

An Indigent Plaintiff in the Federal Courts

Litigants expect certain things from the federal courts. Most fundamentally, they expect that the rules and procedures applied in their case will be consistent with other cases and that the court will give them the same attention and consideration that other litigants receive. Though these expectations often prove realistic, for indigent plaintiffs they do not. Indigent plaintiffs face numerous hurdles—statutory and administrative—and are not guaranteed the same level of attention and consideration as their fee-paying counterparts.

Take, for example, the case of William David Burnside. Burnside was a typical indigent plaintiff, and he followed a typical path—except for the result—through the three levels of the federal court system: the district court, court of appeals, and the U.S. Supreme Court. His case well illustrates the barriers that indigent plaintiffs face in the federal courts.

In the District Court

Burnside's legal drama began on November 9, 2008, when he was arrested for making a fake 911 call that everyone later agreed he did not make. He was jailed for 10 days before the prosecutor dropped the charge. Burnside sued the arresting officers in U.S. District Court for the Western District of Tennessee for false arrest under 42 U.S.C. § 1983 and filed a motion to proceed *in forma pauperis* (IFP).

Because Burnside was indigent and proceeded *pro se*, he came up against several unique statutory and administrative rules. First, instead of random judicial assignment, Burnside's case was transferred to one particular judge, pursuant to a local administrative order regarding all *pro se* § 1983 cases.

Second, special statutory provisions came into play. Enacted as part of the Prison Litigation Reform Act of 1996 (PLRA), one provision of the IFP statute, 28 U.S.C. § 1915(e)(2), states that a court “shall dismiss” an indigent plaintiff's case if it determines that “the action ... fails to state a claim on which relief may be granted.”¹ Under § 1915(e)(2), district courts must screen indigent plaintiffs' complaints prior to service of process and dismiss them if they fail to state a claim on which relief may be granted.²

The Sixth Circuit, alone among the federal circuit courts of appeals, added an additional restriction, which became the focus of the rest of Burnside's journey through the federal court system. Consistent with Federal Rule of Civil Procedure 15, district courts considering dismissing a complaint *sua sponte* generally must give a plaintiff notice and an opportunity to amend the complaint.³ But in

McGore v. Wrigglesworth, the Sixth Circuit interpreted the phrase “shall dismiss” in § 1915 to bar indigent plaintiffs from amending their complaints to avoid dismissal.⁴

Applying § 1915(e)(2) and the Sixth Circuit's *McGore* rule, the district court *sua sponte* dismissed Burnside's complaint with prejudice, without notice or an opportunity to amend.⁵ Burnside filed a Rule 60(b) motion for relief from judgment and included a proposed amended complaint. But the Sixth Circuit had previously held that the *McGore* rule barred amendment before and after dismissal, and the district court accordingly denied the motion.⁶

On Appeal

Burnside filed a notice of appeal of the order dismissing his complaint and another notice of appeal of the order denying his Rule 60(b) motion. The cases were consolidated, and he filed a motion to proceed IFP on appeal. Now represented by counsel (the author of this article), Burnside argued that a 2007 U.S. Supreme Court decision, *Jones v. Bock*, had effectively overruled *McGore*.⁷ In *Jones*, the Supreme Court rejected other restrictions that the Sixth Circuit grafted onto the PLRA, holding that the statutory scheme “does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself.”⁸ Combined with the uniform view of the other federal circuit courts of appeals that § 1915 did not bar amendment, the effect of *Jones* on the continued validity of *McGore* seemed clear.⁹

By attempting to proceed IFP on appeal, though, Burnside activated additional statutory and administrative rules that apply to only indigent plaintiffs. As an indigent plaintiff, his motions and briefs would first be reviewed by the Sixth Circuit's staff attorneys, not by judges' clerks.¹⁰ They do the initial research into the record and the applicable law and present the judges with a recommended disposition and proposed order. The judges review the staff attorneys' recommendations and make all final decisions, of course, but the staff attorneys have considerable influence, and the judges vary in how thoroughly they review the work.

Statutorily, to proceed IFP, the Sixth Circuit had to find that Burnside's appeal raised nonfrivolous issues.¹¹ The Sixth Circuit denied Burnside's motion, reasoning that any appeal of the dismissal order would be frivolous and that the district court lacked jurisdiction to decide Burnside's Rule 60(b) motion once he filed his notice of appeal of the district court's dismissal order.

