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THE FOURTH CIRCUIT TERM IN PERSPECTIVE: AN OVERVIEW

During its 1973 term, the Fourth Circuit Court of Appeals handed down several decisions that promise to have a significant impact on the practice of law within this circuit and throughout the federal court system. Matters of particular concern to the court included the scope of federal jurisdiction, limitations on freedom of speech, the mandates of the civil rights statutes, and the operation of due process within the field of criminal law. The court also interpreted various federal statutes, governmental regulations, and private contractual provisions. The following survey of Fourth Circuit cases is intended as a general guide to these developments.[1]

I. *FEDERAL JURISDICTION AND PROCEDURE*

A recurring issue faced by the Fourth Circuit was the proper delineation between federal and state court jurisdiction. Much of the court's attention in this area centered on the doctrine of abstention and specifically on the impact of the Supreme Court's decisions in *Younger v. Harris*[2] and *Mitchum v. Foster*.[3] The court also noted certain limitations on the exercise of federal and state jurisdiction and commented on the precedential value of its own memorandum decisions.

A. *Guidelines for Abstention in the Fourth Circuit*

In *Younger v. Harris*, the Supreme Court held that there may be "exceptional circumstances" which will prompt the federal court system to disregard its long-standing policy of non-interference in state criminal proceedings.[4] Injunctive relief aginst the state proceeding will be granted only upon a showing by the defendant of irreparable injury which is both great and immediate.[5] The Court subsequently

[1]Not all of the cases decided by the Fourth Circuit during this term have been included in this survey. The description of fact situations and the reporting of specific holdings are necessarily brief due to the number of cases involved. Cases of major significance are also discussed in depth in student articles found elsewhere in this issue and to which the reader is directed in the notes.

[2]401 U.S. 37 (1971).

[3]407 U.S. 225 (1972).

[4]401 U.S. at 53.

[5]The *Younger* court consciously chose not to confront the federal anti-injunction

held in *Mitchum v. Foster* that the exercise of discretion in granting the injunction must be based on considerations of "equity, comity and federalism."[6]

The Fourth Circuit in *Lynch v. Snepp*[7] applied the principles set out in *Younger* and *Mitchum*. The case was an appeal from the district court's grant of a preliminary injunction against the enforcement of a state order which restricted access to public schools in Mecklenburg, North Carolina. The Court of Appeals ruled that the exercise of federal jurisdiction was proper because the action in *Snepp*, brought under 42 U.S.C. § 1983, was an exception to the federal anti-injunction statute.[8] However, the court held that the district court had exceeded its equitable discretion when it granted the preliminary injunction against the enforcement of the state court's order.[9]

The central question in *Snepp* was whether the Supreme Court's guidelines for the granting of injunctive relief in criminal proceedings should be followed in civil cases.[10] The Fourth Circuit concluded that the test for abstention should be the same in both situations.[11] To determine when a federal court should act to enjoin a state proceeding, the court formulated a standard based upon the following considerations: (1) whether a state proceeding is pending and (2) whether equitable relief is appropriate. According to this standard, when no state proceedings are actually pending, the notions of comity and federalism that restrained the Supreme Court in *Younger* do not apply. Conversely, if there is already litigation in state courts involving the same parties, those notions can only be overcome by a strong

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statute, 28 U.S.C. § 2283 (1970), which prohibits an injunction against state proceedings "except as expressly authorized by Act of Congress." Rather, it based its decision on the equitable grounds which justify federal intervention, stating that an injunction is appropriate where there is a threat to the plaintiff's federally protected rights that cannot be eliminated by his defense against a single prosecution. 401 U.S. at 46.

[6]407 U.S. at 243.

[7]472 F.2d 769 (4th Cir. 1973).

[8]*Id.* at 771. *See* Mitchum v. Foster, 407 U.S. 225 (1972), discussed in text accompanying note 5 *supra*.

[9]472 F.2d at 776.

[10]*Id.* at 771. The Fourth Circuit was on new ground in attempting to establish guidelines for situations involving state civil proceedings. *Younger* was set in a criminal context, and the issue was never reached in *Mitchum*.

[11]472 F.2d at 773, 774-75 n.5. *See* Mitchum v. Foster, 407 U.S. 225, 243 (1972) (Burger, C.J., concurring); Fuentes v. Shevin, 407 U.S. 67 (1972) (White, J., dissenting); Younger v. Harris, 401 U.S. 36, 55 n.2 (1971) (Stewart, J., concurring). *See also* Note, *Federal Court Intervention in State Proceedings*, 86 HARV. L. REV. 207, 216-18 (1972), for discussion of arguments for and against an equally stringent standard in civil cases.

showing of the need for federal intervention.[12] The party seeking the injunction must assert the two basic prerequisites to obtaining equitable relief. There must be a showing that he will suffer irreparable injury which is both great and immediate and also that he has no adequate remedy at law.[13] The court noted a third requirement applicable to the issuance of preliminary injunctions: the case must be one in which the outcome on the merits is "reasonably free from doubt."[14]

The Fourth Circuit also dealt with two cases falling within more settled areas of the doctrine of abstention. In *Wohl v. Keene*,[15] the court reiterated the widely-held opinion that abstention is not appropriate solely to avoid the decision of difficult state law questions, regardless of whether the plaintiff has a "plain, adequate and complete" remedy in the state courts.[16] On the other hand, in *AFA Distributing Co. v. Pearl Brewing Co.*,[17] abstention was found justified where a state court decision on an ambiguous or previously uninterpreted state statute could have conceivably avoided a decision on a federal constitutional question.[18]

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[12]*See* Joseph v. Blair, 482 F.2d 575, 578 (4th Cir. 1973), for the court's discussion of its holding in *Snepp*.

[13]472 F.2d at 774, *citing* Younger v. Harris, 401 U.S. 37, 43 (1971).

[14]472 F.2d at 776. The Fourth Circuit, citing *Younger*, also held that the "chilling effect" of state prosecutions on first amendment freedoms does not by itself justify federal intervention. *But see* Greenmount Sales, Inc. v. Davila, 479 F.2d 591 (4th Cir. 1973) (raid on an adult bookstore and confiscation of allegedly obscene items). The court held it was proper for the district court to have exercised its jurisdiction over a first amendment claim regarding the seizing of duplicate copies since it had properly deferred to the state criminal courts by refusing to enjoin pending or future prosecutions based on the nature of the evidence seized. *See also* Note, 41 GEO. WASH. L. REV. 385 (1972).

[15]476 F.2d 171 (4th Cir. 1973).

[16]*Accord*, Meridith v. City of Winter Haven, 320 U.S. 228 (1943); Martin v. State Farm Mutual Ins. Co., 375 F.2d 720 (4th Cir. 1967). The Fifth Circuit reached the opposite result in United States Ins. Co. v. Delaney, 328 F.2d 483 (5th Cir. 1964). *See* the critiques of *Delaney* in Comment, *Abstention Under Delaney: A Current Appraisal*, 49 TEX. L. REV. 247 (1971); Comment, *Recent Developments in the Doctrine of Abstention*, 1966 DUKE L.J. 102; Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964).

[17]470 F.2d 1210 (4th Cir. 1973). For an in-depth discussion of this case see Note, *Federal Court Abstention in Diversity Actions Involving Unsettled State Law: Avoiding Constitutional Adjudication and Interference with State Affairs*, 31 WASH. & LEE L. REV. 186 (1974) (this issue).

[18]This is a case of absention under the Pullman doctrine, from the case of Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Such abstention will not be ordered, however, where the relevant state law is settled, Public Utilities Comm'n v. United States, 355 U.S. 534 (1958); nor where it is clear that the state statute is unconstitu-

B. *The Limitations of Federal and State Jurisdiction*

The Fourth Circuit also encountered jurisdictional questions of a constitutional and statutory nature. In the following cases, the issue was not whether the federal courts should abstain but rather whether they were required to do so by law.

The Fourth Circuit placed strict limitations on the jurisdiction of the federal courts in hearings on motions made pursuant to 28 U.S.C. § 2255.[19] That statute provides that a federal prisoner seeking to challenge his federal sentence may move for a hearing on the merits in the district court that sentenced him in order to determine whether his sentence was rendered on the basis of improper considerations.[20] If the court finds for the petitioner it may vacate the judgment.[21] In *Brown v. United States*,[22] the Court of Appeals was asked to vacate the sentence of a federal prisoner who claimed that in setting his sentence the district court had been improperly influenced by three allegedly invalid state convictions. However, the court refused to do so until those prior convictions had been overturned at the state level. The Fourth Circuit considered the petitioner's motion to be a collat-

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tional no matter how it may be construed by the state courts, Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[19]28 U.S.C. 2255 (1970) provides in pertinent part the procedure for a federal prisoner to vacate his federal sentence:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
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> A motion for such relief may be made at any time.
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> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

[20]Two of the possibly improper considerations included in the statute are that the court did not have jurisdiction to impose the challenged sentence and that the sentence was unconstitutionally obtained.

[21]See note 18 *supra*.

[22]483 F.2d 116 (4th Cir. 1973).

eral attack on the state convictions and held that they must first be invalidated by the courts which imposed them before relief from the federal sentence could be sought under § 2255.

With its decision in *Dawkins v. Craig*,[23] the Fourth Circuit adopted the view that the eleventh amendment[24] prohibits suits for recovery of backpayments of funds due under the Aid to Dependent Children program which have been illegally withheld. Because the action involved the appropriation of funds from the state treasury, the court interpreted it as a suit against the state, and therefore not within the jurisdiction of federal courts since it violated the state's immunity under the eleventh amendment.[25] The Second Circuit had previously taken this position;[26] however, jurisdiction was exercised by the Seventh Circuit in a similar case.[27] The issue of the eleventh amendment's applicability to suits for retroactive welfare payments will soon be resolved by the Supreme Court in the case of *Edelman v. Jordan*.[28]

The circumstances that require the jurisdictional amount in excess of $10,000 under 28 U.S.C. § 1331[29] and that allow mandamus

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[23]483 F.2d 1191 (4th Cir. 1973). For an in-depth discussion of this case see Note, *Dawkins v. Craig: The Eleventh Amendment and Suits For Retroactive Welfare Payments*, 31 WASH. & LEE L. REV. 149 (1974) (this issue).

[24]U.S. CONST. amend. XI provides in part:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State. . . .

The amendment was construed as barring suits against a state brought by its own citizens without its consent. Hans v. Louisiana, 134 U.S. 1 (1890).

[25]The court, relying on *Ex parte* Young, 209 U.S. 123 (1908), stated that suits against state officials to enjoin future wrongful withholdings were permissible. In *Young*, the Supreme Court took the position that an injunction against a state official is proper where the official is acting pursuant to an unconstitutional state law. In such a case "the use of the name of the state to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity." *Id.* at 159. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 48 (2d ed. 1970) [hereinafter cited as WRIGHT]. *See generally* Note, *A Practical View of the Eleventh Amendment: Lower Court Interpretation and the Supreme Court's Reaction*, 61 GEO. L.J. 1473 (1973).

[26]Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 92 (1973).

[27]Jordan v. Weaver, 472 F.2d 985 (7th Cir.), *cert. granted sub nom.*, Edelman v. Weaver, 412 U.S. 937 (1973).

[28]*Id.*

[29]28 U.S.C. § 1331(a) (1970) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

under 28 U.S.C. §1361[30] were discussed by the court in two cases involving actions against commanders of military posts based on alleged deprivations of first amendment rights. The court provided little clarification on the proper scope of jurisdiction in such instances. In the first case, *McGaw v. Farrow*,[31] the court affirmed dismissal on the ground that the required jurisdiction was lacking. In so holding, it quoted the language of the Supreme Court in *Lynch v. Household Finance Corp.*:[32] "[I]n suits against federal officials for alleged deprivations of constitutional rights, it is necessary to satisfy the amount-in-controversy requirement for federal jurisdiction."[33] The court also held that the case was not appropriate for a mandamus proceeding because the petitioners had failed to show two elements necessary for jurisdiction under § 1361: (1) that they had a "clear and certain" claim and (2) that the federal officer had an affirmative duty not to interfere with that right.[34] A month later the court, in *Burnett v. Tolson*,[35] reversed a lower court's dismissal of a suit involving a similar first amendment complaint on the grounds that the suit, though failing to meet the requirement of jurisdictional amount, did come within mandamus jurisdiction.[36] The court considered the fact that no other adequate remedy was available in determining that mandamus was proper.

