and those who argued that unpublished opinions should not be cited

because they are not written with an eye towards future citation.

In response to the Federal Rule Amendments, the Eighth Circuit had to modify its local rules. First, existing Eighth Circuit Rule 28A(i), "Citation of Unpublished Opinions," has been abrogated. In its place, the Eighth Circuit adopted Eighth Circuit Rule 32.1A. The newly-adopted rule still provides that unpublished opinions are not precedent. Unpublished opinions issued after January 1, 2007, may be cited in accordance with the new FRAP rule. Unpublished opinions issued before January 1, 2007, should not be cited unless they are relevant to establishing the doctrines of res judicata, collateral estoppel, the law of the case, or if they meet the other criteria set forth in the rule. The rule also provides that copies of the opinion need not be provided if the opinion is available on a publicly accessible database. The court considers any United States Courts website to be a publicly accessible database. Paper copies of unpublished opinions available through West's unpublished opinion reporting system need not be provided either.

Copies of the court's local rules are available at the court's website:
www.ca8.uscourts.gov.

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CM/ECF

The Eighth Circuit became the first circuit court to implement the appellate version of the CM/ECF case management software when it turned off its AIMS case management on December 18, 2006, and went "live" on the new case management system. In the 16 years the clerk's office used the AIMS system, it made almost 2.2 million data entries.

Implementation of the case management portion of CM/ECF will be followed up this spring by introduction of a limited version of electronic case filing. The clerk's office anticipates the system will permit attorneys to use ECF to file all documents except briefs and records on appeal; those aspects of the system will be introduced later in the year when the district court CM/ECF system is modified to permit users to create hyperlinks to district court documents. In the meantime, the clerk has begun scanning documents into 2007 appeals so that all of the filings in 2007 cases will be available on-line through PACER.

The court is currently working with the Administrative Office of the United States Courts to develop a series of on-line training tools for appellate ECF users. These training tools will take users through the steps required to file an appearance form, a motion, and a response or reply. The information and skills needed to file these documents can be readily translated into filing any other pleading or correspondence. These training tools will be available through the court's website, and the clerk will provide notice about their availability by sending an e-mail to registered users and by posting a notice in the "Announcements" section of the web page.

Attorneys will need to register with the PACER Service Center to become authorized users on the court's CM/ECF system. When they register, users will be given logins and passwords that will permit them access to the court's ECF system. The clerk will provide notice to the bar when the PACER Service Center is ready to begin accepting registrations.

Like the district court CM/ECF systems, filing through the appellate version of CM/ECF will also accomplish service on opposing counsel. The court is in the process of drafting rules governing electronic filing, and they will be made available for comment later this spring. Initial filing under CM/ECF will be governed by a standing order until the rule-making process is completed. Questions about the court's plans can be addressed to the clerk of the court.

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Special Session Notes

The court sat at Washington University Law School on February 14, 2007. The panel, consisting of Judge William Jay Riley, Judge Michael J. Melloy, and Judge Bobby E. Shepherd, heard an immigration case and two criminal cases during the special session.

The court opened session in a packed Levitt Auditorium at the University of Iowa College of Law on Tuesday, March 6, 2007. The session was timely for students just completing the Moot Court Final Competitions on Saturday, March 3. The panel, consisting of Judge David R. Hansen of Cedar Rapids, Judge William Jay Riley of Omaha, and Judge Michael J. Melloy of Cedar Rapids, heard argument in *United States v. Gill*, a criminal case, and in *Gilbert v. Des Moines Area Community College*, an employment discrimination case. Both cases

provided ample opportunity for students to witness the Eighth Circuit's "hot bench," as each judge asked several questions of the attorneys. After completion of the court's session, the judges answered questions from students and offered advice to the future lawyers. The judges stressed that oral argument presents the attorneys with a final opportunity to answer any lingering questions the judges might have and encouraged the students to treat oral argument as a conversation with the judges. The judges also emphasized the importance of the arguing attorney knowing the factual record in the case, even when the appellate attorney was not involved in the case below. The law school hosted a reception for the judges, students, and faculty at the Old Capitol following the session.

