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Survey of Developments in the Fourth Circuit: 1980

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SURVEY OF DEVELOPMENTS IN THE FOURTH CIRCUIT: 1980

Administrative Law .................................................. 633
Civil Procedure .......................................................... 642
Civil Rights ............................................................... 645
Commercial Law .......................................................... 655
Constitutional Law ...................................................... 670
Criminal Law .............................................................. 680
Labor Law ................................................................. 694
Prisoners' Rights ........................................................ 703
Tax ........................................................................... 706
Torts ......................................................................... 717

ADMINISTRATIVE LAW

I. THE DOCTRINE OF ADMINISTRATIVE RES JUDICATA AND THE MENTALLY INCOMPETENT

The slowly developing recognition that special procedural safeguards are necessary in order to protect the due process rights of the mentally ill\(^1\) received new support from the Fourth Circuit Court of Appeal's recent opinion in Shrader v. Harris.\(^2\)

At least with respect to Social Security disability claims, Shrader carves out a narrow exception to the doctrine of administrative res judicata.\(^3\) The court's decision prohibits:

\(^{2}\) 631 F.2d 297 (4th Cir. 1980).
\(^{3}\) 20 C.F.R. § 404.937(a) (1979) provides that with respect to Social Security claims an administrative law judge may, on his own motion, dismiss a hearing request where a previous decision by the Secretary with respect to the rights of the same party on the same facts regarding the same issue has become final.

Claude Danny Shrader filed applications for disability benefits in 1968, 1970, 1974, and 1977 alleging on each occasion "physical disability caused by shrapnel wounds he received in Vietnam." 631 F.2d at 299. Shrader presented each of the first three claims pro se and each was decided adversely to Shrader without a hearing. Shrader did not appeal any of these decisions.

Shrader was assisted by an attorney on his 1977 claim. This claim was denied ex parte. Shrader asked for a hearing before an administrative law judge (ALJ). In support of this motion, Shrader filed a report conducted by a psychiatrist and
[T]he Secretary from summarily invoking the doctrine of res judicata when a claimant presents prima facie proof that mental illness prevented him from understanding the procedure necessary to obtain an evidentiary hearing after the denial of his prior pro se claim. Instead, the Secretary will be obliged to conduct an evidentiary hearing to determine the claimant's mental competency. Only if the claimant is found incompetent need the Secretary afford him an evidentiary hearing on the merits of his claim.  

Before the court could reach the merits of Shrader's claim, they had to address the question of whether the federal courts had jurisdiction to review the Secretary's decision not to hold a hearing on a claim. The district court dismissed the action for want of jurisdiction, relying on Califano v. Sanders and Teague v. Califano. The Fourth Circuit believed that the district court had failed to appreciate the constitutional question exception to the general rule against judicial review.

clinical psychologist in 1977 which dealt with Shrader's mental competency. The ALJ dismissed this request concluding that "the psychiatric report did not establish mental impairment prior to 1971 when Shrader met the Act's earning requirements." Id. The ALJ applied the doctrine of res judicata found in 20 C.F.R. § 404.937(a) and "held that the ex parte denial of the 1974 application barred the right to a hearing on the 1977 claim." Id.

1 631 F.2d at 302.
2 430 U.S. 99 (1977). In Sanders the Court rejected the argument that 42 U.S.C. §§ 405(h) and 405(g) confer jurisdiction on federal courts to review the Secretary's decision not to reopen a claim.

Section 405(h) of the Social Security Act provides that "[n]o findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency" except where such review is provided for within the Act. Section 405(g) is the only section in the Act which deals with judicial review. It allows review of "any final decision of the Secretary made after a hearing . . . ." (emphasis added).

5 560 F.2d 615 (4th Cir. 1977). In this case the court extended the applicability of Sanders' jurisdictional bar beyond motions to reopen to administrative res judicata decisions. Id. at 617-18. As for the further extension of the bar to ex parte denials, See Matos v. Secretary, 581 F.2d 282 (1st Cir. 1978).

7 As explained in Sanders:

Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions . . . [W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by
In light of the recognition that entitlement of Social Security disability benefits is a statutory property interest protected by the due process clause, the Fourth Circuit correctly identified the existing constitutional claim. It stated that although Shrader "did not expressly cite the fifth amendment, it is apparent that he claimed a denial of due process on the ground that his mental illness prevented him from understanding the procedures to obtain review of the denial of his earlier claims."

The fact that Shrader's constitutional claim was not squarely presented to the Secretary did not affect the court's jurisdiction. The court noted that Shrader's constitutional claim was only collateral to his claim for benefits, that his administrative remedies had been exhausted by the presentation of his claim in 1977, and that the dismissal of his request for a hearing and the resulting denial of benefits constituted a final agency action. Given these facts and the fact that the constitutional question "was inappropriate for decision by the Secretary" the court concluded that it had "jurisdiction over [Shrader's] constitutional claim."

In addressing the merits of Shrader's constitutional claim, the court employed the test established by the Supreme Court in *Mathews v. Eldridge* for determining whether challenged administration procedures comport with procedural due process. Application of this analysis clearly supports the Fourth Circuit's imposition of minimal additional procedural steps aimed at ensuring due process protection for the mentally incompetent who

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"clear and convincing" evidence.

430 U.S. at 109.


9 631 F.2d at 299.

10 Id. at 300.

11 Id.

12 Id.

13 424 U.S. 319 (1976). The three distinct factors to be considered: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Id.* at 335.
might otherwise never enjoy the fundamental right of "'the opportunity to be heard'... at a meaningful time and in a meaningful manner.'"

Eldridge's first requirement, that a private interest be affected by the official action was readily satisfied in this case. If the ex parte denial of a previous application is allowed to support summary res judicata dismissal of subsequent applications, a disabled claimant who is mentally ill, despite his incompetency, will forever be denied a chance to be heard.

The second element of the Eldridge test required a consideration of the "risk of an erroneous deprivation of [the private] interest through the [administrative] procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Congress demonstrated an awareness of the risk of an erroneous deprivation in this type of proceeding by affording de novo evidentiary hearings as a matter of right to claimants receiving ex parte denials, however, it failed to address the predicament of the mentally ill claimant incapable of understanding the provided procedure. The court refused to attribute Congress' silence to an intent to deprive the mentally ill claimant of a hearing by the application of the doctrine of res judicata.

The court in addressing the value of additional procedural safeguards concluded that "the Secretary [could] eliminate this risk [to the mentally incompetent claimant] by conducting a hearing on the claimant's competency before invoking the doctrine [of res judicata] to bar his subsequent claim."

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14 631 F.2d at 301 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
15 See note 13 supra.
16 631 F.2d at 301.
17 See note 13 supra.
19 631 F.2d at 301-302.
20 The court noted that if it interpreted the statute as precluding a hearing for the mentally incompetent it "would raise an unnecessary, and therefore improper, question of its constitutionality." Id. at 302. (citing Greene v. McElroy, 366 U.S. 474, 507-508 (1950) and Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936)).
21 631 F.2d at 302.
The final element of the *Eldridge* test required the court to "consider the burden on the government of changing the challenged procedure." The Fourth Circuit believed that the burden placed on the Secretary by the additional procedures it must employ when dealing with mentally incompetent claimants was "relatively light."

The court noted that its "opinion applies solely to claimants afflicted by mental illness whose initial claims, presented pro se, were denied ex parte." The burden is on the claimant to "present prima facie evidence of incompetency." If he meets this burden the Secretary is required to grant a claimant an evidentiary hearing to determine the claimant's mental competency. The Secretary must afford the claimant an evidentiary hearing on the merits of his claim only if the claimant can establish his incompetency.

The court concluded its opinion by noting that while the judiciary was the proper forum to decide constitutional questions it was the Secretary who must initiate the fact-finding process necessary to implement the court's constitutional decision. The court, therefore, ordered the district court to remand the case to the Secretary so that an evidentiary hearing might be held to determine Shrader's mental competency to understand the administrative process and its implications.

*Wm. Douglas Taylor*
II. THE Chrysler v. Brown STANDARD: PUBLIC DISCLOSURE OF HEALTH SERVICES' COST REPORTS

In Humana of Virginia v. Blue Cross of Virginia,1 the Fourth Circuit Court of Appeals was confronted with the conflicting interests of the public's right to know, granted by the disclosure provisions of the Freedom of Information Act (hereinafter FOIA),2 and the desire for confidentiality generally held by those obligated to comply with governmental demands for information.3 Humana of Virginia (hereinafter Humana), providers of services under the Medicare program,4 are required to file cost reports containing detailed financial information with Blue Cross of Virginia.5 By force of a regulation promulgated by the Secretary of Health, Education and Welfare, these cost reports are available to the public upon written request.6 After receiving notification that Blue Cross intended to comply with such a request, Humana, alleging that the regulation mandating disclosure contravened both exemption four of the FOIA7 and the Trade Secrets Act,8 sought injunctive relief to prevent disclo-

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1 622 F.2d 76 (4th Cir. 1980).
6 20 C.F.R. § 422.435 (1980). This regulation provides: "The following shall be made available to the public under the conditions specified: ... (c) Upon request in writing, cost reports submitted by providers of services pursuant to section 1816 of the Act to enable the Secretary to determine amounts due such providers."
7 5 U.S.C. § 552(b)(4) (1976). This section exempts matters that are privileged, confidential, commercial, financial in nature, or trade secrets from the general requirements of the Act.
8 18 U.S.C. § 1905 (1976). This section provides:

   Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof of any book containing any abstract or particulars thereof to be
sure. The district court relied upon the Fourth Circuit's decision in *Westinghouse Electric Corp. v. Schlesinger* in reaching its conclusion that the cost reports supplied by Humana contained information protected from disclosure by exemption four of the FOIA. The district court, therefore, believed it was proper to enjoin disclosure of these materials to prevent the likelihood of substantial harm to Humana's competitive position.

The Fourth Circuit stayed Humana's appeal of the district court's holding pending the Supreme Court's decision in *Chrysler Corp. v. Brown.* The court applied the test established in *Chrysler* and held that the Secretary's regulation enjoys the "force and effect of law," and, therefore, disclosure of the cost reports pursuant to the regulation is not prohibited by section 1905 of the Trade Secrets Act. The court further held that pro-

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seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.


*Westinghouse* held, *inter alia,* that the FOIA "confers on a supplier of private information, an implied right to invoke the equity jurisdiction to enjoin the disclosure of information within Exemption 4." *Id.* at 1210. The district court in *Humana* believed that, under this holding, Humana was entitled to injunctive relief if it could demonstrate that its cost reports were "confidential within the meaning of exemption 4." Humana of Virginia, Inc. v. Blue Cross of Virginia, 455 F. Supp. 1174, 1176 (E.D. Va. 1978).


11 The Supreme Court's holding in *Chrysler* differed from the Fourth Circuit's holding in *Westinghouse* by rejecting the notions that the FOIA and Trade Secrets Act (42 U.S.C. § 1905) created private causes of action to enjoin the disclosure of information that may fall within exemption 4 of the FOIA or violate the Trade Secrets Act respectively. 441 U.S. at 294, 316.

The Court in *Chrysler* held that the Administrative Procedure Act (APA) (5 U.S.C. §§ 702, 706(2)(A)) provided for judicial review of an agency's decision to release material which could conceivably contravene § 1905. *Id.* at 317. The Court noted that a disclosure of information in violation of § 1905 is "not in accordance with law" and that § 706(2)(A) of the APA requires reviewing courts to set aside agency action which is not in accord with the applicable law. *Id.* at 318. However, the Court further noted that if disclosure of information is "authorized by law" it is not in violation of § 1905. *Id.* at 295-300. Thus, the question facing the Fourth Circuit in *Humana* was "whether 20 C.F.R. § 422.435 provides the authorization by law contemplated by § 1905 which permits disclosure." 622 F.2d at 78.


13 622 F.2d at 79. See note 11 supra.
mulgation of the regulation, judged in accordance with the standard of review provided under the Administrative Procedure Act, was not arbitrary and capricious and therefore should not be set aside.14

As a result of the Chrysler decision, the court was limited to determining "whether 20 C.F.R. § 422.435 provides the authorization by law contemplated by § 1905 which permits disclosure."15 The Supreme Court established a three-part test in Chrysler for determining whether a regulation has the "force and effect of law" necessary to provide the required authorization.16 Humana conceded that the first two parts of the test were satisfied with respect to 20 C.F.R. § 422.435,17 so it was only necessary for the court to determine whether the required nexus existed between the regulation and the delegation of legislative authority.

A specific grant of authority to promulgate the regulation is not needed to establish this nexus.18 A court must only be able to reasonably conclude "that the grant of authority contemplates the regulations issued."19 Considering the language Congress incorporated into the relevant grant of legislative authority,20 the Fourth Circuit concluded that disclosure regulations like 20 C.F.R. § 422.435 had been contemplated.21 Congress provided that "[n]o disclosure ... of any file, record, report or any other paper, or any information, obtained at any time by the Secretary of Health, Education and Welfare ... shall be made except as the Secretary ... may by regulation prescribe ...."22 Such comprehensive language would clearly prohibit disclosure of the cost reports submitted by Humana were it not for the

14 Id. at 79-80.
15 Id. at 78. See note 11 supra.
16 441 U.S. at 301-04. The three parts of the test require that: 1) the regulation must be a substantive or legislative-type rule; 2) the regulation must have been promulgated in accordance with the rule-making requirements of the APA; and 3) a nexus must be shown between the regulation and some delegation of the requisite legislative authority by Congress.
17 622 F.2d at 78.
19 Id.
21 622 F.2d at 79.
Secretary's issuance of regulations permitting disclosure. The Secretary has broad discretion in permitting disclosure of such information; therefore, "[a]t the very least § 1306 may reasonably be construed to contemplate the promulgation of 20 C.F.R. § 422.435." With the nexus requirement met, the regulation "is entitled to 'force and effect of law'." Accordingly, disclosure of the cost reports pursuant to the regulation is not prohibited by § 1905."

In analyzing Humana's final contention, that promulgation of the regulation was arbitrary and capricious, the Fourth Circuit noted that it was limited to ascertaining whether regulation was based on a consideration of the relevant factors. The Secretary's statement which accompanied the promulgation of 20 C.F.R. § 422 revealed that it was his opinion that release of the reports would make providers more accountable to the public and thereby promote proper expenditure of public funds. The Secretary had also considered and rejected non-disclosure alternatives as being inconsistent with the FOIA. To give the provider the option of preparing an abstract of the complete cost report was also unacceptable because it would allow the provider to withhold from the public any information he chose. The Secretary finally concluded that even though the cost reports may contain confidential financial information, "it is not in the public interest to withhold the reports from the public." The court believed that the Secretary had obviously based its regulation on the consideration of relevant factors; and, therefore, it was not arbitrary and capricious.

23 622 F.2d at 79 (quoting St. Mary's Hosp. Inc. v. Harris, 604 F.2d 407, 410 (5th Cir. 1979)).
24 Id.
25 Id. The court noted that they were not permitted to substitute their judgment for that of the Secretary under the Supreme Court's holding in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). They noted further that the Court's holding in SEC v. Chenery Corp., 318 U.S. 80, 87 (1943) required that their determination "be made on the administrative record and not by de novo review." 622 F.2d at 79.
27 Id.
28 Id.
29 Id.
30 622 F.2d at 80.
Given the limited scope of review and the holding of Chrysler v. Brown, the Fourth Circuit was clearly justified in reversing the district court and concluding that disclosure of the cost reports was in accordance with the law.

Wm. Douglas Taylor

**CIVIL PROCEDURE**

I. **THE FOURTH CIRCUIT INTERPRETS WEST VIRGINIA'S "SAVINGS STATUTE"**

West Virginia's "savings statute" was accorded a liberal construction by the Fourth Circuit Court of Appeals in the recent case of Stare v. Pearcy. The savings statute provides that if an action is dismissed or reversed upon a ground which would not preclude a new action for the same cause, the statute of limitations which would normally apply to the action will be extended one year from the date of the dismissal or reversal. In Stare, dismissal for lack of personal jurisdiction over the defendants from a foreign forum was held to constitute an involuntary dismissal of the type necessary to invoke the protection of the savings statute in extending the applicable statute of limitations.