In *Frinks v. North Carolina*,[37] the Fourth Circuit encountered the seldomly invoked civil rights removal statute, 28 U.S.C. § 1443.[38]

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[30]28 U.S.C. § 1361 (1970) provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

[31]472 F.2d 952 (4th Cir. 1973).

[32]405 U.S. 538 (1972).

[33]*Id.* at 547.

[34]472 F.2d at 957. *See* Spock v. David, 469 F.2d 1047 (3d Cir. 1972).

[35]474 F.2d 877 (4th Cir. 1973).

[36]For a discussion of the effect of the 1962 amendment to § 1361 on sovereign immunity and of the need for independent jurisdictional grounds for proceedings in the nature of mandamus, *see* WRIGHT, *supra* note 25, § 22. The dissent in *Burnett* was based on the holding in Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

[37]468 F.2d 639 (4th Cir. 1973).

[38]28 U.S.C. § 1443(1) (1970) provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
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> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil

Under that statute a defendant in a state criminal proceeding may have the case removed to a federal court if he is denied or cannot enforce his civil rights in the state court. The petitioners complained (1) that the state criminal charge of rioting had been brought to punish them for having exercised their rights under the public accommodations section of the Civil Rights Act of 1964[39] and (2) that they could not enforce these rights in the courts of the State of North Carolina. The Court of Appeals ruled that removal was not appropriate where it was impossible to "clearly predict from the operation of an explicit state law that federal rights [would] inevitably be denied" the petitioners.[40]

The Fourth Circuit also dealt with the constitutional limits of in personam jurisdiction under the Virginia and South Carolina long-arm statutes. In *Ajax v. J. F. Zook, Inc.*,[41] the Fourth Circuit considered the application of Va. Code Ann. § 8-81.2(a)[42] to a single transaction—in this instance, the defendant's act of shipping its product into the state. Although the Court of Appeals had previously held that the section in question, § 8-81.2(a)(1), was not a "single act" statute,[43] the court overruled itself on that point in light of a recent

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rights of citizens of the United States, or of all persons within the jurisdiction thereof; . . . .

[39]42 U.S.C. § 2000(a) (1970) provides that:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion or creed.

[40]468 F.2d at 643.

[41]41 U.S.L.W. 2339 (4th Cir. Dec. 12, 1972).

[42]VA. CODE ANN. § 8-81.2 (Cum. Supp. 1973) reads in part:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's

(1) Transacting any business in this State;

(2) Contracting to supply services or things in this State;

(3) Causing tortious injury by an act or omission in this State;

(4) Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this State;

(5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might reasonably have expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State. . . .

[43]Haynes v. Carr, 427 F.2d 700, 704, *cert. denied*, 400 U.S. 942 (1970).

decision by the Supreme Court of Virginia holding to the contrary.[44] In *Zook*, the Fourth Circuit refused to hold that the defendant had transacted any business in Virginia even under the state construction of § 8-81.2(a)(1).[45] However, the court did find jurisdiction proper under § 8-81.2(a)(5)[46] on the grounds that the nonresident defendant manufacturer expected that the product would be used in Virginia and had also derived substantial revenues from the use of the product. Consequently, the court ruled that sufficient contact existed to satisfy due process in an action for breach of warranty.[47]

Lee v. Walworth Valve Co.[48] also involved an action against an out-of-state manufacturer based on breach of warranty. In this case, the single tortious act took place at sea. Unlike *Ajax*, the defendant manufacturer in *Walworth* had solicited orders within the state although all of the salesmen involved in this activity were headquartered elsewhere. The issue faced by the court was what combination of defendant's contacts with the forum state coupled with the degree of the forum state's interest in the litigation amounted to "doing business" adequate to allow the court's exercise of personal jurisdiction. The court found that the defendant's contacts would have been sufficient to justify jurisdiction had the action arisen within the state. Therefore, because the accident did not occur in any other state and because the state had a "paternal interest" in helping the plaintiff recover in order that she and her dependents did not become public charges, the court held that jurisdiction in South Carolina was warranted.[49]

C. *Construction of Federal Rules*

In addition to jurisdictional matters, the Fourth Circuit dealt with problems which involved the proper construction of various Federal Rules of Civil Procedure. The cases noted in this section concern the motion for more definite statement, intervention, and discovery.[50]

The Fourth Circuit held in *Hodgson v. Virginia Baptist Hosp.*[51]

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[44]Kolbe v. Chromodern Chair Co., 211 Va. 736, 180 S.E.2d 664 (1971).

[45]41 U.S.L.W. 2339 (4th Cir. Dec. 12, 1972).

[46]See note 42 *supra*.

[47]On similar facts the Fifth Circuit applied basically the same legal theory and came to the opposite conclusion. Benjamin v. Western Boat Bldg. Corp., 472 F.2d 723 (5th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. October 9, 1973).

[48]482 F.2d 297 (4th Cir. 1973).

[49]*Id.* at 301.

[50]Maintenance of a class action under Rule 23 has been included in the procedural discussion relating to civil rights actions. See text accompanying notes 105-116 *infra*.

[51]482 F.2d 821 (4th Cir. 1973).

that Rule 12(e),[52] the motion for more definite statement, should be read in conjunction with the liberal requirements of Rule 8[53] relating to the elements of a claim. Because the emphasis of Rule 8 is on notice, the complaint need only provide information sufficient to enable the other party to prepare an answer, rather than present all of the facts upon which the plaintiff bases his claim.[54]

Francis v. Chamber of Commerce of the United States[55] involved intervention under Rule 24.[56] The court there affirmed denial of intervention by right on the ground that there had not been a timely petition. It also held that permissive intervention[57] was not appropriate where the plaintiff failed to show a practical impairment in his ability to bring a subsequent action.

In a suit for damages arising out of an automobile accident, the Fourth Circuit commented upon the discovery, under Rule 26(b)(3),[58]

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[52]FED. R. CIV. P. 12(e) provides in part:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement. . . .

[53]Rule 8(a) requires only that a pleading specify the grounds upon which jurisdiction rests, contain a brief statement showing the pleader's right to relief, and make a demand for judgment.

[54]*See* WRIGHT, *supra* note 25, §§ 66, 68.

[55]481 F.2d 192 (4th Cir. 1973).

[56]FED. R. CIV. P. 24(a) provides in part:

> Upon timely application anyone shall be permitted to intervene in an action:
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> . . . .
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> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . .

Appellant Chamber sought to intervene in an action to enjoin the State of Maryland from dispensing welfare benefits to strikers in a labor dispute. The issue was raised that the influence on the judiciary of a judgment in favor of the strikers would prejudice the Chamber's claim in a subsequent action. The court discounted this argument since the Chamber could protect itself sufficiently by appearing as amicus curiae. *See Wright* § 75 at 330, nn.25, 26.

[57]FED. R. CIV. P. 24(b) reads in part:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .

[58]Rule 26(b)(3) provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, . . . insurer, or agent) only upon a showing that the party seeking discovery has substantial need

of reports written by insurance agents based on statements of parties and witnesses made to the agents immediately after an accident. The suit in *McDougall v. Dunn*[59] was not brought until two years after the accident, and, in dictum, the question was raised as to whether there was sufficient anticipation of future litigation at the time the reports were made to warrant their classification as "work product." The court expressed the opinion that this material should not be considered work product and therefore ought to be discoverable simply upon a showing of relevance.[60] The court did hold that even if the insurance reports fell within the protection of trial preparation, they should be made available to this plaintiff, who, in the opinion of the court, met the conditions of "substantial need" and "undue hardship," as specified in Rule 26.

In addition to clarifying the federal procedural rules, the Court of Appeals instructed the Bar as to preferred procedure before its own bench, and specifically as to the citation of memorandum decisions to the court. Because such decisions are unpublished and access to them is unequal, the court held in *Jones v. Superintendent*[61] that it would be inequitable to treat them as precedent for purposes of *stare decisis*. Henceforth, any prior memorandum decision in conflict with a subsequently published opinion will be considered overruled.[62]

II. *FIRST AMENDMENT FREEDOMS*

A. *Freedom of Speech*

As a condition of employment, an employee of the Central Intelligence Agency signed a secrecy agreement that required Agency approval prior to publication of all material written by him both during and after his employment. After his resignation, the former employee challenged the constitutional validity of this restriction upon his first amendment rights. The Fourth Circuit held in *United States v. Marchetti*[63] that this agreement did not constitute invalid prior censorship in derogation of the employee's right to freedom of speech as long as his submissions of material for approval were acted upon

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of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

[59]468 F.2d 469 (4th Cir. 1972).

[60]*Id.* at 473.

[61]465 F.2d 1091 (4th Cir. 1972).

[62]*Id.* at 1094.

[63]466 F.2d 1309 (4th Cir. 1972).

promptly, and approval was withheld only with regard to publication of information that was classified and had not been placed in the public domain by prior disclosure.[64] The court structured its decision around three major points: (1) freedom of speech and of the press are not absolute;[65] (2) the government has a right to secrecy;[66] and (3) secrecy agreements with employees provide a reasonable means for government agencies to protect internal secrets.[67]

Chitwood v. Fenster,[68] another Fourth Circuit case that involved freedom of speech, held that a recent Supreme Court decision, *Perry v. Sindermann*,[69] precludes governmentally financed educational institutions from terminating the employment of non-tenured teachers for openly voicing general criticism of public agencies and policies.[70] The court held that a teacher who claimed that the non-renewal of his contract of employment resulted from "participation in anti-war and other protest movements, as well as public statements critical of the state-supported college and its officials"[71] was entitled to a hearing in order to determine whether the termination of his employment resulted solely from activity protected by the first amendment.[72]

In the area of freedom of speech and assembly, the Fourth Circuit held that by indiscriminate rental of a public school auditorium to various groups during non-school hours on a "first-come, first-served" basis, a school board had partially dedicated that auditorium as a neutral forum for the exercise of the first amendment rights of freedom of speech, association and assembly.[73] The court held in *National Socialist White People's Party v. Ringers*[74] that denial of the use of this auditorium on the ground that the group wishing to rent the facility maintained discriminatory membership policies constituted an invalid prior restraint on the exercise of the first amendment rights to freedom of speech and association.[75]

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[64]*Id.* at 1317.

[65]*Id.* at 1313.

[66]*Id.* at 1315.

[67]*Id.* at 1316.

[68]468 F.2d 359 (4th Cir. 1972).

[69]408 U.S. 593 (1972).

[70]468 F.2d at 361.

[71]*Id.* at 360.

[72]*See* Pickering v. Board of Education, 391 U.S. 563 (1963); James v. Board of Education, 461 F.2d 566 (2d Cir. 1972).

[73]National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973).

[74]*Id.* For an in-depth discussion of this case see Note, *First Amendment Rights and the Use of Public Facilities by Private Groups with Discriminatory Membership Policies: National Socialist White People's Party v. Ringers*, 31 WASH. & LEE L. REV. 107 (1974) (this issue).

[75]*Id.* at 1016.

B. *Freedom of the Press*

Despite the newspaper's racially segregationist editorial, staffing, and advertising policies, the Fourth Circuit in *Joyner v. Whiting*[76] held that a university president's irrevocable withdrawal of financial support from an official student newspaper constituted an abridgement of freedom of the press in violation of the first amendment.[77] The court ruled that the president's action could not be sustained by arguing that the fourteenth amendment and the Civil Rights Act of 1964[78] barred a state agency from spending state funds to discourage racial integration of the university.[79] The Fourth Circuit interpreted the first amendment as permitting state agencies to "spend money to publish the positions they take on controversial subjects,"[80] and that therefore the newspaper's editorial stance constituted permissible "state advocacy."[81] In reaching its conclusion, the court noted that the editor of the newspaper did not reject articles opposed to his editorial policy, and there was no proof that the editorial policy of the paper incited violence or the harassment of white students and faculty. The court did suggest, however, that the discriminatory staffing and advertising policies might be enjoinable.

