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Manning v. Caldwell - A Harbinger?

Daniel S. Harawa
Washington University

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MANNING V. CALDWELL: A HARBINGER?

Daniel S. Harawa*

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I. INTRODUCTION

Last term, the Fourth Circuit heard three cases en banc.¹ One case, *Manning v. Caldwell*, involved a challenge to Virginia’s habitual drunkard statute.² In *Manning*, the Fourth Circuit split 8–7.³ The majority opinion, written jointly by Judges Motz and Keenan, garnered eight votes.⁴ The principal dissent, authored by Judge Wilkinson, was joined by five judges.⁵ Judge Diaz wrote a separate dissent.⁶

While the various opinions in *Manning* are interesting, this Article is not about their reasoning. It is about the conflict they revealed. Judge Keenan wrote a separate concurrence lamenting the tone of the principal dissent, and Judge Wilkinson wrote a special dissent defending himself.⁷ These opinions are noteworthy for a court known for its collegiality.⁸

* Associate Professor of Law, Washington University in St. Louis. I will always owe thanks to Judge Roger L. Gregory, my model of civility.

1. Specifically, three cases were heard by the full court: *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (en banc), *cert. denied*, No. 18–1338, 2019 WL 4923463 (U.S. Oct. 7, 2019); *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc); and *Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019) (en banc).

2. *Manning*, 930 F.3d at 268.

3. *See id.*

4. *See id.*

5. *Id.* at 286 (Wilkinson, J., dissenting).

6. *Id.* at 306 (Diaz, J., dissenting).

7. *Compare id.* at 286 (Keenan, J., concurring) (“In my view, the alarmist tone of the principal dissent warrants separate comment.”), *with id.* at 305 (Wilkinson, J., dissenting) (“My concurring colleagues suggest I have attributed to them ‘malfeasance.’ Of course I have done no such thing.”).

8. *See, e.g.,* Ann E. Marimow, *There’s a Word That No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08_story.html [<https://perma.cc/2GQ4-4WHQ>].

This airing of grievances occurred during a period of flux in the Fourth Circuit. In the last couple of years, the court lost, then gained, three members.⁹ Now, of the active judges, six were appointed by Republican presidents, eight were appointed by Democratic presidents,¹⁰ and presidents of both parties appointed Chief Judge Gregory.¹¹ One has to wonder, with this change in composition, are the opinions in *Manning* a sign of things to come? Maybe.

The Fourth Circuit heard two en banc arguments the first day of the 2019–2020 term.¹² This unusual doubleheader marked the first time that the court sat en banc with its current complement of judges.¹³ The Fourth Circuit will be interesting to watch at a time when the judiciary is increasingly politicized.¹⁴ Will the Fourth Circuit maintain its collegiality in this time of polarization?

9. Judges Shedd and Traxler took senior status, and Judge Duncan retired. *See U.S. Court of Appeals for the Fourth Circuit: Succession Chart*, FED. JUD. CTR. [hereinafter *Fourth Circuit Succession Chart*], <https://www.fjc.gov/history/courts/us-court-appeals-fourth-circuit-succession-chart> [https://perma.cc/67WG-9K9Q]. Judge Shedd was replaced by Judge Richardson. *Id.* Judge Traxler's seat was filled by Judge Quattlebaum. *Id.* And Judge Duncan was succeeded by Judge Rushing. *Id.*

10. Judges Wilkinson (Reagan), Niemeyer (Bush I), Agee (Bush II), Richardson (Trump), Quattlebaum (Trump), and Rushing (Trump) were appointed by Republican presidents. Judges Motz (Clinton), King (Clinton), Keenan (Obama), Wynn (Obama), Diaz (Obama), Floyd (Obama), Thacker (Obama), and Harris (Obama) were appointed by Democratic presidents (although Judge Floyd was appointed to South Carolina's district court by President George W. Bush). *See Judges of the Fourth Circuit, Since 1801*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/docs/pdfs/historyjudges.pdf?sfvrsn=16> [https://perma.cc/9TC9-SKJ6].

11. President Clinton appointed Judge Gregory to the court as a recess appointment, then President George W. Bush re-nominated him for a permanent position. *See Neil A. Lewis, Bush to Nominate 11 to Judgeships Today*, N.Y. TIMES (May 9, 2001), <https://www.nytimes.com/2001/05/09/us/bush-to-nominate-11-to-judgeships-today.html> [https://perma.cc/4JEB-D572].