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In this instance, the administrative procedure for handling IFP appeals failed. The staff attorney's proposed order ignored Burnside's nonfrivolous primary argument on appeal and overlooked recent changes in the law directly on point, and the reviewing judge or judges approved it. Even at a glance, Burnside's appeal of the dismissal order was not frivolous—every other federal circuit court of appeals had already adopted his position. And his appeal of the order denying his Rule 60(b) motion was also not frivolous—more than a year earlier, the Federal Rules of Civil Procedure had been amended to expressly give the district courts jurisdiction to deny Rule 60(b) motions while an appeal is pending.¹² Burnside filed a motion for reconsideration explaining these errors, which was granted.

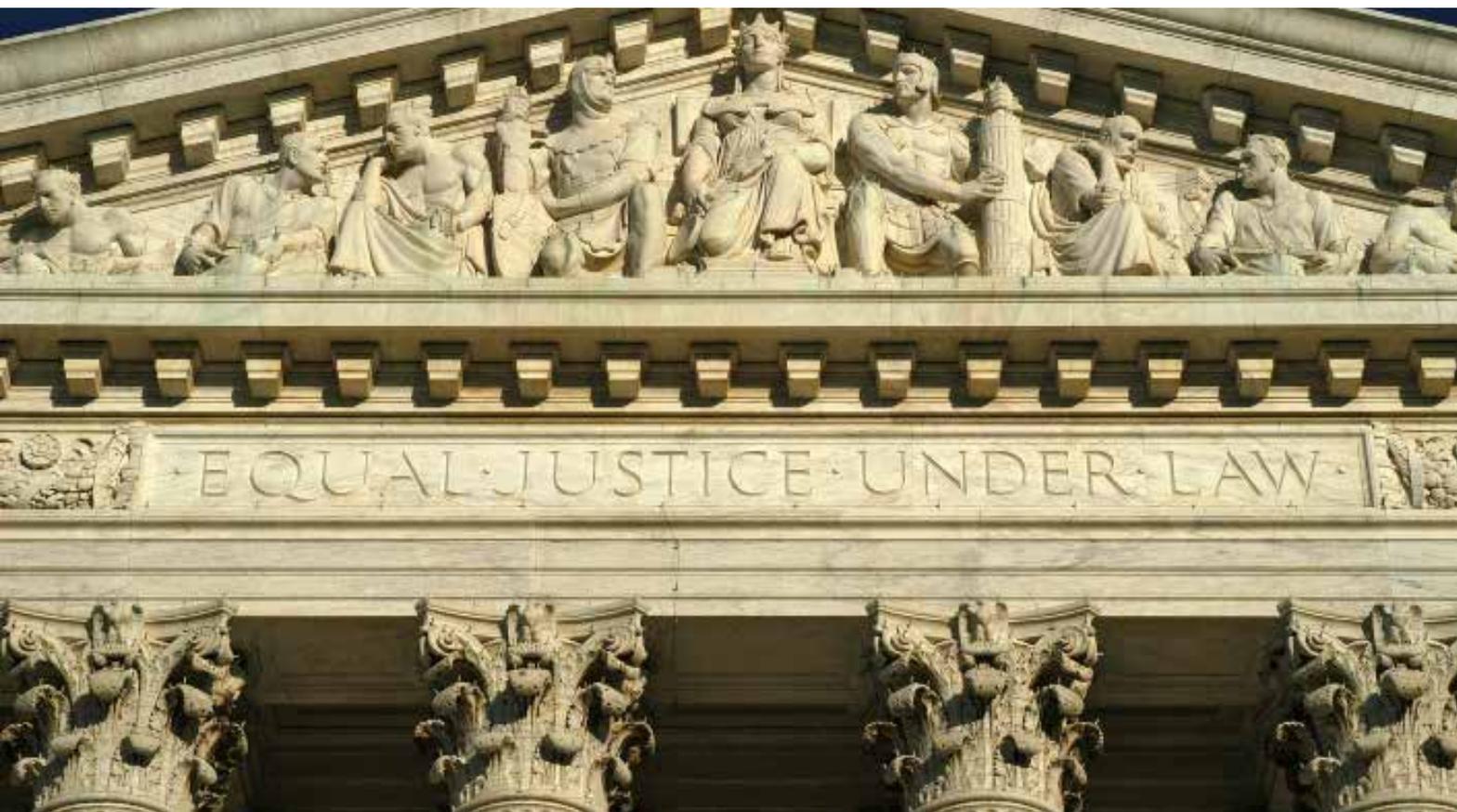
On the merits of Burnside's appeal, the same process—staff attorneys performing the initial review, making a recommendation,

banc. This concluded Burnside's legal battle in the Sixth Circuit—for the time being.