In a case involving freedom of the press on the secondary school level, the Fourth Circuit in *Baughman v. Freienmuth*[82] examined the constitutionality of a school board regulation which required that any student publication must first be submitted to the principal prior to its distribution. The regulation provided that the principal could disapprove the distribution if he judged that the publication contained libelous or obscene language, advocated illegal actions, or was grossly insulting to any group or individual. In invalidating the regulation the court held that it constituted a prior restraint in violation of the student's first amendment rights.[83] The court found the regulation to be lacking a "procedural safeguard of specified and reasonably short period of time in which the principal must act,"[84] and "the regulation fails to provide for the contingency of the principal's failure to act within a specified time, *i.e.*, whether upon such failure the

[76] 477 F.2d 456 (4th Cir. 1973).
[77] *Id.* at 460.
[78] 42 U.S.C. § 2000(a) *et seq.* (1970).
[79] *Id.* at 461-62.
[80] *Id.* at 461.
[81] *Id.* at 461-62.
[82] 478 F.2d 1345 (4th Cir. 1973).
[83] *Id.* at 1348. See also U.S. CONST. amend. I.
[84] 478 F.2d at 1348. *See also* Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971).

material could be distributed."[85] The court further ruled that a regulation requiring prior submission of material before distribution must contain "narrow, objective, and reasonable standards by which the material will be judged."[86] The court found terms such as libelous and obscene sufficiently precise to be understood by high school students.[87]

In rejecting allegations of deprivations of the rights of freedom of speech and press, the Fourth Circuit in *Greenmount Sales, Inc. v. Davila*[88] held that the first amendment does not require an adversary hearing prior to government seizures of allegedly obscene materials as evidence in criminal prosecutions if only single copies of the materials are seized.[89] The court relied on the Supreme Court's decision in *A Quantity of Books v. Kansas*,[90] in holding that such a seizure was not prohibited "as a prior restraint on the circulation and dissemination of books in violation of the constitutional restrictions against abridgement of freedom of speech and press."[91]

III. *CIVIL RIGHTS*

The Fourth Circuit was faced with several cases arising under the federal civil rights statutes. In the course of its decisions in this area,

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[85]478 F.2d at 1348, *citing* Freedman v. Maryland, 380 U.S. 51, 59 (1965).

[86]478 F.2d at 1350, *citing* Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

[87]478 F.2d at 1351. The court rested its decision upon four propositions of law:

> (a) Secondary school children are within the protection of the first amendment, although their rights are not coextensive with those of adults.
>
> (b) Secondary school authorities may exercise reasonable prior restraint upon the exercise of student's first amendment rights.
>
> (c) Such prior restraints must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know what he may write and what he may not write.
>
> (d) A prior restraint system, even though precisely defining what may not be written, is nevertheless invalid unless it provides for:
>
> 1. A definition of "distribution" and its application to different kinds of materials;
> 2. Prompt approval or disapproval of what is submitted;
> 3. Specification of the effect of failure to act promptly; and,
> 4. An adequate and prompt appeals procedure.

Id.

[88]479 F.2d 591 (4th Cir. 1973).

[89]*Id.* at 594.

[90]378 U.S. 205, 209 (1964).

[91]Greenmount Sales, Inc. v. Davila, 479 F.2d 591, 594 (4th Cir. 1973), *quoting* A Quantity of Books v. Kansas, 378 U.S. 205, 209 (1964).

the court elaborated on the prerequisites for actions initiated under 42 U.S.C. § 1983[92] and the granting of attorney fees in civil rights actions. Since many of these cases came before the court as class actions, they posed procedural problems as well as substantive issues relating to school desegregation plans, discrimination in employment, and suits for damages against state officials.

A. *42 U.S.C. § 1983*

The court found "action under color of" state law for the purpose of obtaining relief under 42 U.S.C. § 1983 in situations involving temporary state law enforcement officers,[93] police fraternal organizations,[94] and housing projects operated under federal housing legislation.[95] In *Joy v. Daniels*,[96] a tenant brought an action challenging her threatened eviction, without cause, from an apartment complex that had been constructed under the National Housing Act.[97] The defendant landlord received mortgage benefits as well as rent supplements from the Federal Housing Administration. The court held that this federal funding and the landlord's use of state eviction procedure constituted sufficient state involvement to render the eviction attempt "action under color of" state law.[98]

The more significant portion of the decision in *Joy* dealt with the elements of the plaintiff's claim to relief under the fourteenth amendment. To obtain relief pursuant to § 1983, the plaintiff must have suffered the deprivation of a right secured by Congress and the laws of the United States.[99] The tenant claimed that she should have been

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[92]42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[93]Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973).

[94]Johnson v. Capitol City Lodge No. 74, 477 F.2d 601 (4th Cir. 1973).

[95]Joy v. Daniels, 479 F.2d 1236 (4th Cir. 1973).

[96]*Id.*

[97]National Housing Act § 221(d)(3); 12 U.S.C. § 1715(1)(d)(3) (1970).

[98]479 F.2d at 1239. *See also* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973), which involved an action commenced under 42 U.S.C. § 1981, in which it was held that private action which denied blacks the same right to make contracts as white citizens was sufficient for jurisdiction under the Civil Rights Act of 1866.

[99]Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

afforded procedural due process in any eviction attempt after the expiration of her lease. After stating that procedural due process under the fourteenth amendment applies only to the deprivation of liberty and property, the Fourth Circuit examined the Supreme Court's holdings in *Goldberg v. Kelly*,[100] *Board of Regents v. Roth*[101] and *Perry v. Sindermann*[102] for a definition of property interest.[103] The court concluded that a tenant in such quasi-public housing projects had "a property right or entitlement to continue occupancy until there exists a cause to evict other than the mere expiration of the lease,"[104] and therefore such tenants must be extended the safeguards of due process.

B. *Procedural Difficulties in Civil Rights Class Actions*

A few of the civil rights suits before the Fourth Circuit encountered procedural difficulties on the district court level relating to their maintenance as class actions. The Fourth Circuit responded by setting out in some detail the mechanics for administering a class action. *Cox v. Babcock & Wilcox Co.*[105] and *Moss v. Lane Co.*[106] came from the same district court and involved essentially identical issues: the use of advisory juries and the ability of an individual to maintain a class action even though his personal claim is found to be moot or without merit.[107] Although the Fourth Circuit did not find the use of advisory juries[108] in discrimination cases to be error where the judge made separate findings of fact, it declared that such use would be disfavored because advisory juries should be "restricted . . . to the exceptional case where there are peculiar and unique circumstances supporting its use."[109] However, the court did not elaborate on the circumstances that warrant the use of advisory juries.

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[100]397 U.S. 254 (1970).

[101]408 U.S. 564 (1972).

[102]408 U.S. 593 (1972).

[103]479 F.2d at 1239-40. The Fourth Circuit had previously dealt with the issue of what constituted a protected property in a teacher dismissal case. Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972).

[104]479 F.2d at 1241. *See* Note, *Procedural Due Process in Governmental-Subsidized Housing*, 86 HARV. L. REV. 880 (1973).

[105]471 F.2d 13 (4th Cir. 1972).

[106]471 F.2d 853 (4th Cir. 1973). Use of an advisory jury is provided by FED. R. CIV. P. 39(c).

[107]The court also held in each case that it was not error to refuse to admit Equal Employment Opportunity Commission records into evidence. 471 F.2d at 15; 471 F.2d at 856. *Accord*, Smith v. University Scvs., 454 F.2d 154 (5th Cir. 1972).

[108]See FED. R. CIV. P.39(c) for the federal rule pertaining to advisory juries.

[109]471 F.2d at 855 (dictum).

In *Cox* the district court had dismissed the class action upon finding that the individual plaintiff's claim was without merit and concluded that he could not properly represent the claims of the class. The Court of Appeals affirmed the dismissal, citing several cases as authority for the proposition that "it would be inappropriate . . . to permit a party to prosecute an action on behalf of a class which he has already been adjudged not to be a member."[110] However, in *Moss* the Fourth Circuit reconsidered this proposition and held that the trial court had erred in dismissing the class action subsequent to its ruling that the plaintiff's individual claim for relief was without merit.[111] The Court of Appeals was persuaded that once the plaintiff had been determined to be a competent representive of the class, the merits of the class claim were properly before the trial court. Regardless of whether the representative prevailed on his personal claim, the district court was bound by its initial determination, pursuant to Rule 23(a), that the claims presented were entitled to class action treatment and that the class was adequately represented by the individual plaintiff. Consequently, the Fourth Circuit remanded the case for a finding on the merits of the class claim independent of the decision on the representative's individual complaint.[112]

The issue of precisely when and how the initial determination under Rule 23(a)[113] must be made as to whether the plaintiff is a member of the class he allegedly represents was raised in *Carracter v. Morgan.*[114] There the court decided that the plaintiff not only had to show that the suit met the prerequisites of the class action rule but also had the duty to bring the matter of the class action to the attention of the court for determination by order as to whether it was to be so maintained.[115] The court did not specify whether the latter duty required more than mere notification in the complaint of the plaintiff's intention to prosecute a class action.[116]

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[110]471 F.2d at 15.

[111]471 F.2d at 855.

[112]*Id. Accord*, Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972).

[113]Rule 23(a) generally requires "that the persons constituting the class must be so numerous that it is impractical to bring them all before the court, and the named representatives must be such as will fairly insure adequate representation of them all." WRIGHT, *supra* note 25, § 72, at 308.

[114]No. 71-2175 (4th Cir. July 13, 1973).

[115]*Id.* at 4 of the slip opinion. *Fed. R. Civ. P.* 23(c) provides in part: As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be maintained.

[116]The court cited Adice v. Mather, 56 F.R.D. 492 (D. Colo. 1972), in support of

C. *Substantive Aspects of Civil Rights Class Actions*

Procedural problems relating to class action maintenance were greatly overshadowed by the substantive issues of the civil rights suits. School desegregation was a primary judicial concern. In *Medley v. School Board of Danville*,[117] a court-ordered desegregation plan was challenged by black parents on the ground that it reflected the existing geographical pattern of black and white neighborhoods and therefore failed to produce a genuinely unitary school system.[118] The court cited the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*[119] to the effect that although every school need not reflect the racial composition of the school system as a whole, the school authorities still must satisfy the courts that school assignments do not result from a past history of state-enforced segregation.[120] The court also affirmed its prior holding that "under proper circumstances the assignment of the primary grades to neighborhood schools is not *per se* unacceptable,"[121] but cautioned that "such assignments must rest upon specific findings which demonstrate that no other plan affording greater integration is practicable."[122] Citing the Supreme Court's decision in *Davis v. School Commissioners of Mobile County*,[123] the court held that a lack of transportation facilities should not be controlling in the face of a mandate to formulate a desegregation plan.[124]

The effects of past discrimination were also felt in the area of employment. The Fourth Circuit dealt with equal employment op-

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the argument that the *plaintiff* must "attempt" to have an order entered as to whether the action may be maintained as a class action. No. 71-2175 (4th Cir. July 13, 1973) at 4 of the slip opinion. In that case, however, the plaintiff had not brought a class action in the original complaint. The district court found that his subsequent motion for an order for determination as a class action which was filed 21 months later was unreasonably delayed. In the instant case the original complaint was framed as a class action. *See also* WRIGHT, *supra* note 25, § 72, at 314 nn.70-72 and accompanying text.

[117]482 F.2d 1061 (4th Cir. 1973), *cert. denied* 42 U.S.L.W. 3435 (U.S. Jan. 21, 1974).

[118]The court found that under the district court plan forty-two percent of the city's black elementary school children would have attended two schools which were both approximately ninety percent black. *Id.* at 1063.

[119]402 U.S. 1 (1971).

[120]482 F.2d at 1063. *See also* Note, *School District Consolidation: The Constitutional Unit of Equality*, 30 WASH. & LEE L. REV. 369 (1973); Note, *School Desegregation and Affirmative Equitable Relief: Swann and Beyond*, 29 WASH. & LEE L. REV. 277 (1972).

[121]482 F.2d at 1064, *citing* Thompson v. School Bd., 265 F.2d 83 (4th Cir. 1972) (emphasis in original).

[122]482 F.2d at 1064.

[123]402 U.S. 33 (1971).

