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Foreword: The Impact of Judicial Decision-Making

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FOURTH CIRCUIT REVIEW

FOREWORD: THE IMPACT OF JUDICIAL DECISION-MAKING

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A review of the cases before the Fourth Circuit this past year and my own experience as a judge lead me to characterize the year as uneventful but very active. The most significant feature of the year is probably not any particular case or even a trend in any single area; rather, it embraces every area. I refer to the substantial and unflagging increase in this circuit's calendar.

The Fourth Circuit now leads the nation in the number of cases docketed per judge, a trend that apparently will continue. In 1979, there were 17.1% more filings in this court than in the previous year, far beyond the 6.9% average increase generated in the other ten circuits. Only the District of Columbia Circuit felt a sharper rise during the year. Even more notably, this circuit led the country with a 45.9% upswing in appeals lodged since 1975. The average increase for the other circuits in that period was only 21.4%.[1]

In seeking to discover why this circuit's workload has multiplied in such measure, one cannot ignore, and indeed must focus on, the uneven number of prisoner appeals pressed on this court. While fewer than 10% of the appeals pursued in the federal courts in 1979 were noted in the Fourth Circuit, this court accounted for over 25% of the entire prisoner appeals. Even more dramatic is the fact that judges in the circuit must engage in upwards of four times as many prisoner appeals than their counterparts in the other circuits.[2]

The reason for the ill-balanced number of prisoner cases and the increasingly overburdening litigation for each judge must be traced to the court's expansion of prisoner privileges. I refer to a trend in our decisions that accepts opinions of the United States Supreme Court as the starting point for a doctrine, rather than a statement of the doctrine itself. Five years ago, in *McCray v. Burrell*,[3] Judge Field in dissent accurately analyzed the effect the court's philosophy in the area of prisoners' claims has on the case load of the court. He "discern[ed] something more than a mere coincidental correlation between these disturbing statistics [referring to the large percentage of prisoner appeals] and the philosophy of

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[1] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR THE UNITED STATES COURTS 1979 4, 13.

[2] *Id.*

[3] 516 F.2d 357 (4th Cir. 1975).

judicial lenity evidenced by the majority. . . ."[4] In 1975, the Fourth Circuit ranked fourth among the circuits in the number of appeals per judge. Judge Field's observation is even more evident today, for the court now leads the nation in that statistic.

Although in no way do I argue that the court should give anything but the most thorough consideration to meritorious claims, the expansive decisions have led to frivolous litigation by prisoners that increasingly clogs the court's dockets. Indeed, the barrage of suits filed by prisoners who flout the judicial system may in the end do the greatest harm to those prisoners having meritorious claims, which may be lost in the shuffle of the constantly growing fill of cases.

This discussion relates to the opportunity for judges to meet their responsibilities adequately. Moreover, it is of great importance to ordinary law abiding citizens to have a right to demand that the courts hear their controversies promptly and with the severest solicitude possible, undelayed by frivolous claims of prisoners, many of whom commence numerous suits each year with no more merit to the last than the first.

Although additional judgeships will help to ease the pressure on individual judges, trends indicate that the relief will be only temporary. Therefore, the problems discussed above must be given close consideration so that the quality of our judicial system will not suffer. I do not here suggest the answer, but I do suggest that until the courts and the Congress recognize the problem for what it is, rather than sugar coating it as I think is now being done, merely throwing more judges into the breach will solve nothing in the long haul. Unless there are fundamental decisions made to delineate the proper matters of business of the federal courts, I fear that the very proliferation of our regulation into each nook and crany of human affairs may well undermine the public confidence so necessary to us for the continuance of our fundamental function.