The plaintiffs in Stare, husband and wife and citizens of Ohio, were injured in an automobile collision in West Virginia.

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21 See note 25 supra and accompanying text.
23 622 F.2d at 80.

1 W. VA. CODE § 55-2-18 (1981 Replacement Vol.).
2 617 F.2d 43 (4th Cir. 1980).
3 W. VA. CODE § 55-2-18 (1981 Replacement Vol.) provides:

If any action or suit commenced within due time . . . should be arrested or reversed on a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action of suit by reason of such cause having been dismissed for want of security for costs, or by reason of any other cause which could not be pled in bar of an action or suit . . . the same may be brought within one year after such . . . dismissal . . . or after such arrest or reversal . . .

4 617 F.2d at 46.
They filed a suit for damages in the United States District Court for the Northern District of Ohio within the time period statutorily prescribed for tort actions by both Ohio and West Virginia law, but their complaint was dismissed for lack of personal jurisdiction over the defendant, a West Virginia citizen. Subsequently they brought suit in the United States District Court for the Northern District of West Virginia, where their action was dismissed on the ground that the two-year statute of limitations had run prior to their filing. This decision reflected a narrow interpretation of the provisions of West Virginia Code section 55-2-18. It asserted that dismissal from a federal district court of another state did not provide a basis for extending the statutory limitations period to allow plaintiffs to maintain their suit after the expiration of the original two-year period. Plaintiffs appealed, and the Fourth Circuit Court of Appeals reversed, holding that the remedial nature of the statute mandated a liberal construction—one which would allow involuntary dismissal from another jurisdiction to invoke the one-year extension granted by the savings statute.

The Fourth Circuit emphasized that the purpose of the statute was to remedy the harsh effect of the statute of limitations when a plaintiff appears to have a cognizable claim but through mistake or inadvertence has suffered dismissal or reversal in a trial court. It determined that this remedy should be available to those persons whose mistake involved the improper filing of a suit in a foreign forum.

Although the precise question presented in *Stare* had never been addressed by a West Virginia court, the Fourth Circuit cited two West Virginia cases in support of its holdings. The West Virginia Supreme Court of Appeals in *Tompkins v. Pacific* Mutual Life Ins. Co., 52 W. Va. 479, 44 S.E. 439 (1903).
Mutual Life Insurance Co.\textsuperscript{11} held that the savings statute would operate to give the plaintiffs an extension of one year from the date that their original action had been dismissed from a federal court in West Virginia in which to file an action in a West Virginia state court. In 1973 the West Virginia court reaffirmed the holding in Tompkins in Litten v. Peer.\textsuperscript{12} The Fourth Circuit concluded that the "guidance" to be gleaned from these cases was that "West Virginia's saving statute is to be liberally construed."\textsuperscript{13}

Judge Field, who filed a dissent in Stare, vigorously opposed the majority's holding. He cited a number of cases from jurisdictions other than West Virginia which had held that the filing and subsequent dismissal of a case in a foreign jurisdiction did not save a later action filed in the courts of the forum state after the statute of limitations had run but within a year of the dismissal in the foreign jurisdiction.\textsuperscript{14} Judge Field also criticized the majority for citing the holdings of Tompkins and Litten in support of their decision.\textsuperscript{15}

The difference of opinion exhibited in this case between Judge Field and the majority does not involve any faulty interpretations of the statute or case precedents. Rather, it represents an honest split of opinion over whether a dismissal of a claim from a foreign jurisdiction will allow the unsuccessful claimant to receive the benefits of the forum state's savings statute in extending the time in which he may file an action in

\textsuperscript{11} 52 W. Va. 479, 44 S.E. 439 (1903).
\textsuperscript{12} 156 W. Va. 791, 197 S.E.2d 322 (1973).
\textsuperscript{13} 617 F.2d at 46.
\textsuperscript{14} Andrew v. Bendix Corp., 452 F.2d 961 (6th Cir. 1971), cert. den., 406 U.S. 920 (1972); Riley v. Union Pacific R.R. Co., 182 F.2d 765 (10th Cir. 1949); Estate of Tuckman v. Estate of Cottle, 175 F.2d 775 (10th Cir. 1949); High v. Boradnax, 271 N.C. 313, 156 S.E.2d 822 (1967); Morris v. Wise, 293 F.2d 547 (Okla. 1966).
\textsuperscript{15} Judge Field noted both Tompkins and Litten had involved situations where the first action had been commenced in a federal court in West Virginia and the second action was allowed to proceed when it was filed in a state court "within the period allowed by the savings statute." 617 F.2d at 48. Judge Field concluded that the West Virginia Supreme Court's sanction of the use of the savings statute in this manner was the result of an application of the "general rule" and was not evidence of a willingness to interpret the savings statute liberally. \textit{Id.}
FOURTH CIRCUIT DEVELOPMENTS

1981]

the forum state. This split was brought on by a lack of controlling precedent in West Virginia; however, given the West Virginia court's apparent practice of liberally interpreting the savings statute in other contexts, the majority's opinion seems most in harmony with this approach.

Laurie J. Garrigan

CIVIL RIGHTS

I. STANDING FOR TESTERS UNDER THE FAIR HOUSING ACT

The Fair Housing Act of 1968 provides a method for the elimination of discrimination in the sale and leasing of housing based upon race, color, religion, national origin and sex. In order to further the purposes of the Act, Congress expanded the traditional standing requirements to include a broad class of potential plaintiffs. Questions soon arose as to how large Congress meant to expand the plaintiff class. Coles v. Havens Realty Corp., the most recent case attempting to delineate the boundaries of the class of aggrieved persons who may bring a suit

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2 Congress intended to provide all victims of Title VIII [Fair Housing Act] violations two alternative mechanisms by which to seek redress: immediate suit in federal district court (42 U.S.C. § 3612), or a simple, inexpensive, informal conciliation procedure, to be followed by litigation should conciliation efforts fail (42 U.S.C. § 3610). Galdstone, Realtors v. Village of Bellwood, 441 U.S. 91, 104 (1979).
4 633 F.2d 384 (4th Cir. 1980).
under the Act, addresses a question that has not been answered by the United States Supreme Court: does a tester\textsuperscript{6} of housing discrimination have standing to sue under the Fair Housing Act?\textsuperscript{9}

The Coles suit was brought under sections 3601, 3604, and 3612(a) of the Fair Housing Act,\textsuperscript{7} and section 1982 of the Civil Rights Act of 1866.\textsuperscript{8} Three individual plaintiffs, a renter and two testers, all of whom resided in the City of Richmond or Henrico County, Virginia, and one corporate plaintiff, attempted to secure rental information from the defendants, a realty company and its employee.\textsuperscript{9} The renter and a tester, both black were advised by the defendants that no vacancies existed at specific apartment complexes in Henrico County. The white tester, who requested rental information on the same days as the black tester was advised by the defendants that vacancies did, in fact, exist at the same apartment complexes about which the black tester had inquired. The plaintiffs filed suit both individually and as a class consisting of all persons who had rented or sought to rent residential property in Henrico County and who were adversely affected by the defendant realty company's discriminatory practices.\textsuperscript{10} The plaintiffs sought declaratory and injunctive relief as a class, and, in addition, compensatory and punitive damages as individuals.\textsuperscript{11}

\textsuperscript{6} "Testing" is a procedure by which individuals posing as prospective purchasers or tenants survey sales practices of real estate agents to determine if the agency is using discriminatory methods.

\textsuperscript{7} Some lower federal courts have begun to answer the question of tester standing under the Fair Housing Act without guidance from the United States Supreme Court: Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 488 (E.D.N.Y. 1977) (a coalition of residents who had organized a "testing program" was granted standing under the Fair Housing Act); Zuch v. Hussey, 394 F. Supp. 1028, 1051 (E.D. Mich. 1975), aff'd, 547 F.2d 1168 (6th Cir. 1976) (except in the case of a refusal to deal, the Fair Housing Act does not require that a prospective buyer be a bona fide purchaser); Cf. Myers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3rd Cir. 1977) (tester has standing to assert housing discrimination under the Civil Rights Act of 1866, 42 U.S.C. § 1982).

\textsuperscript{8} 42 U.S.C. §§ 3601, 3604, 3612(a) (1976).


\textsuperscript{10} Id. at 385.

\textsuperscript{11} Id.
The district court dismissed all claims except that of the renter, holding that the tester and corporate plaintiffs lacked standing to assert discrimination proscribed by the Fair Housing Act. On appeal, the Fourth Circuit reversed and remanded to the district court, holding that all plaintiffs, including the tester plaintiffs, had standing to assert discrimination under the Fair Housing Act. The court did not reach the question of whether the plaintiffs should be granted standing to prove defendants' violations of 42 U.S.C. § 1982.

The court found that strong public policy reasons existed for affording standing to testers of racial discrimination who unearth Fair Housing Act violations. In those instances where no other effective challenge can be mounted against actions frustrating vital public policy, the court found that testers play an important role in overcoming the evil that exists. The notion of the private attorney general who assists in vindicating the congressional purpose of the Fair Housing Act has previously been used to grant standing to apartment dwellers who had not personally experienced housing discrimination. The court in Coles concluded that testers served the same role as private attorneys general in carrying out the Congressional intent manifested in the Act.

The court's finding of standing in Coles was not the first time standing had been granted to testers of racial discrimination. The United States Supreme Court in Evers v. Dwyer and

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12 Id. at 385.
13 Id.
14 Id. at 387-88.
15 The plaintiffs alleged that the defendants were guilty of "racial steering," a practice by which real estate firms direct potential purchasers or tenants to certain areas based solely on their race or ethnic group. Because the real estate firm never mentions race or ethnicity to the inquirer, he may never realize that he has been discriminated against. Id. at 385.
17 633 F.2d at 388.
18 358 U.S. 202 (1958) (per curiam). Evers held that a black resident who attempted to sit in front of a segregated bus had standing as a tester to sue officials
Pierson v. Ray\textsuperscript{19} found that testers of racial discrimination in public facilities had standing to assert an injury. The Coles' court found that the housing discrimination testers served the same fundamental purpose as the public facilities' testers even though the testers in Coles merely inquired about apartment rentals and did not apply to rent an apartment. The housing testers' inquiry, the Fourth Circuit found, constituted the first step in eradicating racial discrimination in housing, the right to which is no less important than the rights affecting human dignity in Evers and Pierson.\textsuperscript{20}

A plaintiff must allege a demonstrable, particularized injury to himself in order to meet standing requirements and thus obtain judicial review.\textsuperscript{21} The testers in Coles alleged that they were residents of Henrico County, and that the defendants' practice of racial steering adversely affected the area in which they live. The black tester claimed the defendants had denied her the right to rent property and to make and enforce contracts for the lease of real estate in Henrico County, that she had been deprived of the advantages and conveniences she would have enjoyed from living in the area, and that she had "been deprived of the right to the important social, professional, business, political, and aesthetic benefits of interracial associations that arise from living in integrated communities free from housing discrimination."\textsuperscript{22} The white tester claimed deprivation of the same rights that an integrated community would have afforded the black tester.\textsuperscript{23}

In Trafficante v. Metropolitan Life Insurance Co.\textsuperscript{24} and Gladstone, Realtors v. Village of Bellwood\textsuperscript{25} tenants and village residents, respectively, made similar allegations of loss of social and professional benefits due to defendants' discriminatory

\textsuperscript{19} 396 U.S. 547 (1967). Pierson held that a group of black and white clergymen attempting to use a waiting room in a segregated bus terminal had standing as testers to bring suit under 42 U.S.C. § 1983.
\textsuperscript{20} 633 F.2d at 387.
\textsuperscript{21} Warth v. Seldin, 422 U.S. 490, 508 (1975).
\textsuperscript{22} 633 F.2d at 386-87.
\textsuperscript{23} Id.
\textsuperscript{24} 409 U.S. 205 (1972).
\textsuperscript{25} 441 U.S. 91 (1979).
housing practices. The United States Supreme Court awarded both the tenants and residents standing under the Fair Housing Act notwithstanding the fact that they had not been personally turned away from housing for discriminatory reasons.\textsuperscript{26} The Supreme Court found in both cases that the plaintiffs had alleged an injury in fact. Analogizing to those cases, the Fourth Circuit found that the testers in \textit{Coles} had experienced no less of an injury than the apartment tenants or housing residents in the two foregoing cases and that the tester plaintiffs had alleged "such a personal stake in the outcome of the controversy" so as to satisfy Article III case or controversy requirements.\textsuperscript{27}

Reliance on testers in housing discrimination cases has in the past been limited to using testers' documentation to assist in proving an injury to the community and its residents.\textsuperscript{28} But, testers play a vital role in furthering the purposes of the Fair Housing Act, and as individuals in their own right and as members of the community which is injured by racial steering and other discriminatory practice, they should uniformly be granted standing by the federal courts. \textit{Coles} is the first federal circuit court case that has clearly taken such a position. In light of the liberal standing policies of the Fair Housing Act, it will most certainly not be the last.

\textit{Jill Kramer Traina}

\section*{II. Local Legislators Granted Absolute Immunity from Section 1983 Actions}

The Fourth Circuit Court of Appeals in \textit{Bruce v. Riddle}\textsuperscript{1} has extended absolute immunity from damage liability under 42 U.S.C. § 1983 to members of county councils acting within the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{26} In neither case did the United States Supreme Court hold that the plaintiffs had standing as testers. In \textit{Trafficante} the plaintiffs did not allege that they were testers, while in \textit{Bellwood} the plaintiffs did not press their claim that they had standing to sue as testers when their case was heard by the Supreme Court.
\item \textsuperscript{27} \textit{633 F.2d} at 390.
\item \textsuperscript{28} \textit{See, e.g., Zuch v. Hussey, 394 F. Supp. 1028, 1051 (1975).}
\end{itemize}
\end{footnotesize}
scope of their legislative duties. The holding expands the protection of absolute immunity from section 1983 actions which the United States Supreme Court has previously granted to state legislators and regional legislators.

In Bruce, the plaintiff landowner brought an action against Greenville, South Carolina and members of the Greenville County Council, in their official and individual capacities, after the county council rezoned an area of land to prohibit multi-family dwellings. The landowner had planned to build a federally subsidized 150-unit apartment complex on the land and subsequently brought this action under section 1983 claiming that the zoning ordinance was unconstitutionally enacted. The county council had rezoned the land after meeting privately with influential citizens who feared that public housing would be developed on the property.

The district court granted the motion of the individual county council members for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. It held that the landowner's complaint failed to state a cause of action as to the individual members because they were entitled to absolute legislative immunity.

The landowner appealed the district court's dismissal of the individual county council members to the Fourth Circuit. He asked the court to determine whether county councilmen had absolute immunity from damage suits brought under 42 U.S.C. § 1983; and, in the event that they were immune, whether the private meetings they had prior to passing the zoning ordinance placed them outside the scope of their immunity.

