

Judicial Profile

ROBERT E. KOHN

Hon. Joel F. Dubina Chief Judge, U.S. Court of Appeals for the Eleventh Circuit

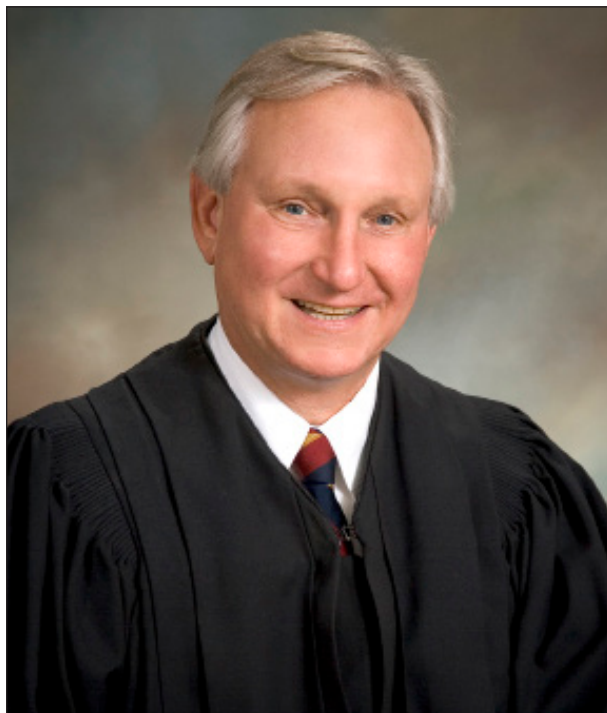
ADVOCATES WHO APPEAR before the U.S. Court of Appeals for the Eleventh Circuit may not realize at first glance that its chief judge has a mountaineer's skill, precision, and perseverance. Fair, efficient, and respectful of the parties and their lawyers, Hon. Joel F. Dubina has

served as a U.S. magistrate judge, as a U.S. district judge, and now as chief judge for the Eleventh Circuit. After a successful career in private practice, during which he earned the esteem of the bar, he has become one of the nation's most respected federal judges.

Joel Dubina attended the University of Alabama and graduated from the Cumberland School of Law in 1973. He then clerked for Judge Robert E. Varner of the U.S. District Court for the Middle District of Alabama in Montgomery. During the next 10 years of private practice, Dubina earned a reputation in Montgomery and throughout Alabama as a smart, collegial, and effective federal litigator. He became president of the Montgomery Chapter of the Federal Bar Association before accepting an appointment as a U.S. magistrate judge in 1983. He served the bench in that role until 1986, when, after Judge Varner took senior status, President Ronald W. Reagan appointed Judge Dubina to fill Judge Varner's former position on the district court bench in Montgomery. President George H.W. Bush elevated Judge Dubina to the Court of Appeals for the Eleventh Circuit in 1990. In 2010, Chief Justice Roberts appointed Chief Judge Dubina to serve as a member of the Executive Committee of the Judicial Conference of the United States, which is the senior executive arm of the Judicial Conference.

Noteworthy Judicial Opinions

Judge Dubina has reviewed many important cases, one of which was the case of six-year-old Elian Gonzalez, the Cuban boy who was rescued at sea after the boat carrying his mother and others who were escaping from Cuba sank. After a drawn-out dispute over his custody, federal law enforcement officials (armed with automatic weapons) stormed the Florida house of his uncle,



seized Elian from his uncle's custody, and returned the boy to his father, who had come to Washington, D.C., in the hope of bringing Elian back to his home in Cuba. The legal case that ensued was a massive media cause célèbre. Judge Dubina was assigned as a member of the panel to hear the appeal, along with Judges J. L. Edmondson and Charles Wilson. After oral argument, the panel decided that the decision of the Immigration & Naturalization Service (INS) that Elian should be returned to his father was not arbitrary or capricious. The Eleventh Circuit held the following:

The INS determination that ordinarily a parent (even one outside of this country—and, more important, *only* a parent—can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of

the public in the prompt but fair disposition of asylum claims. The INS policy—by presuming that the parent is the sole, appropriate representative for a child—gives paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy’s stress on the parent-child relationship is unreasonable. See *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 1280, 20 L. Ed. 2d 195 (1968) (“[T]he parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”).

Gonzalez v. Reno, 212 F.3d 1338, 1351–52 (11th Cir. 2000) (footnotes omitted). The Supreme Court promptly declined to review the decision, see 530 U.S. 1270, and Elian and his father returned to Cuba.