Developments in this circuit in the area of criminal procedure have been somewhat more interesting than in most other areas of the law, and a few significant cases are worthy of note. Some of these cases seem to give the police greater powers, while others give greater protection to defendants and prisoners. An expanded view of what constitutes an extended border search allows law enforcement authorities greater flexibility in dealing with drug importers, while an expanded definition of "interrogation" provides greater protection for defendants in custody. Although defendants can now rely on plea bargain offers and have a reasonable time in which to accept such offers, once convicted they can go to jail on the evenly divided vote of an appellate court. The constitutional prohibition of cruel and unusual punishment now limits the length of a jail sentence that a jury can impose, but, despite a recent decision to the contrary, probably does not limit the practice of "double celling."

The court refined the law relating to searches and seizures under the fourth amendment, the most noteworthy case being *United States v.*

[4] *Id.* at 375.

Bilir.[5] *Bilir* upheld a warrantless search and seizure that produced heroin in the Pennsylvania Railroad Station in downtown Baltimore. The search and seizure, which occurred several miles from the port and several hours after the heroin had been brought into the country, was justified on the theory that it was an extended border search. The government agents had deliberately delayed searching the suspects when it was believed that they were importing heroin. The court decided that the government's delay was permissible because it "was motivated in major part to make suspicion more reasonable by further observation."[6] Moreover, the government had kept a continuous surveillance on the suspects from the time they brought in the heroin at the port until they were searched at the train station. The court refused to extend *Almeida-Sanchez v. United States*,[7] to preclude the warrantless search in this case, noting that in *Almeida-Sanchez* there was no "reasonable suspicion that material recently illegally imported would be disclosed by the search."[8]

If it can be said that the Fourth Circuit, as exemplified by *Bilir*, has allowed the government somewhat greater flexibility with respect to the potential defendant in its investigation of suspected criminal activity, it must also be said that the court has expanded the rights of the suspect once he becomes an actual defendant. Two cases from the past year are indicative of that expansion.

In *Henry v. United States*,[9] the court found an interrogation under circumstances in which one might have thought no interrogation had occurred. The court held that an undisclosed government informant's conversation in jail with an indicted defendant constitutes an interrogation, even if the informant does not initiate the discussion regarding the crime for which the defendant has been charged. The government's action, it was held, violated the defendant's sixth amendment right to counsel, and thus prohibited the use of any information elicited during the interrogation.

Cooper v. United States[10] continued the expansion of a criminal defendant's constitutional rights. The court held that the government's withdrawal of a plea bargain proposal prior to the defendant's communication of acceptance to the government violated both the defendant's constitutional right to fundamental fairness embraced within substantive due process guarantees and his sixth amendment right to effective assistance of counsel. Even though, under classical contract theory, no binding contract had been formed, the court still required the government to ful-

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[5] 592 F.2d 735 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Criminal Procedure, *infra* at 521.

[6] 592 F.2d at 740 n.9.

[7] 413 U.S. 266 (1973).

[8] 592 F.2d at 742.

[9] 590 F.2d 544 (4th Cir. 1978), *aff'd* 48 U.S.L.W. 4703 (U.S. June 16, 1980); *see* FOURTH CIRCUIT REVIEW: Criminal Procedure, *infra* at 589.

[10] 594 F.2d 12 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Criminal Procedure, *infra* at 480.

fill its proposal to the defendant. The net result of this decision is that whenever an assistant United States Attorney communicates a plea bargaining proposal to a defendant, the government is required to keep the offer open until a reasonable time passes. This is true even where the assistant attorney had no authority to offer the plea bargain in the first place, where the assistant's supervisor directs him immediately to withdraw the proposal, and where the withdrawal has in no way harmed the defendant.

The single case arousing the most public interest heard by the court last year was *United States v. Mandel.*[11] Marvin Mandel, governor of Maryland at the time of these proceedings, and others were convicted on mail fraud and racketeering charges arising out of activities involving the Marlboro Race Track in Maryland. A panel of this court reversed those convictions on evidentiary and jury instruction grounds.[12] An en banc court upon rehearing affirmed the convictions by an equally divided vote of 3-3. That per curiam opinion reveals that a majority of the court would affirm the convictions on the evidentiary questions but that the court was equally divided on the jury instruction issues. Soon thereafter two new judges were appointed to the court, and a subsequent petition for rehearing en banc before the enlarged court was denied.

