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Foreword

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THE FOURTH CIRCUIT REVIEW

FOREWORD

Francis D. Murnaghan, Jr.*

Last year the Fourth Circuit docket continued its relentless growth. Total filings rose 3.9% over 1986, with a record 2,886 cases filed. We disposed of 2,760 cases in that period, and were left with 1,952 cases pending at the end of the year. On a per three-judge panel basis, the Fourth Circuit ranked third among the twelve circuits for total appeals filed and for total appeals terminated in 1987.

There has been a shift in the types of cases filed. The number of criminal appeals filed dropped 13.9% in 1987, after increasing steadily for the previous four years. Administrative appeals also declined sharply, with 26.2% fewer filings in 1987 than in 1986 (from 195 to 144). The decreases in those two categories were more than compensated for by an 11% increase in the number of civil appeals, building on the 10.1% increase seen in 1986. The biggest part of our workload is prisoner petitions, which increased 17.6% last year. In 1987, the Fourth Circuit received 13.5% of all state prisoner petitions filed in the United States; these petitions account for 31.2% of the court's total caseload. Most of the petitions are filed *pro se,* and the vast majority ultimately are found to be without merit, but this Court commits the necessary resources to satisfy our by-no-means-secondary duty to ensure that each petition is fairly heard and considered.

Every year brings a diverse crop of cases for decision, mundane and profound, simple and complex. Several cases in various subject areas are discussed *infra* in the annual review. I will discuss two broader issues that have been controversial this year and that touch on many cases before the court: granting rehearing en banc, and certifying undecided questions of state law to state courts for decision.

I.

Chorus:
All hail great Judge!
To your bright rays
We never grudge
Ecstatic praise.
All hail!
May each decree
As statute rank

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* Circuit Judge, United States Court of Appeals for the Fourth Circuit.

And never be
Reversed in banc.
All hail!

W.S. Gilbert[1]

An issue that recently has troubled the Fourth Circuit is determining when a rehearing en banc should be granted. Federal Rules of Appellate Procedure 35(a) states that:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc.[2]

In 1983 we dealt with the question of what comprised "a majority" of the active circuit judges. In *Arnold v. Eastern Air Lines, Inc.*[3] we held that an active judge who has recused himself from a case should not be counted when determining whether a "majority" of judges has voted to rehear en banc. In a circuit split, most of the circuits require an *absolute* majority of the circuit judges in regular active service to order a rehearing en banc.[4] At least three circuits, however, have taken the same position as the Fourth Circuit and have authorized en banc review upon less than an absolute majority of active circuit judges.[5]

This year we were faced with the even more fundamental question of whether a particular case was worthy of an en banc rehearing. In *Beatty v.*

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1. Gilbert, *Trial by Jury,* in 1 LONDON, THE WORLD OF LAW 206 (1950) (quoted *in* Note, *En Banc Hearing in the Federal Court of Appeals: Accommodating Institutional Responsibilities (Part I),* 40 N.Y.U. L. REV. 563, 563 (1965)).

2. FED. R. APP. P.. 35(a); *see also* 28 U.S.C. § 46(c) (Supp. 1988):

> Cases and controversies shall be heard and determined by a court or division of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

3. 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied,* 464 U.S. 1040 (1984).

4. *See* 5TH CIR. R. 35.6; D.C. CIR. I.O.P. XIII 3.2; 3D CIR. I.O.P. ch. IX B.4; 6TH CIR. I.O.P. 18.5; 7TH CIR. I.O.P. 5(d)(1); 8TH CIR. I.O.P. VI D; *see also* Cooper & Brass Fabricators Council, Inc. v. Department of Treasury, 679 F.2d 951 (D.C. Cir. 1982), *reh'g denied,* unpublished order, No. 81-2091 (Aug. 3, 1982); Clark v. American Broadcasting Cos., Inc., 684 F.2d 1208, 1226 (6th Cir. 1982) (rehearing *en banc* denied), *cert. denied,* 460 U.S. 1040 (1983), *overruled on other grounds,* Bichler v. Union Bank & Trust Co. of Grand Rapids, 745 F.2d 1006, 1012 (6th Cir. 1984); Curtiss-Wright Corp. v. General Electric Co., 599 F.2d 1259, 1259 (3d Cir. 1979) (rehearing en banc denied), *vacated and remanded,* 446 U.S. 1 (1980); Porter County Chapter of Izaak Walton League of America, Inc. v. Atomic Energy Comm'n, 515 F.2d 513, 533-34 (7th Cir. 1975) (rehearing en banc denied), *rev'd on other grounds sub nom.,* Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton League of America, Inc., 423 U.S. 12 (1975).