[124]482 F.2d at 1065.

portunity in two suits against railroads arising under the Civil Rights Act of 1964.[125] In *Rock v. Norfolk and Western Railway*,[126] the complaint alleged racial discrimination in employment at the railroad's two terminal yards in Norfolk, Virginia. Plaintiffs sought a merger of the seniority rosters at the two yards. The court's decision turned on the issue of whether the defendant's employment practices were the result of business necessity, an exception to the Act's mandate of equal employment. In order to qualify as an exception, an employment practice must not only foster safety and efficiency, but must also be essential to that goal.[127] The court held that the evidence failed to show that the separate seniority system was essential to the safe, efficient operation of the rail yards and ordered the merger of the seniority lists.

In *United States v. Chesapeake & Ohio Railway*,[128] the court again applied the test of business necessity, but, more significantly, adopted a relatively new remedy to eliminate the effects of past discriminatory hiring practices. The court found that prior to the Civil Rights Act of 1964 the railroad had discriminated in hiring for its three classifications of employees, blacks being segregated into the lowest of the three. Relying on a precedent established by the Fifth and Eighth Circuits,[129] the Fourth Circuit allowed cross-craft relief. Under this plan, "group three" black employees hired prior to the Act were allowed to bid for all "group one" jobs for which they could qualify and at the same time maintain their company seniority accumulated in the lower classification assignment. The court held that union policies and the current collective bargaining agreements which prohibited the transfer of seniority were not a bar to the application of the Act since the right to equal employment could not be bargained away.

In another class action brought under the equal employment opportunity provisions, *Moody v. Albemarle Paper Co.*,[130] the court ordered changes in the defendant's pre-employment testing procedures

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[125]42 U.S.C. § 2000(e) *et seq.* (1970).

[126]473 F.2d 1344 (4th Cir. 1973).

[127]*Accord*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

[128]471 F.2d 582 (1972), *cert. denied*, 411 U.S. 939 (1973).

[129]United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973); United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[130]474 F.2d 134 (4th Cir. 1973).

and allowed damages in the form of backpay. Citing the Supreme Court's decision in *Griggs v. Duke Power Co.*[131] as authority, the Fourth Circuit held that personnel tests must be "job-related, have a manifest relationship to employment, and have been validated in accordance with [Equal Employment Opportunity Commission] guidelines."[132] Such validation requires detailed empirical analysis of the test's asserted job-related nature as opposed to possible subjective ratings made by supervisors who in this case were only given vague standards by which to judge job performance. The court also found that backpay was allowable where a discriminatory seniority system had perpetrated unequal employment practices even though there was no evidence of bad faith noncompliance with the Civil Rights Act of 1964.[133]

Actions were also brought under 42 U.S.C. § 1983 to recover damages from state officials for injuries caused by the deprivation of civil rights. The Fourth Circuit specifically confronted the issue of what constitutes a defense sufficient to bar liability of state officials under the statute. In *Hill v. Rowland*,[134] a suit for damages against a police officer for false arrest, the court held that the test of liability in a § 1983 action is not the objective test of "probable cause" but rather "the partly subjective test of the reasonable good faith of the police officers in the legality of the arrest."[135] The court cited two other federal court decisions in allowing the less stringent standard of the reasonable man in cases of alleged unlawful arrest and search.[136]

D. *Attorney Fees in Civil Rights Cases*

The Civil Rights Act of 1964 provides for the award of attorney

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[131]401 U.S. 424 (1971).

[132]474 F.2d at 139. *See* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Test for Both Public and Private Employers*, 41 GEO. WASH. L. REV. 505 (1973); Note, *Employment Testing: The Aftermath of Griggs v. Duke Power Co.*, 72 COLUM. L. REV. 900 (1972).

[133]474 F.2d at 142. Judge Boreman dissented as to the backpay issue, questioning whether the mandate to award such damages exists in the Act. *Id.*

[134]474 F.2d 1374 (4th Cir. 1973).

[135]*Id.* at 1377. For a discussion of the good faith defense in other actions against government officials see Skinner v. Spellman, 480 F.2d 539 (4th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973). *Eslinger* involved a suit for damages against the Clerk of the Senate of South Carolina for refusing to hire a female as a senate page. The court allowed the defense of good faith, but also noted the collateral issue of governmental immunity. *See generally* Note, *The Doctrine of Official Immunity and Section 1983: A New Look at an Old Problem*, 30 WASH. & LEE L. REV. 344 (1973).

[136]Biven v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972); Richardson v. Snow, 340 F. Supp. 1261 (D. Md. 1972).

fees to the prevailing party in certain civil rights actions.[137] In *Lea v. Cone Mills Corp.*,[138] the Fourth Circuit ruled that a motion under 42 U.S.C. § 2000e-5(k) for the award of attorney fees in employment discrimination cases was exempt from Rule 52(a) of the Federal Rules of Civil Procedure which requires that in actions tried without jury, the judge must make findings of fact and conclusions of law. A judge's discretionary award in that case did not therefore constitute error since the amount awarded was not "clearly wrong."

In *Bradley v. School Board of Richmond*,[139] the Fourth Circuit reversed an award of attorney fees in a school desegregation case, holding that the evidence did not support a finding of "obdurate obstinacy" on the part of the school board in its failure to develop an acceptable plan of desegregation. The court found that such an award was inappropriate where the school board had no clear legal standards on which to rely in formulating its plan for a unitary school system.[140] The Fourth Circuit also interpreted § 718 of the Federal Emergency School Act of 1972[141] and found it inapplicable where a final order against the plaintiff had been entered in the case.[142]

IV. *FEDERAL STATUTES AND GOVERNMENTAL REGULATION*

A. *Environmental Protection*

In several cases involving the Environmental Protection Agency (EPA), the Fourth Circuit construed and applied the Clean Air Act,[143] the National Environmental Policy Act,[144] and the Freedom of Information Act.[145] The court found in *Appalachian Power Co. v. EPA*[146]

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[137]42 U.S.C. §§ 2000a-3(b), 2000c-7, 2000e-5(k) (1970). *See also* 42 U.S.C. §§ 3612, 3612(c) (1970); Emergency School Aid Act § 718, 20 U.S.C. § 1617 (1972).

[138]467 F.2d 277 (4th Cir. 1972).

[139]472 F.2d 318 (4th Cir. 1972), *cert. granted*, 41 U.S.L.W. 3644 (U.S. June 12, 1973).

[140]*Id.* at 322. *See* Note, *Attorney Fees in School Desegregation Cases*, 29 WASH. & LEE L. REV. 309 (1972).

[141]Section 718 of the Emergency School Act, 20 U.S.C. § 1617 (1972). This section specifically authorizes allowances of attorney fees upon entry of a final order against an educational agency for failure to comply with the provisions of the Civil Rights Act of 1964 or the fourteenth amendment. *See also* Medley v. School Bd. of Danville, 482 F.2d 1061, 1065 (4th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3435 (U.S. Jan. 21, 1974) (Winter, J., concurring and dissenting).

[142]472 F.2d at 332.

[143]42 U.S.C. § 1857(c) *et seq.* (1971).

[144]42 U.S.C. § 4321 *et seq* (1970).

[145]5 U.S.C. § 552 (1970).

[146]477 F.2d 495 (4th Cir. 1973).

that neither the Clean Air Act nor the due process clause of the fourteenth amendment required the Administrator of EPA to provide in all instances an evidentiary hearing prior to approval of state plans for emission control. The court reasoned that where state hearings on the plans are adequate and are reviewed by the Administrator in the course of his own evaluation of the state proposals, no additional procedural safeguard is necessary.

Another procedural issue arose under the National Environmental Policy Act in *Rucker v. Willis*,[147] a suit by conservationists to enjoin construction of a marina. In *Rucker*, the United States Army Corps of Engineers had not issued an environmental impact statement prior to granting the building permit. However, the court held that, under the Act's guidelines, an impact statement need not be prepared simply because there is opposition to the proposed use of the environment. Rather, the requirement to issue an impact statement was held to apply only "where a substantial dispute exists as to the size, nature or effect of the major federal action."[148] In this instance, the Fourth Circuit found that the granting of the permit did not constitute a major federal action[149] and therefore did not require the issuance of an environmental impact statement. Furthermore, since the Corps of Engineers had made a thorough good faith assessment of the environmental effect of the proposed project, the decision to grant the permit was neither arbitrary nor an abuse of discretion.

Release of information gathered by EPA was the object of two actions brought under the Freedom of Information Act. In *Ethyl Corp. v. EPA*,[150] a manufacturer sued under § (b)(5) of the Act[151] to force disclosure of medical and scientific data which the Administrator had considered in connection with the issuance of proposed lead content regulations under the Clean Air Act. In rejecting the defendant's theory of "executive privilege," the court held that the constitutional doctrine of executive privilege was no broader than the ex-

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[147]484 F.2d 158.

[148]*Id.* at 162.

[149]The decision contains a list of cases in which major federal action has been found. *Id.* at 163.

[150]41 U.S.L.W. 2660 (4th Cir. May 10, 1973).

[151]Section 552(b)(5) of the Act reads as follows:

> . . . .
> (b) This section shall not apply to matters that are—
> . . . .
> (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.

5 U.S.C. § 552(b)(5) (1970).

emption provided under § (b)(5) of the Freedom of Information Act. Therefore, since the Administrator had failed to bring himself within the ambit of the exemption provided for in the Act, he was not protected against disclosure.

The Administrator was also unsuccessful in resisting a suit to compel disclosure in *Robles v. EPA*[152] where he based his defense upon a specific exemption of the Freedom of Information Act. In that case, the plaintiffs sought the release of information collected by EPA relating to the existence of radioactivity in homes built on fill dirt obtained from a uranium processing plant. In rejecting the Administrator's claim, the court found that the information sought was not "similar" to "personnel and medical files" which are exempt under § (b)(6)[153] of the Act because of their highly personal nature.[154] The Fourth Circuit, in ordering disclosure, stated that there was to be no "balancing of equities or . . . weighing of need or benefit" in determining whether the right to disclosure would be a "clearly unwarranted invasion of personal privacy."[155]

B. *Federal Taxation*

The Fourth Circuit also made determinations under the Internal Revenue Code. The court examined the applicability of the realization and recognition requirements of the Code to claims of tax-exemption by several taxpayers. It considered the applicability of the Code's anti-injunction provision to suits brought to enjoin the termination of tax-exempt status. Finally, the court significantly contributed to the controversy over the Commissioner's use of the "John Doe" summons to require production of records prepared and held by accounting firms.

Bell Lines, Inc. v. United States[156] presented the question of whether the replacement of property held for productive use in trade or business resulted in a sale under § 1002 or a "like kind" exchange

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[152]484 F.2d 843 (4th Cir. 1973).

[153]5 U.S.C. § 552(b)(6) (1970) reads in part:

> (b) This section shall not apply to . . .
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> . . . .
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

[154]The court thoroughly discussed its interpretation of the quoted terms. 484 F.2d 843, 845 (4th Cir. 1973). *See also* Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527 (1972).

[155]484 F.2d 843, 848 (4th Cir. 1973).

[156]480 F.2d 710 (4th Cir. 1973).

under § 1031. The case involved the taxpayer's sale of old trucks to a third party and his purchase of new trucks from a dealer. The dealer, without the taxpayer's knowledge, had supplied funds to the third party to buy the old trucks and then subsequently took title to most of the used trucks from the third party. The existence of both a contract binding the taxpayer to buy the new trucks, whether or not he sold the old ones, and legitimate business reasons for effecting the replacement in two steps convinced the court that the transactions were complimentary but not mutually dependent. The court held, therefore, that no "like kind" exchange had occurred and that the taxpayer's basis for depreciation for the new trucks was properly their cost computed under § 1012 rather than a substituted basis under § 1031(d).[157]

In *Harris v. Commissioner*,[158] the Fourth Circuit reversed the Tax Court's determination as to when gain must be recognized in a case involving the sale of an incompetent's property. Pursuant to North Carolina law, the state court had approved a plan designed to minimize the tax consequences of the transaction whereby the proceeds of the sale were to be placed in an escrow account to be disbursed in installments to the incompetent. The Fourth Circuit noted the general rule that the sale proceeds are constructively received "when available without restriction," notwithstanding the utilization of an escrow devise solely to defer "actual" receipt. In applying this rule to the transaction at bar, the court held that the gain was recognized when the sale proceeds were deposited into the escrow account and therefore were includable in gross income under § 61(a) as provided by § 451(a) and Treasury Regulation § 1.451-2(a). Furthermore, the Fourth Circuit found that since the state court was acting on behalf of the incompetent taxpayer, its order that the money be put in escrow was "in legal effect" the act of the taxpayer.