Governor Mandel then filled a petition for a writ of mandamus in the United States Supreme Court against the court.[13] That writ seeks to have the panel decision of this court reaffirmed on two grounds. First, it asserts that a rehearing by an en banc court can only review the actions of the panel and therefore an equally divided decision would affirm the panel decision, not the district court's decision. The petitioner's alternative claim is that because the judgment of the panel of this court was never vacated the en banc court did not have the power to ignore that decision and affirm the convictions. Governor Mandel has also sought certiorari in the Supreme Court.[14] If the petition for certiorari were granted, then it would be very doubtful that the petition for mandamus should proceed further, mandamus being generally unavailable if there is any other remedy. On the other hand, if certiorari is denied, then the Supreme Court will have to dispose of the mandamus petition by one means or another, either on its merits or on procedural grounds.

In *Davis v. Davis,*[15] an en banc court affirmed the granting of a writ of habeas corpus on the grounds that a sentence of forty years imprisonment and $20,000 fine for possession of less than nine ounces of marijuana amounted to cruel and unusual punishment for a known narcotics dealer. Reversing the panel decision, the en banc court concluded that the penal-

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[11] 602 F.2d 653 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Criminal Procedure, *infra* at 502.

[12] 591 F.2d 1347 (4th Cir. 1979).

[13] 48 U.S.L.W. 3452 (1979).

[14] *Id.*

[15] 601 F.2d 153 (4th Cir. 1979), *vacated sub nom.* Hutto v. Davis, 48 U.S.L.W. 3622 (March 31, 1980).

ties imposed were so disproportionate to the offenses that they violated the eighth amendment even though they were well within the State statutory limitations. The case is most interesting because no other court, to my knowledge, has ever concluded that a sentence to a term of years within State statutory limitations was unconstitutional merely because excessive. Adding to the significance of the decision is the fact that the terms of years were fixed by a jury and not by a judge.

Our holding in *Johnson v. Levine*,[16] that two Maryland penal institutions were in violation of the eighth amendment's mandate against cruel and unusual punishment primarily because of their practice of double celling now seems questionable in light of the Supreme Court's holding in *Bell v. Wolfish*.[17] There the Supreme Court held that the double celling of pretrial detainees did not violate the due process clause of the fifth amendment. Although the Court in *Bell* applied the due process clause rather than the eighth amendment, a strong argument is that a similar condition existing for other prisoners would be constitutional since a pretrial detainee has at least the same rights as a prisoner.[18]

If in the area of criminal procedure neither the cops nor the robbers can claim a clear victory in the Fourth Circuit this year, in the area of environmental law, neither the environmentalists nor the industrialists can claim victory. Two noteworthy cases involved challenges to new regulations. In one, we held that Environmental Protection Agency regulations will be struck down if the Agency fails to live up to the law's procedural requirements.[19] However, where the agency does abide by the applicable statutes and regulations, reasonable regulations will, of course, be upheld and given full effect.[20] This approach, if it may be called that, of applying and enforcing the law's procedural requirements, should ensure that the administrative rulemaking process affords each of the competing interests a fair hearing.

The circuit's principal task in the area of employment discrimination law was to give effect to recent Supreme Court decisions, principally *International Brotherhood of Teamsters v. United States*,[21] and *Hazelwood School District v. United States*.[22] This court, applying *Teamsters* in *Sledge v. J.P. Stevens & Co.*,[23] determined that section 703(h) of Title VII[24] insulated a bona fide seniority system, but at the same time upheld

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[16] 588 F.2d 1378 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Criminal Procedure, *infra* at 540.

[17] 441 U.S. 520 (1979).