Another major case in which Judge Dubina was involved was the dispute over the recount of the ballots in Florida during the disputed 2000 presidential election. Judge Dubina participated en banc in reviewing the Miami district court’s denial of a preliminary injunction that would have stopped local county officials from recounting the ballots by hand. The appeal was argued on Dec. 5, 2000, and decided the very next day. See *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000). Judge Dubina dissented from the majority’s affirmation of that denial. 234 F.3d at 1193–94. In the dissenters’ view, which Judge Dubina joined, the manual recounts conducted in four of Florida’s counties violated principles of equal protection and substantive due process. Six days later, the Supreme Court of the United States brought all the litigation to an end when the Court held that the manual recounts ordered by Florida’s Supreme Court violated equal protection principles because the Florida court’s order did not provide specific standards for discerning a voter’s intent. See *Bush v. Gore*, 531 U.S. 98, 105–109 (2000).

This year, Chief Judge Dubina presided over an appeal concerning the Patient Protection and Affordable Care Act—*Florida v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011). His opinion carefully considered the competing presentations of the questions actually raised by the case:

Properly formulated, we perceive the question before us to be whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives. These types of purchasing decisions are legion. Every day, Americans decide what products to buy, where to invest or save, and how to pay for future contingencies such as their retirement, their children’s education, and their health care. The government contends

that embedded in the Commerce Clause is the power to override these ordinary decisions and redirect those funds to other purposes. Under this theory, because Americans have money to spend and must inevitably make decisions on where to spend it, the Commerce Clause gives Congress the power to direct and compel an individual’s spending in order to further its overarching regulatory goals, such as reducing the number of uninsureds and the amount of uncompensated health care.

648 F.3d at 1287 (footnote omitted). Together with Circuit Judge Frank M. Hull, Chief Judge Dubina ruled that the central provision of the reform law lacks constitutional authority under the Commerce Clause. The decision is controversial and is likely to be reviewed by the U.S. Supreme Court. Fellow Circuit Judge Stanley Marcus dissented from that part of the ruling, which represents a split from some other circuit authority.

Advice to Counsel on Appeal

Approximately 75 percent of the Eleventh Circuit’s cases are decided only on the briefs, without oral argument. Chief Judge Dubina finds short, simple prose most effective. The best briefs raise only the critical issues and the strongest arguments. He commends to counsel Judge John C. Godbold’s influential article, “Twenty Pages and Twenty Minutes: Effective Advocacy on Appeal,” 30 Sw. L.J. 801 (1976). “A brief that raises every colorable issue runs the risk of burying good arguments ... in a verbal mound made up of strong and weak contentions.” *Jones v. Barnes*, 463 U.S. 745, 753 (1983) (citing Godbold, *supra*); see also John C. Godbold, *Twenty Pages and Twenty Minutes Revisited*, 2 THE RECORD (JOURNAL OF THE FLA. BAR APPELLATE PRACTICE & ADVOCACY SECTION) 801 (March 1994). After Judge Godbold, who also lived in Montgomery, Judge Dubina is the second Alabamian to serve as chief judge of the U.S. Court of Appeals for the Eleventh Circuit.

Chief Judge Dubina advises lawyers conducting oral argument that they should know the record well, answer questions directly, show respect to the appellate court, and refrain from making “jury arguments.” According to Judge Dubina, when lawyers cannot agree on the record, both sides lose credibility, unless one of the lawyers can specifically and directly cite the pertinent portion of the record. He expects lawyers to answer the court’s questions directly, for example, by answering “yes” or “no” to a question, and only then explaining the answer. Sometimes counsel extemporaneously cite a case for a proposition of law that does not exist. Chief Judge Dubina advises lawyers not be one of those counsel.

Qualities of Character

Chief Judge Dubina enjoys living in Montgomery

with his gracious wife, Beth, and they both like traveling to exotic mountaintops around the world. He has climbed Mount Rainier, Mount Kilimanjaro, and Mount La Conte. The ascent of Kilimanjaro was led by Eric Simonson, a noted climber with International Mountain who was featured in *National Geographic* magazine. The teams that climbed Mount La Conte at different times have included Judges Ed Carnes, Susan H. Black, and Frank M. Hull—all fellow judges on the Eleventh Circuit.

The judge enjoys fishing and hunting, and the Dubina home contains a game room boasting trophies that rival those of any other sportsman. Other judges regard Chief Judge Dubina as a gregarious and respectful colleague. Members of the bar know him as a careful, thoughtful, and courteous panelist. His law clerks know him as a loyal friend and mentor, teaching the values of fairness and diligence by example. **TFL**

Robert E. Kohn, who previously served as a law clerk to Judge Dubina, litigates entertainment, business, and intellectual property disputes in the Los Angeles area. He is the vice chair of the FBA's Federal Litigation Section and co-chairs the Committee on Federal Rules of Procedure and Trial Practice. He can be reached at rkohn@kobnlawgroup.com.