12. *See United States v. Lockhart*, 947 F.3d 187 (4th Cir. 2020) (en banc); *Perez v. Cuccinelli*, No. 18-1330, 2020 WL 611530, at *1 (4th Cir. Feb. 10, 2020) (en banc). The Fourth Circuit heard five additional en banc arguments during the 2019–2020 Term, including *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc), and *Long v. Hooks*, 972 F.3d 442 (4th Cir. 2020) (en banc).

13. The current members of the court are Chief Judge Roger L. Gregory and Judges J. Harvie Wilkinson III, Paul V. Niemeyer, Diana Gribbon Motz, Robert B. King, G. Steven Agee, Barbara Milano Keenan, James A. Wynn Jr., Albert Diaz, Henry F. Floyd, Stephanie D. Thacker, Pamela A. Harris, Julius N. Richardson, A. Marvin Quattlebaum Jr., and Allison Jones Rushing. *See Judges of the Court*, U.S. CT. APPEALS FOR FOURTH CIR., <http://www.ca4.uscourts.gov/judges/judges-of-the-court> [https://perma.cc/E2JV-UN6C].

14. *See, e.g., Richard L. Hasen, Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019) (explaining how political polarization creeps into the judiciary through judicial selection, decision-making, and public perception of judicial decisions).

II. THE FRIENDLY FOURTH

The Fourth Circuit's reputation has varied over the years. In a 2003 *New York Times* article, the court was labeled "the shrewdest, most aggressively conservative federal appeals court in the nation."¹⁵ Six years later, a commentator called the Fourth Circuit "the most conservative circuit court in modern American history."¹⁶ One article described the Fourth Circuit as "not only conservative but also bold and muscular in its conservatism."¹⁷

Over the last decade, the Fourth Circuit has shed its conservative label.¹⁸ President Barack Obama appointed seven judges to the court during his eight years in office.¹⁹ And with these new appointments, the Fourth Circuit shifted from a court that was once heavily populated with judges appointed by Republican presidents to a court with a majority of judges appointed by Democratic presidents. The Fourth Circuit went from being seen as the most conservative court in the country to a "favorable court for liberal causes."²⁰

Even with the shift in personnel, one thing remained unchanged about the Fourth Circuit—its collegiality. In a talk at the University of Chicago, Judge Harris commented on how the Fourth Circuit's operations are structured to promote collegiality, including ordered conversations in which all the judges

15. Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 L. & SOC'Y REV. 171, 171 (2001).

16. *Id.* at 172.

17. Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAG. (Mar. 9, 2003), <https://www.nytimes.com/2003/03/09/magazine/the-power-of-the-fourth.html> [<https://perma.cc/87LY-J72C>]; see also Frank Green, *4th Circuit Shedding Conservative Reputation*, RICHMOND TIMES-DISPATCH (Nov. 19, 2012), https://www.richmond.com/news/local/government-politics/th-circuit-shedding-conservative-reputation/article_bc5d4a00-3208-11e2-a877-0019bb30f31a.html [<https://perma.cc/TK9B-UNYN>]; Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES (May 24, 1999), <https://www.nytimes.com/1999/05/24/us/a-court-becomes-a-model-of-conservative-pursuits.html> [<https://perma.cc/Z69R-4V2P>].

18. See, e.g., Tricia Bishop, *Conservative Federal Appeals Court Shifts Left*, BALT. SUN (Nov. 11, 2011), <https://www.baltimoresun.com/maryland/bs-md-fourth-circuit-20111119-story.html> [<https://perma.cc/28U8-77V3>]; Green, *supra* note 17; Jason G. Idilbi, *A Liberal Shift in the Fourth Circuit? Observations from the Court's Recent En Banc Rehearings*, BLOOMBERG L. (Feb. 11, 2014), <https://news.bloomberglaw.com/us-law-week/a-liberal-shift-in-the-fourth-circuit-observations-from-the-courts-recent-en-banc-rehearingspart-two> [<https://perma.cc/FT3H-NQH7>]; Marimow, *supra* note 8.

19. One of President Obama's nominees, Judge Andre Davis, took senior status in 2014 and fully retired in 2017. Judge Harris filled his seat. See *Fourth Circuit Succession Chart*, *supra* note 9.