In addressing the first issue presented for resolution, the Fourth Circuit reviewed the reasoning of various United States Supreme Court decisions which have held that absolute immunity

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4 631 F.2d at 273.
5 Id.
6 Id. at 274.
7 Id. at 273.
8 Id. at 274.
protects certain state government officers from suit arising under section 1983. In Tenney v. Brandhove the United States Supreme Court grounded its decision that state legislators had absolute immunity from a suit brought under section 1983 on ancient English and early American common law. Common law had reflected the need to encourage legislators to discharge their public trust with firmness by protecting them from damage suits. This common law protection had become so well established by the time Congress passed the Civil Rights Act of 1871, which contained the predecessor of section 1983, that the Court reasoned that Congress had not intended to "impinge on a tradition so well grounded in history and reason by covert inclusion in the general language of § 1983."11

The Fourth Circuit noted that neither English nor American common law had traditionally granted immunity from suit to local legislators. However, it believed that the lack of this tradition was attributable to the fact that there were "relatively few early local legislative bodies" and thus few suits against local legislators. The court concluded that Tenney had been written in a generic sense and its rationale for "immunizing state legislatures could logically apply with equal force to local legislators."14

The Fourth Circuit then reviewed the Supreme Court's decisions in Butz v. Economou and Lake Country Estates, Inc. v. Tahoe Regional Planning Agency in which the Court took a functional approach to the issue of immunity. Butz had held that judicial immunity extended to administrative law judges because the special nature of administrative law judges' responsibilities were of the same nature as judges protected by absolute immunity. In Lake Country Estates, the nature of regional legislators' responsibilities was found to be functionally

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10 Id. at 373.
11 Id. at 376.
12 631 F.2d at 276.
13 Id. at 277.
14 Id.
15 438 U.S. 478 (1978)
17 438 U.S. at 511.
equivalent to that of state legislators, thus the Supreme Court found that the former also enjoyed absolute immunity from federal damage suits.\textsuperscript{18} Lake Country Estates would seem to logically extend to cover local legislators but for the fact that the Supreme Court specifically refused to decide that issue.\textsuperscript{19} The Fourth Circuit noted, however, that four members of the Court in Owens \textit{v. City of Independence}\textsuperscript{20} has used language which seemed to indicate that they believed section 1983 immunity had already been extended to local legislators at the city council level.\textsuperscript{21}

Armed with the opinion of these four members of the Court and utilizing the Supreme Court's functional approach to determine whether immunity exists, the Fourth Circuit held that local legislatures at the county council level were absolutely immune from suits brought under section 1983.\textsuperscript{22}

Turning its attention to the scope of this immunity, the Fourth Circuit addressed the issue of whether a county council’s private meetings with interest groups prior to an official vote lay outside the protection of absolute immunity for legislative acts. The court reasoned that modern legislative procedures through which legislators receive information bearing on proposed legislation include private meetings with interest groups.\textsuperscript{23} In addition, the Fourth Circuit found that both Tenney and Lake Country Estates had asserted that immunity extends to legislative acts beyond the mere delivering of a speech or the giving of a vote.\textsuperscript{24} Therefore, the court of appeals found that the county council was acting within the scope of its legislative duties when it met with partisans on one side of the zoning controversy and that such a legislative act was absolutely immune from suit under section 1983.\textsuperscript{25}

\textit{Jill Kramer Traina}

\textsuperscript{18} 440 U.S. at 405, n.30, 406, 408.
\textsuperscript{19} \textit{Id.} at 404, n.26.
\textsuperscript{20} 445 U.S. 622 (1980).
\textsuperscript{21} \textit{See} 445 U.S. at 664, n.6 (Powell, J. dissenting). The four members of the Court referred to are the Chief Justice and Justices Powell, Stewart, and Rehnquist.
\textsuperscript{22} 631 F.2d at 279.
\textsuperscript{23} \textit{Id.} at 280.
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{Id.}
III. COMMENCEMENT OF ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In response to continuing discriminatory practices affecting the employment of older persons, Congress enacted the Age Discrimination in Employment Act\(^1\) in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."\(^2\) The Act incorporates the enforcement provisions of the Fair Labor Standards Act\(^3\) and the statutes of limitations contained in the Portal-To-Portal Pay Act.\(^4\)

One of the Act's enforcement provisions\(^5\) allows the Secretary of Labor\(^6\) to seek injunctive relief to restrain violations of the Act. Another enforcement provision\(^7\) allows the Secretary to sue on behalf of individuals to recover back pay due to the aggrieved individuals, and for liquidated damages. This provision defined the commencement of an action for purposes of tolling the applicable statute of limitations for each individual claimant as being "the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action."\(^8\)

Against this statutory background, the Fourth Circuit in

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\(^2\) Id. at § 621.
\(^3\) Id. at § 626(b). This provision provides that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures, provided in sections 211(b), 217 of this title." 29 U.S.C. §§ 215-17 (1976) contain the enforcement provisions of the Fair Labor Standards Act.
\(^4\) Id. at § 626(e). This provision provides that "[s]ections 255 and 259 of this title shall apply to actions under this chapter." 29 U.S.C. § 255 (1976) is the statute of limitations provision of the Portal-to-Portal Pay Act.
\(^5\) Id. at § 217 [This section will hereinafter be referred to as Section 17].
\(^7\) 29 U.S.C.A. § 216(c) (West Supp. 1980) [This section will hereinafter be referred to as Section 16(c)].
\(^8\) Id.
Equal Employment Opportunity Commission v. Gilbarco, Inc.\textsuperscript{9} was required to define when an action brought by the Secretary under section 17 of the Act has been commenced for statute of limitations purposes. The court was confronted with a situation in which the Secretary had filed an action under section 17 of the Act prior to the running of the applicable three-year statute of limitations but had failed to name any individual claimants.\textsuperscript{10} Subsequent to the running of the statute of limitations, the individual claimants' names were obtained by the defendant through use of discovery. The narrow issue confronting the court was whether the "commencement of action" definition of section 16(c) was applicable to section 17 actions brought by the Secretary.

The court first determined that the remedies provided in sections 16 and 17 were "distinct and alternative," and thus the particular requirements of section 16(c) had no application to an action brought under section 17.\textsuperscript{11} The court reasoned that "commencement of the action" was a term of art with a common established meaning—"the filing of a complaint."\textsuperscript{12} Thus, "commencement of an action," unless otherwise defined (as in section 16), should be given its established common meaning. Therefore, the court held that the filing of the section 17 complaint by the Secretary tolled the statute of limitations for all individuals who were eventually named through discovery.\textsuperscript{13}

However, since the original complaint contained a claim for liquidated damages recoverable only under section 16, the

\textsuperscript{9} 615 F.2d 985 (4th Cir. 1980).

\textsuperscript{10} A three-year statute of limitations applies when, as in this case, the discharges are claimed to be willful violations of the Age Discrimination in Employment Act. 29 U.S.C. § 255 (1976).

\textsuperscript{11} 615 F.2d at 989.

\textsuperscript{12} Id. at 990.

\textsuperscript{13} Id. The only cases cited by the court in support of its decision were two district court decisions, Wirtz v. Novinger's, Inc., 261 F. Supp. 698 (M.D. Pa. 1968), and Wirtz v. W.G. Lockhard Constr. Co., 230 F. Supp. 823 (N.D. Ohio 1964). Both of these cases were decided prior to enactment of the Age Discrimination in Employment Act; however, they held that a section 17 complaint when used to enforce the provisions of the Fair Labor Standards Act (29 U.S.C. § 201 et seq. (1976)) "did not have to name the individuals on whose behalf the Secretary was proceeding in order to effectively commence the action for statute of limitations purposes." 615 F.2d at 990.
Fourth Circuit affirmed the district court's summary judgment denying this element of the claim, but remanded for further consideration the rest of the claim seeking "employment, reinstatement and back pay," which it thought had been properly brought under section 17.14

This remand prompted a rather lengthy and well-reasoned dissenting opinion by Judge Murnaghan who questioned the remand on the issue of back pay. Judge Murnaghan contends that back pay claims are subject to the section 16(c) limitations since it is that section which provides for recovery of back pay.15

However, section 626(b) of the Act provides:

In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.16

Due to the obviously broad coverage of this provision, the results reached in Gilbarco can be seen as effectuating the purpose of the Age Discrimination in Employment Act.

John Kent Dorsey

COMMERCIAL LAW

I. DISCLOSURE OF GRAND JURY MATERIALS UNDER THE PROVISIONS OF THE ANTITRUST IMPROVEMENTS ACT OF 1976

In United States v. Colonial Chevrolet,1 disclosure of grand jury materials was sought by the United States Attorney General and the State Attorney General of Virginia under 15

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14 615 F.2d at 990-91.
15 Id. at 991-1018.

1 629 F.2d 943 (4th Cir. 1980).
U.S.C. § 15f(b). This section was enacted as part of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The express purpose of this Act was to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving state attorneys general a cause of action [to sue as parens patriae on behalf of the states' citizens] against antitrust violators." Under the Act the United States Attorney General, when he has brought an action under federal antitrust laws, is required to give written notification to any state attorney general who he believes would be entitled to bring an action under the parens patriae authority. Such an action must be based on substantially the same violation of antitrust law as was the federal action. The Act also requires that the United States Attorney General provide the state attorney general, to the extent permitted by law, with any relevant or material investigative files or other materials.

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(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under sections 12 to 27 of this title based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.
(b) To assist a State attorney general in evaluating the notice or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title.


In his report on the final bill as submitted by the conferees, the senate floor leader for the bill stated that "[t]itle III is the legislative response to the present inability of our judicial system to afford equal justice to consumers for violation of the antitrust laws." 122 CONG. REC. 29148 (1976) (remarks of Sen. Abourezk).

5 See note 2 supra.
6 See note 2 supra.
7 See note 2 supra.
In this case the United States Attorney General notified the Virginia attorney general of the successful federal antitrust prosecution of Colonial Chevrolet Corporation. The Virginia attorney general requested that "all grand jury materials" relating to the federal prosecution be made available to him. Both the United States Attorney General and the attorney general of Virginia then moved the federal district court with jurisdiction over the matter for disclosure of the grand jury materials. The district court denied the motion on two grounds; first, the grand jury materials were not seen by the court as "investigative files" under the Act and therefore could not be disclosed by the United States Attorney General, and second, even if the grand jury materials were "investigative files," their disclosure could only be allowed to the extent permitted by Rule 6(e) of the Federal Rules of Criminal Procedure.\footnote{629 F.2d at 946. Rule 6(e) of the Federal Rules of Criminal Procedure states:}

(2) General Rule of Secrecy—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(iii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under sub-paragraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection
interpreted this rule as requiring a showing of "particularized need" which it believed was not met by the Virginia attorney general.9

On appeal, the Fourth Circuit first considered the district court's assertion that the term "investigative files," within the meaning of the statute, did not include grand jury materials. Judge Russell dismissed this argument, stating that the Act's purpose was to make available all materials developed in the federal investigation which were not restricted by law to the State attorney general.10 The well-recognized use of grand jury materials as investigative instruments was also cited as a factor favoring disclosure.11 The opinion reasoned that any prevention of disclosure of grand jury materials would negate the effectiveness of the Act. Further support for disclosure was found in the fact that the only other federal circuit court to decide this issue also concluded that grand jury materials were investigatory files within the meaning of the statute.12

The court dismissed Colonial's argument that Senator Abourezk's statements during the final senate debate on the Hart-Scott-Rodino Antitrust Improvements Act demonstrated a legislative intent that investigative files should not include grand jury materials.13 These remarks were seen as merely in-

with a judicial proceeding; or
(ii) when permitted by a court at the request of the defendant,
upon a showing that grounds may exist for a motion to dismiss
the indictment because of matters occurring before the grand
jury.

If the court orders disclosure of matters occurring before the grand
jury, the disclosure shall be made in such manner, at such time, and
under such conditions as the court may direct.

9 629 F.2d at 946.
10 Id. at 946-47.
11 Id. at 947. See Antitrust Adviser, § 9.6, p. 602 (2d Ed. 1978); Unikel, Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Cir-
12 Id. at 947. See United States v. B.F. Goodrich, Co., 619 F.2d 798 (9th Cir.
1980).
13 Id. at 947. Senator Abourezk in addressing § 15(b) of the Act stated:
The section specifically limits the Attorney General's power to release
documents to whatever his powers are under existing law. Under ex-
sting law he cannot turn over materials given in response to a grand
jury demand or to a civil investigative demand. Therefore the section is
limited by existing law to cases where materials were turned over
dictating that the United States Attorney General could not voluntarily turn over grand jury materials to state attorneys general. Nothing in Senator Abourezk's remarks was seen as prohibiting the court from authorizing disclosure of the grand jury materials in order to support proceedings in a state court.\textsuperscript{14}

The court relied heavily on the House Committee Report concerning the statute. This report stated that the Act "reflect[ed] the committee's desire that the Federal Government cooperate fully with state antitrust enforcers" and that the Justice Department's investigative files were to be made available to the State attorney general "except where specifically prohibited."\textsuperscript{15}

The opinion then considered whether Rule 6(e) of the Federal Rules of Criminal Procedure "specifically prohibited" disclosure of grand jury proceedings. The district court had held that disclosure of grand jury materials was prohibited since the

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voluntarily. This section is in the bill, because it was requested by members of the House conferees, who had met on this.
\end{quote}


\textsuperscript{14} Id. at 947-48.


The exact language of the House Committee Report is as follows:

Section 4P promotes pares patrae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under \$ 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential pares patrae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a pares patrae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general "to the extent permitted by law." This means that the files are to be made available except where specifically prohibited.

Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.

The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

Virginia attorney general hd not shown a "particularized need" for the disclosure.16 This requirement was found by the court to apply only in private litigation.17 Thus, in this case, since a state attorney general, with the capacity to maintain a parens patriae federal antitrust action, sought disclosure, a showing of particularized need was not required.18 The court supported this view stating that Congress, in requiring disclosure of investigative materials, had resolved the public interest considerations surrounding such a disclosure.19 Therefore, state attorneys general had been relieved of demonstrating a "particularized need" as a "threshold condition" for disclosure.20

The state attorney general's right to disclosure in parens patriae suits was not seen as absolute, however, the burden of showing why disclosure should not be granted was placed on those opposing such a disclosure.21 In such situations the district judge can exercise discretion over whether disclosure should be granted.22 This discretion cannot be exercised arbitrarily.23 Moreover, the district court was given the power to impose whatever protective limitations it deemed appropriate on the use of disclosed materials.24

The only other federal circuit court to consider the issues raised in Colonial was the Ninth Circuit in United States v. B.F.

16 The district court noted that Rule 6(e) of the Federal Rules of Criminal Procedure (See note 8 supra) did not establish an absolute bar to the disclosure of grand jury proceedings. However, it believed that the Supreme Court's opinion in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), established the requirement that the parties seeking disclosure had to prove that "the need for [disclosure] outweighs the public interest in secrecy." Id. at 223. In other words, there had to be a demonstration of "particularized need" on the part of the applicant for disclosure. Id. at 221.

17 The Fourth Circuit noted that the requirements set forth in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), applied only where disclosure was sought "by private parties engaged in private litigation." 629 F.2d at 949 (emphasis in original).

18 629 F.2d at 950.

19 Id.

20 Id.

21 Id. at 951.

22 Id. The Fourth Circuit did not give examples of situations in which it would be within the discretion of the district judge to deny disclosure.

23 Id.

24 Id.
In that case the Ninth Circuit reached the same conclusions as the Fourth Circuit in Colonial. It held that Section 15f(b) "impliedly directs the Attorney General of the United States to disclose grand jury materials to state attorneys general without the showing of particularized and compelling need which is normally required by Rule 6(e)." The court considered the need for disclosure of grand jury materials to be greater for state attorneys general than for individuals. This greater need results from the important position which state attorneys general occupy in Congress's antitrust enforcement scheme.

A federal district court ordered disclosure of grand jury materials in In Re Montgomery County Real Estate. The court stated that the House Committee Report on Section 15f demonstrated "a Congressional intention to create an exception to the general rule of grand jury secrecy." Therefore, the disclosure of grand jury materials to the state was seen as permissible when the materials would be helpful to the state in its prosecution of a parens patriae antitrust action.

Several district courts have held that grand jury materials are not investigative files and should not be disclosed, however, the Fourth Circuit's opinion in Colonial adds support to the conclusion that the trend of opinion is toward the belief that grand jury materials should be released to state attorneys general upon the successful conclusion of a federal antitrust suit against a business within their jurisdictions.

Louis F. Williams, Jr.