In the U.S. Supreme Court

Burnside pursued his only remaining avenue for relief—filing a petition for a writ of certiorari in the U.S. Supreme Court. Proceeding IFP meant that Burnside's petition would be on the unpaid docket, which is considered separately and viewed by scholars as “generally frivolous and unimportant.”¹⁵ The Supreme Court grants certiorari in less than 0.5 percent of IFP cases.¹⁶

To raise the profile of his petition, Burnside sought support from *amici curiae*. Clinical law professors Paul Reingold at the University of Michigan and Alistair Newbern at Vanderbilt University, with student assistance, drafted an *amici* brief. Professor Newbern



and drafting a proposed order—resulted in a panel of the Sixth Circuit affirming the district court's orders without permitting oral argument. The court's order made virtually no attempt to address the weight of authority against the *McGore* rule, stating only that “Burnside's argument that other circuit courts permit such amendments is unpersuasive because their practices are not binding upon us.”¹³ The order was unpublished, as is typical for cases decided without oral argument (and which would be important later), but went a step further—to this day, the order cannot be found in any electronic database and cannot be found using the “Opinions Search” function on the Sixth Circuit's website.¹⁴ It is impossible to know how many indigent plaintiffs have lost appeals by application of the *McGore* rule, because there is nowhere to find those orders.

Burnside filed a petition for rehearing *en banc*, noting the significant circuit split. No judge requested a vote on whether to hear the case *en*

had a case raising the same issue pending in the Sixth Circuit, *LaFountain v. Harry*, and she submitted Burnside's cert petition to that panel as additional authority.

On May 13, 2013, the Supreme Court granted Burnside's petition for a writ of certiorari.¹⁷ Nine days later, the *LaFountain* panel of the Sixth Circuit issued a published opinion (thus superseding the unpublished *Burnside* order), holding: “*McGore* is flatly inconsistent with *Jones*. We therefore overrule *McGore*; and we hold, like every other circuit to have reached the issue, that under Rule 15(a) a district court can allow a plaintiff to amend his complaint even when the complaint is subject to dismissal under the PLRA.”¹⁸ Burnside filed a motion asking the Supreme Court to remand his case in light of *LaFountain*, which was granted. His case was returned to the district court to start over, more than three and a half years after it began.¹⁹

Conclusion

Indigent plaintiffs in the federal courts face special barriers litigating their claims. After *Burnside* and *LaFountain*, plaintiffs proceeding *in forma pauperis* in the Sixth Circuit no longer face one of those barriers and may be permitted to amend their complaints. But as *Burnside*'s journey from the district court to the U.S. Supreme Court shows, it may still take extraordinary efforts to persuade the courts simply to give their claims a fair review. ☉

Endnotes

- ¹28 U.S.C. § 1915(e)(2).
- ²See *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997).
- ³See *Tingler v. Marshall*, 716 F.2d 1109, 1112 (6th Cir. 1983).
- ⁴*McGore*, 114 F.3d at 612.
- ⁵*Burnside v. Walters*, No. 09-2727 (W.D. Tenn. June 1, 2010).
- ⁶See *Moniz v. Hines*, 92 F. App'x 208, 212 (6th Cir. 2004).
- ⁷*Jones v. Bock*, 549 U.S. 199 (2007).
- ⁸*Id.* at 214.
- ⁹See, e.g., *Brown v. Johnson*, 387 F.3d 1344, 1349 (11th Cir. 2004) (collecting cases).
- ¹⁰See Posting of Pierre Bergeron to Sixth Circuit Appellate Blog, Interview with Sixth Circuit Clerk Leonard Green, www.sixthcircuitappellateblog.com/interviews/we-sat-down-recently-with/ (July 1,

2011); see also Posting of Colter Paulson to Sixth Circuit Appellate Blog, Case Management at the Sixth Circuit: Comparisons Between Circuits on the Role of Staff Attorneys, www.sixthcircuitappellateblog.com/news-and-analysis/case-management-at-the-sixth-circuit-comparisons-between-circuits-on-the-role-of-staff-attorneys/ (August 17, 2011); Posting of Colter Paulson to Sixth Circuit Appellate Blog, Case Management at the Sixth Circuit: The Role of Staff Attorneys, www.sixthcircuitappellateblog.com/news-and-analysis/case-management-at-the-sixth-circuit-the-role-of-staff-attorneys/ (August 12, 2011).