20. Emma Dumain & Brian Murphy, *This Court Has Gone to the Left. Trump Has a Chance to Move It to the Right.*, NEWS & OBSERVER (July 26, 2018), <https://www.newsobserver.com/news/politics-government/article215247000.html> [<https://perma.cc/KKV9-WATA>].

get a chance to speak and social lunches after oral arguments.²¹ Once, when Judge Gregory was interviewed, he said that what he loved most about being a judge “is working with wonderful colleagues on the court.”²² Judge Wilkinson has remarked that “[t]he 4th Circuit has never prided itself on ideology but on the collegiality that takes minds out of concrete and prevents personal animosities from clouding and distorting the essential act of judgment.”²³ Collegiality is grafted onto the court’s DNA. So much so, that the Fourth Circuit’s operating procedures require the judges to leave the bench after every oral argument and come down to the well to thank the advocates.²⁴

Remarkably, the Fourth Circuit has (seemingly) remained collegial despite a marked shift in its ideological reputation. It will be even more remarkable if the Fourth Circuit can maintain its collegiality in the face of unprecedented partisanship.

III. A POLARIZED JUDICIARY

Many say our country is more polarized than ever before.²⁵ The concern is that the country is divided along party lines, with both sides entrenched and the middle disappearing.²⁶ Some even claim that this “hyperpartisanship ‘has led Congress—and the United States—to the brink of institutional collapse.’”²⁷

21. Maura Levine, *Inside the Fourth Circuit Court of Appeals: How Collegiality Works*, U. CHI. L. SCH. (May 19, 2016), <https://www.law.uchicago.edu/news/inside-fourth-circuit-court-appeals-how-collegiality-works> [<https://perma.cc/3ZV3-4Y77>].

22. Judge Willie J. Epps Jr., *An Interview with Judge Roger L. Gregory*, 57 JUDGES’ J., Fall 2018, at 7.

23. J. Harvie Wilkinson III, *Obama’s Judicial Choices: Storming the 4th Circuit*, WASH. POST (Jan. 23, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/22/AR2009012202842.html> [<https://perma.cc/4W88-XFXT>]. In this article, Judge Wilkinson prayed that when President Obama filled vacancies on the Fourth Circuit, the “coming appointments to [the] court [would] not cause the doors of communication and compromise to slam shut.” *Id.*

24. See *Courtroom Protocol for Counsel*, U.S. CT. APPEALS FOR FOURTH CIR., <https://www.ca4.uscourts.gov/oral-argument/courtroom-protocol-for-counsel> [<https://perma.cc/T7QF-6G6N>].

25. See, e.g., Steven Shepard, *Study: Americans More Divided Along Party Lines Than Ever*, POLITICO (Oct. 5, 2017), <https://www.politico.com/story/2017/10/05/poll-americans-divided-party-lines-243466> [<https://perma.cc/9RQN-GQAW>].

26. See, e.g., Dante Chinni, *Election Maps Show “Middle Ground” Communities Are Disappearing*, NBC NEWS (Sept. 8, 2019), <https://www.nbcnews.com/politics/meet-the-press/election-maps-show-middle-ground-communities-are-disappearing-n1051176> [<https://perma.cc/3QFW-S6YX>]; Danielle Kurtzleben, *The Disappearing Middle: Electorate Way Less Moderate than Past Primaries*, NPR (Apr. 16, 2016), <https://www.npr.org/2016/04/16/474224605/the-disappearing-middle-electorate-way-less-moderate-than-past-primaries> [<https://perma.cc/DEW6-CNDC>].

27. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction*, 115 COLUM. L. REV. 1689, 1691 (2015).

The judiciary has not been immune from the plight of polarization and partisanship. President Trump has repeatedly attacked the third branch when faced with unfavorable rulings.²⁸ The attacks were so vociferous that Justice Gorsuch had to denounce them at his confirmation hearings.²⁹ That did not stop President Trump's attacks. On the contrary, he went further, criticizing a judge who ruled against him as an "Obama judge."³⁰ This attack was so beyond the pale that Chief Justice Roberts was compelled to issue a rare public response, declaring:

We do not have Obama judges or Trump judges, Bush judges or Clinton judges What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.³¹

President Trump did not leave it alone, tweeting: "Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges.'"³²

President Trump's nominees to the bench have also been plagued with complaints of partisanship.³³ This is in part due to President Trump's promise that he would outsource judicial selection to conservative legal groups and his

28. Russell Berman, *The President Learns About Separation of Powers and He Doesn't Like It*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-brawls-james-robart-and-judiciary/580000/> [<https://perma.cc/LZR5-DJYA>]; Kristine Phillis, *All the Times Trump Personally Attacked Judges – and Why His Tirades Are 'Worse than Wrong,'* WASH. POST (Apr. 26, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/> [<https://perma.cc/3PHZ-TCTB>].