[18] *See id.* at 558.

[19] National Crushed Stone Ass'n v. EPA, 601 F.2d 111 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Environmental Law, *infra* at 632.

[20] Consolidated Coal Co. v. Costle, 604 F.2d 239 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Environmental Law, *infra* at 632.

[21] 431 U.S. 324 (1977).

[22] 433 U.S. 297 (1977).

[23] 585 F.2d 625 (4th Cir. 1978); *see* FOURTH CIRCUIT REVIEW: Employment Discrimination, *infra* at 605.

[24] 42 U.S.C. § 2000e-2(H) (1976).

the district court's grant of broad relief in other aspects of the case. Perhaps more significant, and certainly of greater public interest, is the guidance that *Sledge* provides in the controversial area of quotas. Without ruling on the abstract validity of quotas, the court determined that hiring and promotional quotas are appropriate only under limited and compelling circumstances, and that whenever possible, discrimination victims should be afforded full and effective relief without resort to the extreme procedure of quotas. The effect, if any, of *United Steelworkers of America v. Weber*,[25] on this decision is yet to be determined.

Other recent cases, *EEOC v. Radiator Specialty Co.*[26] and *EEOC v. United Virginia Bank*[27] teach that the EEOC will be held to the requirement of proving a prima facie case, and to its burden of proof, as any other litigant is. In using statistics to show disparate impact, a court may rely only on valid and proper statistics. The statistics should take into account and exclude pre-Act hiring when appropriate and must reflect the Supreme Court's determination that even after the enactment of Title VII not every individual is qualified for every job. On the issue of special qualifications, *Radiator Specialty* provides procedural guidance. Trial judges should use discovery and pre-trial to identify this as either an issue of law or fact, and if the latter then the employer bears the burden of proving that a position requires special qualifications. Moving by inches rather than by feet, the court is making sure that everyone involved is complying with the law's existing requirements, rather than establishing new requirements. *Hill v. Western Electric Co.*[28] exemplifies the trend in this area. There the district court upheld the plaintiff's claims and granted extensive relief. This court upheld some of those findings but reversed others and remanded to ensure that the same rules of procedure and evidence (and common sense) were applied as in all other cases. "We do not employ babes at high salaries to lead men doing hourly rated work."[29]

In the civil rights field, although no new rights were created, there were no cutbacks and existing rights were given full force and effect. *Doe v. Kenley*[30] makes clear that where a state has established a policy designed to eliminate medicaid funding for nontherapeutic abortions, the state cannot implement that policy by providing reimbursement only when the physician certifies that the mother's life was threatened. *Dorsey v. Solomon*[31] generally upheld a State's power to commit a criminal defendant to a mental hospital after his acquittal by reason of insanity and without a prior hearing. Nevertheless when the judicial hearing is held, the State must carry the burden of proving that the individual is unfit for

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[25] 99 S. Ct. 2721 (1979).

[26] 610 F.2d 178 (4th Cir. 1979).

[27] 615 F.2d 147 (4th Cir. 1980).

[28] 596 F.2d 99 (4th Cir. 1979).

[29] *Id.* at 105.

[30] 584 F.2d 1362 (4th Cir. 1978); *see* FOURTH CIRCUIT REVIEW: Civil Rights, *infra* at 447.

[31] 604 F.2d 271 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Civil Rights, *infra* at 438.

release. According to *Mitchell v. Board of Trustees*,[32] terminating or failing to renew a teacher's contract solely because of her pregnancy is a prima facie violation of Title VII of the Civil Rights Act; and according to *Paxman v. Campbell*,[33] it is also actionable under 42 U.S.C. § 1983 as a constitutional violation. None of these cases can be characterized as a significant cutback or extension of civil rights, but in each case the court upheld the civil rights claim under existing law.