5. *See* Ford Motor Co. v. Federal Trade Comm'n, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982) (Reinhardt, J., dissenting) (dissent from the denial of rehearing en banc), *cert. denied,* 459 U.S. 999 (1982); 2D CIR. R. 35 (reversing Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972), *aff'd on other grounds,* 414 U.S. 291 (1973)); 10TH CIR. R. 35.4.

Chesapeake Center, Inc.[6] the Court addressed the issue of whether the district court's finding of no intentional discrimination in a Title VII case was clearly erroneous. Despite a strong dissent by Judge Haynsworth, a majority of the three-judge panel concluded that the district court's finding was clearly erroneous and directed the entry of judgment for the plaintiff.[7] Upon consideration of the defendant's petition for rehearing, a majority of the judges in active service granted a rehearing before the en banc court.[8] On the merits, ten judges voted to affirm the district court's decision on the basis that the judge's finding was not clearly erroneous. Only two, the original members of the panel's majority opinion, voted to reverse.

While voting with the majority of the en banc court, Chief Judge Winter expressed his belief that *Beatty* should not have been reheard en banc:

> Since a majority of the active judges voted to rehear this case in banc and since I have a duty to sit and to vote, I concur in Judge Haynsworth's opinion. I do so reluctantly, not because I have any doubt that affirmance is proper, but because I am convinced that the case should not have been heard by the in banc court even it it was incorrectly decided by a majority of the panel.[9]

That comment prompted me to reexamine the standard by which we determine whether to grant a rehearing en banc.

Obviously there are competing interests to consider when an appellate court entertains the possibility of proceeding en banc. By rehearing en banc, the court may seek to reconcile or resolve intracircuit conflicts.[10] Moreover, since all circuit courts now consist of more than three judges, an en banc hearing would avoid decisions that would have the appearance of being determined by the fortuitous composition of the panel.[11] A court also may determine that certain types of litigation are "important" enough so that a rehearing en banc should be granted to develop authoritative precedents.[12]

Balanced against those interests is the practical concern that en banc hearings take much time.[13] As one commentator has noted, courts have an

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6. 835 F.2d 71 (4th Cir. 1987) (en banc).

7. Beatty v. Chesapeake Center, Inc., 818 F.2d 318 (4th Cir. 1987).

8. 823 F.2d 60 (4th Cir. 1987).

9. 835 F.2d at 73 (Winter, C.J., concurring).

10. *See generally* Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563, 582-86 (1965) [hereinafter Note].

11. *See* Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 WIS. L. REV. 461, 481 (suggesting that element of justice-by-lottery is inherent in three member panel device); *see also* Comment, *In Banc Procedures in the United States Court of Appeals*, 43 FORDHAM L. REV. 401, 401 (1974) (substantial increase in caseload and steady increase in intercircuit assignment of judges have decreased control exercised by majority of active judges over panel decisions).

12. *See generally* Note, *supra* note 10, at 586-92.

13. In 1987 the Fourth Circuit heard twelve cases *en banc. In Banc Hearings—Statistical Years 1984-1987* (prepared by the Clerk, United States Court of Appeals for the Fourth

institutional responsibility to decide cases efficiently.[14] It is beyond dispute that en banc hearings tax the resources of the courts and also prolong the length of litigation. One survey indicated that panels of the Second and Third Circuits ordinarily dispose of a case within about two and one-half months following oral argument.[15] The same survey showed that a hearing en banc, where the en banc court originally decided the case, lengthened the time from argument to judgment to approximately four and one-half months; if the en banc court only is substituted after some panel consideration, the average time increased to eight to eleven months.[16] In addition, it is obvious that devoting the attention of eleven judges to a case instead of three may slow the disposition of other cases awaiting attention.

Without a doubt, the substantial expense involved in a hearing or rehearing en banc does complicate our determination of how to allocate the court's limited resources and time.[17] Despite such concerns, it has become my opinion that if an injustice or an inconsistency may be remedied only by hearing or rehearing en banc, then concerns about time and resource allocation should not be the determinative factors. Indeed, certain safeguards could reduce the amount of time judges must spend reviewing en banc petitions. The Ninth Circuit utilizes an informal screening device by which petitions for rehearing initially are submitted to the panel that is assigned to or has heard the case. The panel then makes a recommendation to the entire court.[18] Nine other circuits require that a petitioner for rehearing en banc file a statement noting the possibility of an intracircuit conflict or identifying the issue of exceptional importance.[19] The Fourth Circuit could adopt either of these procedural time-savers to alleviate concerns of time constraints. In addition, some circuits specifically authorize assessment of costs if counsel files a frivolous petition for rehearing en banc.[20] However, the consideration of potentially time-saving "safeguards" merely begs the principal question that must be addressed by each appellate court: how the court should determine when to grant a hearing or rehearing en banc.