In the area of excludable receipts, the Fourth Circuit ruled upon the taxable status of certain cash awards in *Rogallo v. United States*.[159] The court held that a cash "contribution award" made under § 306 of the National Aeronautics and Space Act[160] to an inventor-employee for the contribution of the rights for his invention to NASA was not excludable from the inventor's gross income. The award was found to be primarily compensatory rather than gratuitous and therefore not exempt under § 74(b).

[157]For a discussion of the test of separability of transactions, see 3 J. MERTENS, LAW OF FEDERAL INCOME TAXATION §§ 20.161, 20.163 (1972).

[158]477 F.2d 812 (4th Cir. 1973).

[159]475 F.2d 1 (4th Cir. 1973).

[160]42 U.S.C. § 2458 (1970).

In a case of apparent first impression under § 531 of the Code, the Fourth Circuit in *Inland Terminals, Inc. v. United States*[161] found that the taxpayer, a wholly-owned subsidiary, was not subject to the accumulated earnings tax. The court held that, in assessing the reasonable needs of a wholly-owned subsidiary, it is permissible to consider the reasonable business needs of its parent, but only to the extent that the business needs of the parent have not already been used to justify the parent's accumulation of earnings. It was noted in support of this conclusion that Treasury Regulation § 1.537-3(b) does not forbid one corporation from accumulating earnings for another where it does not control the other.

In *Behrend v. United States*,[162] the Fourth Circuit encountered a strong Government argument to reconstruct a series of events through use of the step transaction doctrine. The court held that the taxpayers, who had donated preferred stock in their controlled corporation to their family-owned charitable foundation, did not realize constructive dividend income when the corporation subsequently redeemed the stock from the foundation. Although the redemption had been planned from the beginning of the entire transaction, the court did not consider this fact as controlling in the absence of a "binding obligation" requiring the redemption.[163] The court also noted that the taxpayers' control of both the corporation and foundation would not result in their constructive receipt of income where they "did not participate whatsoever in the beneficence of the foundation."[164]

In *Old Dominion Box Co. v. United States*,[165] the Court of Appeals held that tax-exempt status can be revoked where a foundation is engaged in noncharitable activities. In this case the foundation had engaged in inflating the value of debentures it had received from a director of the company and lost its tax-exempt status under § 501 of the Code. The Fourth Circuit did not accept the corporate taxpayer's argument that the revocation of tax-exempt status should not affect the deductible nature of the corporation's gifts to the foundation. Rather, it held that the evidence of overlapping management of

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[161]477 F.2d 836 (4th Cir. 1973).

[162]73-1 U.S. Tax Cas. 80,065 (4th Cir. 1972). For an in-depth discussion of this case see Note, *The Donation-Redemption of Closely Held Stock as a Constructive Dividend to the Donor*, 31 WASH. & LEE L. REV. 129 (1974) (this issue).

[163]*Id.* at 80,067.

[164]*Id.*

[165]477 F.2d 340 (4th Cir. 1973).

the foundation and the taxpayer was sufficient to support the finding that the latter was not an innocent contributor.

Bob Jones University v. Connolly[166] was an action by the university to enjoin the threatened revocation of its tax-exempt status. In reversing the district court's grant of a preliminary injunction, the Fourth Circuit held that the suit constituted an action to enjoin the assessment of taxes and was thus barred by § 7421, the tax anti-injunction statute.[167] The court found this statute permits such suits only when there is a showing that (1) irreparable injury will result if collection is effected and (2) "under no circumstances [will] the government ultimately prevail" in its assertion of tax liability.[168] It was the court's opinion that these conditions were absent in the present case.

The enforcement of "John Doe" summonses by the Internal Revenue Service was at issue in *United States v. Theodore*.[169] Although the court did not reach the fourth amendment objection relating to unreasonable searches, it did set out standards for the enforcement of such summonses. The case originated in a proceeding by the Internal Revenue Service to enforce an administrative summons issued under § 7602 directing the executive of an accounting firm to produce all records pertaining to the preparation of unidentified clients' income tax returns for a three-year period. The district court ordered the executive to produce the documents, but the Fourth Circuit reversed and remanded, finding that § 7602 does "not authorize the use of open-ended John Doe summonses."[170] Rather, the court held that this section only allows the "IRS to summon information relating to the correctness of a particular return or a particular person,"[171] without elaborating upon the meaning of either the term "particular" or

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[166]472 F.2d 903 (4th Cir. 1973). Judge Boreman dissented.

[167]INT. REV. CODE OF 1954, § 7421 provides in part:

> (a) Tax.—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . .

But see "Americans United", Inc. v. Walter, 41 U.S.L.W. 2392 (D.C. Cir. Jan. 11, 1973). For a discussion of the distinctions between this and the principal case, see Comment, *Avoiding the Anti-Injunction Statute in Suits to Enjoin Termination of Tax-Exempt Status*, 14 WM. & MARY L. REV. 1014 (1973).

[168]472 F.2d at 906, *citing* Enochs v. Williams Packing Co., 370 U.S. 1, 7 (1962).

[169]479 F.2d 749 (4th Cir. 1973). For an in-depth discussion of this case see Note, *The Standards for Enforceability of John Doe Summonses of Third Party Records Relating to the Affairs of Unidentified Taxpayers*, 31 WASH. & LEE L. REV. 162 (1974) (this issue).

[170]479 F.2d at 755.

"open-ended." The Fourth Circuit agreed with the district court that the IRS had the power to summon a list of names, addresses, and social security numbers of the clients if, on remand, it was established that such information was not reasonably accessible to the IRS from its own files.

C. *Securities Regulation*

The court dealt with alleged violations of the registration and antifraud provisions of the Securities Act of 1933[172] and the Securities Exchange Act of 1934[173] in *SEC v. Daltronics Engineers, Inc.*[174] The Securities and Exchange Commission charged that the defendant corporation was involved in a scheme of mergers and spin-offs whereby it was making a distribution of unregistered shares of stock to its shareholders.[175] The court defined "sale" as a "disposition of a security" in return "for value."[176] In holding that the spin-offs constituted the sale of unregistered securities in violation of § 5 of the 1933 Act, it ruled that Daltronics had received "value" because the interest it had retained in the merged companies was enhanced when the spun-off stock began to be traded.[177] Alternatively, the defendant was found to be an underwriter within the meaning of the 1933 Act and therefore subject to its registration requirements. The court also held that the defendant had made misleading statements regarding the spin-offs to its stockholders in violation of § 10(b) of the 1934 Act and Rule 10(b)(5) promulgated thereunder.

D. *Federal Labor Law*

1. National Labor Relations Act

The Fourth Circuit reviewed several particularly noteworthy findings of the National Labor Relations Board (NLRB) involving the Board procedure of consolidating for a single hearing objections to a

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[171] *Id.*

[172] 15 U.S.C. § 77a *et seq.* (1970).

[173] 15 U.S.C. § 78a *et seq.* (1970).

[174] No. 72-2240 (4th Cir., July 27, 1973).

[175] *See* INT. REV. CODE OF 1954, § 368(a)(2)(D) and (E).

[176] No. 72-2240 (4th Cir., July 27, 1973) at 6.

[177] The pattern of the spin-offs was as follows: Daltronics would enter into an agreement with a private company whereby the latter would merge into a Daltronic subsidiary or a new corporation created by Daltronic. The principals of the private company would receive the majority interest in the merger corporation with Daltronics retaining the remainder and disbursing it to its shareholders. *Id.* at 4-5.

representative election and charges of unfair labor practices. The court also considered several claims of coercion under § 8(a)(1) of the National Labor Relations Act[178] (NLRA).

The long-established NLRB procedure of consolidating for a single hearing objections to a representative election and charges of unfair labor practices was challenged in a Fourth Circuit case *Barrus Construction Co. v. NLRB.*[179] Such consolidations have been challenged on the grounds that an attorney simultaneously representing the Board in a representation case and the General Counsel in an unfair labor practice case results in a conflict of interest establishing a denial of due process. The majority of the court, despite a lengthy dissent, expressed its approval of the consolidation procedure.[180]

In the Fourth Circuit decision *NLRB v. Quality Manufacturing Co.*,[181] the issue was raised whether §§ 7 and 8(a)(1) of the NLRA guarantee an employee's right to union representation at a pre-disciplinary interview with an employer.[182] Traditionally, it has been a violation of § 7[183] and § 8(a)(1)[184] of the NLRA for an employer to interfere with, restrain, or coerce an employee when the employee is participating in protected union activities. Accordingly, after disciplinary action has been taken by an employer, and a grievance has been filed by the union, an employee has had the right to union representation at a confrontation with his employer.[185] Over a sixteen

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[178]29 U.S.C. § 151 *et seq.* (1970).

[179]483 F.2d 191 (4th Cir. 1973).

[180]*Id.* at 193.

[181]481 F.2d 1018 (4th Cir. 1973).

[182]*Id.* at 1021.

[183]National Labor Relations Act § 7 states:

> Employees shall have the right to self-organization; to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 157 (1970).

[184]National Labor Relations Act § 8(a) provides:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . . .

29 U.S.C. § 158(a)(1) (1970).

[185]Texaco, Inc. v. NLRB, 408 F.2d 142, 144 (5th Cir. 1969). In this case the Fifth Circuit stated:

year period decisions of two circuits[186] and the NLRB[187] have held that the right to union representation does not arise until after discipline has been taken by the employer. However, in *Quality Manufacturing* the Board attempted to distinguish this line of cases by stating that when the employee has reasonable grounds to believe that disciplinary action will be taken, he has the right to be represented by the union. The Fourth Circuit disagreed and denied enforcement of the Board's order, noting that the present case was indistinguishable from the precedent and that the employee had an opportunity for redress in the formal grievance procedures.[188]

In *E.I. DuPont de Nemours & Co. v. NLRB*,[189] the Fourth Circuit found that an NLRB order involving coercive threats and roll-back rights[190] was supported by substantial evidence and should be enforced. The Board had found that: (1) a meeting called by a plant manager during which the plant employees were told that they would lose their company benefits if a union were elected to represent them, constituted a coercive threat and was a violation of § 8(a)(1) of the

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> Section 7 of the Act [NLRA] invests employees with the right to bargain collectively through their chosen representatives. Sections 8(a)(1) and 8(a)(5) provide that an employer's refusal to respect this right constitutes an unfair labor practice. "Collective bargaining" is defined by section 8(d) as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and *other terms and conditions of employment*. . . ."

Id. at 144 (emphasis in original).

[186]Texaco, Inc. v. NLRB, 408 F.2d 142 (5th Cir. 1969); NLRB v. Ross Gear and Tool Co., 158 F.2d 607 (7th Cir. 1947).

[187]*E.g.*, Jacobe-Pearson Ford, Inc., 172 N.L.R.B. 594 (1968); Dobbs Houses, Inc., 145 N.L.R.B. 1565 (1964).

[188]The Seventh Circuit reached the same decision on the same NLRB distinction in Mobil Oil Corp. v. NLRB, 482 F.2d 842 (7th Cir. 1973).

[189]480 F.2d 1245 (4th Cir. 1973).

[190]The court offered the following explanation of the roll-back procedure:

> The employees would acquire plantwide seniority from the time they were hired and work group seniority from the time they were placed in a certain work group. By using both types of seniority, an employee could advance not only within his own work group but could bid for transfers to other work groups within the plant. In the event of a layoff within a work group, an employee's work group seniority controlled who left the group. Although the employee may have lacked sufficient seniority to retain employment in his work group, he was permitted to "bump back" or "roll back" to the plantwide labor pool, and by exercising his plantwide seniority, he could displace employees within the pool having less plantwide seniority.

Id. at 1246-47.

