

## WHO ARE THE JURISTOCRATS? GUERRILLA WARFARE AMONG THE COURTS

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The term “juristocrat”, as I understand it, refers to the possession and exercise of power by judges who are not themselves subject to the collective will of the electorate. No doubt that power is generally thought to reside in the hands of the Supreme Court of the United States<sup>2</sup>. That is surely true in some sense. But it is also true that, to rework an old adage, “the Supreme Court proposes, and the lower court disposes.” That is, when the lower courts of this country are unhappy with the product issued by a higher court, they have a number of ways to circumvent and, perhaps, ultimately change the doctrine sent down from on high. Power, in other words, is a two way street.

The judges, of course, have developed a number of methods, some quite sophisticated, to conduct this guerrilla warfare against the usurpers and villains from Washington (or even from down the highway when the offenders come from less exalted courts). These tactics necessarily involve stealth devices of one sort or another—hence, my use of the term guerrilla warfare; the days of overt judicial defiance of orders from the Supremes has been gone for a third of a century or more; the lines of power in that regard, at least, are quite clear. But the guerrillas remain in the field.

In this piece, I will mention several of these stealth techniques, concentrating on examples from two areas: antitrust and civil procedure. I use those areas primarily because so much academic analysis of judicial behavior centers on decision-making in constitutional law and related areas, rather than on more prosaic topics such as the ones I have selected. In addition, it is likely that guerrilla warfare is more pronounced when the subject matter of the litigation involves areas generally receiving less scrutiny.

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<sup>2</sup> The decisions of state supreme courts receive little attention, either as a group or individually. That general statement especially holds true for discussion concerning the manner in which those courts exercise power. But those courts exercise a great deal of power, unrestrained by the popular attention the press pays to the Supreme Court. An example is provided by the school finance litigation involving many millions a year, now largely conducted under state constitutional provisions.

## I. TECHNIQUES

There are two basic ways that lower courts can avoid the impact of disliked and apparently controlling precedents. First, the judges on those courts can manipulate the fact-finding and opinion-writing processes in various ways, thus, eliminating the need to deal with the bad law directly. Second, they can twist or thwart the controlling authority in order to reach the desired result.

### A. Avoidance Techniques.

A court can make it unlikely that effective review of its decisions can ever take place. It may, for example, make creative use of fact-finding, and it may issue its opinions in such a way as to forestall careful consideration of what it does. By making review more difficult, the lower court can help forestall realization that it has ignored pronouncements from on high.

**1. Fact-Finding.** A trial court can always find “facts” in such a way as to insulate the case from effective appellate review. That is because review of “factual” resolutions is subject to deferential review (that is, whether there was some evidence to support the finding), as opposed to the de novo review (that is, our guess is as good as yours) given legal findings. Appellate judges, of course, are alert to these kinds of shenanigans, and know how to play the game in reverse; they can do so by simply finding that the court below mischaracterized “law” as “facts.” And if the trial judge and the appellate judge are both convinced that the Supreme Court was wrong, a tacit conspiracy between the two on law and facts can achieve a lot.

A variation on this treatment occurs when the trial judge strikes a Solomonic balance; effectively giving each side enough in the way of victory so that neither wishes to risk partial success by an appeal, followed by a loss, on remand. In those circumstances, the trial judge may have circumvented a rule laid down, but her decision stands as final because no one has an adequate incentive to appeal it. A variation

involves an institutional litigant paired with an ordinary person. Give the former the statement of law that it wishes, and give the latter some money; both will be happy and the decision goes unreviewed. Finally, the game can be played both ways; the Supreme Court and lower appellate courts are quite capable of making their own mis-statement of inconvenient things in both the record and in decisions below in order to reach a desired result.

In both cases hypothesized in this part it is difficult to determine whether the trial judge has fudged the statement of the facts in order to reach a result outside the boundaries of stated law. Figuring out the answer to that question would require an extremely tedious reading of the record to determine whether that had, in fact, happened, something that no one has endured, as far as I am aware. Nevertheless, the author, an experienced appellate attorney, believes that to happen regularly.