619 F.2d 798 (9th Cir. 1980).
Id. at 801.
Id.
See note 15 supra.
452 F. Supp. at 62.
Id.
II. THE INTRODUCTION OF EXTRINSIC EVIDENCE TO EXPLAIN AN UNAMBIGUOUS CONTRACT TERM UNDER UCC SECTION 2-202

The Fourth Circuit Court of Appeals in *Brunswick Box Co. v. Coutinho, Caro & Co.* held that the parol evidence rule did not bar the introduction of extrinsic evidence as to intentions of parties in their use of the term “F.A.S. Norfolk, Virginia” in a written agreement. Judge Merhige stated that although the term itself was not ambiguous, other evidence provided a basis for the conclusion that the parties had otherwise agreed as to the meaning of the term.

This case involved a contract dispute between the Brunswick Box Co. and Coutinho, Caro & Co., a New York based exporter. The dispute centered around which party was obligated to pay for the unloading of stevedore pallets from Brunswick’s trucks and the placing of the pallets into storage space contracted out by Coutinho. The contract required Brunswick to ship the pallets it had manufactured “F.A.S. Norfolk, Virginia.” Brunswick delivered the pallets to the appropriate terminal but refused to pay any unloading charges. Coutinho, under protest, paid all of the unloading expenses. Shortly after Brunswick delivered all of the pallets called for under the contract, Coutinho made a claim for the unloading charges against a letter of credit which Brunswick had been required to post under the terms of the contract. The bank paid Coutinho $52,237.50 out of Brunswick’s letter of credit. This payment was based upon Coutinho’s sworn statement that Brunswick had broken the contract by not paying the unloading charges. Brunswick then filed a breach of contract suit against Coutinho alleging that the unloading of the pallets was Coutinho’s responsibility under the contract. The United States District Court for the Eastern District of Virginia, however, directed a verdict against Brunswick. The district court held that the contract represented the parties’ final agreement and “that the meaning of the term ‘F.A.S.’, in light of the custom in the port of Norfolk, clearly required Brunswick to pay the pallet unloading charges.” The opinion stated that the

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1 617 F.2d 355 (4th Cir. 1980).
2 Id. at 361.
3 Id. at 357.
evidence introduced by Brunswick was inadmissible under the parol evidence rule since it contradicted the clear meaning of the contract.4

On appeal Brunswick contended that although the term "F.A.S. Norfolk" was clear and unambiguous, the disputed evidence introduced at trial concerning the parties' course of performance created a factual issue as to the meaning ascribed to that term by the parties. Coutinho argued that the evidence was properly excluded since it was inconsistent with the express terms of the contract.5

Judge Merhige began the circuit court's opinion by recognizing that the Uniform Commercial Code (U.C.C.) controlled any interpretation of the contract.6 The term "F.A.S." is defined in Virginia Code § 8.2-319(2) in the following manner:

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must
(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer . . .

Judge Merhige reasoned that the trial court erred when it limited proof of how the parties might have otherwise agreed on the term "usage of the port."7 The district court should have applied the test for admissibility of evidence under U.C.C. § 2-202 set out in Columbia Nitrogen Corp. v. Royster Co.8

Columbia Nitrogen Corp. involved a breach of contract action by Royster, a phosphate producer, against Columbia for Columbia's failure to purchase a certain amount of phosphate from Royster. Columbia claimed that when the contract terms were

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4 Id. at 356-57.
5 Id. at 357-58.
6 Virginia has adopted the U.C.C. and it controls all transactions involving goods. Va. Code § 8.2-102 (1965 added volume) states: "Unless the context otherwise requires, this title applies to transactions in goods; . . . ."
7 617 F.2d at 359.
explained and supplemented by course of dealing and usage of trade, no obligation was placed upon it to accept the minimum quantities and prices stated in the contract with Royster. The Fourth Circuit held that U.C.C. § 2-202 permitted Columbia to introduce evidence of course of dealing and usage of trade to explain and supplement the express language in the contract. The court stated that under the U.C.C., in contrast to the traditional parol evidence rule, a finding of ambiguity is not required for

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VA. Code § 8.1-205 states:

Course of Dealing and Usage of Trade—(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

10 451 F.2d at 9. U.C.C. § 2-202 states:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

11 Professor Corbin in his treatise on contracts described the parol evidence rule in the following manner: "When the terms of a contract have been embodied
introduction of parol evidence. Rather, "the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement." 

The record in Brunswick demonstrated that each party attached a different meaning to the term "F.A.S." It contained numerous instances where each party viewed the term "F.A.S. Norfolk, Virginia" in a manner inconsistent with the statutory definition. Thus, the Fourth Circuit held that the trial court erred by refusing to allow the parties to go outside the written document and bring in evidence as to course of dealing when determining whether the parties had otherwise agreed as to the meaning of the term "F.A.S." The extrinsic evidence of course of dealing was seen as consistent with the terms of the contract because it helped to explain the true meaning given the term by the parties.

The court in Brunswick correctly applied the U.C.C's liberalized parol evidence rule. U.C.C. § 2-202(a) allows the introduction of information as to course of dealing and usage of trade which would be excluded under the traditional parol evidence rule. West Virginia has also adopted the U.C.C. and its liberalized parol evidence rule contained in § 2-202(a). However, the West Virginia Supreme Court of Appeals has not yet considered

in a writing to which both parties have assented as the definite and complete statement thereof, parol evidence of antecedent agreements, negotiations, and understandings is not admissible for the purpose of varying or contradicting the contract so embodied." A. Corbin, Contracts (One Volume Edition) § 573 (rev. ed. 1952). See also 9 J. Wigmore, Evidence § 2425 (3d ed. W. Jaeger 1961); RESTATEMENT (SECOND) OF CONTRACTS § 239 (1973); RESTATEMENT OF CONTRACTS §§ 237, 240 (1932).

12 451 F.2d at 9.
13 Id.
14 617 F.2d at 361.
15 Id.
16 Id. Except for limited circumstances, parol evidence is not admissible unless consistent with the written terms of a particular agreement under U.C.C. § 2-202. In this case the court did not seriously consider the consistency requirement. For more on this consistency requirement see Wittenberg, Section 2-202: A Different Approach to Consistency, 12 J. MAR. J. OF PRAC. & PROC. 87 (1978).
the issue of whether § 2-202(a) permits the introduction of extrinsic evidence of course of dealing or usage of trade when the contract is not ambiguous. The fact that § 46-2-202(a) of the West Virginia Code is identical to § 8.2-202(a) of the Virginia Code leads to the conclusion that West Virginia would follow the Fourth Circuit's holdings in Columbia Nitrogen Corp. and Brunswick. Therefore, regardless of whether the contract is ambiguous, evidence of course of dealing and usage of trade would be admissible when the evidence indicates that the parties may have otherwise agreed to the meaning of a contract term.

This liberalization of the parol evidence rule will have a significant effect upon the sources available to judges attempting to interpret sales contracts. It will also force businessmen to re-examine "boilerplate" contract provisions and the effect that admissibility of course of dealing and usage of trade may have on interpreting these provisions.

Louis F. Williams, Jr.

III. ACCRUAL OF INDEMNITY ACTIONS UNDER UCC SECTION 2-725

In Walker Manufacturing Co. v. Dickerson, Inc., a subcontractor which had been found liable for the defective construction and workmanship of a roof it had installed sought indemnification from the manufacturer of the roofing materials.

However, the West Virginia Supreme Court of Appeals in Ashland Oil Inc., v. Donahue, 223 S.E.2d 433 (W. Va. 1976) held that parol evidence may be received in order to explain or supplement the writings forming an agreement with reference to a course of dealing or usage of trade or course of performance in order to eliminate vagueness or ambiguity in the agreement.

1 619 F.2d 305 (4th Cir. 1980).
2 The factual background is as follows: On April 21, 1969 Walker Manufacturing Co. (hereinafter Walker) entered into an agreement with Dickerson, Inc. (hereinafter Dickerson) for the construction of a warehouse. Edward's Roofing and Sheet Metal Company (hereinafter Edwards) was in turn employed by Dickerson to install the roof on the building. After the building was completed in May 1970 the roof developed leaks. Edwards made various efforts to correct the problem, but ceased such efforts in May 1971 when the one year warranty of workmanship it had given Dickerson and Walker expired. During the period from June 1971 to May 1975 Walker and Dickerson entered into various negotiations
The manufacturer, relying upon Uniform Commercial Code (U.C.C.) section 2-725, argued that the subcontractor's claim was time barred because it was brought more than four years after the date of delivery of the materials. The district court rejected which resulted in several attempts by Dickerson to correct the problem. Despite the fact that Dickerson spent over $75,000 in the effort, its attempts to repair the roof were largely unsuccessful.

On August 6, 1975 Walker filed a diversity action in federal district court against Dickerson and its surety, Seaboard Surety Co. (hereinafter Seaboard), alleging that Dickerson had breached its contract by the improper construction of the roof. Dickerson and Seaboard in turn filed third-party complaints against the subcontractor Edwards, the architect, Piedmont Engineering and Architects, Inc. (hereinafter Piedmont), and the manufacturer of the roofing materials, The Celotex Corp. (hereinafter Celotex). Edwards cross-claimed against both Piedmont and Celotex.

Prior to trial all parties moved for summary judgment. Seaboard's motion was granted and it was dismissed from the case. The district judge severed the third-party and cross-claims, and the principal case was then tried before a jury in July 1976. At trial the court granted Dickerson's motion for a directed verdict, holding that Walker's action was time barred by the North Carolina three year statute of limitations. On appeal the Fourth Circuit reversed concluding that there was sufficient evidence to permit the jury to consider the application of the doctrine of estoppel to Dickerson's defense, and therefore the district court had erred in directing a verdict. Walker Mfg. Co. v. Dickerson, Inc., 560 F.2d 1184 (4th Cir. 1977). On remand the district court found that Dickerson had breached its contract with Walker and was estopped from asserting the statute of limitations. Dickerson appealed.

At the trial of the third-party claims the jury found that Edwards had breached its subcontract with Dickerson, and that Dickerson was entitled to recover $194,000 from Edwards. The jury also found that despite the negligence of Piedmont and Celotex, Dickerson was estopped from asserting any claim against them. With respect to Edwards' cross-claim the jury found that Edwards was entitled to recover $97,000 from Celotex and $48,500 from Piedmont. Dickerson, Edwards, and Celotex appealed.

In addition to deciding the indemnity issue discussed in the text, the Fourth Circuit also decided that the indemnity clause in Edwards' roofing subcontract supported the judgment in favor of Dickerson for $194,000, and that the evidence was sufficient to support the finding that Dickerson breached its contract with Walker, and was estopped from asserting the defense of the statute of limitations.


(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitations to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of war-
this argument and held that under North Carolina law where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not commence to run against his right to indemnity from the party primarily liable until damages have been paid to the injured party.

On appeal, the Fourth Circuit affirmed, holding that the U.C.C. was not intended to shield manufacturers of defective products from indemnity claims made by their purchasers more than four years from the date of sale, and that the district court, therefore, had correctly applied the North Carolina law as articulated in Hager v. Brewer Equipment Co., and as previously recognized by the Fourth Circuit in Premier Corp. v. Economic Research Analysts.

In Hager, a worker was injured when an elevator malfunctioned. An action was brought against the furnishers of the elevator, who subsequently filed a third-party action against the seller of the elevator for indemnity, based upon negligence and breach of warranty. The court held that the statute of limitations would not begin to run against the indemnity claim until the furnisher was required to pay damages.

The vast majority of jurisdictions agree with the position taken by the North Carolina court in Hager that the statute of limitations for an indemnity action does not begin to run until a judgment has been paid. Although Walker is the first case

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1 17 N.C. App. 489, 195 S.E.2d 54 (1973).
2 578 F.2d 551 (4th Cir. 1978).
3 52 N.C. L. Rev. 921 (1974). For a list of cases from other jurisdictions in accord with the Hager rule, see Hager v. Brewer Equipment Co., 17 N.C. App. at 493-94, 195 S.E.2d at 57. See also 41 Am. Jur. 2d, Indemnity, § 39 (1968); and 51 Am. Jur. 2d, Limitations of Actions, § 287 (1970). It is important to distinguish these cases involving a right to indemnification from cases involving the right to subrogation. In the latter instance it is usually held that a subrogee can acquire no mere rights against a third party than are held by its subrogor. Accordingly an insurer subrogated to the rights of its insured is subject to the same statute of limitations as the insured, and the cause of action will be deemed to accrue at the time of injury, not at the time benefits are paid. See, e.g., Great American Ins.
specifically dealing with the period of limitation contained in U.C.C. section 2-725 as applied against a claim for indemnity, the same reasons which justify the application of the indemnity rule against other state statutes of limitation, also justify its use in a case governed by the U.C.C.\(^7\)

Essentially two policy reasons justify the exception of an indemnity action from the normal statute of limitations: First, a tortfeasor should be held accountable for his wrongful acts; and second, it is wrong for one whose negligence is only secondary to bear the liability for an injury attributable to the primary negligence of another.\(^8\) Furthermore, claims for indemnification are generally viewed as separate and distinct from claims that arise at the time of breach of warranty.\(^9\) The holding in *Walker* that the U.C.C. was not intended to shield manufacturers of defective products from indemnity claims made more than four years after the date of sale is an implicit acceptance of these policies.

Although the application of the *Hager* indemnity rule in a commercial case otherwise governed by the U.C.C. frustrates the policy of the U.C.C. to provide commercial certainty, the rule is not unduly burdensome in light of the ability of a manufacturer to avoid prolonged susceptibility to a potential indemnity action by a valid contractual limitation of the time within which a buyer may commence an action. As a general rule when the parties are involved in an arms-length transaction for a private purpose, and when the language of the contract and the intent of the parties are clear, courts will normally uphold a contract which limits the time of potential liability or which reallocates the risk of either party's negligence.\(^10\)

In *Walker* the Fourth Circuit joined the majority of jurisdictio-
tions in deciding that, in the absence of such contractual provisions, the policies which support the exemption of indemnity claims from the normal statute of limitations are superior to the U.C.C. policy of commercial certainty.

John H. Bicknell

CONSTITUTIONAL LAW

I. THE FIRST AMENDMENT: REGULATION OF STUDENT EXPRESSION

In Williams v. Spencer,1 student editors of an “alternative” school newspaper brought suit against the Montgomery County (Maryland) Board of Education and various school officials for declaratory and injunctive relief, damages and attorney's fees for an alleged interference with their first amendment rights. The plaintiffs sought an order enjoining the school authorities from restraining the distribution of their non-school sponsored publication, Joint Effort, Issue 2, and from enforcing the Publication Guidelines of the Montgomery County school system.

The students published and distributed the issues of Joint Effort on the school grounds with the express permission of the principal. They were not required to seek prepublication or predistribution approval of the contents. Ten to twenty minutes after the sale of the second issue began, the building monitor confiscated the remaining copies and took them to the principal. The principal upheld the seizure and banned any further distribution of that issue on school property.

The principal followed guidelines prescribed under the Student Rights and Responsibilities Policy and within two school days stated the reasons for his action. First a cartoon depicting the building monitor in western clothing was found in violation of publication guidelines in that a “member of the staff [was] depicted in derogatory terms with clear indications of racial overtones.”2 Second, the promotion of drug paraphernalia in the

1 622 F.2d 1200 (4th Cir. 1980).
2 Id. at 1203.
paper through an advertisement by a local headshop "encourages actions which endanger the health and safety of students," also in violation of the publication guidelines.

After unsuccessful administrative appeals to the area superintendent, where an informal hearing was held, and to the superintendent of schools, the students filed suit claiming that the seizure and continued restraint against distribution violated first amendment rights and that the school's regulatory scheme was facially invalid.

The district court rejected the argument that the health and safety regulations were so vague that they were invalid under the first amendment. It also found that the school system's administrative appeal process was not unconstitutionally lengthy. The district court held that the advertisement for the headshop gave the principal the right, under the health and safety regulation, to halt the distribution of the paper. The students appealed.