In a related matter, the *Paxman* decision also concluded that some form of municipal immunity is available under 42 U.S.C. § 1983, but the court could not agree on the nature of the immunity. Perhaps the Supreme Court will resolve this issue through a decision in the recently argued case of *Owen v. City of Independence, Missouri*.[34] In *Owen*, the Eighth Circuit had allowed a city and its officials to assert a good faith immunity defense in a section 1983 action.

A third facet of *Paxman* is also noteworthy. The court determined that Federal Rule of Civil Procedure 23(b)(2) does not permit certification of a class of defendants. That subsection was intended to allow a class of plaintiffs to seek injunctive relief against named defendants, not against a class of defendants.

The *Erie* case of the year is *Justice v. Penzoil Co.*,[35] which provides an interesting examination of the allocation of function between judge and jury in a federal diversity case. *Justice* involved a suit by the owners of surface rights against the lessee of oil and gas rights, alleging unreasonable use of the mineral rights so as to damage the surface. West Virginia law allows some damage to the surface as a result of reasonable production of gas, and it also dictates that the issue of reasonable use be determined by the court. The Fourth Circuit recognized, of course, that the federal rules normally control and would make the reasonableness of a particular use a jury question. However, because of the meaning that West Virginia real property law gives to "reasonable" in this context, allowing the jury to decide the issue very well might have infringed on the substantive real property rights of the mineral rights lessee. Therefore, the West Virginia rule which requires that the matter be decided by the judge was held to be binding on a federal court sitting in the exercise of its diversity jurisdiction.

In two instances, the court took a restrained approach to constitutional matters during the past year. Rejecting decisions of the Second, Sixth and Eighth Circuits, the court held that there was no implied cause of action for damages under the fourteenth amendment.[36] By so ruling

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[32] 599 F.2d 582 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Employment Discrimination, *infra* at 622.

[33] No. 75-1506 (4th Cir. Jan. 2, 1980) (en banc).

[34] 598 F.2d 335 (8th Cir. 1978), *rev'd*, 100 S. Ct. 1398 (1980). Since the writing of this foreword, the Supreme Court has reversed the Eighth Circuit's decision in *Owen*.

[35] 598 F.2d 1339 (4th Cir. 1979); *see* FOURTH CIRCUIT REVIEW: Civil Procedure, *infra* at 433.

[36] Cale v. City of Covington, 586 F.2d 311 (4th Cir. 1978); *see* FOURTH CIRCUIT REVIEW: Constitutional Law, *infra* at 484.

the court refused to extend the Supreme Court's holding in *Bivens v. Six Unknown Agents*[37] to the fourteenth amendment. In *Ramey v. Harber*,[38] the court refused to give retroactive effect to *Elrod v. Burns*,[39] which made discharges of nonconfidential, nonpolicymaking employees solely for patronage reasons unconstitutional. In *Ramey* deputy sheriffs were discharged following an election that brought to office a new sheriff of a different political persuasion than his predecessor. The court, however, did not decide whether *Elrod* would even apply to the instant case, where a State statute governed the appointment of deputies. As a result, no binding guidance exists for future application of *Elrod* in this circuit.

I should add that it has been my good fortune, or misfortune, depending on the point of view, to have been involved in a disproportionately large number of the cases selected for discussion by the Law Review staff in this year's Fourth Circuit Review issue. I hasten to add that I had no part in their selection. I have tried to be careful not to use this article for further ax grinding, that is, not to further my point of view where it may have differed from that of some or all of the members of the court. Any opinions expressed and conclusions stated are my own alone, and if any of these may be taken as critical, I assure they are not intended to carry any intramural disagreements beyond the court's conferences. As our Judge Craven used to say, we are experts in the art of disagreement.

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[37] 402 U.S. 388 (1971).

[38] 589 F.2d 753 (4th Cir. 1978); *see* FOURTH CIRCUIT REVIEW: Constitutional Law, *infra* at 494.

[39] 427 U.S. 347 (1976).