**2. The Unpublished Opinion.** Although Federal Rule of Civil Procedure 52 (a) requires a written explanation of the disposition by the trial court in non-jury cases, the explanation provided can often be quite scant and unhelpful. Appellate courts may grumble when that happens, but reversals on Rule 52 (a) grounds are relatively unusual.<sup>3</sup> The effect is that the trial courts can mask their unhappiness with doctrine by writing a cursory opinion that makes effective review difficult.

A more important technique, perhaps, available to the guerrilla fighting juritocrat centers on the fact that about 80% of all federal appellate dispositions are now formally “unpublished.”<sup>4</sup> The practical effect of getting rid of a case on the non-publication track is that it becomes effectively unreviewable by the Supreme Court; unpublished opinions

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<sup>3</sup> Source: Author’s guess. There is no way to find out.

<sup>4</sup> This is a bizarre concept for the uninitiated. Unpublished opinions are often in print in some sense (that is, published), but they generally cannot be cited as precedent. In any event, they are short and uninformative. *See generally* William L. Reynolds and William M. Richman, *An Evaluation of Limited Publication in The United States Courts of Appeals*, 48 U.Chi.L.Rev. 573 (1981). The processes in state courts are similar.

tend to be short and cursory to the point of incomprehension;<sup>5</sup> and the Supreme Court, given its limited caseload, is very, very unlikely to spend time looking for the real problems that just possibly may be found in the Record.<sup>6</sup>

## **B. Legal Strategies**

A lower court may also evade bad precedent (that is disliked decisions by nominally superior courts by fiddling in various ways with the law laid down by the higher court. There are a number of common techniques available to the creative court here.

**1. Ignore the Test.** In *Kulko v. Superior Court*,<sup>7</sup> the Court held that a state could not exercise personal jurisdiction over a father who had acquiesced in the move by his children from his New York to the home of his former wife in California. The issue was a modification in the amount of child support the father owed following the children's change in domicile. The opinion is appalling in reasoning and result, and it is not surprising that lower courts are profoundly unhappy with the results that it dictates. Thus, in one case, the Michigan Supreme Court simply ignored *Kulko*,<sup>8</sup> even though the court's clerks surely would have been aware of it, because *Kulko* is a staple of the basic

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<sup>5</sup> For the results of an empirical study showing the appallingly poor content of unpublished opinions, *see id.* at ---.

<sup>6</sup> Unpublished opinions do get reviewed on occasion by the Supreme Court, although that event is far less common than a blue moon. It is a real tribute to the dedication of the Court's clerks that *any* unpublished opinion ever gets reviewed. *See generally* William L. Reynolds and William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978).

<sup>7</sup> 436 U.S. 86 (1978).

<sup>8</sup> *Black v. Black*, (Mich.)

course in Civil Procedure.<sup>9</sup> Sweeping a disliked precedent under the rug may be a helpful stealth technique, but it can be risky—at least if the case is likely to be reviewed.<sup>10</sup>

**2. Re-State the Test.** In the 1981 decision of *Reyno v. Piper Aircraft Co.*<sup>11</sup>, the Supreme Court enunciated the test for trial courts to follow when deciding whether to grant a motion to dismiss on forum non conveniens grounds. That test requires, *inter alia*, that the trial court determines that personal jurisdiction exists over the defendant before moving on to consideration of the forum non conveniens criteria. That part of the test—that is, the order of the test-- often makes no sense. In many cases, it will be readily apparent that the plaintiff has filed in the wrong forum. Moreover, determining whether personal jurisdiction exists may take a lot of time: It is largely a fact-bound determination that can require extensive discovery. It is not surprising, therefore, that trial judges prefer to do the easy task before undertaking the hard one. How can an efficiency seeking trial court avoid the inefficient Supreme Court test? It can do so by assuming that personal jurisdiction exists over the defendant.<sup>12</sup> In other words, the lazy (or realistic) district judge will simply make the assumption that a basis exists for exercising personal jurisdiction, sometimes doing so even though no discovery has been conducted on the issue, and then move on to an analysis of the forum non conveniens factors.