The Fourth Circuit, at the outset of its opinion, noted that the first amendment rights of school students are not necessarily equal to those of adults, and that the "constitutional right to free speech of public secondary school students may be modified or curtailed by school regulations 'reasonably designed to adjust these rights to the needs of the school environment.'" This theory of law has been utilized by other circuits in dealing with first amendment freedoms in the school system.

The court held that the health and safety regulation was not impermissibly vague. Noting that a prior restraint regulation "must contain precise criteria sufficiently spelling out what is forbidden so that a reasonably intelligent student will know

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3 Id.
4 Id. at 1204. Since the district court found that the health and safety regulation provided sufficient justification for the principal to halt distribution of the paper, it did not address the constitutionality of the regulation which allowed a school to halt distribution of libelous material. Id. at 1204, n.6.
5 Id. at 1205 (citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969)).
6 Id. at 1205 (citing Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971)).
what he may write and what he may not write," the court reasoned that because there was a large number of materials that may be found to encourage actions which endanger the health or safety of students the regulation described as explicitly as is required the kind of material which would allow the principal to halt distribution. The court observed:

The First Amendment rights of the students must yield to the superior interest of the school in seeing that materials that encourage actions which endanger the health and safety of students are not distributed on school property. Because the only type of material regulated by the guideline is material that must yield to the school's superior interest, we think the guideline does not prohibit constitutionally protected conduct of the students. Thus, the guideline is not unconstitutional on its face.

The court affirmed the district court's decision to take judicial notice of the fact that an advertisement encouraging the use of drugs encourages actions which endanger the health or safety of students. Thus, the court held that the principal had correctly applied the health and safety regulation in this case.

The court also noted that the fact that the advertisement was purely commercial speech was an additional reason in upholding the restraint, observing that commercial speech does not enjoy the same degree of protection as other types of speech.

The court further held that the administrative appeals procedure provided for in the regulations meets the requirement that there be an "adequate and prompt appeals procedure." The time limits were held to be reasonable on their face. The principal had two days to justify his actions, the area superintendent had ten days to make his decision (five, if after a hearing) and the superintendent of schools had five days. These lim-

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8 622 F.2d at 1205 (citing Baughman v. Freienmuth, 478 F.2d 1345, 1351 (4th Cir. 1973)).
9 Id.
10 Id.
11 Id.
12 Id. at 1206.
13 Id. at 1207.
its, along with the ten day limits to appeal the decisions of the principal and assistant superintendent discouraged delay in the administrative appeals. The court emphasized, however, that there was no need to submit the publication for prior approval and that the students were free to distribute the paper off of school property, thus lessening the impact of the administrative appeals process.

David B. Thomas

II. THE FIRST AMENDMENT: THE VALIDITY OF NEUTRAL STATE REGULATIONS WHICH INHIBIT RELIGIOUS EXPRESSION

In Edwards v. Maryland State Fair and Agricultural Society, Inc., the Baltimore chapter of the International Society for Kirshna Consciousness (ISKCON) sought declaratory and injunctive relief under 42 U.S.C. § 1983 against the Maryland State Fair, maintaining that their "booth rule," which restricted ISKCON to a booth in their solicitation of funds and distribution of literature, unconstitutionally infringed upon the practice of their religion in violation of the first amendment. The district court found that the "booth rule" of the fair constituted state action on the part of Maryland for purposes of section 1983 but concluded that neither the "booth rule" nor its enforcement denied plaintiffs their first amendment rights. Plaintiffs and defendants both appealed this decision.

The Fourth Circuit Court of Appeals affirmed that part of the decision of the district court which found state action on the

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14 Id.
15 Id.

1 628 F.2d 282 (4th Cir. 1980).
2 42 U.S.C. § 1983 (1976) provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.
3 628 F.2d at 283.
part of Maryland but reversed the holding that the rule did not infringe upon the first amendment rights of the members of ISKCON. In their state action analysis the court noted that the fair received a substantial subsidy from the state of Maryland, the state fair board was a statutorily created body, and the use of the state funds was conditioned on compliance with the rules and regulations of the fair board. The role of the state in subsidizing and regulating the fair was sufficient to find the requisite state action for purposes of section 1983.

In their discussion of the booth rule, the court observed that it had been in effect since the early 1960's. The rule required all persons, organizations and groups, whether commercial, civic, political or religious, wishing to solicit contributions, sell products or distribute literature, to do so from a booth. The members of ISKCON are required to practice a ritual known as Sankirtan. This practice requires the dissemination of religious literature and the solicitation of funds to support the missionary programs of ISKCON. The donations and book distribution in exchange for contributions are the principal means of financial support for ISKCON.

The Fourth Circuit concluded from a study of Sankirtan that it is a genuine and necessary ritual in the practice of the beliefs of ISKCON. The religion requires its members to approach other individuals to proselytise and solicit contributions. The court further concluded that "enforcement of the [booth] rule may be a complete abrogation of religious expression by ISKCON members. The legal question is whether plaintiffs in the practice of that ritual may be restricted to a booth or whether such a restriction impermissibly burdens the exercise of their First Amendment rights."

The court utilized the rule articulated by the United States Supreme Court in Sherbert v. Verner in testing the constitu-

4 Id. at 285-86.
5 Id. at 285.
6 Id.
7 Id. at 284.
8 Id.
9 Id. at 285.
10 Id.
tionality of the booth rule. Under this standard the rule must be justified by a compelling state interest and it must be shown that the state aim cannot be accomplished by less restrictive means. The Fourth Circuit agreed with the Seventh Circuit decision in ISKCON v. Bowen, almost factually identical with the instant case, that the state had failed to show a legitimate state interest in maintaining the public safety through control of the crowd, noting that a fear or apprehension of such a danger is not a sufficient state interest to restrict first amendment freedoms.

The court noted that in the very nature of a fair there is no expectation of privacy because of the large numbers of people. They recognized that the first amendment protects unpopular as well as irritating expression, concluding that in a public place such as a fair a person is fully capable of refusing any solicitation and continuing on his way. The court looked to the less burdensome alternative of the penal laws for fraud to control the solicitations of groups.

The decision of the Fourth Circuit was not an absolute guarantee to ISKCON and other groups to exercise their constitutional rights of religion outside of the booth. The court cautioned that the result may change "should a marked change in circumstances be shown." This part of the opinion recognizes the state's right to regulate conduct within the sphere of the first amendment when legitimate state interests are endangered.

David B. Thomas

III. CORPORAL PUNISHMENT AND THE SUBSTANTIVE DUE PROCESS RIGHTS OF SCHOOL CHILDREN

On December 6, 1974, Naomi Faye Hall, a minor, was hit "repeatedly and violently" with a homemade paddle by her

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12 628 F.2d at 286.
13 600 F.2d 667 (7th Cir.), cert. denied, 444 U.S. 963 (1979).
14 628 F.2d at 286.
15 Id. (citing Cohen v. California 403 U.S. 15 (1971)).
16 Id.
17 Id.
18 Id. at 287.
grade school teacher, G. Garrison Tawney. The paddling was authorized by the school's principal, Bernard Caldwell. Naomi and her parents filed a four count complaint in the United States District Court for the Southern District of West Virginia against Tawney, Claywell, the superintendent of the county schools, and the members of the County Board of Education.¹

The district court dismissed the entire action in response to the defendant's motion under rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The district court based its holding on a recent Supreme Court opinion which had been decided after commencement of the plaintiff's action. The Supreme Court held in Ingraham v. Wright that where state tort and criminal law provided sufficient remedies against school officials for excessive applications of corporal punishment a school child's liberty interest was sufficiently protected to meet the procedural requirements of the due process clause.² It also held that the constitutional prohibition against cruel and unusual punishment was applicable only to individuals convicted of crime and, therefore, could not be invoked by school children subjected to corporal punishment.³

The plaintiffs in their appeal of the district court's decision to the Fourth Circuit Court of Appeals conceded that the holding in Ingraham foreclosed the procedural due process and cruel and unusual punishment elements of their claim. However, Naomi and her parents continued to assert their individual substantive due process claims.

The parents' primary argument in support of their claim was that "Naomi's paddling violated [their] right . . . to deter-

¹ The plaintiff's action was brought under 42 U.S.C. § 1983. The four counts of the complaint alleged that the paddling had violated: 1) Naomi's procedural due process rights under the fourteenth amendment, 2) Naomi's substantive due process rights under the fourteenth amendment, 3) Naomi's right to be free from cruel and unusual punishment under the eighth amendment, and 4) the substantive due process rights of Naomi's parents.
² 430 U.S. 651, 674-83 (1977). "[T]he district court found Ingraham dispositive of the procedural due process claim because West Virginia law—as had been expressly noted in Ingraham—afforded essentially the same common law civil and criminal remedies as did Florida law in Ingraham." Hall v. Tawney, 621 F.2d 607, 609 n.2 (4th Cir. 1980). The Fourth Circuit agreed with this conclusion. Id.
³ 430 U.S. at 659-71.
mine the means by which Naomi could be disciplined." The Fourth Circuit noted that the issue presented by the parents had already been decided "adversely" to the parents in the case of Baker v. Owen, a case recently decided by a three-judge district court and summarily affirmed by the Supreme Court. The district court noted in Baker that "we cannot allow the wishes of a parent to restrict school officials' discretion in deciding the methods to be used in accomplishing the not just legitimate, but essential purpose of maintaining discipline."

The Fourth Circuit held that "[e]ven without the imprimatur of the Supreme Court" it would have been in agreement with the holding in Baker. The court believed that the school's interests in maintaining order and discipline outweighed any rights of particular parents in dictating the form, if any, by which their child should be disciplined. Moreover, the court found that the parents' rights did not increase proportionally with the severity of the punishment. The Fourth Circuit, therefore, affirmed the district court's dismissal of the parents' claim.

The court was left with resolution of the issue of whether Naomi had a substantive due process right to be free from certain forms of corporal punishment. The court noted that the Supreme Court's holding in Ingraham had expressly left this issue unresolved. In resolving the issue, the Fourth Circuit started with the proposition that "disciplinary corporal punishment does not per se violate the public school child's substantive due process rights." The plaintiffs argued that while corporal

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4 Hall v. Tawney, 621 F.2d 607, 610 (1980). Naomi's parents had informed "school officials, including Tawney, that they did not want Naomi corporally punished." Id.
5 Id.
7 395 F. Supp. at 301. The Supreme Court in Ingraham cited its summary affirmation of Baker as standing for the proposition "that parental approval of corporal punishment is not constitutionally required." 430 U.S. at 662 n.22.
8 621 F.2d at 610.
9 Id.
10 Id.
11 Id. at 610-11.
12 Id. at 611. This proposition was based on the fact that the court believed
punishment did not constitute a per se violation of a fundamental constitutional right the constitutional right would be violated where the severity of the punishment inflicted exceeds that necessary to maintain order the schools.\textsuperscript{13}

The Fifth Circuit Court of Appeals rejected this argument in its decision in \textit{Ingraham v. Wright}.\textsuperscript{14} It held that federal constitutional rights could not be made to hinge on the question of "whether in a particular instance of misconduct five licks would have been more appropriate punishment then [sic] ten licks."\textsuperscript{15} The Fifth Circuit Court also rested its decisions on the fact that civil or criminal action could be taken in the state courts "against a teacher who has excessively punished a child."\textsuperscript{16}

The Fourth Circuit rejected the holding of the Fifth Circuit in \textit{Ingraham}. It noted that "relief under § 1983 does not depend upon the unavailability of state remedies, but is supplementary to them."\textsuperscript{17} The court believed that a constitutional right existed in this situation in addition to the rights and remedies afforded by state law.

The Fourth Circuit defined this substantive due process right as "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of the court."\textsuperscript{18} The court found this right "grounded" in the substantive due process right which has been protected in a series of police brutality cases.\textsuperscript{19}

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\textsuperscript{13} Id. at 612.
\textsuperscript{14} 525 F.2d 909 (5th Cir. 1976) (en banc), aff'd on other grounds, 430 U.S. 651 (1977).
\textsuperscript{15} 525 F.2d at 917.
\textsuperscript{16} Id.
\textsuperscript{17} 621 F.2d at 612.
\textsuperscript{18} Id. at 613.
\textsuperscript{19} Id. The court cited the following cases as examples of where the right had been found to exist in the police brutality context: Rochin v. California, 342 U.S. 165 (1952) (forcible use of stomach pump by police); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (unprovoked beating of pretrial detainee by guard); and Jenkins v. Averett, 424 F.2d 1128 (4th Cir. 1970) ("reckless" pistol shooting of suspect by police).
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The court believed that the appropriate inquiry into whether this right had been violated involved balancing the need for the use of corporal punishment against the force applied and the severity of the resulting injury. The motivation of the individual administering the corporal punishment was also seen as an appropriate subject of the inquiry. Thus, if the punishment was "inspired by malice or sadism rather than a merely careless or unwise excess of zeal" and the force with which it was applied caused injury the severity of which was out of proportion to the reason which gave rise to the need for corporal punishment, the court believed that it could properly be found that the substantive due process rights of the school child had been violated.

The Fourth Circuit found that on its face it could not be held that Naomi Hall's complaint failed to state a claim for which relief could be granted. It, therefore, remanded this portion of the plaintiffs' original complaint to the district court for further consideration in light of its decision articulating a newly-found substantive constitutional right existing under the rubric of the due process clause.

Thomas H. Fluharty

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20 621 F.2d at 613.
21 Id.
22 Id.
23 Id. at 614.
24 The court held that the allegations of the remaining complaint did not "state substantive due process claims under § 1983 against any of the other defendant than Tawney and Claywell." Id. at 615. Consequently, the court affirmed the dismissal of Naomi's substantive due process claim against all the defendants except Tawney and Claywell. Id.
CRIMINAL LAW

I. INEFFECTIVE ASSISTANCE OF COUNSEL: BAD ADVICE AND THE "COLLATERAL CONSEQUENCES" RULE

The decision in Strader v. Garrison\(^1\) clearly indicates that the Fourth Circuit Court of Appeals will rigorously uphold a criminal defendant's right to effective assistance of counsel. Strader had been sentenced in 1968 to a forty-five to fifty-five year indeterminate term for burglary and robbery. He escaped from prison in 1974, and after recapture, was tried in 1975 for offenses allegedly committed while he was at large. A plea bargain was agreed upon that would have enabled Strader, after pleading guilty to both of the offenses charged, to serve thirty years for one charge concurrently with his prior sentence and to serve five to ten years on another charge, to be served consecutively to the 1968 sentence. Strader was greatly concerned that the thirty-year sentence would postpone his parole eligibility date, but his attorney assured him it would not. Strader pleaded guilty, then discovered that his attorney had been incorrect. In fact, published regulations of the North Carolina Department of Correction clearly required a recomputation in the case of concurrent sentences of the time to be served before eligibility for parole could be determined.\(^2\)

The district court granted the defendant's habeas corpus petition, which attacked his conviction on the ground of bad advice by counsel. The court found that "his parole eligibility date was of great importance to Strader and he would not have entered his guilty plea if he had been correctly advised about the effect of the new sentences upon that eligibility date."\(^3\) The State of North Carolina appealed the decision on the ground that the guilty plea was not involuntary in a constitutional sense, since parole eligibility is but a "collateral consequence" of a plea, of which a defendant need not be informed before entering a plea of guilty.\(^4\)

The Fourth Circuit Court of Appeals upheld the decision of

\(^1\) 611 F.2d 61 (4th Cir. 1979).
\(^2\) Id. at 63.
\(^3\) Id.
\(^4\) Id.
the district court. It concluded that the collateral consequence rule would not apply in a situation where the facts of the case were such that the defendant entered an improvident plea based upon bad advice of counsel. ⁶

The court did state that parole eligibility dates are "collateral consequences of the entry of a guilty plea of which a defendant need not be informed" but added the significant phrase "if he does not inquire," ⁷ thus strictly limiting the collateral consequences rule to a situation where the defendant has not requested advice. Where a defendant does request advice, is grossly misinformed, and then relies on that misinformation, his plea is not voluntarily made; and he has been denied his constitutional right to the effective assistance of counsel.⁸

On remand, the court advised North Carolina that if it could reduce the sentence to such an extent that it would have no adverse impact on the defendant's parole eligibility date, the blunder of counsel would be reduced to harmless error. Otherwise, the defendant would have to be released subject to retrial by the state.⁹

In reaching this decision, the court rejected the decisions reached by two other circuits which had held that the collateral consequences rule was applicable to situations similar to the one which existed in Strader. In United States v. Parrino,⁹ an alien was assured by his attorney that he would not be deported if he pleaded guilty, when in fact a guilty plea was a ground for deportation. A panel of the Second Circuit Court of Appeals refused to allow him to withdraw his plea. The second case, United States v. Sambro,¹⁰ also involved alien deportation and reliance by the alien on his counsel's advice. Since deportation was only a "collateral consequence" of the sentence, the Court of Appeals for the District of Columbia Circuit found the plea voluntary and denied relief.