- ¹¹See 28 U.S.C. § 1915(a); *Coppedge v. United States*, 369 U.S. 438, 445 (1962).
- ¹²See Fed. R. Civ. P. 62.1(a)(2).
- ¹³*Burnside v. Walters*, No. 10-5790/6368, slip op. at 3 (6th Cir. Apr. 27, 2012).
- ¹⁴www.ca6.uscourts.gov/opinions/opinion.php.
- ¹⁵Wendy L. Watson, *The U.S. Supreme Court's In Forma Pauperis Docket: A Descriptive Analysis*, 27 JUST. SYS. J. 47, 47 (2006).
- ¹⁶David C. Thompson and Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 254-55 (2009).
- ¹⁷See *Burnside v. Walters*, 133 S. Ct. 2337 (2013).
- ¹⁸*LaFountain v. Harry*, 716 F.3d 944, 951 (6th Cir. 2013).
- ¹⁹See *Burnside v. Walters*, 133 S. Ct. 2789 (2013).

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Endnotes

- ¹*Zivotofsky v. Secretary of State*, No. 07-5347 (D.C. Cir., July 23, 2013), memo op., at 2.
- ²*Id.* at 1 (Tatel, J., concurring).
- ³*Zivotofsky*, majority op., at 14
- ⁴*Id.*
- ⁵*Id.* at 17.
- ⁶299 U.S. 304 (1936).
- ⁷*Clinton v. City of New York*, 524 U.S. 417, 445 (1998), cited by majority op., at 23-24.
- ⁸Majority op., at 24.
- ⁹*United States v. Belmont*, 301 U.S. 324, 330 (1937), cited by majority op., at 24-25.
- ¹⁰Majority op., at 40.
- ¹¹10 ANNALS OF CONG. 533 (1800).
- ¹²*Id.* at 515.
- ¹³*Id.*
- ¹⁴The full speech can be read at www.loufisher.org/docs/pip/444.pdf.
- ¹⁵Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 572 (1938).
- ¹⁶*Id.* at 572-73.
- ¹⁷*Id.* at 573, n.50.
- ¹⁸C. Perry Paterson, *In Re the United States v. The Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 297 (1944).
- ¹⁹David M. Levitan, *The Foreign Relations Powers: An Analysis of Mr. Sutherland's Theory*, 55 YALE L.J. 467, 478 (1946).
- ²⁰*Id.* at 493.
- ²¹*Id.* at 497.
- ²²Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 25 (1973) (emphasis in original).

- ²³*Id.* at 30.
- ²⁴*Id.*
- ²⁵*Id.* at 32 (emphasis in original).
- ²⁶Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 11 (1988).
- ²⁷*Id.* at 12.
- ²⁸*Id.* at 13.
- ²⁹*Id.* at 14.
- ³⁰David Gray Adler, *The Constitution and Presidential War-making: The Enduring Debate*, 103 POL. SCI. Q. 1, 30 (1988).
- ³¹*Id.*
- ³²*Id.* at 34.
- ³³Louis Fisher, *The "Sole Organ" Doctrine*, Law Library of Congress, August 2006, loufisher.org/docs/pip/441.pdf; Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139 (2007), loufisher.org/docs/pip/439.pdf.
- ³⁴LOUIS FISHER, *PRESIDENTIAL WAR POWER* 68-72 (3d ed. 2013).
- ³⁵Majority op., at 25 (emphasis in original).
- ³⁶*Id.*
- ³⁷*Talbot v. Seeman*, 5 U.S. (1 Cr.) 1 (1801).
- ³⁸*Bas v. Tingy*, 4 U.S. (4 Dall.) 36 (1800).
- ³⁹*Talbot*, 5 U.S. (1 Cr.) at 28.
- ⁴⁰*Id.*
- ⁴¹*Little v. Barre*, 2 Cr. (6 U.S.) 170, 177 (emphasis in original).
- ⁴²*Id.* at 178.
- ⁴³*Id.* at 179.
- ⁴⁴*Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 165 (1803).
- ⁴⁵*Id.*
- ⁴⁶*Id.* at 165-66.
- ⁴⁷*Id.* at 166.