29. See Andrew Rafferty & Jane C. Timm, *Gorsuch: Trump Attacks on Federal Judges 'Disheartening,' 'Demoralizing,'* NBC NEWS (Mar. 21, 2017), <https://www.nbcnews.com/politics/politics-news/neil-gorsuch-readies-grilling-confirmation-hearing-n736281> [<https://perma.cc/D6W3-H2X8>].

30. See William Cummings, *US Does Have 'Obama Judges': Trump Responds to Supreme Court Justice John Roberts' Rebuke*, USA TODAY (Nov. 21, 2018), <https://www.usatoday.com/story/news/politics/2018/11/21/john-roberts-trump-statement/2080266002/> [<https://perma.cc/JU7P-M3VV>].

31. See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html> [<https://perma.cc/3YHP-Q8NS>].

32. See Matthew Choi, *Trump Hits Back at Chief Justice Roberts, Escalating an Extraordinary Exchange*, POLITICO (Nov. 21, 2018), <https://www.politico.com/story/2018/11/21/supreme-court-chief-justice-john-roberts-calls-out-trump-for-his-attack-on-a-judge-1011203> [<https://perma.cc/5C4E-QS2W>].

33. See Tom McCarthy, *All the President's Judges: How Trump Can Flip Courts at a Record-Setting Pace*, GUARDIAN (May 11, 2019), <https://www.theguardian.com/law/2019/may/11/trump-judge-nominees-appointments-circuit-court-flip> [<https://perma.cc/AB63-4CM8>].

celebration of the fact that his appointments have transformed the courts.³⁴ But it is also due to many of the nominees taking extremely conservative positions on politically charged issues prior to their appointments.³⁵ Even so, every nominee testifies before the Senate Judiciary Committee that they will be fair and decide cases based on the law and the law alone, promising to be a neutral arbiter who is not beholden to any political party or ideological view.³⁶

As it turns out, the judiciary is not always a politics-free zone. And while much of the commentary on the politicization of the judiciary focuses on the Supreme Court,³⁷ the federal courts of appeals have had their fair share of battles. For example, in *Grutter v. Bollinger*, the blockbuster affirmative action case, the Sixth Circuit had a very public feud.³⁸ There, Judge Boggs balked at the court's decision to hear the case initially en banc—a rare occurrence.³⁹ To underscore his displeasure, Judge Boggs' dissent included a "Procedural Appendix" in which he aired what he believed were deviations from "long-established rules" that may have impacted the outcome of the case.⁴⁰ In a concurrence, Judge Moore responded that Judge Boggs'

34. Carl Hulse, *Trump and Senate Republicans Celebrate Making the Courts More Conservative*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/us/trump-senate-republicans-courts.html> [https://perma.cc/H8TW-K546]; Ian Millhiser, *Trump Says He Will Delegate Judicial Selection to the Conservative Federalist Society*, THINK PROGRESS (June 5, 2016), <https://thinkprogress.org/trump-says-he-will-delegate-judicial-selection-to-the-conservative-federalist-society-26f622b10c49/> [https://perma.cc/8MU6-H5VM].

35. See, e.g., Dahlia Lithwick, *The Judges Republicans Are Doing It All For*, SLATE (Oct. 23, 2019), <https://slate.com/news-and-politics/2019/10/sarah-pitlyk-judge-nomination-anti-abortion-activist-trump.html> [https://perma.cc/QAW5-6J9A]; Shira A. Scheindlin, *Trump's Hard-Right Judges Will Do Lasting Damage to America*, GUARDIAN (May 31, 2018), <https://www.theguardian.com/commentisfree/2018/may/30/trump-judge-appointments-roe-v-wade-courts> [https://perma.cc/Z3R3-V3HM].