Circuit). Over a four-year period, 1984-1987, the Fourth Circuit heard 42 cases en banc, the second highest number among the circuits. *Id.* As a percentage of the total number of cases argued, the Fourth Circuit had the third highest number of en banc cases at .014%, while the average for all the circuits was .009%. *Id.* The First and Second Circuits almost never hear cases en banc; each has heard two en banc cases over the last three years. *Id.*

14. *See* Note, *supra* note 10, at 574-77.

15. *Id.* at 577.

16. *Id.*

17. As Chief Judge Winter opined, "[d]uring the time consumed in rehearing this case in banc, they should have sat in four panels and heard four other cases." (Winter, C.J., concurring).

18. 9TH CIR. I.O.P. II K(2)(b); Note, *In Banc Review in Federal Circuit Courts: A Reassessment,* 72 MICH. L. REV. 1637, 1651 (1974); Note, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part II),* 40 N.Y.U. L. REV. 726, 730-32 (1965).

19. *See* D.C. CIR. R. 15(a)(3); 1ST CIR. R. 35; 3D CIR. R. 22; 5TH CIR. R. 5.2.2; 6TH CIR. R. 14; 7TH CIR. R. 40(c); 8TH CIR. R. 16(d); 10TH CIR. R. 35.2; 11TH CIR. R. 35-6.

20. *See* 2D CIR. R. 40; 8TH CIR. R. 16(e).

One starting point is Federal Rules of Appellate Procedure 35(a). In addition to authorizing rehearing en banc, Rule 35(a) cautions that:

> Such a hearing or rehearing [en banc] is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

However, despite such instructions for limiting en banc hearings, federal appeals courts have, for the most part, failed to articulate clearly the reasons for granting or denying rehearing en banc. As recognized by Judge Phillips in his dissent in *Arnold*:

> The standards by which courts of appeals are to decide whether to rehear an appeal en banc are concededly not subject to precise formulation and wholly consistent application. The controlling rule, Fed. R. App. P. 35(a), implementing the undergirding statutory grant of power, 28 U.S.C. § 46(c), tells us only that the procedure is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." There is enough flexibility built into the very text of this rule—in the word "ordinarily" and in the open-ended expression of "exceptional importance"—that it could not be claimed that the rule itself either compels or excludes rehearing en banc in *any* case.[21]

Indeed, the Supreme Court succinctly has explained that, though en banc courts are to be convened only when extraordinary circumstances exist, "'[t]he principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions. . . .'"[22]

While manifestly not all erroneous decisions merit an en banc hearing, I adhere to the view that a petition for a rehearing en banc should be granted if a majority of active judges believe that an injustice has been inflicted by the panel decision. In *Beatty* ten of the twelve judges voting on the merits of the case voted to affirm the district court's decision. The only judges voting otherwise were two judges who originally were on the panel and there had decided to reverse the district court.[23] Therefore, if the random selection of judges had picked any other judge on the Circuit to

21. 712 F.2d at 914 (en banc) (Phillips, J., dissenting) (emphasis in original), *cert. denied*, 464 U.S. 1040 (1984).

22. United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting Maris, *Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91, 96 (1954)).

23. Judges Hall and Sprouse comprised the majority for the panel. Judge Haynsworth dissented from the panel decision.

replace one of the two panel members, the result would have been different. The statistical probability that those two panel members would sit together on any randomly selected panel is only 4.54%.[24] Because of the fortuitous "4.54% probability" composition, the panel had reached an erroneous conclusion. Yet, despite the fact that the overwhelming percentage of the Fourth Circuit judges acknowledged that the panel decision was wrong, Judges Winter and Phillips would have denied rehearing en banc. As Judge Danaher noted in *Cafeteria & Restaurant Workers Union v. McElroy,*[25] however, I am unable to subscribe to the view that to perpetuate error makes for sound judicial administration.