⁵ Id.
⁶ Id. at 65.
⁷ Id.
⁸ Id.
⁹ 212 F.2d 919 (2d Cir. 1954).
¹⁰ 454 F.2d 918 (D.C. Cir. 1971).
In dismissing these two decisions as "aberrations," the court stressed that neither case had been analyzed from the perspective of determining whether effective assistance of counsel had been provided.\textsuperscript{11} In fact, a later Second Circuit case, \textit{United States ex rel. Hill v. Ternullo},\textsuperscript{12} reached the same conclusion as the Fourth Circuit in \textit{Strader} that bad advice given a defendant and relied upon should be grounds for relief, without any mention of its previous decision in \textit{Parrino}.

In determining that the bad advice given the defendant by his counsel deprived the defendant of his sixth amendment right to the assistance of counsel, the Fourth Circuit applied the test for measuring the competence of counsel adopted by the majority of the circuits in one form or another: the "reasonable criminal lawyer standard."\textsuperscript{13} The issue under this test is whether a reasonably competent lawyer could be expected to know of the recomputation requirement set forth in writing by the North Carolina Department of Correction. The court held that a reasonably competent criminal lawyer should have known that concurrent sentences would have extended the time necessary to become eligible for parole, and that the defendant had detrimentally relied on the bad advice.\textsuperscript{14}

In 1975 the Fourth Circuit held in \textit{Hammond v. United

\textsuperscript{11} 611 F.2d at 64.
\textsuperscript{12} 510 F.2d 844 (2d Cir. 1975).


\textsuperscript{14} The court noted that the attorney was not called on to make a "prediction." He could have easily discovered the applicable rule had he only looked in the published material. 611 F.2d at 63.
States\textsuperscript{15} that bad advice concerning the direct consequence of a plea would constitute ineffective assistance of counsel. In Hammond, a young defendant was induced to enter a plea bargaining agreement on the erroneous advice that if he did not do so, he could be subject to a ninety to ninety-five year sentence when, in fact, the defendant could only have received a maximum fifty-five year sentence. The court held that the guilty plea was involuntary, and that he had been denied the effective aid of counsel.\textsuperscript{16}

The court in Strader believed that the crucial element in the Hammond decision was that the defendant has been "misled by erroneous advice" not that the misinformation had concerned the direct consequences of his pleas.\textsuperscript{17} It therefore concluded that it was a natural progression to hold that where a defendant has been "misled by erroneous advice," even when the advice concerns a collateral matter about which the defendant would not ordinarily need to be informed to make a voluntary and intelligent decision concerning his plea, he has been denied his constitutional right to the effective assistance of counsel.\textsuperscript{18}

Melody Helm Gaidrich

II. CONDITIONS NECESSARY FOR BINDING THE FEDERAL GOVERNMENT TO A PLEA BARGAIN

In United States v. McIntosh,\textsuperscript{1} the defendant was charged by the State of Virginia with running a gambling operation on his business premises. Before his appearance in the state court, his defense attorneys and the prosecutor met and entered into a plea bargain. The defendant then entered his plea of guilty in the state court. At the evidentiary hearing for the federal tax evasion charge which stemmed from the gambling operations, McIntosh contended that the state prosecutors had promised him that if he pleaded guilty, they would pay the $3,000 which had been seized as evidence for the state to the Internal

\textsuperscript{15} 528 F.2d 15 (4th Cir. 1975).
\textsuperscript{16} Id. at 18-19.
\textsuperscript{17} 611 F.2d at 65.
\textsuperscript{18} Id.
\textsuperscript{1} 612 F.2d 835 (4th Cir. 1979).
Revenue Service "to clear [appellant] with the IRS," and that no federal prosecution would result. At no time did the defendant's attorneys contact a federal official to attempt to verify this bargain. The defendant presented no evidence to show that the state prosecutor had authority granted from any federal official, nor was there any evidence to prove that the federal authorities had done any act which would have clothed the state prosecutors with apparent authority to act.³

The state prosecutor denied that he had made any promise to waive federal prosecution, and testified that he promised only that the money would be turned over to the IRS to satisfy any jeopardy assessments against the defendant. The IRS agent who had been contacted by the state prosecutor corroborated this testimony.⁴ The district court accepted the state prosecutor's version of the bargain and held that there had been no promise made, and that even if the promise had been made it would not have bound the federal authorities, because the state prosecutor had no authority to make it.⁵

The defendant appealed, contending that the finding of the district court was clearly erroneous, and further, that "the very fact a state prosecutor might make a promise to prevent federal prosecution is sufficient to bar it so long as the promise was made and was reasonably believed by his attorneys."⁶ The defendant relied on Cooper v. United States,⁷ a Fourth Circuit case which posits generally that under appropriate circumstances a constitutional right to the enforcement of plea proposals may arise before any technical contract has been formed "on the basis alone of expectations reasonably formed in reliance upon the honor of [the] Government in making and abiding by its proposals."⁸

The court distinguished Cooper from the instant case because in Cooper a promise had been made by a person with

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² Id. at 836.
³ Id. at 836-37.
⁴ Id. at 836.
⁵ Id. at 837.
⁶ Id.
⁷ 594 F.2d 12 (4th Cir. 1979).
⁸ Id. at 18.
authority to bind the government. The promise was made, then withdrawn before the defense attorney could convey to the prosecutor the defendant's acceptance of the bargain. The court held that the technical offer and acceptance rules of contract law should not work to defeat the bargain where its defeat could impair the defense attorney's credibility and affect the defendant's right to effective assistance of counsel.

The court refused to extend Cooper to allow the subjective belief of a defendant that a promise was made by one without authority to make it to create a valid plea bargain. The court believed that "where the content of a plea bargain and the authority for its offer are at issue, [the] traditional precepts of contract and agency should apply." This conclusion is supported by decisions in other jurisdictions.

In United States v. Long, an Illinois Bureau of Investigation agent employed by the State of Illinois led the defendant to believe he was authorized to represent the federal government and allegedly promised that, if the defendant would plead guilty to the state charge, the agent would not turn over a gun seized as evidence to the federal authorities to be used as a basis for federal charges. The agent insisted that he agreed only to make a recommendation to the U.S. Attorney's Office and advise them of the defendant's cooperation, and that in any event, the defendant had not cooperated fully. The district court held that an agreement did exist and dismissed the federal indictment. The court of appeals reversed, noting that the district court cited no precedent for imposing an agency relationship between the federal government and the state agent.

While, as the district court said, an IBI agent who investigates, arrests and charges a defendant with an offense which may be prosecuted federally may well be regarded by the accused as an agent of the United States, the federal Government may not be held responsible for his agreement when no agency relationship

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9 See Judge Phillips concurring opinion which explains the majority's characterization of Cooper.
10 594 F.2d at 16-18.
11 612 F.2d at 837.
12 511 F.2d 878 (7th Cir.), cert. denied, 423 U.S. 895 (1975).
in fact exists and the Government has no actual knowledge of the agreement.\textsuperscript{13}

United States v. Lombardozzi\textsuperscript{14} involved an FBI agent who was a member of a prosecutorial team who conceded that he had convinced the defendant that he was speaking for the Assistant United States Attorney in plea negotiations, when he was not. The defendant claimed that the agent promised him that his federal sentence could run concurrently with his state sentence and that the defendant would spend no time in a federal institution. The court of appeals found that “while Kinally [the agent] may have ‘conveyed’ the ‘idea of a concurrent sentence,’ this falls short of amounting to a promise; he had made a suggestion, not an assurance. Indeed, the transcript of the evidentiary hearing indicates that appellant knew Kinally could not bind the Department of Justice.”\textsuperscript{15}

In United States v. Padilla,\textsuperscript{16} the defendant attempted to enforce a plea bargain made at the state level against the federal government, on the grounds that the state official who made the agreement later became an Assistant United States Attorney and prosecuted the case in federal court. The court said that since the United States was not a party to the New Mexico prosecution, the government's power to enforce its criminal laws could not be affected by any proceedings in a state court.\textsuperscript{17}

The latest case involving a question of authority came from the Ninth Circuit, in United States v. Hudson,\textsuperscript{18} where a federal agent promised that charges would be dropped if the defendant cooperated in the apprehension of suppliers of counterfeit bills. The issue was whether the United States Attorney's Office was bound by the acts and promises of other federal agents who were not within the United States Attorney's office. The court held that fundamental fairness did not require the United States Attorney's office to be bound, and cited the Lombardozzi case as

\textsuperscript{13} Id. at 882 (emphasis added).
\textsuperscript{14} 467 F.2d 160 (2d Cir. 1972), cert. denied, 409 U.S. 1108 (1973).
\textsuperscript{15} Id. at 162.
\textsuperscript{16} 589 F.2d 481 (10th Cir. 1978).
\textsuperscript{17} Id.
\textsuperscript{18} 609 F.2d 1326 (9th Cir. 1979).
authority as well as another Ninth Circuit case\textsuperscript{19} where the investigator was acting in a private capacity.

It is clear then, that before the federal government may be bound by a plea bargain, two conditions must exist: (1) a promise must be made, \textit{and} (2) by someone with actual authority to make such a promise. A mere subjective belief on the part of the defendant that either one or both exists will not be sufficient to create a bargain, and it appears that the burden has been squarely placed on the defense counsel to ascertain both the existence of the bargain and the validity of the authority.

The district court in \textit{McIntosh} found that a promise had not in fact been made. This alone would have been a sufficient basis for denying relief, yet the court went on to say in dicta that even if a promise had been made, no authority existed and the federal government would not be bound.

\textit{Melody Helm Gaidrich}

\section*{III. FOREIGN INTELLIGENCE EXCEPTION TO WARRANT REQUIREMENT}

In \textit{U.S. v. Truong Dinh Hung},\textsuperscript{1} the United States Court of Appeals for the Fourth Circuit addressed an issue that the Supreme Court has thus far left open in the area of fourth amendment warrant requirements. Truong Dinh Hung was a Vietnamese citizen living in the United States. Truong had enlisted the help of a Vietnamese-American woman to carry packages for him to representatives of the Socialist Republic of Vietnam in Paris. Unknown to Truong, this woman was a confidential informant employed by the Central Intelligence Agency and the Federal Bureau of Investigation. She regularly kept these agencies informed of Truong's activities. After learning that Truong was transmitting classified documents to Paris, the government tapped Truong's telephone and bugged his apartment in order to locate his source of information. The taps and bugs were installed without court authorization or warrant. The

\textsuperscript{19} United States v. Stevens, 601 F.2d 1075 (9th Cir.), \textit{cert. denied}, 444 U.S. 917 (1979).

\textsuperscript{1} 629 F.2d 908 (4th Cir. 1980).
government subsequently brought criminal charges against Truong for espionage and other crimes. Upon conviction Truong appealed on the ground that the surveillance conducted by the government violated the fourth amendment, because the surveillance was conducted without first obtaining a warrant. Truong argued that all the evidence uncovered through that surveillance should have been suppressed.²

The fourth amendment provides that all searches and seizures must be reasonable and that warrants may only issue based upon a showing of probable cause.³ It is well settled that wiretapping constitutes a search and seizure within the meaning of the fourth amendment.⁴ A search conducted without a warrant issued upon probable cause is a per se fourth amendment violation except for a few specifically established and well-defined exceptions.⁵ A warrant need not be obtained where the person to be searched consents⁶ or where exigent circumstances make it impractical to obtain a warrant.⁷ Examples of exigent circumstances that the courts have recognized include: where the officer is responding to an emergency or is in hot pursuit of a fleeing felon; or where the evidence is in danger of being destroyed or removed from the jurisdiction.

In Truong Dinh Hung, neither of these exceptions applied. Truong did not consent to the surveillance and there was no emergency situation requiring prompt action. The wiretapping continued for more than one year. It would not have been an undue burden on the government to obtain a warrant prior to con-

² Id. at 312.
³ The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
ducting the wiretapping. There was also no danger that the information or evidence was about to be destroyed.

Recognizing that the surveillance in this case did not fit into any of the recognized exceptions to the warrant requirement, the Fourth Circuit formulated a new exception—the "foreign intelligence" exception. This new theory relieves the government of the burden of seeking a warrant when the object of the surveillance is a foreign power, its agent, or collaborator. The surveillance also must be conducted primarily for foreign intelligence areas. If the primary reason for the surveillance is to form the basis for a criminal prosecution, then a warrant would be required.

The Fourth Circuit based its decision upon the reasoning of United States v. United States District Court. In that case the Supreme Court required the government to secure a warrant prior to conducting domestic security surveillance. They reached that decision using the following balancing test:

If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

In applying this standard to the foreign intelligence situation, the Fourth Circuit found that, unlike the domestic security situation, the needs of the government were so compelling that requiring a warrant would unduly frustrate the executive branch of government in carrying out its foreign affairs responsibilities. The court also said that attempts to counter foreign threats to the national security require the utmost stealth,

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8 629 F.2d at 912-19.
9 Id. at 915.
10 Id.
11 Id.
13 Id. at 315.
14 629 F.2d at 913.
speed, and secrecy. Furthermore, the executive branch possesses great expertise in the area of foreign affairs and is in a much better position than the judiciary to determine the necessity of surveillance.

The Fourth Circuit's basis for establishing this new foreign intelligence exception rests entirely upon the supposition that because of the government's practical experience, its constitutional competence and the need for flexibility in the management of foreign affairs, the requirement of a warrant for surveillance would unduly frustrate the government's ability to protect itself. It is not entirely clear that this supposition is justified. Surely the government has just as much need to act with stealth, speed, and secrecy in the area of domestic security as it does in foreign intelligence. Moreover, the executive branch is charged by the Constitution to enforce the criminal laws just as it is charged to conduct foreign affairs. Its practical experience and constitutional competence in the area of foreign affairs should be no greater than its practical experience and constitutional competence in executing the federal criminal laws in an attempt to maintain domestic security.

Even with the existence of a foreign intelligence exception to the warrant requirement, however, there are still some fourth amendment restraints on the government's ability to wiretap. The surveillance undertaken must still be reasonable. Thus, the government cannot indiscriminately wiretap in the name of foreign intelligence. It must still be able to demonstrate that there was a reasonable need for the surveillance and that it was conducted in a reasonable manner under the circumstances.