The court held a special session at the University of St. Thomas School of Law in Minneapolis, Minnesota, from March 12 through March 16, 2007. The panel consisted of Judge Roger L. Wollman, Judge John R. Gibson, and Judge Diana E. Murphy. Over the four-day period, 22 cases were orally argued before the panel.

The court will back in the Twin Cities on April 2, 3 and 4, 2007, when it sits at Hamline University School of Law (April 2), the University of Minnesota School of Law (April 3), and William Mitchell College of Law (April 4).

The court will sit at St. Louis University on April 10, 2007. Special week-long sessions will also be held in Kansas City (May 14-18) and Omaha (June 11-15).

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Association News

Website

The Association Board of Directors ("the Board") is considering moving the Association website to a new host and possibly making some format changes to the website.

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Mentoring Program

The Association's planned mentoring program for attorneys newly admitted to practice before the Eighth Circuit is almost in place. The Board is working with Clerk of Court Michael Gans to inform attorneys about the new program.

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E-filing

The Board is also exploring ways to assist the court in educating people about the transition to e-filing, such as by conducting seminars for later this year or for 2008.

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Judicial Conference

The Board has offered to help the court in planning and promoting the 2008 Judicial Conference in Chicago.

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Higher Authority

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

The United States Supreme Court granted certiorari in the Eighth Circuit case of *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006). The question presented in *Atlantic* is whether a party that is potentially responsible for the cost of cleaning up property contaminated by hazardous substances under CERCLA—but cannot sue for contribution under § 113 of the Act—can bring an action against another potentially responsible party under § 107.

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"Federal Officer Removal" Law

The Eighth Circuit case of *Watson v. Philip Morris, Co., Inc.*, 420 F.3d 852 (8th Cir. 2005), will be heard by the Supreme Court on Wednesday, April 25, 2007. The issue before the Court is, when a private actor complies with a federal regulation, whether that action allows a state court case to be removed to federal court pursuant to 28 U.S.C. § 1442(a)(1), as there was a "person acting under a federal officer." In *Watson*, consumers brought a putative class action in state court against a cigarette manufacturer, alleging that the manufacturer designed its cigarettes to deliver more tar and nicotine to smokers than its use of the labels "light" and "lowered tar and nicotine" suggested, in violation of the Arkansas Deceptive Trade Practices Act. The action was then removed to federal court based on a "federal officer removal" law dating back to the early 19th Century. Philip Morris relied on the law, claiming that it was acting under the Federal Trade Commission's advertising regulation when it shifted the lawsuit to federal court. The

district court denied the consumers’ motion to remand to state court, and the Eighth Circuit affirmed the district court.

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Habeas Corpus

The Supreme Court also granted certiorari in *Roper v. Weaver*, 438 F.3d 823 (8th Cir. 2006), to determine whether a federal appellate court has the authority to overturn a death sentence in a habeas case based on a finding that the prosecutor’s closing argument in the penalty phase was unfairly inflammatory. Oral argument is set for Wednesday, March 21, 2007.

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Appellate Review of Remand Orders and the Westfall Act

On January 22, 2007, the Supreme Court issued *Osborn v. Haley*, ___ U.S. ___, 127 S. Ct. 881 (2007), in which the Court held that a federal statutory bar against appellate review of remand orders did not displace a provision of the Westfall Act, which shielded from remand any action removed to federal court based upon the Attorney General’s certification. Under the Westfall Act, a federal employee is accorded absolute immunity from tort claims arising out of acts undertaken in the course of their official duties, 28 U.S.C. § 2679(b)(1), and the Attorney General is empowered to certify that a federal employee sued for wrongful or negligent conduct “was acting within the scope of his office or employment at the time of the incident out of which the claim arose.” 28 U.S.C. § 2679(d)(1), (2). After the Attorney General’s certification, the United States is substituted as defendant in place of the employee, and the action is thereafter governed by the Federal Tort Claims Act. If the action commenced in state court, the Westfall Act mandates the case’s removal to a federal district court and renders the Attorney General’s certification “conclusiv[e]...for purposes of removal.” 28 U.S.C. § 2679(d)(2).