NLRA;[191] and (2) that the cancellation of a single employee's roll-back rights, and the subsequent termination of his employment constituted a violation of § 8(a)(3)[192] of the Act.[193] In support of its approval of the Board's conclusions, the Fourth Circuit held that the cancellation of roll-back rights and termination of employment fulfilled the three requirements for a violation of § 8(a)(3):

> (1) employer discrimination as to hire or tenure of employment or any term or condition of employment; (2) a resulting encouragement or discouragement of membership in a union; and (3) anti-union motive.[194]

In *Robertshaw Controls Co. v. NLRB*,[195] the Fourth Circuit granted partial enforcement of a Board order which found that oral reprimands given to pro-union employees were motivated by anti-union considerations rather than a fear of violence. The court accepted the Board's finding that the pro-union employees in their organizational efforts had not harassed other employees despite claims to the contrary. However, because there was no indication of coercion by the employer, the Fourth Circuit refused to enforce that portion of the order which found the employer's request for certain of his employees' prehearing statements violative of § 8(a)(1).[196] The prehearing statements had been made to the NLRB by five employees whose charges of harassment by pro-union employees had initiated the employer's original reprimand procedure. The statements were valuable to the employer in the preparation of a defense to the charge that the reprimands violated the NLRA. The Board, in finding the employer guilty of a § 8(a)(1) violation, had cited several cases supporting the position that a request for an employee's prehearing

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[191] *Id.* at 1247.

[192] National Labor Relations Act § 8(a)(3) provides:

> It shall be an unfair practice for an employer—
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> . . . .
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .

29 U.S.C. § 158(a)(3) (1970).

[193] 480 F.2d at 1248.

[194] *Id.*, *citing* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32-33 (1967).

[195] 483 F.2d 762 (4th Cir. 1973).

[196] National Labor Relations Act § 8(a)(1) states, in relevant part:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in . . . this section; . . . .

29 U.S.C. § 158 (1970).

statement constituted coercion *per se.*[197] However, the Fourth Circuit distinguished these decisions[198] and held that since the company had made clear in its request that compliance or noncompliance would neither be rewarded nor punished, the request was not an unlawful interference with the employee's right to organize. The court denied enforcement of the Board's order despite contentions that the employees' willingness to provide information would be inhibited and the Board's ability to investigate allegations of unfair labor practices would be impaired.[199]

2. Fair Labor Standards Act

In *Hodgson v. Elk Garden Corp.*,[200] the Fourth Circuit established a new standard for determining whether an employer of agricultural labor should be exempted from the minimum wage and recording requirements of the Fair Labor Standards Act[201] on the ground that his employees are "principally engaged in range production of livestock."[202] In most instances, the exemption is allowed only when "the employees must constantly attend, on a standby basis, livestock that is on a range away from the ranch's headquarters."[203] The court concluded that the fact that the animals are grazed on the range is not in and of itself controlling. Additionally, the court stated that "when Congress used the phrase 'range production of livestock,' it intended to describe a method of raising cattle or sheep in which the computation of the hours worked by employees caring for the stock would be extremely difficult."[214] As a result of this clear legislative intent, the Fourth Circuit held that the exemption should require an examination of the terrain on which the cattle are raised "only for determining whether its characteristics require employees to work in such a manner that computation of their hours is difficult."[205]

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[197]NLRB v. General Stencils, Inc., 438 F.2d 894 (2nd Cir. 1971); Retail Clerks Int'l Ass'n v. NLRB, 373 F.2d 655 (D.C. Cir. 1967); NLRB v. Ambox, Inc., 357 F.2d 138 (5th Cir. 1966); NLRB v. Winn-Dixie Stores, Inc., 341 F.2d 750 (6th Cir. 1965); Texas Industries, Inc. v. NLRB, 336 F.2d 128 (5th Cir. 1964); Henry I. Siegel Co. v. NLRB, 328 F.2d 25 (2d Cir. 1964).

[198]483 F.2d at 767-69.

[199]*Id.* at 769.

[200]482 F.2d 529 (4th Cir. 1973).

[201]29 U.S.C. § 201-19 (1970).

[202]The exemption is set forth in 29 U.S.C. § 213(a)(b)(E) (1970).

[203]*Id.* at 534-35.

[214]*Id.* at 533.

[205]*Id.*

V. *CRIMINAL LAW AND PROCEDURE*

A. *Pre-Trial*

1. *Miranda* Warnings

A conflict exists among the circuits as to the proper interpretation of the constitutional requirements mandated by *Miranda v. Arizona.*[206] In *Wright v. North Carolina,*[207] the Fourth Circuit upheld a warning which stated that if the person in custody desires a lawyer one would be appointed "if and when [he goes] to court."[208] In rejecting the "instant counsel" theory, which requires a statement that one has the right of counsel immediately and not at some later time, the Fourth Circuit adopted the view of the Fifth Circuit as expressed in *United States v. Lacy.*[209] In *Lacy* the Fifth Circuit held that *Miranda* demands only that one in custody be informed that he has the right to defer answering any questions until the time an attorney is ap-

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[206]384 U.S. 436 (1966).

[207]483 F.2d 405 (4th Cir. 1973).

[208]*Id.* at 409-10. The full *Miranda* warning given to the defendant is set forth below:

> Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to Court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Id. at 410 (appendix).

[209]446 F.2d 511 (5th Cir. 1971). The following language of the *Lacy* court is similar to the position adopted by the Fourth Circuit:

> We think this warning comports with the requirements of *Miranda.* Lacy was informed that he had the right to the presence of an appointed attorney before any questioning. The agents did say that the appointment of an attorney would have to be made by the court at a later date. But they also made perfectly clear that Lacy had a right not to answer questions until that time should come. Thus we think the twin requirements of Lathers v. United States, 5 Cir. 1968, 396 F.2d 524 were met: the defendant was informed that (a) he had the right to the presence of an attorney and (b) that the right was to have an attorney "before he uttered a syllable." That the attorney was not to be appointed until later seems immaterial since Lacy was informed that he had the right to put off answering any questions until the time when he did have an appointed attorney.

Id. at 513, *See also* Mayzak v. United States, 402 F.2d 152, 155 (5th Cir. 1968).

pointed for him. By following *Lacy* the Fourth Circuit adopted an interpretation of *Miranda* which is consistent with a prior decision by the Second Circuit,[210] but inconsistent with decisions in both the Seventh[211] and Ninth[212] Circuits.

2. Right to Counsel and Hearing

The Fourth Circuit has traditionally followed the rule that late appointment of counsel "is inherently prejudicial, and . . . constitutes a *prima facie* case of denial of effective assistance of counsel, *so that the burden of proving lack of prejudice is shifted to the state.*"[213] However, in *Garland v. Cox*,[214] the court was forced to reconsider its rule in light of a recent Supreme Court case[215] and recent decisions rendered by other federal courts of appeal.[216] In *Garland*, the court reviewed these later decisions and, although retaining its rule, held that where a petitioner demonstrates late appointment of counsel, a presumption of ineffective assistance of counsel will operate in the absence of contradictory evidence. However, the moment contravening evidence is presented from any source, the presumption vanishes completely as though it never existed.[217] Thus, the court reaffirmed its position that the burden of proving that the defendant was not prejudiced by late appointment of counsel lies with the state yet significantly altered the effect of this rule in its modification of the presumption. Although the Fourth Circuit recognized the conflict between its own rule and those adopted by the First and Third Circuits which incorporate a presumption running in favor of the state,[218]

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[210]Massimo v. United States, 463 F.2d 1171 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973).

[211]United States v. Cassell, 452 F.2d 533 (7th Cir. 1971).

[212]United States v. Garcia, 431 F.2d 134 (9th Cir. 1970).

[213]Fields v. Peyton, 375 F.2d 624, 628 (4th Cir. 1967), (emphasis in original) *citing*, Twilford v. Peyton, 372 F.2d 670, 673 (4th Cir. 1967).

[214]472 F.2d 875 (4th Cir. 1973).

[215]Chambers v. Maroney, 399 U.S. 42 (1970).

[216]Restrom v. Robbins, 440 F.2d 1251 (1st Cir. 1971); Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

[217]This is the Thayer, or "bursting bubble," theory under which the only effect of a presumption is to shift the burden of producing evidence with regard to the presumed fact. If the evidence is produced by the adversary, the presumption is spent and disappears. In the words of McCormick: "[i]n practical terms, the theory means that, although a presumption is available to permit the party relying upon it to survive a motion for directed verdict at the close of his own case, it has no other value in the trial." C. McCORMICK, EVIDENCE § 345, at 821 (2d ed. 1972). This view is sanctioned by Wigmore, 9 J. WIGMORE, EVIDENCE § 2491(2) (3d ed. 1940), and adopted in the MODEL CODE OF EVIDENCE rule 704(2) (1942). *See also* Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

[218]Restrom v. Robbins, 440 F.2d 1251 (1st Cir. 1971); Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

the Fourth Circuit stated:

> The value of our own rule is in those relatively rare situations where because of passage of time or the unavailability of material witnesses, a defendant can show late appointment and no more. In such cases, it comports with notions of fair play to expect the state, with its greater resources, to bear the burden of demonstrating regularity, especially since a court of the state, not the defendant, produced the unhappy situation by originally making the late appointment.[219]

The court also considered the relationship of due process to the waiver of juvenile court jurisdiction. In a 1970 decision, *Kemplen v. Maryland*,[220] the court considered a Maryland statute which permitted a juvenile court to waive its jurisdiction and thus permit a juvenile to be tried and sentenced as an adult. The court held that a juvenile was entitled to counsel at a waiver hearing and that the juvenile, his parents, and counsel must be given adequate notice of the nature, date, and charges to be considered at the proceeding so that they might have a reasonable opportunity to prepare and present the juvenile's position on the waiver question.[221] The Fourth Circuit recently enlarged upon the scope of *Kemplen* in the case of *Cox v. United States*.[222]

In *Cox*, the defendant and four companions held up a North Carolina bank and all five were apprehended. Cox was seventeen years of age at the time of the offense. The request by the United States Attorney to try Cox as an adult offender was approved by the Department of Justice. When the United States Attorney obtained this authorization, Cox was neither represented by counsel, nor was he given notice that the request had been made or granted. Furthermore, he was given no opportunity to controvert the data considered by the Department of Justice or to advance other information which might have supported the case for juvenile proceedings. The Fourth Circuit concluded that the decision that a juvenile be dealt with as an adult offender is a "critical stage" in the criminal proceedings and, therefore, the right to counsel fully attaches. The court also held that Cox, his parents, and counsel should have been notified of the United States Attorney's request and should have been given an opportunity to present Cox's opposing arguments. The dissent criticized the ma-

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[219] 472 F.2d at 879.

[220] 428 F.2d 169 (4th Cir. 1970).

[221] *Id.* at 175.

[222] 473 F.2d 334 (4th Cir. 1973). For discussion of this case see Note, *Due Process and Waiver of Juvenile Court Jurisdiction*, 30 WASH. & LEE L. REV. 591 (1973).

jority's application of the *Kemplen* rationale to *Cox*:

> Actually, . . . that decision [*Kemplen*] does not touch the instant case; rather its determinant completely divorces it from consideration here. There, appellant was already before the court, and the court, not the prosecutor, was called upon to decide the most appropriate forum for the trial. The question was purely *judicial* and counsel was required to develop defendant's most advantageous course.
>
> Just the opposite obtained here. Unlike *Kemplen*, the accused was not before the court. No court was making a decision as to his welfare. Appellant complains rather of an act of the Attorney General—a step both inherently within the exclusive prerogative of the Executive branch of Government and explicitly authorized by Congress.[223]

3. Eyewitness Identification

In a relatively unsettled area of the law, the Fourth Circuit ruled in *Smith v. Coiner*[224] that a "one-to-one" confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that admitting evidence of the identification as part of the government's direct case denied the defendant due process. In determining that the confrontation denied the defendant due process, the court employed the "totality of the circumstances" test announced by the Supreme Court in *Stovall v. Denno*.[225] The defendant, after being booked on a rape charge, was taken in handcuffs to the doctor's office where the elderly victim was being treated. The defendant, with a state policeman on each arm, was exhibited to the victim who promptly identified him as the man who had attacked her five hours earlier. This "positive" identification was made despite the fact that at the time of the assault the victim was not wearing her glasses, had cataracts, and caught only a brief glimpse of her assailant through the use of a flashlight. Additionally, prior to the one-to-one confrontation, the victim described her assailant as resembling a man nearly twice as old as the defendant. The Fourth Circuit apparently relied upon the victim's visual difficulties and inconsistent statements in ruling the prejudicial confrontation as being particularly responsible for the identification.