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15 Id. at 915.
16 Id. at 913-14.
17 Id. at 914.
18 The "reasonableness" of the surveillance depends upon the circumstances which exist in each particular case. Scott v. United States, 436 U.S. 128 (1978). The Fourth Circuit determined that the surveillance of Truong had been conducted in a reasonable manner. 629 F.2d at 916-17.
IV. EXTRADITION: THE PRESENCE OF PROBABLE CAUSE

In Zambito v. Blair, the United States Court of Appeals for the Fourth Circuit examined the constraints which the fourth amendment places on interstate extradition. In this case the accused was charged with armed robbery in Florida. After the robbery the accused fled to West Virginia. The governor of Florida made a demand on the governor of West Virginia for the arrest and extradition of the accused. This demand was accompanied by an affidavit of probable cause executed by a Florida deputy sheriff containing data which had led the deputy to believe that the accused had committed the robbery for which he was charged. A Florida circuit judge had made a finding of probable cause based upon this affidavit; however, no statement of this fact was included in the documents accompanying the demand for extradition. The governor of West Virginia decided to comply with the demand and executed a warrant for the accused's arrest. The accused then attacked this arrest warrant through a writ of habeas corpus and ultimately this matter reached the Fourth Circuit Court of Appeals. The accused contended that the West Virginia arrest warrant was constitutionally invalid because the demand papers before the governor of West Virginia at the time the warrant was issued failed to show on their face a judicial finding of probable cause.

The United States Constitution provides that

1 610 F.2d 1192 (4th Cir. 1979).
2 Zambito first filed a petition for a writ of habeas corpus in a West Virginia circuit court. This petition was denied and an appeal from this judgment was denied by the West Virginia Supreme Court of Appeals.

After exhausting his state court remedies, Zambito filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of West Virginia. This court granted the writ and stayed Zambito's extradition. The effectiveness of the writ, however, was stayed for a thirty-day period so that the arresting sheriff would have an opportunity to demonstrate that a "judicial determination of probable cause had been made in Florida" concerning Zambito's participation in the armed robbery. Id. at 1195 (emphasis added).

Within this thirty-day period, the arresting sheriff presented to the district court an "Order Finding Probable Cause" signed by a Florida circuit judge. Finding this order to be a sufficient judicial determination of probable cause, the district court withdrew the writ of habeas corpus previously granted and lifted the stay against Zambito's extradition. Zambito appealed the court's decision.

3 Id. at 1194-95.
[a] person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the crime.4

In addition to these constitutional requirements, West Virginia has statutory requirements that must be met before the governor can issue an arrest warrant for extradition purposes.5 Basically, these requirements are that the governor may not honor an extradition demand unless he is presented with written allegations that a crime was committed in the demanding state, that the accused was present in the demanding state at the time of the commission of the crime, and that he has fled from the demanding state.6 In addition, the demand must be accompanied by a copy of the indictment or information filed against the accused.7 In the present case all of these statutory requirements were met.

The fourth amendment to the United States Constitution also places certain restrictions on the extradition process. This amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . . ."8 With this constitutional language in mind, the United States Supreme Court has held that no warrant for arrest can be constitutionally valid unless there has first been a judicial finding that a crime has been committed and that there is probable cause to believe that the accused committed the crime.9 The Court has reasoned that any arrest and confinement "may imperil the suspect's job, interrupt his source of income, and impair his family relationships. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential . . . ."10 This protection is even more essential in the extradition situation. Not only is the accused arrested and confined, but he could be transported hun-

4 U.S. Const. art. IV, § 2.
5 The West Virginia extradition procedure is set out in W. Va. Code §§ 5-1-7 through 5-1-13 (1979 Replacement Vol.).
6 W. Va. Code § 5-1-7(c) (1979 Replacement Vol.)
7 Id.
8 U.S. Const. amend. IV.
dreds or thousands of miles away from his job and home. Before depriving an individual of his liberty to such a great extent, it is imperative that an impartial judicial officer make a determination that reasonable grounds exist for making the arrest.\textsuperscript{11} Thus, the district court in this case held that it is mandatory that there be a judicial finding of probable cause to support an arrest and extradition request.\textsuperscript{12}

The Fourth Circuit held in \textit{Zambito} that while a statement declaring that there had been a judicial finding of probable cause in the demanding state is sufficient basis for a governor of the asylum state to issue an arrest warrant, it is not absolutely required.\textsuperscript{13} A governor may infer from the presentation of sufficient facts to support a judicial finding of probable cause and the fact that the demanding governor has asserted his right to extradition that the required judicial action has taken place.\textsuperscript{14} Thus, as in this case, a governor may issue an arrest warrant in the absence of a statement of a judicial finding of probable cause if the demand is accompanied by facts that indicate probable cause did exist.\textsuperscript{15} In \textit{Zambito} the demand was accompanied by an affidavit executed by a deputy sheriff containing data which linked Zambito to the crime.\textsuperscript{16} From this information the governor of West Virginia could infer that there had been a judicial finding of probable cause.\textsuperscript{17} However, the mere fact that the documents on their face indicate that a judicial finding of probable cause has taken place is not conclusive. The accused may still seek "an independent court inquiry as to whether such a finding ha[s] been made," no matter what the documents say.\textsuperscript{18}

\begin{footnotesize}
\begin{itemize}
\item[(12)] 610 F.2d 1192, 1194. The Fourth Circuit Court of Appeals assumed that this conclusion was correct. \textit{Id.} at 1194, n.3.
\item[(13)] 610 F.2d at 1196.
\item[(14)] \textit{Id.}
\item[(15)] \textit{Id.}
\item[(16)] \textit{Id.} at 1194.
\item[(17)] \textit{Id.} at 1196.
\item[(18)] \textit{Id.} The Fourth Circuit believed that this type of court inquiry would not run afoul of the Supreme Court's holding in Michigan v. Doran, 439 U.S. at 290 prohibiting such court inquiries in the asylum state "when a neutral judicial officer of the demanding state has determined that probable cause exists."
\end{itemize}
\end{footnotesize}
Thus, the accused is not left without a remedy during the extradition process.

In summary, Zambito establishes essentially two prerequisites to the issuance of a valid warrant by a governor for extradition. First, there must have been a judicial determination that probable cause existed for the arrest of the accused by the demanding state. Second, there must be sufficient documentation of the fact that such a determination was made from which the governor of the asylum state can infer that a determination was actually made. This documentation can be either in the form of a statement declaring that a probable cause finding occurred or in the form of facts that would be sufficient to support a judicial finding of probable cause in the demanding state.

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LABOR LAW

I. THE REGIONAL DIRECTOR'S DUTY TO TRANSMIT THE RECORD

In NLRB v. Cambridge Wire Cloth Co., Inc.,¹ the National Labor Relations Board (hereinafter Board) petitioned the Fourth Circuit Court of Appeals to enforce its order requiring the respondent, Cambridge Wire, to bargain with the United Steelworkers of America, AFL-CIO (hereinafter Union).

Cambridge Wire had refused to bargain with the Union after its objections to a representation election had been overruled by the Regional Director without a hearing² and its appeal

be an absence of such a statement. It is the actual fact, not the statement or lack of a statement that in the end, matters." 610 F.2d at 1196.

¹ 622 F.2d 1195 (4th Cir. 1980).
² Cambridge Wire challenged the propriety of the representation election because of alleged union misconduct during the campaign. It contended:
   a) that the Union was responsible for defacing official election notices by affixing Union labels stating "Vote Yes" on the plexiglass front of bulletin boards which contained sample ballots of the election;
   b) that two persons acting on behalf of or with the acquiescence of the
of that decision had been denied by the Board. The Union set forth this refusal to bargain in a complaint to the Board. At the time this complaint was heard, Cambridge Wire raised its objections to the election again; however, the Board considered it unnecessary to reach the merits of Cambridge Wire's allegations finding “no abuse of discretion” on the part of the Regional director in not directing a hearing on Cambridge Wire's original complaint.3

The Fourth Circuit also found it unnecessary to address the substance of Cambridge Wire's objections to the election finding instead that “the Board had failed to comply with its own regulations” in the denial of Cambridge Wire's original request for the review of the Regional Director's decision.4 One of the arguments made by Cambridge Wire to the court was that the Board's affirmation of the Regional Director's findings was invalid because the entire record was not before the Board in its review of the Regional Director's decision. The Regional Director had transmitted only a portion of the evidence considered by him to the Board.5 As a result, the Board's decision was premised almost entirely upon the findings of the Regional Director, rather than an independent examination of the evidence.

This situation presented the court with the issue of whether the Regional Director has the responsibility to transfer all evidence considered by him in his decision or only that which he considers relevant.

It should be noted at the outset that this case involves an

Union coerced and threatened various employees to vote for the Union;

- that the Union issued material misrepresentations in its campaign literature, specifically:
  - (1) this union would never go out on strike;
  - (2) there would never be any “sympathy” strikes; and
  - (3) the employees would be dealing with a local union.

622 F.2d at 1197.

3 622 F.2d at 1197.

4 Id.

5 The only evidence tendered to the Board by the Regional Director was his decision and three pictures “depicting the alleged defacement by the Union of bulletin boards containing the sample ballots.” Id. at 1198. The “voluminous material” relating to other issues of the case was retained by the Regional Director. Id.
appeal of a decision by the Regional Director without the benefit of a hearing. Where there has been a hearing, the entire record must be transmitted by the Regional Director if an appeal is taken. The Board's regulations, however, are somewhat ambiguous with regard to what is required of a Regional Director in the absence of a hearing. This ambiguity is primarily the result of a section of the Board's procedural regulations which provides:

[T]hat in a proceeding in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections of challenges, or any opposition thereto, may append to its submission to the Board copies of documents it has timely submitted to the regional director and which were not included in the report or decision.

The Board has interpreted this section as relieving a Regional Director of an absolute duty to transfer all evidence comprising

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8 This requirement is set forth in the Board's procedural rules at 29 C.F.R. § 102.68 (1980) and 29 C.F.R. § 102.69(g) (1980). 29 C.F.R. § 102.68 provides:

The record in the proceeding shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the board. (emphasis added).

29 C.F.R. § 102.69(g) provides:

The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other legal memoranda submitted by the parties, the decision of the regional director, if any, and the record previously made as described in § 102.68, shall constitute the record in the case . . . . Immediately upon issuance of a report on objections of challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the board, the regional director shall transmit the record to the Board.

9 29 C.F.R. § 102.69(g).
the record to the reviewing body. This responsibility is shared, it contends, by the appellant. This interpretation is premised on the fact that alternative interpretations would tend to render the clause meaningless. The Fifth Circuit, while having on several occasions skirted a direct resolution of the issue presented in Cambridge Wire, seems, at least tacitly, to have adopted the Board's interpretation of its procedural rules. That court appears to distinguish between "documentary evidence" which must be transmitted to the Board by the Regional Director and "documents" which should be appended by the appellant to its list of exceptions. The distinction between "documents" and "documentary evidence" is not readily apparent, and the Fifth Circuit has not attempted to explain the difference. The Fifth Circuit has side-stepped direct resolution of the issue in Cambridge Wire by applying a "harmless error" test whenever all the evidence considered by the Regional Director is not transmitted by him to the Board. This test involves an examination of both evidence before the reviewing body and that which was withheld. As long as the general import of all the evidence is before the reviewing body, the failure to transmit specific items will be deemed harmless.

The Sixth Circuit, in Prestolite Wire Division v. NLRB, adopted an interpretation of the Board's procedural rule differ-

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9 Birmingham Ornamental Iron Co. v. NLRB, 615 F.2d 651, 666 (5th Cir. 1980).
10 See Birmingham Ornamental Iron Co. v. NLRB, 615 F.2d 661 (5th Cir. 1980); NLRB v. Dobbs House, Inc., 613 F.2d 1254 (5th Cir. 1980); NLRB v. Osborn Transp., Inc., 589 F.2d 1275 (5th Cir. 1979); Southwestern Portland Cement Co. v. NLRB, 407 F.2d 131 (5th Cir. 1969).
11 See NLRB v. Osborn Transp., Inc., 589 F.2d 1275, 1281-82 (5th Cir. 1980). The distinction between "documentary evidence" and "documents" is apparently premised on the fact that section 102.68 of the Board's procedural rules (29 C.F.R. § 102.68) refers to "documentary evidence," among others, as things which must be transmitted to the Board, while section 102.69(g) (29 C.F.R. § 102.69(g)) permits a party excepting to a Regional Director's decision to append copies of "documents" which it has submitted to the Regional Director but were not included in his record or report to the Board.
12 See note 10 supra.
13 592 F.2d 302 (6th Cir. 1979).
ent from that of the Fifth Circuit.\textsuperscript{14} \textit{Prestolite} involved facts similar to \textit{Cambridge Wire}, and there the court said: "Without expressly ruling that the Regional Director is invariably required under Section 102.69(g) to transmit to the Board all of the materials considered by him (although the language says 'shall'), we think the better practice is to do so . . . ."\textsuperscript{15} The court held that the clause dealing with the appellant's right under section 102.69(g) to append other evidence not included within the Regional Director's report was "insufficient" to shift the burden of "assembling and transmitting the record" from the Regional Director to the petitioner.\textsuperscript{16}

While the court in \textit{Prestolite} did not expressly rule that the failure to transmit the entire record would automatically result in setting aside the Board's findings, as a practical matter, this would normally be the case.\textsuperscript{17} This fact may be presumed since, as the court in \textit{Prestolite} points out, when the entire record is not transferred, the petitioner's objections will be construed in the most favorable manner.\textsuperscript{18}

The Fourth Circuit, in resolving the issue presented in \textit{Cambridge Wire}, appears to have adopted elements of both the Fifth and Sixth Circuits' approaches. Following the Sixth Circuit's reasoning, it held that "as a matter of common sense, the Regional Director who has possession of the materials in the record, is the logical party to transmit that record to the Board."\textsuperscript{19} The court believed that the Regional Director has a duty under the Board's procedural rules to transmit to the

\textsuperscript{14} Accord, NLRB v. RJR Archer, Inc., 617 F.2d 161 (6th Cir. 1980).
\textsuperscript{15} 592 F.2d at 306.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} The Sixth Circuit reaffirmed the position taken in an earlier decision that on an appeal "the Board is entitled to rely on the report of the Regional Director in the absence of specific assertions of error, substantiated by offers of proof." NLRB v. Tennessee Packers, Inc. 379 F.2d 172, 178 (6th Cir.), \textit{cert. denied}, 399 U.S. 958 (1969). Thus in those instances where an appellant's objections are "shotgunned" and "lacking in factual detail" the failure of the Regional Director to transmit the entire record will not result in a setting aside of the Board's conclusions. Prestolite Wire Div. v. NLRB, 592 F.2d 302, 306 (6th Cir. 1979).
\textsuperscript{18} The result of this treatment of the petitioner's allegations is that, in most instances, the Board's decision to reject the petitioner's claim will be considered "an abuse of discretion." 592 F.2d at 307.
\textsuperscript{19} 622 F.2d at 1199.
Board "all the materials which were part of the record and considered by him."\(^{20}\)

The Fourth Circuit, however, apparently adopted the Fifth Circuit's "harmless error" test to determine whether a failure to transmit a part of the record warrants a setting aside of the Board's findings rather than adopting the Sixth Circuit's practice of almost automatically setting aside the Board's findings when a failure to transmit has occurred.\(^{21}\)

The Fourth Circuit approach avoids the inefficiency and complications that arise from having two parties, the Regional Director and the appellant, transmit the material contained in the record to the Board. It also avoids needless overturning of board decisions because of a failure on the part of the Regional Director to transmit an unimportant document along with the rest of the record by adopting the "harmless error" test. The Fourth Circuit has combined the best of the different approaches used by the Fifth and Sixth Circuits in deciding the issue presented in Cambridge Wire.

Randal A. Minor

II. BONUS PAYMENTS TO NON-STRIKING EMPLOYEES AND SECTION 8(a)(5) OF THE WAGNER ACT

In S & W Motor Lines, Inc. v. NLRB\(^{1}\) a trucking company attempted to continue its operations despite a strike by a local of the Teamsters Union (hereinafter Union). One method of achieving this goal was to pay a fifty dollar per trip bonus to non-striking, over-the-road drivers, all of whom were members of the bargaining unit and some of whom were members of the Union. The Union citing, inter alia, this practice and S & W Motor Line's refusal to accede to its request to provide it with a list of non-bargaining unit employees who had been laid off during the strike sought to have the company charged with violations of

\(^{20}\) Id.