Another example of restating the test comes from the area of personal jurisdiction. Twenty years ago, in the *Helicopteros* decision, the Court announced that a court could not combine elements of specific and general jurisdiction; jurisdiction, in other words,

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<sup>9</sup> As an added insult to *Kulko*, the drafters of the Interstate Uniform Foreign Support Act provided for the exercise of long-arm jurisdiction in situations like the one in *Kulko* itself. UIFSA § 201 (a) (5).

<sup>10</sup> This tactic can be very risky. Consider forum non conveniens cases, when more or less complete deference is accorded the decision of the trial court, as long as that court correctly *recites* the applicable law.

<sup>11</sup> 454 U.S. 235 (1981).

<sup>12</sup> William L. Reynolds, *The Proper Forum for a Suit: Transnational forum non conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 Tex. L. Rev. 1663, ----(1992).

could be one or the other, but it could not combine elements from both. Lower courts have grown restive under that restriction, and, ignoring the *Helicopteros* strictures, have begun stealthily doing just that kind of combination

**3. Fill in the Blanks.** Another stealth tactic is to pay lip service to the law laid down by the Supreme Court but then to add additional considerations that permit the court to reach correct results. Antitrust law provides the example. The 1947 decision in *International Salt Co. v. United States*,<sup>13</sup> held that a manufacturer who required a buyer of one product to buy another product as well (that is, if you want my salt you must also buy my salt machine) violated antitrust law if the amount of commerce involved in the traffic was not insubstantial. This preposterous doctrine,<sup>14</sup> which contains little in the way of possible exceptions, amazingly did not reach its apogee until 1972<sup>15</sup> and was not seriously limited by the Court until 1984.<sup>16</sup>

The lower courts immediately began nibbling away at the edges of the doctrine, eventually carving out so many exceptions that tie-in law no longer comprehended a coherent body. They were able to do so because tie-in doctrine purported to permit no exceptions; that left gaps that the lower courts fill in using necessity as an excuse. Here are a few examples.

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<sup>13</sup> 332 U.S. 392 (1947).

<sup>14</sup> The fallacious under-pinning of tie-in doctrine had been exposed as early as 1957. The basic problem is that the doctrine assumes, absent market power, the seller can get a higher price for selling the two in tandem, rather than selling each by itself. Thus, tie-ins as an Antitrust problem are really a specialized variant on monopoly law. See Ward Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19 (1967). The long life of tie-in doctrine reflected not only the appalling ignorance of economics on the Court until quite recently, but, of more importance, it reflected the strong hostility toward “Big Business” held by many members of the Court, especially Justices Black and Douglas.

<sup>15</sup> See *Fortner Enterprises Inc. v. United States Steel Corp.*, 394 U. S. 495 (1969) (holding that the sale of mobile homes and the extension of credit for their purchase were two separate products).

<sup>16</sup> See *Jefferson Parish Hosp. Dist. No. 1 v. Hyde*, 466 U.S.2, (1984).

a. *New Product.* One of the first holes involved what became known as the “new product” exception. The Jerrold Products Company had pioneered cable TV, tying together products and service in a way that otherwise would be an illegal tie. The trial court recognized that the success of a new and expensive product required customer satisfaction, something that the tie helped by insuring quality in the whole<sup>17</sup> system. Eventually, however, once the product became accepted in the industry, the new product defense would evaporate (as it did in *Jerrold* itself).

b. *One Product or Two.* The tie-in doctrine requires the existence of two products. Often satisfying that demand can be obvious: tying the sale of IBM punch cards to the purchase of IBM card machines provides an example. Often the answer is not so clear. A problem that long plagued the computer industry (or at least IBM when it was the Microsoft of the 60s and 70s) was whether IBM could require buyers of its equipment also to buy “peripherals”, products like disks, plugs, adapters, and so forth.<sup>18</sup> The problem became definitional, and was closely linked with problems of quality and efficiency.