In *Osborn*, the plaintiff sued a federal employee in state court, alleging that the employee tortiously interfered with her employment with a private contractor, that he conspired to cause her wrongful discharge, and that his efforts to bring about her discharge were outside the scope of his employment. The United States Attorney, serving as the Attorney General’s delegate, certified, pursuant to the Westfall Act, 28 U.S.C. § 2679(b)(1), that the employee was acting within the scope of his

employment at the time of the conduct alleged in the plaintiff’s complaint. On this basis, the United States Attorney removed the case to federal district court and asserted that the alleged wrongdoing never occurred. The district court, relying on the plaintiff’s allegations, entered an order that rejected the Westfall certification, denied the government’s motion to substitute the United States as defendant in the employee’s place, and remanded the case to the state court. The Sixth Circuit, however, vacated the district court’s order, holding that a Westfall Act certification is not improper simply because the United States denies the occurrence of the incident on which the plaintiff centrally relies.

In affirming the Sixth Circuit, the Court held that (1) a district court’s order was reviewable under the collateral order doctrine; (2) the federal statutory bar against appellate review of remand orders did not displace the provision of the Westfall Act that shielded from remand any action removed to the federal court based upon the Attorney General’s certification; (3) once the Attorney General certified that the federal employee named as a defendant was acting within the scope of employment and the cause of action was removed, the district court had no authority to remand the case to state court on the ground that the Attorney General’s certification was unwarranted; and (4) the Attorney General could validly certify that a federal employee named as a defendant acted within the scope of his employment, thereby warranting substitution of the United States as defendant pursuant to the Westfall Act, despite the fact that the Attorney General’s certification rested on an understanding of the facts that differed from the plaintiff’s allegations.

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Prison Litigation Reform Act (PLRA)

On January 22, 2007, the Supreme Court issued its opinion in *Jones v. Bock*, ___ U.S. ___, 127 S. Ct 910 (2007). In *Jones*, state prison inmates brought separate § 1983 actions against corrections officials. The district court dismissed the inmates’ actions for failure to satisfy procedural rules, and the court of appeals affirmed. The Court reversed, holding that (1) an inmate’s failure to exhaust under the Prison Litigation Reform Act (PLRA) is an affirmative defense, i.e., an inmate is not required to specially plead or demonstrate exhaustion in his complaint; (2) the inmates’ § 1983 actions were not automatically rendered noncompliant with the PLRA exhaustion requirement by the fact that not all of the defendants named in the complaints had been

named in previous administrative grievances; and (3) an inmate's compliance with the PLRA exhaustion requirement as to some, but not all, claims does not warrant dismissal of the entire action.

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Issues on Appeal

Criminal Justice Act (CJA) Fees

The Eighth Circuit recently rejected a Sioux City attorney's payment request, prompting a candid response from the attorney. In *Rhinehart v. Eighth Circuit Court of Appeals*, No. 07-8003, 2007 WL 703611 (8th Cir. March 9, 2007), the district court had appointed Richard Rhinehart to represent an indigent defendant. *Id.* at *1. After Rhinehart completed his duties, he filed a CJA voucher requesting payment for the services rendered. *Id.* According to Rhinehart, Chief Judge James B. Loken "summarily, arbitrarily, and unilaterally cut without notice, hearing, justification or explanation" of the claimed amount. *Id.* In response to Judge Loken's decision, Rhinehart had filed a "Motion for Hearing on CJA Fees," requested that the court hold a hearing on the motion, and requested that the hearing be "followed by a review process along with an independent decision by an unbiased arbitrator" to restore his legal fees. *Id.* The court dismissed Rhinehart's motion, holding that it was without jurisdiction to consider the motion, as "[t]he chief judge's role under 18 U.S.C. § 3006A(d)(3) is to rule upon requests for waiver of the maximum amounts of compensation set forth in § 3006A(d)(2)... The role of the chief judge therefore relates to the management of funds, and the decision to approve a recommendation for excess funds is entirely his responsibility, not that of an appellate panel." *Id.* (quoting *United States v. Johnson*, 391 F.3d 946, 948 (8th Cir. 2004)).