In addition, I believe that this court properly heard the *Beatty* case en banc because the issue of whether a district court's decision was clearly erroneous is an area that has caused much trouble in this Circuit. In the wake of *Anderson v. City of Bessemer City,*[26] which reversed a Fourth Circuit decision,[27] this court three times has assembled en banc, including in the *Beatty* case, to reaffirm the strictures of "clearly erroneous" review.[28] We are striving to secure or maintain uniformity with the *Anderson* decision. I regard it as important that we not encourage the ill-conceived notion of "achieving justice" for the sympathetic party by ignoring the factual evidence and the district court judge's decision. I believe that the *Beatty* case had to be heard en banc to secure or maintain such uniformity; leaving the panel decision intact not only would have encouraged an unsound trend in the district courts but also would have imposed an unjust result on the defendants and clogged our appeals docket.

It is clear that the debate on when to grant a hearing or rehearing en banc will continue to challenge the judges of the Fourth Circuit and those of other circuits. In view of the fact that circuit courts have become the final arbiter of all but a small percentage of cases, it is a debate worth pursuing thoughtfully and in a lively fashion.

II.

Another area in which the Fourth Circuit has not yet fully agreed on a common approach is certification. Four of the five states in the Fourth Circuit now have adopted certification procedures by which federal courts may refer unresolved questions of state law for decision by the state's highest court.[29] While certification of a disputed legal question is not always

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24. *Beatty,* 835 F.2d at 75 n.1 (Murnaghan, J., concurring).

25. 284 F.2d 173, 189 (D.C. Cir. 1960), *aff'd,* 367 U.S. 886 (1961).

26. 470 U.S. 564 (1985).

27. Anderson v. City of Bessemer City, 717 F.2d 149 (4th Cir. 1983).

28. *See* Warren v. Halstead Industries, Inc., 835 F.2d 535 (4th Cir. 1988) (en banc, *vacating* 802 F.2d 746 (4th Cir. 1986), *cert. denied,* 108 S. Ct. 2872 (1988); Beatty v. Chesapeake Center, Inc., 835 F.2d 71 (4th Cir. 1987) (en banc), *vacating* 818 F.2d 318 (4th Cir. 1987); Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986) (en banc), *vacating* 774 F.2d 636 (4th Cir. 1985).

29. *See* MD. CTS. & JUD. PROC. CODE ANN. §§ 12-601—12-609 (1972); S.C. SUP. CT. R. 46 (1986 Supp.); VA. S. CT. R. 5:42 (1987); W.VA. CODE §§ 51-1A-1—51-1A-12 (1981).

favored by judges or by parties to a controversy, I fully agree with Judge Butzner's view that "[a]part from the abolition of diversity jurisdiction, the best solution to the federal courts' difficulty in predicting uncertain state law is certification."[30]

The United States Supreme Court has expressed a similar view, ordering certification of unresolved questions of state law in particular cases as a way of promptly and definitively resolving legal issues, and because the certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[31] Most recently, in a case on appeal from the Fourth Circuit, the United States Supreme Court certified questions arising under Virginia law to the Virginia Supreme Court. In *Virginia v. American Booksellers Ass'n, Inc.*[32] the United States Supreme Court declined to decide whether a Virginia statute making it "unlawful for any person . . . to knowingly display for commercial purpose in a manner whereby juveniles may examine or peruse" any material that "depicts sexually explicit nudity, sexual conduct or sadomasochistic abuse and which is harmful to juveniles"[33] violates the first amendment. Noting that the parties urged inconsistent interpretations of the statute, with the state arguing for a narrow construction and the plaintiff booksellers portraying the statute as "a broad enactment, potentially applying to a huge number of works,"[34] the Supreme Court held:

> Under these unusual circumstances, where it appears the State will decline to defend a statute if it is read one way and where the nature and substance of plaintiffs' constitutional challenge is drastically altered if the statute is read another way, it is essential that we have the benefit of the law's authoritative construction from the Virginia Supreme Court. Certification, in contrast to the more cumbersome and (in this context) problematic abstention doctrine, is a method by which we may expeditiously obtain that construction. See *Bellotti v. Baird,* 428 U.S. 132 (1976) (remanding with instructions to certify questions pertaining to construction of a state statute that was susceptible to multiple interpretations, one of which would avoid or substantially modify a federal constitutional challenge). Consequently, we shall resort to its certification Rule 5:42 to ask the Virginia Supreme Court whether any of the books introduced by plaintiffs as exhibits below fall within the scope of the amended statute, and how such decisions should take into account juveniles' differing ages and levels of maturity.[35]

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30. Butzner & Kelly, *Certification: Assuring the Primacy of State Law in the Fourth Circuit,* Foreword: Fourth Circuit Review, 42 WASH. & LEE L.REV. 449, 449 (1985).

31. Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974); *see* Bellotti v. Baird, 428 U.S. 132, 150-51 (1976) (ordering certification of open questions of statutory interpretation).

32. 108 S. Ct. 636 (1988) (on appeal from 802 F.2d 691 (4th Cir. 1986)).

33. VA. CODE ANN. § 18.2-391(a) (Supp. 1987).

34. 108 S. Ct. at 643.

35. *Id.* at 644.

The Supreme Court noted that the Fourth Circuit had not had the choice of certification in the case, because Virginia's certification procedure had not yet been enacted at the time of decision in the Court of Appeals.[36]

While some federal courts have employed the certification procedure with enthusiasm, it is necessary to note that state courts have added limitations to their state certification rules, and sometimes simply decline to answer a certification request. In *Abrams v. West Virginia Racing Comm'n*[37] the West Virginia Supreme Court declined to answer a question certified to it by a federal district court because the question certified asked the state court to resolve a federal constitutional issue.[38] In *Jones v. Heckler*[39] we expressed our disappointment at the unwillingness of the Supreme Court of Mississippi to assist us on a question involving effective Mississippi intestacy law regarding illegitimate children:

> We hoped for assistance from the Supreme Court of Mississippi on the question of whether that state would simply bow to dictates of the Federal Constitution and regard state law as nullified or whether, instead, on the principle of neutral extension, or a similar concept, the Jones children would be deemed entitled as a result of positive application of state law. The Supreme Court of Mississippi saw fit to reject the question; thereby, in our view, striking an undesirable blow against the developing and potentially enormously helpful procedure under which certification of unresolved and important questions of state law may be referred to the court best equipped to provide answers to them.[40]

Fortunately, such instances of disagreement have been rare,[41] so that use of the certification procedure has in the main furthered the "cooperative judicial federalism" applauded by the Supreme Court in *Lehman Brothers. Since* 1981, the Fourth Circuit has certified questions in fifteen cases, and received helpful responses in all but a few.

In addition to the guidance supplied by certification provisions of the various states, the Fourth Circuit has expressed general policies to govern certification. For example, we will not certify a question to a state court "unless and until it appears that the answer is dispositive of the federal

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36. *See id.* at 639 n.1. The Court observed, "Virginia's certification procedure became effective on April 1, 1987, and hence was unavailable to the courts below." *Id.*

37. 164 W. Va. 315, 263 S.E.2d 103 (1980).

38. 263 S.E.2d at 106-07 (federal court interpretation of United States Constitution will override state court interpretation; because decision under state constitution will not foreclose overriding decision under federal Constitution, no basis for accepting certification).

39. 754 F.2d 519 (4th Cir. 1985) (per curiam).

40. *Id.* at 520.

41. Most recently, the Supreme Court of South Carolina declined to answer questions certified to it by the Fourth Circuit in *Catawba Indian Tribe v. South Carolina* (No. 82-1671). The questions certified dealt with the application of the state statute of limitations; the state law issues in the case, which is pending rehearing en banc before the Fourth Circuit at this writing, will now have to be decided without benefit of guidance from the state supreme court.

litigation or is a necessary and inescapable ruling in the course of the litigation."[42] Even when the certification process is available, however, the Fourth Circuit does not always achieve unanimity in deciding whether to certify a question.

Last year in *Dixon v. Nationwide Mutual Ins. Co.*,[43] the Fourth Circuit voted en banc 6-5 not to certify a disputed issue to the South Carolina Supreme Court. In a concurring opinion, Judge Wilkinson explained that while certification of state law questions "is a desirable procedure in appropriate circumstances,"[44] in the present case certification was undesirable because it would delay the resolution of the case "and impose an added burden upon state courts."[45] In a vigorous dissent, Chief Judge Winter argued that the question of interpretation of a South Carolina statute should have been certified:

> As I view the case, it is a classic one for certification of the question of statutory interpretation to the South Carolina Supreme Court, and I am at a loss to understand the majority's refusal to adopt this course. The case presents a question of interpretation of a relatively recent state statute on which there is no authoritative state adjudication. Only the State Chief Insurance Commissioner has expressed a view on the meaning of the statute; and while his view is entitled to deference, it does not bind any state or federal court. As the panel opinions demonstrate, the statute can be read to have either of two conflicting meanings. Because we have the case under diversity jurisdiction, our function as to the question of statutory interpretation is to determine and apply state law, but we are faced with a total lack of authoritative state precedent.[46]