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[223]473 F.2d at 344-45 (emphasis in original).

[224]473 F.2d 877 (4th Cir. 1973).

[225]388 U.S. 293 (1967).

4. *Wharton Rule*

The Fourth Circuit held in *United States v. Bobo*[226] that the Wharton Rule was not applicable to an indictment charging a conspiracy to violate 18 U.S.C. § 1955 which makes it a violation to conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business.[227] In essence, the Wharton Rule states:

> [W]hen by definition the intended substantive offense requires a plurality of actors, a conspiracy prosecution cannot be maintained if only the minimum number of parties logically necessary for the commission of the substantive offense agree to commit it.[228]

The appellants argued that the indictment charged a conspiracy to commit a crime one element of which was conspiracy.

The Wharton Rule is a concept that has been given a wide range of interpretation. Among the cases that have considered the issue, the only apparent point of agreement is the validity of the rule as applied to the crimes listed by Wharton when the rule was announced: dueling, bigamy, incest and adultery. The Fourth Circuit limited the scope of the Wharton Rule in two earlier decisions,[229] and in *Bobo* further defined its interpretation of the rule:

> We are of the opinion that the following elements must coexist or else the rule may not apply: the immediate effect of the act in view, which is the gist of the substantive offense, reaches only the participants therein; the agreement of the paritcipants is necessary for the completion of the substantive offense; and the conspiracy must be in such close connection with the substantive offense as to be inseparable from it.[230]

Recent decisions of other federal courts both agree[231] and disagree[232]

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[226]477 F.2d 974 (4th Cir. 1973).

[227]*Id.* at 987.

[228]Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 954 (1959). There is no definitive statement of the rule.

[229]Old Monastery Co. v. United States, 147 F.2d 905 (4th Cir. 1945); Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929).

[230]477 F.2d at 987. For discussion of *Bobo* case and the Wharton Rule see Note, *Wharton's Rule and Conspiracy to Operate an Illegal Gambling Business*, 30 WASH. & LEE L. REV. 613 (1973).

[231]United States v. Becker, 461 F.2d 230 (2d Cir. 1972); United States v. Benter, 457 F.2d 1174 (2d Cir. 1972); United States v. Mainello, 345 F. Supp. 863 (E.D.N.Y. 1972).

[232]United States v. Figueredo, 350 F. Supp. 1031 (M.D. Fla. 1972); United States v. Greenberg, 334 F. Supp. 1092 (N.D. Ohio 1971).

with the Fourth Circuit's analysis.

5. Appointment of Psychiatrist

In *United States v. Matthews,*[233] the court advised district judges that the appointment of a psychiatrist pursuant to 18 U.S.C. § 3006A[234] should be made with the advice and approval of counsel for the defendant, and, "[u]nless some reason affirmatively appears," the court should select the psychiatrist preferred by the defendant.[235] The Fourth Circuit stated that ordinarily this practice should be followed, although it is not mandatory. The Court of Appeals further stated that the district court should also require the defendant to submit to examination by a government psychiatrist whenever a psychiatrist of the defendant's choice is appointed. Furthermore, the court ruled that when a district court judge finds it necessary to participate in the psychiatrist selection process, he should ordinarily require the defendant to nominate two or more physicians from whom the judge may then select one.[236] With regard to medical witnesses in general, the Fourth Circuit stated:

> Nothing we have said is meant to foreclose the possibility, too rarely implemented, of the government and the defendant agreeing on one medical witness. Indeed, the avoidance of multiple expert witnesses is a preferred solution but one that can be achieved only by genuine consent.[237]

B. *Trial*

1. Guilty Pleas

The Fourth Circuit held in *Wade v. Coiner*[238] that "[a]s a matter of expediency and circumspection," state judges may choose to engage in the colloquy mandated for federal judges by Rule 11 of the Federal Rules of Criminal Procedure, but they are not constitution-

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[233]472 F.2d 1173 (4th Cir. 1973).

[234]18 U.S.C. § 3006(A)(e)(1) (1970) provides:

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

[235]472 F.2d at 1174.

[236]*Id.* at 1174-75.

[237]*Id.* at 1175.

[238]468 F.2d 1059 (4th Cir. 1972).

ally required to do so.[239] The court ruled that it is enough if the record affirmatively shows that a plea was voluntarily and intelligently entered. The court agreed with the Fifth Circuit that due process does not require that a defendant be given a specific monition as to each constitutional right waived by entry of the plea.[240] The Fourth Circuit also suggested that in a state criminal proceeding it would probably be constitutionally sufficient for the clerk of court, defendant's counsel, or the solicitor to advise the state defendant of the charge and consequences of his plea in lieu of the judge so informing the defendant as required by Rule 11 of the Federal Rules of Criminal Procedure.[241]

Cuthrell v. Director, Patuxent Institution[242] presented a question concerning the validity of a guilty plea. The court held that the petitioner's plea of guilty to a criminal assault in a Maryland state court was voluntary although he had not been informed that the court's acceptance of his plea would subject him to possible commitment to a therapeutic institution pursuant to the Maryland Defective Delinquent Act.[243] The court based its decision on two factors: (1) commitment to the institution did not automatically result from his plea, but rather was determined in an independent civil proceeding;

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[239] *Id.* at 1060. FED. R. CRIM. P. 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court stated:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which the courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences.

Id. at 243-44.

[240] 468 F.2d at 1061, *citing* United States v. Frontero, 452 F.2d 406 (5th Cir. 1971).

[241] 468 F.2d at 1060.

[242] 475 F.2d 1364 (4th Cir. 1973). For an in-depth discussion of this case see Note, *The Rational Basis for Guilty Pleas and the Restrictive Scope of Direct Consequences,* 31 WASH. & LEE L. REV. 236 (1974) (this issue).

[243] MD. ANN. CODE art. 31B, § 1 *et seq.* (Repl. vol. 1971). For a detailed statement of the Maryland Defective Delinquent Act, *see* Tippett v. Maryland, 436 F.2d 1153, 1155-56, (4th Cir. 1971), *cert. dismissed,* Murel v. Baltimore Criminal Court, 407 U.S. 355 (1972).

and (2) commitment to the institution was not imposed in the nature of punishment, but represented an "enlightened and progressive experiment" aimed at rehabilitating persons whose anti-social activities are caused by mental disorders.

In *Parker v. Ross,*[244] the Fourth Circuit ruled that "an indictment by an unlawfully composed grand jury does not invalidate a subsequent voluntary and intelligent guilty plea, entered upon the advice of competent counsel and with awareness of the nature of the charge and the probable direct consequences of the plea."[245] Parker argued that in light of the Supreme Court's decision in *Johnson v. Zerbst,*[246] his guilty plea did not constitute a valid waiver of his right to challenge the grand jury because the guilty plea did not amount to "an intentional relinquishment or abandonment of a known right or privilege."[247] However, the Fourth Circuit expressed the view that one who has intelligently pleaded guilty with advice of counsel should not be allowed belatedly to assert a constitutional deprivation that did not cause or even trigger the guilty plea. Consequently, it found that the *Johnson* test should not be controlling. The court stated that Parker's conduct either constituted waiver or its "effective equivalent."

2. Admissibility of Evidence

To minimize prejudice and insure a fair trial, the general rule on the admissibility of evidence states that evidence of previous criminal activity is not admissible to prove that an accused is a person of bad character and therefore likely to have committed the crime in question.[248] However, if such evidence is offered to prove some proposition other than bad character, and its probative value outweighs its prejudicial effect, the evidence may be admitted. In *United States v. Woods,*[249] the Fourth Circuit affirmed the propriety of the admission of evidence of prior crimes in an infanticide case in which the prosecutor offered evidence linking the defendant with several prior instances of child abuse. Although the court found authority for its ruling in recent decisions[250] and scholarly treatises,[251] it took a novel

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[244]470 F.2d 1092 (4th Cir. 1972).

[245]*Id.* at 1095.

[246]304 U.S. 458 (1938).

[247]*Id.* at 464.

[248]*E.g.*, Michelson v. United States, 335 U.S. 469, 475-76 (1948); United States v. Baldivid, 465 F.2d 1277 (4th Cir.), *cert. denied*, 409 U.S. 1047 (1972); United States v. Mastrototaro, 455 F.2d 802 (4th Cir. 1972). *See also* 1 J. Wigmore, Evidence § 192 (3d ed. 1940).

[249]484 F.2d 127 (4th Cir. 1973). For an in-depth discussion of this case see Note, *Admissibility of Prior-Crimes Evidence in Prosecutions for Child Abuse*, 31 WASH. & LEE L. REV. 207 (1974) (this issue).

[250]United States v. Hines, 470 F.2d 225 (3d Cir. 1972); United States v. Hallman,

approach in assessing the conclusiveness of the evidence regarding the defendant's previous history of child abuse. Rather than considering each prior offense separately, the court considered the evidence of prior offenses collectively. By viewing the evidence in this manner, the court discerned a past pattern of child abuse. The court held that when the crime of infanticide or child abuse is charged, repeated incidents of previous abuses are "especially relevant because it may be the only evidence to prove the crime."[252] Consequently, admission of the evidence was permitted as an exception to the general rule.

3. Right to Cross-Examination

In *United States v. Jordan,*[253] the Fourth Circuit held that when a defendant has an undiminished right to cross-examination, failure of the trial judge to allow discovery of the names of two eyewitnesses to a knife attack, and his refusal to grant a continuance for the purpose of investigating these witnesses did not constitute error.[254] The court noted that the government had advised the defense counsel of the substance of the eyewitnesses' testimony and of the fact that they were convicted felons.[255] Furthermore, the victim's testimony which positively identified the defendant as his assailant was in itself enough to sustain conviction.[256] Consequently, the court held that the government properly refused to disclose the names of these witnesses

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439 F.2d 603 (D.C. Cir. 1971); Dirring v. United States, 328 F.2d 512 (1st Cir.), *cert. denied,* 377 U.S. 1003 (1964). The Fourth Circuit in interpreting these cases stated:

> These cases stand for the proposition that evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime, provided that the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.

484 F.2d at 134.

[251]McCormick states:

> [S]ome of the wiser opinions (especially recent ones) recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need of the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility.

C. McCORMICK, EVIDENCE § 190, at 453 (2d ed. 1972).

[252]484 F.2d at 133.

[253]466 F.2d 99 (4th Cir. 1972).

[254]*Id.* at 101.

[255]*Id.* at 102.

[256]*Id.*

and that the trial judge had not abused his discretion in refusing to grant a continuance.[257]

4. Prosecutorial Comments

In *United States v. Williams,*[258] the Fourth Circuit repeated an earlier admonition regarding prosecutorial comments rendered by United States Attorneys.[259] In a closing argument to the jury, an Assistant United States Attorney stated that the government's evidence was the only evidence in the case and that it was "uncontradicted and undenied and unrefuted."[260] The court conceded that the overwhelming weight of authority, even after the Supreme Court's decision in *Griffin v. California,*[261] seems to allow the prosecutor to point out that the defense did not offer evidence to refute the government's case,[262] at least where it is apparent that witnesses other than the defendant were available to the defense.[263] Accordingly, several circuits have adopted the following test: "Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?"[264] The Fourth Circuit held that the comments to the jury made by the United States Attorney in *Williams* appeared to "skirt the precipice of reversible error,"[265] and that a not-guilty plea was an effective denial of all of the government's evidence. Furthermore, the court stated that from the context in which the words "uncontradicted" and "unrefuted" were used, it could not "say with any degree of assurance that the jury was misled."[266]

The court had earlier faced the same problem in a 1968 decision.[267] There it held that a single statement by the prosecutor, in a closing argument to the jury, to the effect that certain evidence and testimony was "uncontradicted and undisputed" was not plain error. However, the court admonished the United States Attorneys within the Fourth Circuit to observe the spirit of *Griffin* and to avoid jeopardizing otherwise certain convictions by arguments that border on

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[257]*Id.* at 103.

[258]479 F.2d 1138 (4th Cir. 1973).

[259]*See* United States v. Weems, 398 F.2d 274, 275-76 (4th Cir. 1968).

[260]479 F.2d at 1140.

[261]380 U.S. 609 (1965).