In response to the court's decision, Rhinehart stated, "My recourse is to write a letter to the 8th Circuit and tell them to take my name off the panel. I don't work for free. They can find some other idiot that will work for \$92 a hour." *Appeals Court Rejects Sioux City Attorney's Payment Request*, SIOUX CITY J., March 10, 2007. In his complaint to the court, Rhinehart said that the current system requires attorneys "to act as financier for an indigent defendant and banker for the United States Courts for unpaid fees until the matter is resolved". *Id.* Rhinehart explained that he filed a bill for \$13,401 in the case, which Chief Judge Loken reduced by \$2,000, and that the court may not violate his constitutional rights "in its

efforts to balance the budget, make ends meet, or impose financial sanctions against lawyers that object." *Id.*

Rhinehart has continued to express his disagreement with the court's calculation of fees for court-appointed attorneys, most recently during oral argument in *United States v. Mills*, No. 06-1952, 06-154. At the end of oral argument, the court thanked Rhinehart for his service as a CJA-appointed attorney. In response, Rhinehart stated, "Cause you brought it up, the reason that I'm not [going to be] CJA appointed any more is because this court cut my fees in a case, and when I requested an explanation for why I got no response."

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100:1 Powder Cocaine/"Crack" Cocaine Quantity Ratio

The Eighth Circuit, sitting en banc, joined the First, Second, Fourth, Seventh, and Eleventh Circuits in rejecting the argument that a district court may depart downward from the Sentencing Guidelines based solely on its categorical rejection of the Guidelines's 100:1 powder cocaine/"crack" cocaine quantity ratio. *United States v. Spears*, 469 F.3d 1166, 1178 (8th Cir. 2006) (en banc). District courts must engage in an individualized, case-specific evaluation of the facts under 18 U.S.C. § 3553(a) and may not grant a downward variance "based solely on [a] rejection of the 100:1 quantity ratio." *Id.*

While 10 members of the court joined the majority opinion authored by Judge William Jay Riley, Judge Kermit E. Bye, joined by Judge Donald P. Lay, dissented.

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Excessive Force

On January 9, 2007, the Eighth Circuit, sitting en banc, heard oral arguments in *Kenyon v. Edwards*, No. 05-3487. In *Kenyon*, an arrestee brought a civil rights action against a deputy sheriff and others, alleging use of excessive force. The magistrate judge denied the deputy's motion for summary judgment based on qualified immunity, but a two-member majority of the Eighth Circuit panel reversed the magistrate judge, holding that the deputy used reasonable force to arrest and handcuff the arrestee. 462 F.3d 802, 807 (8th Cir. 2006), opinion vacated Nov. 22, 2006. Judge Lavenski R. Smith dissented, concluding

that the “[t]he facts alleged by [the arrestee], if true, establish that [the deputy] violated a clearly established constitutional right to be free from excessive force.” *Id.* at 808.

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Neutral and Detached Magistrate

The Eighth Circuit, sitting en banc, also heard oral arguments on January 9, 2007, in *United States v. Lucas*, No. 05-2165. In *Lucas*, the defendant had escaped from the Nebraska Department of Corrections, and the Nebraska Director of Correctional Services had issued a warrant for the defendant’s arrest. The defendant argued that the arrest warrant was invalid because it was issued by a member of the executive branch instead of a neutral and detached magistrate. The district court determined that the arrest warrant was valid, as the Director was a neutral and detached magistrate. On appeal, a three-member panel of the Eighth Circuit reversed the district court, holding that the Director was not a neutral and detached official who could execute the arrest warrant for the defendant, despite Nebraska law authorizing the director to issue such a warrant, because the Director is a member of the executive branch. 451 F.3d 492, 496, opinion vacated June 16, 2006.