Chief Judge Winter also pointed out that the Supreme Court has instructed and encouraged lower federal courts to certify questions of law in similar circumstances.[47]

In another case last year, Chief Judge Winter successfully opposed certification. In *Corrigan v. United States*[48] the Fourth Circuit reversed a

42. Boyter v. Commissioner, 668 F.2d 1382, 1385 (4th Cir. 1981). The court noted in *Boyter* that some, but not all, states expressly prohibit certification of questions that would yield mere advisory opinions. *Id.* at n.5. In *Boyter* the panel split on the certification issue; while Judge Widener argued for certification of the state law issue to determine the validity of a divorce, the panel majority found certification premature because "there is present and undecided a federal issue which may be dispositive of the litigation, and it is proper that the federal issue be decided before certification is made." *Id.* at 1388; *compare id.* (Widener, J., dissenting) ("case presents a classic opportunity to take advantage of the certification procedure").

43. 800 F.2d 422 (4th Cir. 1986) (en banc).

44. *Id.* at 423 (Wilkinson, J., concurring).

45. *Id.*

46. *Id.* at 423 (Winter, C.J., with Phillips, Murnaghan, Sprouse, & Ervin, J.J., dissenting).

47. *Id.* at 424 (citing *Bellotti* and *Lehman Brothers).*

48. 815 F.2d 954 (4th Cir. 1987) (per curiam), *cert. denied,* 108 S. Ct. 290 (1987).

district court decision holding the United States liable under the Federal Tort Claims Act for negligence on a dram shop liability principle, in a case involving a drunken Army private who drove his car through a stop sign and seriously injured the plaintiff's daughter. The court of appeals majority held that the United States does not significantly differ from a private proprietor of a bar and was not liable because Virginia, where the accident occurred, does not recognize dram shop owner liability.[49] I argued in dissent that the unusual degree of control enjoyed by the Army over its personnel, and the violations of Army regulations that occurred when the underage and inebriated Army private was served drinks at an Army NCO club, distinguished the present case from existing Virginia case precedents[50] on dram shop liability:

> The majority *may* ultimately be right that if asked to decide this case, the Virginia Supreme Court would not hold the Army responsible. But, with respect, the majority makes the assumption prematurely. To my mind there are still questions which have not been answered by *Williamson* or any other Virginia case establishing the principle applicable in the present case, which a Virginia court should first address and answer. The questions go to the issue of whether there is another ground of common law liability—not necessarily denominated a dram shop principle—which applies here, and to whether the Virginia Supreme Court's analysis of the dram shop rule would differ in the presence of the unique facts of the present case.[51]

The disagreement among the panel members on whether to certify questions arising in *Corrigan* thus arose more from the judges' analysis of the case and identification of pertinent issues than from any philosophical disagreement over the appropriate use of certification. The majority found the Virginia dram shop precedents sufficiently analogous to dispose of the case; I found the extant Virginia cases inapposite because of the special facts present where an Army private was served alcohol by an Army facility in violation of state law *and* Army regulations, and thus would have certified for lack of adequate guidance on Virginia law. While I am tempted to

49. 815 F.2d at 956-57.

50. The panel majority relied chiefly on Williamson v. The Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986), which we had also found dispositive in Webb v. Blackie's House of Beef, 811 F.2d 840 (4th Cir. 1987) (per curiam). In *Williamson*, the Supreme Court of Virginia reaffirmed the common-law principle that an innocent third party does not have a cause of action against a vendor of alcoholic beverages for injuries suffered as a result of the intoxication of a patron. 232 Va. at 354, 350 S.E.2d at 624. The court also ruled that such vendor liability did not arise from the violation of a state statute barring the sale of alcoholic beverages to intoxicated persons, because the statute was not enacted for the benefit of injured third parties. *Id.*

51. 815 F.2d at 959 (Murnaghan, J., dissenting) (emphasis in original).

decry this case as "Wrong-Way *Corrigan*,"[52] I cannot point to any differing views of certification as being responsible for the difference of opinion in *Corrigan*. It is thus important, when examining a certification decision, to distinguish between different views of the case at hand and different views of the value of certification.

52. "Wrong-way" was the nickname appended to an adventuresome pilot named Corrigan who took off from the east coast of the United States for the west coast of the United States and ended up on the coast of Ireland instead.