36. See Lithwick, *supra* note 35.

37. See, e.g., Vincent J. Samar, *Politicizing the Supreme Court*, 41 S. ILL. U. L. J. 1 (2016); Senator Sheldon Whitehouse, *Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts*, 9 HARV. L. & POL'Y REV. 195 (2015); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX, <https://www.vox.com/the-big-idea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing> (last visited Feb. 5, 2021); David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/> [https://perma.cc/4TXL-86ZM]. Even so, recent polls show that confidence in the Supreme Court remains relatively high when compared to other branches of government. See Harper Neidig, *Poll: Most Americans Say They Trust the Supreme Court*, HILL (Oct. 16, 2019), <https://thehill.com/regulation/466110-poll-most-americans-say-they-trust-supreme-court> [https://perma.cc/RA4Z-CTHQ].

38. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003).

39. *Id.* at 814 (Boggs, J., dissenting).

40. *Id.* at 810–14.

“Procedural Appendix” visited “a grave harm not only to [himself and the other judges who joined his dissent], but to this court and even to the Nation as a whole.”⁴¹ Judge Clay similarly called Judge Boggs’ dissent “an embarrassing and incomprehensible attack on the integrity of the Chief Judge and this Court as a whole.”⁴² This conflict caught the attention of the national news media.⁴³

More recently, the Fifth Circuit was in the spotlight after one of its judges intimated that the outcome of a case turned on the political affiliations of the judges who decided it.⁴⁴ *Thomas v. Bryant* was a vote dilution case brought under Section 2 of the Voting Rights Act.⁴⁵ After the district court found for the challengers, Mississippi asked the Fifth Circuit to stay the decision.⁴⁶ A divided panel partially denied the stay.⁴⁷ Judge Costa, an Obama appointee, and Judge Dennis, a Clinton appointee, were in the majority.⁴⁸ Judge Clement, who was appointed by George W. Bush, dissented.⁴⁹ After attacking the majority opinion on the merits, Judge Clement closed her dissent with this startling assertion: “I am afraid defendants [lost because they] have simply had the poor luck of drawing a majority-minority panel,”⁵⁰ seemingly referring to the fact that the panel consisted of two judges appointed by Democratic presidents, when the entire Fifth Circuit has more Republican-

41. *Id.* at 752 (Moore, J., concurring).

42. *Id.* at 772 (Clay, J., concurring).

43. See Adam Liptak, *Court Report Faults Chief Judge in University Admissions Case*, N.Y. TIMES (June 7, 2003), <https://www.nytimes.com/2003/06/07/us/court-report-faults-chief-judge-in-university-admissions-case.html> [<https://perma.cc/XY3W-JAT8>].

44. *Thomas v. Bryant*, 919 F.3d 298, 325 (5th Cir. 2019).

45. *Id.* at 301.

46. *Id.*

47. *Id.* at 316.

48. *Id.* at 298–301; see *Costa, Gregg Jeffrey*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/costa-gregg-jeffrey> [<https://perma.cc/2AML-ZFNE?type=image>]; *James, L.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/dennis-james-l> [<https://perma.cc/Z7FR-DU2A?type=image>].

49. *Thomas*, 919 F.3d at 316 (Clement, J., dissenting in part); *Clement, Edith Brown*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/clement-edith-brown> [<https://perma.cc/J56T-VPPL?type=image>].

50. *Thomas*, 919 F.3d at 325 (Clement, J., dissenting in part).

appointed judges.⁵¹ Like the Sixth Circuit spat, this decision also received public attention⁵² and even earned Judge Clement an ethics complaint.⁵³

These invective opinions demonstrate that the judiciary, too, can be polarized, and partisanship can reveal itself in court decision-making. However, this kind of infighting is rarely featured in the Fourth Circuit. That is what made *Manning v. Caldwell* so noteworthy.