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En Banc Oral Arguments in April

The Eighth Circuit granted en banc review of three cases that will be orally argued on April 11, 2007. First, the court will hear *Niederstadt v. Nixon*, No. 05-4329, which involves the forcible compulsion element of Missouri’s sodomy statute. In *Niederstadt*, the defendant was convicted of one count of sodomy under Missouri law and sentenced to 25 years’ imprisonment. The Missouri Court of Appeals, however, reversed the conviction, holding that insufficient evidence existed to support the conviction. After the Missouri Supreme Court reinstated the defendant’s conviction, the defendant filed a federal petition for a writ of habeas corpus, which the district court granted on the ground that the defendant’s due process rights under the Fourteenth Amendment were violated by the Missouri Supreme Court’s construction of the sodomy statute. A two-member majority of the Eighth Circuit panel affirmed the district court, holding that the Missouri Supreme Court’s construction of the forcible compulsion element to include the defendant’s act of inserting his finger into the vagina of a 16-year-old female in his care while the female

was sleeping violated the defendant’s right to due process because that construction unexpectedly changed and retroactively applied Missouri’s sodomy statute. 465 F.3d 843, 849 (8th Cir. 2006), opinion vacated Dec. 13, 2006. Chief Judge James Loken dissented, concluding that Missouri law provided the defendant with fair warning that his conduct would “subject him to severe criminal penalties.” *Id.* at 851.

Second, the court will review *United States v. Hudspeth*, No. 05-3316, in which a two-member majority of the Eighth Circuit panel held that the defendant’s wife’s consent to a state trooper’s search of the defendant’s home computer did not overrule the defendant’s prior denial of consent for the search of the computer, meaning that the wife’s consent was not a valid authorization for the search. 459 F.3d 922, 930–31 (8th Cir. 2006), opinion vacated Jan. 4, 2007. Judge Riley dissented, concluding that the defendant was not physically present and objecting when his wife gave her voluntary and non-coerced consent, meaning that *Georgia v. Randolph*, 126 S. Ct. 1515 (2005), does not apply. According to Judge Riley, the wife’s consent was not invalid “simply because the officers knew [the defendant] earlier refused consent.” *Id.* at 934.

Finally, the court will consider *Planned Parenthood v. Rounds*, No. 05-3093. The case involves a South Dakota law that requires doctors to inform women seeking abortions that the procedure would “terminate the life of a whole, separate, unique, living human being.” According to the two-member majority of the Eighth Circuit panel, the law’s defect is that it supplements factual information with a value judgment; therefore, the majority affirmed the district court’s grant of a preliminary injunction. 467 F.3d 716, opinion vacated Jan. 9, 2007. Judge Raymond Gruender dissented, concluding that the law “fall[s] within the reasonable bounds of constitutionality, as defined by *Casey*, for informed consent provisions in the abortion context.” *Id.* at 729.

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Footnotes

Brown v. Board of Education Exhibit

The Judicial Learning Center hosted *Brown v. Board of Education: In Pursuit of Freedom and Equality* from December 26, 2006, through February 28, 2007. The exhibit is on loan from The Brown Foundation for Educational Equity, Excellence and Research, in Topeka, Kansas. This exciting visual presen-

tation uses images and text to share little known facts about the history and importance of the *Brown* decision.

The legal victory in *Brown* signaled the end of segregation across the United States. The Supreme Court’s findings were based on the Fourteenth Amendment to the Constitution. The case set into motion social and political movements that changed the course of history. The case, decided in May 1954, focused national attention on the practice of maintaining racially segregated public schools, which was a common practice at that time. Chief Justice Earl Warren delivered the opinion of the Court, stating, “We conclude, unanimously, that in the field of public education, the doctrine of ‘separate-but-equal’ has no place.”

Today, few people realize that as early as 1849 African Americans fought the system of education in this country that mandated separate schools for their children based solely on race. In many instances, these schools were substandard facilities with out-of-date textbooks and often no basic school supplies. What was not in question was the dedication of the African-American teachers assigned to these schools.

