South Carolina Law Review

Volume 60
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 11

Summer 2009

FOREWORD

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FOREWORD

The Honorable Karen J. Williams*

As the Chief Judge of the Fourth Circuit[1] and a proud graduate of the University of South Carolina School of Law, I am honored to introduce the *South Carolina Law Review*'s inaugural *Fourth Circuit Survey*. I am delighted that the *South Carolina Law Review* will help focus attention on the work of the Fourth Circuit given that our court, particularly in the last decade, has played a leading role in many of the provocative areas of developing law. For instance, the Fourth Circuit has been home to several of the "enemy combatant" cases, including *Hamdi v. Rumsfeld*,[2] *Padilla v. Rumsfeld*,[3] and *al-Marri v. Pucciarelli*.[4] The Fourth Circuit has also been responsible for hearing the appeals arising from the criminal trial of Zacharias Moussaoui.[5] More recently, a panel of the court decided the appeal of sitting Congressman William Jefferson, addressing his challenge under the Speech and Debate Clause.[6] And, as this *Survey* demonstrates, we address a variety of cases and issues ranging from the Commerce Clause to the First Amendment to claims involving arbitration clauses and the Uniform Commercial Code.

I wanted to take this unique opportunity to provide an overview of the court, its traditions, and its docket. The Fourth Circuit covers the states of South Carolina, North Carolina, Virginia, West Virginia, and Maryland, and serves as the court of last resort for more than 95% of the cases that come before it. Traditionally, the Chief Justice of the United States Supreme Court has served as our Circuit Justice, receiving requests for stays and other scheduling motions in cases appealed from our Circuit. This practice is quite a change from the founding of our republic when, under the Judiciary Act of 1789, the Circuit Justices literally "rode circuit," each traveling to his assigned circuit to hear cases. The eleven active judges on our court hale from across the five states that comprise the Circuit, and we traditionally hold oral arguments in Richmond, Virginia. We also make a concerted effort to travel to the many fine law schools

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1. This Foreword was written and submitted for publication prior to Chief Judge Williams's retirement in July 2009.

2. 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

3. Padilla *ex rel.* Newman v. Rumsfeld, 243 F. Supp. 2d 42, (S.D.N.Y.), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003), *rev'd*, 542 U.S. 426 (2004). The Supreme Court determined that Padilla should have brought his appeal in the District of South Carolina, rather than the Southern District of New York. The case was subsequently refiled and heard in South Carolina as *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert denied*, 126 S. Ct 1649 (2006).

4. 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

5. United States v. Moussaoui, 483 F.3d 220 (4th Cir. 2007).

6. United States v. Jefferson, 546 F.3d 300 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009).

within our Circuit to enable law students to observe appellate arguments before federal circuit judges. In this past fiscal year, we were able to hear arguments at West Virginia University School of Law, Charleston School of Law, and the University of North Carolina School of Law. In fact, as I am writing this foreword, I have just had the pleasure of hearing arguments at Wake Forest University Law School. These law school sittings are a tradition we intend to continue because we judges find them rewarding, and we hope that an early exposure to appellate practice serves as a valuable teaching and learning tool for law students throughout the Circuit.

Speaking of traditions, the tradition for which our court is probably best known began long before my tenure as Chief Judge commenced. Chief Judge John Parker, in the 1920s, started the practice of having the judges come down from the bench and greet counsel after each case is argued. This tradition, unique to the Fourth Circuit, plays a large role in shaping the collegial image that has always been attached to our court. Another key component of that image is the size of our court; with fifteen authorized judgeships, the Circuit is able to handle a significant caseload—more than 5,000 appeals were filed in the prior fiscal year—while still maintaining a sense of intimacy.

The Fourth Circuit's job, at the end of the day, is to decide appeals, and that makes the state of our docket important. As mentioned, last fiscal year saw more than 5,000 appeals—5,185 to be exact—a rise of roughly 650 appeals from the previous year. The rise was reflected almost wholly in prisoner appeals, many in response to the United States Sentencing Commission's new guidelines on crack-cocaine.[7] To put these filings in perspective, the Circuit currently has fifteen authorized judgeships, of which four remain unfilled—the longest vacancy dating all the way back to 1994. Thirty years ago, the Circuit had annual filings of 1,644 with ten authorized judgeships. In other words, filings have tripled over the past thirty years, yet the number of authorized judgeships has increased only slightly. Offsetting this increasing caseload, however, is our excellent staff, which, in the past year, helped our Circuit become one of the first courts in the nation to switch to Microsoft Word and to implement a wholly electronic docket.

Last year the Fourth Circuit closed a total of 4,671 cases; 2,851 of these cases were decided on the merits while the remainder were either dismissed on procedural or jurisdictional grounds or consolidated with existing appeals. Oral argument was held in 395 cases, 199 of which resulted in published precedential

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7. On November 7, 2007, the Sentencing Commission amended the guidelines for crack-cocaine, resulting in lower penalties for most crack cocaine offenses. The Sentencing Commission made this change retroactive on March 3, 2008, permitting prisoners whose appeal rights had otherwise been exhausted leave to file a motion pursuant to 18 U.S.C. § 3582(c)(2) (2006), which provides that "the court may reduce the term of imprisonment," after considering the relevant factors, for "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission."

opinions. Only one case was argued en banc this prior fiscal year, a testament to the strength of the three-judge panel process.

Although these statistics make clear that a majority of cases are decided without the benefit of oral argument, there are several routes cases can take to the oral argument calendar. All *pro se* appeals filed in the Fourth Circuit are scheduled for informal briefing and are decided on the briefs unless a panel member believes that the case warrants formal briefing and oral argument. In that event counsel is appointed, and the case is formally briefed and argued. All civil appeals in which both sides are represented by counsel are initially routed to the Circuit's mediation program for assessment of settlement potential and discussion of settlement via teleconference. Our active mediation program settles about one-third of the Circuit's cases each year. Those cases which do not settle, in addition to all criminal cases, are reviewed under the court's Local Rule 34(a), which provides for pre-argument review prior to being placed on the argument calendar. Under that rule, if argument would not aid the decision making process, the case is submitted on the briefs. Any member of the panel, however, retains the right to schedule such a case for oral argument. Approximately one-third of the cases with counsel are scheduled for argument under this procedure, with the remaining two-thirds submitted on the briefs without argument.

In cases decided on the merits, the Circuit had a reversal rate of 5.7%, which is below the national average of 9.1%. The Circuit is far ahead of the national average, however, in merits terminations per judge. Currently, we average 652 merits terminations per judge annually, compared to the national average of 448. Likewise, our median disposition time of 8.4 months for cases decided on the merits is well below the national average of 12.7 months. I think I speak for all of the judges when I say that we are rightfully proud of these two statistics, which point to the hard work and effort put in by all of the Circuit's employees.

The Fourth Circuit, and federal appellate courts in general, can seem shrouded in mystery, and I hope the preceding discussion has lifted that veil somewhat. More importantly, I know that this annual *Fourth Circuit Survey* by the *South Carolina Law Review* will provide an essential tool for practitioners and law students in the Circuit, and I welcome its publication.

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