Thus, in one case, the court refused to enjoin Ford from selling new cars with radios already installed; the plaintiff had wanted an empty cavity left for the radio so that it could compete for radio sales with Ford.<sup>19</sup> Although it would have been an easy task to find two products present, the obvious inefficiency and waste to society led the circuit court to find but one product present, and tie-in doctrine inapplicable.

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<sup>17</sup> *United States v. Jerrold Elec. Corp.*, 187 F. Supp. 545 (E.D. Pa.), *aff'd per curiam*, 365 U.S. 567 (1961).

<sup>18</sup> See *ILC Peripherals Leasing Corp. v. IBM*, 448 F. Supp. 228 (N.D. Cal. 1978).

<sup>19</sup> *Automatic Radio Mfg. Co. v. Ford Motor Co.*, 390 F. 2d 113 (1st Cir.), *cert. denied*, 391 U.S. 914 (1968).

c. *Health and Safety*. An argument along the lines of health and safety is sure to find willing judicial listeners. Tie-in cases in this respect do not differ from, say, dormant commerce clause cases, and tying doctrine gradually accepted yet another exception to a stated rule that permitted none.<sup>20</sup>

**4. Prod the Court Along.** Beginning with the famous Alcoa decision in 1945,<sup>21</sup> the Supreme Court in a series of decisions that continued until 1964, enunciated a test to use in determining whether a monopolist was behaving illegally. This test required that a monopolist be essentially passive player in the market; innovation and expansion by the monopolist were risky business, liable to subject it to severe penalties.

That was a remarkably silly test. And yet it still stands as stated law because even more remarkably, the Supreme Court has not re-visited the area since 1964, even though its standard was badly flawed, and the question was one of great importance for the economy. And perhaps most remarkably of all, the Supreme Court repeatedly denied review in monopolization cases.

Fortunately, the lower courts entered the fray and saved the day. The key decision was *Berkey Photo, Inc. v. Eastman Kodak Co.*<sup>22</sup> There, the circuit court clearly frustrated by the silence from on high, rejected the stated law and permitted defendant Kodak “to seek the competitive advantages of its broad based activity.”<sup>23</sup> After the Supreme Court denied certiorari—yet again—other lower courts followed the economically sound approach of *Berkey*, and permitted monopolists to compete. The Supreme Court has *never* reviewed any of these cases, (another remarkable phenomenon) which have met with general academic approval. Guerrilla warfare, in short, had effectively changed the law.

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<sup>20</sup> See—

<sup>21</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir.1945). The final decision was made by the circuit court because the Supreme Court lacked a quorum. The opinion by Learned Hand in *Alcoa* was shortly thereafter approved by the Supreme Court as if it were one of that Court’s own decisions.

<sup>22</sup> 603 F. 2d 263 (2d Cir.), *cert. denied*, 444 U. S. 1093 (1980).

<sup>23</sup> *Id.* at 276.



## II. WHAT DOES IT ALL MEAN?

Several lessons perhaps can be learned from the above recitation.

First, the Supreme Court does not like to admit that it is wrong. It needs to be tolerant, therefore, of lower court manipulation of its results. Another corollary of this proposition, therefore, is that the Court should ensure leeway in its pronouncements

Second, courts do not like to reach unjust results.. As a result, they will do what they can to avoid doing so. The two corollaries mentioned just above also work here.

Third, the American system of checks and balances works. The Supreme Court must enlist the support of those it ostensibly controls in order to implement its program. If it does not, they will check its efforts.

Fourth, the Supreme Court cannot merely pronounce; it must also *explain and convince* its audience of lower court judges why a particular result is correct. The Court, in short, cannot be a dictator; it must instead be a politician.

Fifth, the Supreme Court knows what is going on. It does nothing about the guerrillas for a number of reasons; high among those reasons, I suspect, is a need to let the other judges “percolate” the area (in Frankfurter’s wonderful phrase) in order to find the proper law. It may be, as was true in the monopolization line of cases, that things might work best without further intervention, especially if coherent revised doctrine is not likely to emerge from the deliberations.

Fifth, there *is* a God. Just kidding.