This chronological look at the history of *Brown* leaves the viewer with a clear understanding that efforts still continue across the country to realize the dream of equality. The *Brown* exhibit portrays the role of the federal courts in acknowledging and protecting such a right.

The Learning Center is located on the main floor of the Thomas F. Eagleton Courthouse in St. Louis.

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Dred Scott Exhibits

The Judicial Learning Center is hosting the exhibit *Dred Scott, Slavery and the Struggle To Be Free* beginning March 1, 2007, through September 30, 2007. The 150th anniversary of the *Dred Scott* decision was March 6, 2007.

On March 6, 1857, Chief Justice Roger B. Taney delivered the opinion for the Supreme Court in *Dred Scott v. Sandford*, 19 How. 393, 15 L.Ed. 691 (1856). Judge Taney tried to address the national issues of slavery and states’ rights in a way that would calm the country; instead, the Court’s decision steered the country toward disunion and civil war.

The exhibit is presented in 24 panels,

containing photographs, illustrations, and reproductions of newspaper articles and documents. It examines the *Dred Scott* decision, as well as the effects of slavery in antebellum Missouri.

The Old Courthouse was the site of the *Dred Scott* trial. *Dred Scott* was not the only slave to sue for his freedom. Lucy Delaney also sued for her freedom in the same courthouse. The exhibit also presents a copy of the manumission papers of ex-slave Nicene Clark by Taylor Blow. Blow also set *Dred Scott* free after the Court’s decision.

The exhibit is at the Old Courthouse, which is part of the Jefferson National Expansion Memorial, on loan from the National Parks Service. The exhibit was researched and organized by the Jefferson National Expansion Memorial with support from the Jefferson National Parks Association.

Also, the Eighth Circuit Library has prepared a display commemorating the 150th anniversary of the *Dred Scott* decision. In six panels of photographs, illustrations, maps, and text, the exhibit outlines the chronology of *Dred Scott*’s freedom suit during its 11 years in the state and federal courts and conveys the impact of this 1857 landmark decision on the nation. The exhibit will be on display in the St. Louis library on the 22nd floor of the Thomas F. Eagleton United States Courthouse until March 30th. After that, it will travel to the branch libraries of the Eighth Circuit, beginning with the Minneapolis and Fargo libraries, and then to the African-American Historical Museum and Cultural Center of Iowa in Cedar Rapids.

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Thomas F. Eagleton Memorial

The Eighth Circuit Library also has a small display honoring the late Senator Thomas F. Eagleton. Senator Eagleton died on March 4, 2007, at age 77. Senator Eagleton served not only served as Missouri attorney general of Missouri and lieutenant government of Missouri but also as a United States senator for three terms, ending in 1987.

Nationally, Senator Eagleton was known for the 18 days that he served in 1972 as presidential nominee George McGovern’s running mate. He had to withdraw from the race after it was revealed that he suffered from depression and had undergone shock treatments a decade earlier.

Eighth Circuit Historical Society Website

The website for the Eighth Circuit Historical Society has moved to a new Internet address:

http://www.lb8.uscourts.gov/pubsandservices/histsociety/hist_society.html

Please update any bookmarks or desktop shortcuts you may have to this site.

The Eighth Circuit Historical Society is a not-for-profit corporation whose mission is to preserve and celebrate the rich history of the federal courts of the seven states that make up the Eighth Circuit. It is composed of a parent organization and 11 branches, with one branch for the court of appeals and one for each district court in the circuit. The branches act as their own local historical societies and undertake exciting projects in court history. To see what each branch is up to, check out the annual reports on the website. To learn more about the organization as a whole, access the bylaws, parent annual reports, and meeting minutes. To find out who represents your court, access the board of directors listing or the individual branch page. To get involved in the Historical Society, just contact your branch's representatives!

Eighth Circuit Newsletter

This newsletter is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Tiffany Milligan Brown (Tmill720@aol.com).

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