IV. A SIGN OF THINGS TO COME?

Manning v. Caldwell is an interesting case on its face. It involves a class action brought on behalf of Virginians, who experience homelessness and suffer from alcoholism, challenging the state's "habitual drunkard" law.⁵⁴ The law had two parts. A person was interdicted as a "habitual drunkard" in a civil proceeding, and once that happened, the person was prohibited from possessing or consuming alcohol.⁵⁵ The plaintiffs argued that the law was unconstitutionally vague and that its targeted enforcement constituted cruel and unusual punishment in violation of the Eighth Amendment and the Fourteenth Amendment's Due Process and Equal Protection Clauses.⁵⁶

The district court dismissed the case, and a panel of the court affirmed.⁵⁷ The Fourth Circuit took the case en banc and reversed.⁵⁸ The majority opinion, written jointly by Judge Keenan and Judge Motz, held that the law was unconstitutionally vague because "the term 'habitual drunkard' specifies no standard of conduct."⁵⁹ The majority further held that the scheme violated the Eighth Amendment as applied to the plaintiffs because it "targets them for

51. See, e.g., Mark Joseph Stern, *Fifth Circuit Judge Does Her Best Trump Impression in Opinion Attacking Liberal Colleagues*, SLATE (Mar. 25, 2019), <https://slate.com/news-and-politics/2019/03/clement-mississippi-reeves-senate-gerrymander.html> [<https://perma.cc/8NXW-P4MC>].

52. See *id.*; see also Kevin Drum, *White Mississippi Judge Not Happy with Non-Republican Colleagues*, MOTHER JONES (Mar. 25, 2019), <https://www.motherjones.com/kevin-drum/2019/03/white-mississippi-judge-not-happy-with-non-white-colleagues/> [<https://perma.cc/NHM6-HHQH>]; Debra Cassens Weiss, *5th Circuit Judge Raises Eyebrows with 'Majority-Minority Panel' Reference in Gerrymandering Case*, ABA J. (Mar. 27, 2019), <http://www.abajournal.com/news/article/huh-5th-circuit-dissenter-raises-eyebrows-with-reference-to-majority-minority-panel> [<https://perma.cc/VWM9-JZYP>].

53. Debra Cassens Weiss, *Lawyer's Ethics Complaint Targets 5th Circuit Judge for Alleged 'Vitriolic' Dissent*, ABA J. (Apr. 12, 2019), <http://www.abajournal.com/news/article/lawyers-misconduct-complaint-targets-5th-circuit-judge-for-vitriolic-and-highly-partisan-dissent> [<https://perma.cc/Q7Y5-446G>].

54. *Manning v. Caldwell*, 930 F.3d 264, 268 (4th Cir. 2019) (en banc).

55. *Id.* at 268–69.

56. *Id.* at 270.

57. *Id.*

58. *Id.*

59. *Id.* at 278 (emphasis omitted).

special punishment for conduct that is both *compelled by their illness* [their alcoholism] and is *otherwise lawful* for all those of legal drinking age.”⁶⁰

Judge Wilkinson authored the principal dissent.⁶¹ Casting the majority opinion as “unprecedented,” Judge Wilkinson thought the majority got the vagueness question wrong because, in his opinion, the vagueness doctrine does not apply to civil statutes.⁶² He thus accused the majority of “stretching [the] vagueness doctrine to meet its preferences.”⁶³ As for the Eighth Amendment question, Judge Wilkinson believed the scheme did not punish the plaintiffs’ statuses as alcoholics but instead punished their acts of possessing or consuming alcohol.⁶⁴ Given this distinction, he thought the Virginia scheme was in accord with the Supreme Court’s Eighth Amendment case law.⁶⁵ In the end, Judge Wilkinson had this to say about the majority opinion: It is “an assault upon the constitutional, democratic, and common law foundations of American civil and criminal law, and most importantly, to the judge’s place within it.”⁶⁶ It “aspires to rework our constitutional system” and “erodes the states’ role as separate sovereigns entrusted to define the criminal law within their own borders.”⁶⁷ And it is “an affront to our legal traditions” that “operates to visit structural and institutional damage in so many respects.”⁶⁸ Indeed, Judge Wilkinson found it “hard to imagine a decision so infused with ruinous consequences or so insensitive to a judge’s inability to rework society from the bench”⁶⁹ and “hard to believe a single decision could inflict more damage.”⁷⁰

Judge Keenan (joined by Judges Motz and Thacker) separately concurred, believing “the alarmist tone of the principal dissent warrant[ed] separate comment.”⁷¹ Judge Keenan worried “about the message [judges] convey to the public when [they] attempt to bolster legal analysis by making assertions suggesting malfeasance by judges who disagree with [their] position.”⁷² Judge Keenan wondered, “what message [this] send[s] to trial judges and lawyers who know that such assertions are false? Will they view these broadsides as

60. *Id.* at 281.

61. *Id.* at 286.