[262]*E.g.*, United States v. Lipton, 467 F.2d 1161, 1168 (2d Cir. 1972); United States v. Hager, 461 F.2d 321, 324 (7th Cir. 1972).

[263]Desmond v. United States, 345 F.2d 225 (1st Cir. 1965).

[264]United States v. Follette, 418 F.2d 1266, 1269 (2d Cir. 1969). See cases cited therein.

[265]479 F.2d at 1141.

[266]*Id.*

[267]United States v. Weems, 398 F.2d 274, 275-76 (4th Cir. 1968).

forbidden grounds. The court repeated this admonition in *United States v. Williams.*

5. "Allen Charge"

Despite strong disagreement among the circuits, the Fourth Circuit in *United States v. Davis*[268] reaffirmed its approval of the "Allen Charge." The Allen Charge is an instruction given to a jury, after the main charge has been delivered, when the jury returns to the court for clarification or for further instructions. The name is derived from the Supreme Court decision, *Allen v. United States,*[269] in which the Court upheld a trial judge's instructions that admonished the jurors to seek agreement among themselves in order to avoid impasse. In some circuits the Allen Charge has been declared an undue intrusion into the exclusive province of the jury which constitutes reversible error.[270] This intrusion is particularly evident when coercion is involved.[271] Yet the Fourth Circuit has steadfastly maintained the position supporting the propriety of the charge. In *Davis*, the court also reiterated an earlier recommendation[272] that trial judges in the Circuit should consider using the American Bar Association version of the Charge.[273]

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[268]481 F.2d 425 (4th Cir. 1973).

[269]164 U.S. 492 (1896). In *Allen*, the following charge was upheld:

> These instructions were . . . in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501.

[270]United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert denied*, 396 U.S. 837 (1969).

[271]*See, e.g.*, United States v. Wynn, 415 F.2d 135 (10th Cir. 1969); Sullivan v. United States, 414 F.2d 714 (9th Cir. 1969); Green v. United States, 309 F.2d 852 (5th Cir. 1962).

[272]United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970).

[273]481 F.2d at 429. The American Bar Association recommended charge states as follows:

> (a) Before the jury retires for deliberation, the court may give an

C. *Sentencing*

1. Cruel and Unusual Punishment

In *Hart v. Coiner,*[274] a habeas corpus action, the Fourth Circuit reviewed a state court decision which imposed a mandatory life sentence pursuant to the West Virginia recidivist statute.[275] The life sentence rested upon three prior convictions: (1) writing a $50 check on insufficient funds; (2) transporting forged checks in the amount of $140 across state lines; and (3) perjury.[276] The court held that the "statute's mandatory life sentence is so disproportionate to the seriousness of the underlying offenses, and so grossly excessive that it amounts to cruel and unusual punishment forbidden by the eighth amendment."[277] The Fourth Circuit did not invalidate the statute, but the court did find that the mandatory life sentence was unnecessary to accomplish the legislative purpose of the statute on the facts presented. As stated in the dissent, this decision appears to create a serious dilemma for the state court judge.[278] The dissent believed the

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instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO TRIAL BY JURY § 5.4(a) (approved 1968).

[274]483 F.2d 136 (4th Cir. 1973). For an in-depth discussion of this case see Note, *Hart v. Coiner: Mandatory Life Sentence Pursuant to West Virginia Recividist Statute Held Cruel and Unusual Punishment*, 31 WASH. & LEE L. REV. 223 (1974) (this issue).

[275]W. VA. CODE ANN. § 61-11-18 (1966).

[276]483 F.2d at 138.

[277]*Id.*

[278]*Id.* at 145. (Boreman, J., dissenting).

decision did not fix a formula or standard which would serve as a guide to aid in the determination of when and under what circumstances the mandatory life sentence would be excessive.

2. *Furman v. Georgia* and Criminal Statutes that Provide for a Mandatory Death Sentence

United States v. Watson[279] concerned the effect of the Supreme Court's invalidation of the death penalty in *Furman v. Georgia*[280] upon other federal statutes that provide special assistance to persons charged with "capital crimes." 18 U.S.C. § 3005 (1970) states:

> Whoever is indicted for [a] . . . capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried . . . shall immediately, upon his request assign to him such counsel, not exceeding two, as he may desire . . .[281]

The court held that *Furman v. Georgia* did not effect a judicial repeal of this statute.[282] The Fourth Circuit recognized the problem created by *Furman* with regard to statutes similar to 18 U.S.C. § 3005.[283] With little success, the court looked to the legislative history of § 3005 in order to discern the Congressional purpose behind its enactment. The court concluded, however, that the possibility of the imposition of the death penalty was not the only reason why Congress gave an accused the right to two attorneys in § 3005.[284] The court expressed the view that any repeal of the statutes affected by *Furman* should be carried out by the legislative branch of government and not the judiciary.[285] A strong dissent was based upon the proposition that "the sole reason Congress gave an accused charged with a capital crime the right to two attorneys was the possibility of imposition of

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[279]No. 72-1452 (4th Cir., Aug. 20, 1973).

[280]408 U.S. 238 (1972).

[281]18 U.S.C. § 3005 (1970).

[282]No. 72-1452 (4th Cir., Aug. 20, 1973) at 8.

[283]*Furman* held that, with respect to two Georgia cases and one Texas case, "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. at 239-40. Since the penalty provision of 18 U.S.C. § 1111 under which the defendant was charged is indistinguishable from those challenged in *Furman* [death], the court concluded that had the penalty been imposed on defendant, such a sentence would have been void. No. 72-1452 (4th Cir., Aug. 20, 1973) at 4. From this set of circumstances, it may be argued that the defendant was not charged with a "capital crime" at the time his attorney requested additional counsel and, therefore, that 18 U.S.C. § 3005 should not apply.

[284]No. 72-1452 (4th Cir., Aug. 20, 1973) at 11.

[285]*Id.* at 12.

the death penalty."[286] The dissenting judge expressed the view that any problems created by the *Furman* decision in the administration of criminal proceedings could be solved on a case by case basis in the absence of congressional action.[287]

VI. *PERSONAL INJURY*

The Fourth Circuit rendered decisions of particular significance in the area of personal injury involving consumer protection, the defense of qualified privilege to a charge of libel, the Federal Torts Claims Act,[288] and the West Virginia Workmen's Compensation Act.[289]

A. *Consumer Protection*

In *Matthews v. Ford Motor Co.*,[290] a statutory provision relating to unconscionability was determinative in a damage suit brought by an automobile purchaser against both the manufacturer and the dealer for injuries sustained in an accident caused by an automobile's mechanical defect. The manufacturer's express warranty contained a clause restricting the customer's remedies to replacement of defective parts. The Fourth Circuit applied § 2-719(3) of the Virginia Commercial Code and held that the clause in attempting to eliminate liability for personal injury was prima facie unconscionable,[291] and that the manufacturer had failed to rebut this presumption. Furthermore, the court found that the independent dealer could not rely on the manufacturer's express disclaimer of implied warranties to avoid liability on his own implied warranty of fitness since express warranties and disclaimers do not generally run with personal property.[292]

The Fourth Circuit dealt with the evolving concepts of products liability in *Spangler v. Kranco, Inc.*[293] A manufacturer had built a pendant overhead crane in accordance with customer specifications which did not require that the crane be equipped with a motion-activated warning device. An employee of the customer's subcontrac-

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[286] *Id.* at 16. (Murray, J., dissenting).

[287] *Id.* at 18. (Murray, J., dissenting).

[288] 28 U.S.C 2671 *et seq.* (1970).

[289] CODE W. VA., 23-2-1 (1973).

[290] 479 F.2d 399 (4th Cir. 1973).

[291] VA. CODE ANN. § 8.2-719(3) (1965) provides in part:

> Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. . . .

[292] 479 F.2d at 403.

[293] 481 F.2d 373 (4th Cir. 1973).

tor was struck and injured by the crane. He claimed that failure to equip the crane with a warning device caused the crane to be inherently dengerous. The Fourth Circuit held that the manufacturer of the crane could not be held liable where the crane was without latent defects and had been built according to customer specifications.[294]

B. *Libel and the Defense of Qualified Privilege*

In an area of the law that has seen little litigation, the Fourth Circuit held in *Casale v. Donner Laboratories, Inc.*[295] that "the district judge [had] erred in submitting to the jury determination of whether the alleged libel was made upon a privileged occasion."[296] The plaintiff in this case had been employed as a drug representative and salesman by the William S. Merrell Company for a number of years. The defendant offered the plaintiff a higher salary and more substantial company benefits, and as a consequence, the plaintiff changed jobs. The plaintiff was subsequently fired by the defendant for allegedly "ineffective salesmanship."[297] The plaintiff claimed that he was unable to find new employment as a drug representative and salesman because he had been "blackballed" by the various pharmaceutical companies within the Washington area due to libelous material contained in a letter written to the various pharmaceutical companies by the defendant. Donner Laboratories raised the defense of qualified privilege. The Fourth Circuit held that "[u]nder Maryland law, where the facts are not in substantial dispute, as here, privilege is initially a question of law to be decided by the court."[298] It further stated that the plaintiff did not present sufficient evidence of malice in order for the judge to send to the jury the question of qualified privilege. In other words, malice must be proven to rebut the defense of "qualified privilege." The Fourth Circuit ruled that the district court should have granted the defendant's motion for a directed verdict.[299]

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[294] *Id.* at 375. Judge Butzner dissented in this case and felt that under Virginia law "the manufacture [*sic*] of a product, which—though not dangerous in itself—becomes dangerous when it is used in its customary or ordinary manner, owes a duty of reasonable care to any person who might foreseeably be injured because of the product's negligent design or manufacture." *Id.*

[295] No. 72-2180 (4th Cir., July 13, 1973).

[296] *Id.* at 8.

[297] *Id.* at 2.

[298] *Id.* at 8.

[299] *Id.*

C. *Tort Claims Act*

In an important decision in the area of governmental tort liability, the court held in *Garrett v. Jeffcoat*[300] that the cumulative effect of the Federal Drivers Act[301] and *United States v. Gilman*[302] "is to make the United States *solely* liable for the negligent acts of its servants while operating motor vehicles within the scope of their employment and that there is no cause of action whatever against the employee himself."[303]

Prior to the passage of the Federal Drivers Act, there was much confusion among the circuits as to whether the government could be held liable for the negligent operation of automobiles by its employees.[304] Even after passage of the Act, a Tenth Circuit case maintained its pre-Act position that the United States is immune from liability for the automobile accidents of its employees while driving in the course of their employment.[305] However, in holding the government liable in *Jeffcoat* the Fourth Circuit explained that the Federal Drivers Act was designed "to relieve Government employees of the burden of personal liability for accidents which occurred on the job."[306]

In a malpractice suit under the Federal Tort Claims Act,[307] *Portis v. United States,*[308] the court ruled that the statute of limitations[309] as applied to the plaintiff's loss of hearing "began to run in 1969 when, for the first time, a doctor ascribed [the plaintiff's] deafness to the 1963 malpractice, and that accordingly, the suit was timely begun. . . ."[310] The court analogized this position to its earlier decision in *Young v. Clinchfield R.R.*[311] In *Young,* the court determined

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[300]483 F.2d 590 (4th Cir. 1973).

[301]28 U.S.C. § 2679(b)-(e) (1970).

[302]347 U.S. 507 (1954).

[303]483 F.2d at 593 (emphasis in original).

[304]*E.g.*, Munson v. United States, 380 F.2d 976 (6th Cir. 1967); Land v. United States, 231 F. Supp. 883 (N.D. Okla. 1964), *aff'd per curiam* 342 F.2d 785 (10th Cir. 1965).

[305]Scoggin v. United States, 444 F.2d 74 (10th Cir. 1971) (per curiam).

[306]422 F.2d at 593, *citing* Carr v. United States, 422 F.2d 1007, 1009 (4th Cir. 1970).

[307]28 U.S.C. § 1346(b) (1970).

[308]483 F.2d 670 (4th Cir. 1973).

[309]28 U.S.C. § 2401(b) (1966) provides in part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues. . . .

This is the section as amended in 1966. The revision does not affect this case, however, since the amendment did not alter the substance of the two-year limitation.

[310]483 F.2d at 671.

[311]288 F.2d 499 (4th Cir. 1961).