62. *Id.* at 286, 304 (Wilkinson, J., dissenting).

63. *Id.* at 304.

64. *Id.* at 291–92.

65. *Id.* at 293.

66. *Id.* at 287.

67. *Id.* at 297.

68. *Id.* at 304–05.

69. *Id.* at 304.

70. *Id.* at 287. Judge Diaz’s dissent mostly agreed with the reasoning of the principal dissent. *See id.* at 306 (Diaz, J., dissenting).

71. *Id.* at 286 (Keenan, J., concurring).

72. *Id.*

evidence of institutional disharmony?”⁷³ In Judge Keenan’s view, “[s]uch attacks are not part of a ‘vigorous exchange of views,’ but instead detract from any substantive analysis.”⁷⁴ Judge Keenan closed her concurrence with this parting wish: “Our Court has a cherished tradition of civility. In that spirit, I express hope that we will turn away from the use of inflammatory language, which diminishes the value of our work.”⁷⁵

Judge Wilkinson did not let Judge Keenan have the last word. Writing a special dissent, Judge Wilkinson stood by his dissenting opinion “[w]ith all respect” and explained that in his “mind, mutual respect and collegiality are enhanced, not compromised, by a vigorous exchange of views over basic and fundamental principles of law.”⁷⁶ And while Judge Wilkinson noted that “civil discourse is often the best antidote to a coarsening culture,” he went on to say that “civility, for all its value, may also be used as a censoring mechanism to drain and dilute dissenting voices.”⁷⁷ Judge Wilkinson thanked the majority for “the sincere expression of their views” and for their service to the court, but “[t]hat having been said,” he concluded that they still have “a deep and honest difference of opinion” that “can neither be brushed off nor wished away.”⁷⁸

While these dueling opinions did not get the level of national coverage as the examples from the Fifth and Sixth Circuits, their back-and-forth did not go unnoticed. The separate opinions were mentioned in much of the decision’s coverage.⁷⁹ In fact, the separate opinions spurred one legal blog that covers the Fourth Circuit to publish a post asking: *Institutional Disharmony in the Fourth Circuit? Or Merely Patriotic Dissent?*⁸⁰

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 305 (Wilkinson, J., dissenting).

77. *Id.* at 306.

78. *Id.*

79. See, e.g., Nick Sibilla, *Federal Court Strikes Down Virginia’s “Habitual Drunkard” Law That Criminalized Owning Alcohol*, FORBES (Aug. 2, 2019), <https://www.forbes.com/sites/nicksibilla/2019/08/02/federal-court-strikes-down-virginias-habitual-drunkard-law-that-criminalized-owning-alcohol/#25cbfe171d39> [<https://perma.cc/G5A6-NNF7>]; Debra Cassens Weiss, *Habitual Drunkard Law Is Struck Down by Full Appeals Court in Closely Divided Opinion*, ABA J. (July 17, 2019), <http://www.abajournal.com/news/article/habitual-drunkard-law-is-struck-down-by-closely-divided-federal-appeals-court> [<https://perma.cc/AY59-NJQU>]; Ed Whelan, *Sharply Divided Fourth Circuit Rules Against Virginia’s Regulation of ‘Habitual Drunkards’—Part 2*, NAT’L L. REV. (July 18, 2019), <https://www.nationalreview.com/bench-memos/sharply-divided-fourth-circuit-rules-against-virginias-regulation-of-habitual-drunkards-part-2/> [<https://perma.cc/4RA2-WDG8>].

80. Patrick M. Kane, *Institutional Disharmony in the Fourth Circuit? Or Merely Patriotic Dissent*, FOX ROTHSCHILD: N.C. APP. PRAC. BLOG (July 18, 2019), <https://www.ncapb.com>

The answer is unclear. As the court settles into its new configuration, it will be interesting to see if collegiality will continue to define the Fourth Circuit or if the court will fall prey to the polarization of current times. Hopefully, the Fourth remains friendly.⁸¹

[/2019/07/18/institutional-disharmony-in-the-fourth-circuit-or-merely-patriotic-dissent/](https://perma.cc/44L6-Q5R9)
[<https://perma.cc/44L6-Q5R9>].

81. A postscript: The Fourth Circuit heard more en banc cases during the 2019–2020 Term than it had in recent memory. And most of the cases were closely divided along party lines of the appointing president. See *supra* note 11.

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