\(^{21}\) The court did not explicitly adopt a "harmless error" test although it stated in Cambridge Wire that it could not "view the failure to transmit the record in this case as harmless." Id. (emphasis added).

\(^{1}\) 621 F.2d 598 (4th Cir. 1980).
sections 8(a)(1), (2), (3), and (5) of the National Labor Relations Act.²

An administrative law judge (ALJ) held that the bonus payments constituted violation of sections 8(a)(1)³ and (5)⁴ and that the failure to provide the requested list violated section 8(a)(5). A three-member panel of the National Labor Relations Board (NLRB) modified the ALJ's order by requiring S & W Motor Lines to pay to any striking, over-the-road drivers reinstated after the strike the average amount earned by non-striking drivers as a result of the bonus payments. As modified, the NLRB affirmed the order of the ALJ.⁵

The Fourth Circuit Court of Appeals overruled the ALJ's determinations that the bonus payments⁶ and the company's refusal to provide the list of laid-off, non-bargaining unit employees⁷ constituted violations of section 8(a)(5). The ALJ had determined that the bonus payments constituted an attempt to bypass the selected bargaining representative and negotiate directly with the employees in violation of section 8(a)(5). The Fourth Circuit rejected this view because "[a] strike was in progress, and it [was] apparent that the Union would have refused to approve special payments to non-striking workers."⁸ The court distinguished the cases of NLRB v. Rubatex Corp.⁹ and NLRB v. Aero-Motive Mfg. Co.¹⁰ which had upheld violations of section 8(a)(5) when bonus payments similar to those in this case had been made because in those instances "the bonus payments... came after the strike was over and a new collective bargaining agreement had been signed."¹¹ In those cases, there was a

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⁴ 29 U.S.C. § 158(a)(5) (1976). The ALJ determined that the bonus payments "constituted an attempt to bypass the selected bargaining representative and negotiate directly with employees in violation of § 8(a)(5)." 621 F.2d at 601.
⁵ 621 F.2d at 601.
⁶ Id. The court upheld the ALJ's finding that the bonus payments constituted violations of section 8(a)(1). It believed that this "conclusion, though not compelled, was permitted by the evidence before the ALJ." Id.
⁷ Id. at 602-03.
⁸ Id. at 601-02.
¹⁰ 475 F.2d 27 (6th Cir. 1973).
¹¹ 621 F.2d at 602.
possibility that the Union may have reacted in "some useful fashion" to the company's request to award bonus payments to non-striking employees.  

The rationale of the Rubatex and Aero-Motive cases, the court claimed, was that negotiations with the Union over the bonuses would have provided the Union with an opportunity to demonstrate to the employer the illegality of the proposed bonuses at a time when the bonus payments could have been stopped. The court believed that such a view was warranted in a period of labor peace where the "availability of employees has been assured through the execution of a new collective bargaining agreement." These conditions, however, do not exist in a situation where a strike is in progress, the employer is endeavoring to continue in operation, and the striking employees have sabotaged equipment and engaged in a campaign of harassment.

In devising a rule to determine when bonus payments will constitute a violation of section 8(a)(5), the court focused on the character of the 8(a)(1) violation which often results from the payment of bonuses of this kind. Where, as in Rubatex and Aero-Motive, a post-strike, post-new collective bargaining agreement situation exists, the illegality of special payments to non-strikers under section 8(a)(1) is "patent" and "indisputable." In these instances, bonus payments to non-striking employees would constitute a violation of section 8(a)(5).

On the other hand, in situations like the one that existed in the instant case, bonus payments may or may not be prohibited by section 8(a)(1). In these instances, bonus payments to non-

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12 Id.

13 Judge Hall, in dissent, believed that the court misconstrued the rationale of the Aero-Motive and Rubatex cases. He stated that [a]lthough these opinions address the issue of illegal bonus payments made after the conclusion of a strike, the violations of § 8(a)(5) were found to exist because the employer, in each case, had circumvented the prescribed bargaining process and its potentially preventative effect on questionable, if not outright illegal, conduct.

621 F.2d at 604.

14 Id.

15 Id.

16 Id.

17 The court stated that "[t]he record contained disputed evidence and we would have been obliged to sustain a finding either way." Id.
striking employees will not constitute a violation of section 8(a)(5). The court stated that "[i]t would unreasonably subject the Employer to a responsibility to foresee what the NLRB's ultimate resolution of a possible § 8(a)(1) charge would be."  

The second aspect of the ALJ's order struck down by the court was the holding that the employer's refusal to supply the Union with a list of the non-bargaining unit employees laid-off during the strike and copies of their lay-off notices constituted a section 8(a)(5) violation. The court reasoned that the Union's motive in requesting such a list could not automatically be considered proper in those instances, like the present case, where negotiations for a collective bargaining agreement to replace one that has expired have stalled. Moreover, the court believed that the employer could properly resist attempts to obtain this information in order to avoid "dislocations" and "disruptions" of its non-bargaining unit employees and to protect their "rights of privacy."  

Thus, the court held that the employer's refusal to furnish information relating to non-bargaining unit employees will not constitute an unfair labor practice under section 8(a)(5) unless the Union has "made [a] demonstration to the employer of [the] need to know" the information. Since no reason was given by the Union in this case for its request, S & W Motor Line's refusal to provide the requested information did not constitute a section 8(a)(5) violation.

Randal A. Minor

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18 Id. Judge Hall, in dissent, stated that the general principle, adhered to by the ALJ and the NLRB was that "the unilateral granting of bonuses to employees during negotiations without consulting the bargaining representative violates § 8(a)(5)." Id. at 605 (citing NLRB v. Union Mfg. Co., 179 F.2d 511 (6th Cir. 1960)). He believed that neither Rubatex nor Aero-Motive supported "a departure from this established rule in favor of a more narrowly drawn statement that only post-strike, clear-cut violations of § 8(a)(1) will permit a finding of illegality under § 8 (a)(5)." Id.

19 Id. at 603. The Union had included no "justification" in its letter requesting this information from S & W Motor Lines.

20 Id.

21 Id.

22 See note 19, supra. Judge Hall, in dissent, believed that the majority's requirement that a Union must articulate "a need to know" before it can receive in-
PRISONERS' RIGHTS

I. MAINTAINING AN ACTION UNDER SECTION 1983 FOR SEXUAL ASSAULTS

Due to the dynamics of prison life, many prisoners in state penal institutions face the threat of assaults by other prisoners. When these assaults occur, prison officials are often charged with liability. In the majority of actions, liability is premised on ordinary negligence; however, under appropriate circumstances, an action can be based on a violation of 42 U.S.C. § 1983. To maintain an action under section 1983 the state prisoner must establish that his federal constitutional rights were violated under the color of state law.\(^1\)

Recently the Fourth Circuit Court of Appeals addressed the question of the degree of wrong which must be proven to sustain an action under section 1983 when a prisoner has been assaulted by another prisoner. In Withers v. Levine,\(^2\) the plaintiff, a young, slightly built, black man, was homosexually raped by his cellmate in the medium security Maryland House of Corrections (MHC). Withers upon his initial arrival at MHC was involved in a fight "with his cellmate who attempted a sexual assault." After a brief period in solitary confinement, Withers requested and was granted a transfer to the Maryland Correc-

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\(^1\) 42 U.S.C. § 1983 (1976) provides that:

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

\(^2\) 615 F.2d 158 (4th Cir. 1980).

\(^3\) Id. at 160.
tional Institute at Hagerstown. Eighteen months later, however, he was transferred back to MHC. Despite the fact that the records office of MHC had Withers' file which contained information about the earlier assault upon him, this file was not available to cell assignment officials. As a result, Withers was placed in a cell with a man named Redd whose file, also unavailable to the cell assignment officials, reported that he "had a history of violent, aggressive sexual assaults." Withers was assaulted by Redd on the second night in his cell.

Withers filed a section 1983 action against Maryland prison officials in federal district court. The court granted declaratory and injunctive relief, requiring the prison officials to devise a procedure to provide inmates with reasonable protection from sexual assaults. The prison officials appealed.

The Fourth Circuit had previously stated, in the case of Woodhous v. Virginia, that a prisoner had a constitutional right "to be reasonably protected from the constant threat of violence and sexual assault from his fellow inmates." To prevail in a section 1983 action a prisoner had to demonstrate a "pervasive risk of harm to inmates from other prisoners" and that prison officials had "failed to exercise reasonable care" to prevent the unreasonable risk of harm or harm itself. The court in Woodhous suggested that an isolated attack by one prisoner upon another would not demonstrate a "pervasive risk of harm," however "confinement in a prison where violence and terror reign is actionable."

The court in Withers rejected the MHC officials' contention

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4 This prison was chosen because of Withers "age and his victimization by sexually aggressive prisoners." Id.
5 Id.
6 Withers v. Levine, 449 F. Supp. 473 (D. Md. 1978). The court rejected Withers' claim for money damages finding that there was "no indication under the facts of the case that the defendants acted with improper motivation." Id. at 479.
7 487 F.2d 889, 890 (4th Cir. 1973). The constitutional right protected is the right not to be subjected to cruel and unusual punishment secured by the eighth amendment and made applicable to the states through the fourteenth amendment of the United States Constitution. Id.
8 Id.
9 Id.
that Woodhous required that "something approaching anarchy" must be proven and something more than simple negligence demonstrated before section 1983 could be utilized. It stated that an assault would be actionable under section 1983 if "violence and sexual assaults occur[red] ... with sufficient frequency" against an identifiable group of prisoners to put that group in reasonable fear for their safety and to alert prison officials of the problem and the need to take corrective measures. The court found that Withers belonged to an identifiable group of young and slightly built prisoners and that the problem of sexual assault against this group in the MHC was pervasive enough to alert prison officials of the need to provide reasonable protection for members of this group. Given this situation, the court held that "negligence, by prison officials in the performance of their duty of care is a violation of the constitutional right and actionable under § 1983." The court believed that a mere negligence standard was necessary because the prisoners' constitutional right may remain "unredressed" if a higher standard of care were employed.

In addressing the facts of the case before it, the court believed that "the absence of any procedure or guidelines to assist assigning officials" in making cell assignments to assure that sexually aggressive prisoners are not placed in cells with prisoners who have been or are likely to be victims of sexual assaults "was probably much more than simple negligence." The court, therefore, upheld the district court's injunction which had directed Maryland prison officials to develop cell assignment procedures with safety as a "leading criterion."

Thomas H. Fluharty

10 615 F.2d at 161.
11 Id.
12 The court found that, "[t]ypically, the attacks are upon younger prisoners, and a young, white, slightly built man is at the greatest risk of all. Withers, although black, otherwise fits this description." Id. at 160.
13 Id. at 162 (emphasis added).
14 Id.
15 449 F. Supp. at 478. The Fourth Circuit upheld the district court's denial of monetary damages. It stated that "in a § 1983 action, [a defendant] is responsible in damages only when he acts in violation of a 'clearly established' constitutional right." 615 F.2d at 163 (citing Procunier v. Navarette, 494 U.S. 555 (1989) and
TAX

I. TAX CONSEQUENCES OF A DEED CONTEST COMPROMISE

"The purpose of allowing charitable deductions is to encourage testators to make charitable bequests, not to permit executors and beneficiaries to rewrite a will so as to achieve a tax savings." This proposition has been judicially stated numerous times and recently the Fourth Circuit Court of Appeals reiterated this view in Estate of Burgess v. Commissioner. The court also upheld the Tax Court of the United States' interpretation of section 2055 of the Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1969, and the corresponding

Wood v. Strickland, 420 U.S. 308 (1975)). The court noted that the Woodhous decision, although announced, had not been published at the time Withers was assaulted; and, moreover, it had defined the protected right only "in broad outline." Id. Thus, it affirmed the district court's conclusion that the prison officials had no reason to "believe they were violating a constitutional right." Id.

3 622 F.2d 700 (4th Cir. 1980). In Burgess, the Fourth Circuit stated that "[w]hile those persons mentioned in the will had the power to divide the property by agreement inter se, they could not maneuver their interests so as to rewrite the will and, thereby, achieve a tax savings." Id. at 704.
5 At the date of Grafton Burgess' death (June 23, 1973), the pertinent parts of section 2055 of the Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1969, provided:
(a) In general.—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return) . . . .
(2) to or for the use of any corporation organized and operated exclusively for religious charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings
Estate Tax Regulations.

of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statement), any political campaign on behalf of any candidate for public office; . . .

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

. . . .

(e) Disallowance of Deductions in Certain Case.—

. . . .

(2) Where an interest in property (other than a remainder interest in a personal residence or farm or an undivided portion of the decedent's entire interest in property) passes or has passed from the decedent to a person, or for a use, described in subsection (a), and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a person, or for a use, not described in subsection (a), no deduction shall be allowed under this section for the interest which passes or has passed to the person, or for the use, described in subsection (a) unless—

(A) in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust (described in section 664) or a pooled income fund described in section 642(c)(5), or

(B) in the case of any other interest such interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).

The pertinent parts of 26 C.F.R. § 20.2055-2(e)(2)i, ii, iii (1980) provide:

(e) Limitation applicable to decedents dying after December 31, 1969.—(1) Disallowance of deduction. In general, in the case of decedents dying after December 31, 1969, where an interest in property passes or has passed from the decedent for charitable purposes and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed from the decedent for private purposes (for less than an adequate and full consideration in money or money's worth) after October 9, 1969, no deduction is allowed under section 2055 for the value of the interest which passes or
The facts of the case reveal that Grafton Burgess obtained eleven tracts of real property by deed from his mother. Of this has passed for charitable purposes unless the interest in property is a deductible interest described in subparagraph (2) of this paragraph. The principles of section 2056 and the regulations thereunder shall apply for purposes of determining under this subparagraph whether an interest in property passes or has passed from the decedent.

(2) Deductible interests. A deductible interest for purposes of subparagraph (1) of this paragraph is a charitable interest in property where—

(i) Undivided portion of decedent's entire interest. The charitable interest is an undivided portion, not in trust, of the decedent's entire interest in property. An undivided portion of a decedent's entire interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the decedent in such property and must extend over the entire term of the decedent's interest in such property and in other property into which such property is converted. For example, if the decedent transferred a life estate in an office building to his wife for her life and retained a reversionary interest in the office building, the devise by the decedent of one-half of that reversionary interest to charity while his wife is still alive will not be considered the transfer of a deductible interest; because an interest in the same property has already passed from the decedent for private purposes, the reversionary interest will not be considered the decedent's entire interest in the property. If, on the other hand, the decedent had been given a life estate in Blackacre for the life of his wife and the decedent had no other interest in Blackacre at any time during his life, the devise by the decedent of one-half of that life estate to charity would be considered the transfer of a deductible interest; because the life estate would be considered the decedent's entire interest in the property, the devise would be of an undivided portion of such entire interest.

(ii) Remainder interest in personal residence. The charitable interest is a remainder interest, not in trust, in a personal residence. Thus, for example, if the decedent devises to charity a remainder interest in a personal residence and bequeaths to his surviving spouse a life estate in such property, the value of the remainder interest is deductible under section 2055. For purposes of this subdivision, the term "personal residence" means any property which was used by the decedent as his personal residence even though it was not used as his principal residence.

(iii) Remainder interest in a farm. The charitable interest is a remainder interest, not in trust, in a farm. Thus, for example, if the decedent devises to charity a remainder interest in a farm and bequeaths to his daughter a life estate in such property, the value of the
property, Grafton received the fee simple title to eight tracts and a remainder interest in three tracts. On June 23, 1973, Grafton died, and by his will made a few specific bequests and devises. In particular, Grafton's brother received two small parcels for life. The remainder of Grafton's property passed into a residuary trust for the benefit of his mother during her lifetime. Upon the mother's death, the remainder interest in the residuary trust property would pass in fee simple to two Lutheran churches.

Grafton's brother instituted a deed contest to set aside his mother's conveyances to Grafton, asserting that she had been subjected to undue influence. Grafton's will, however, was never questioned. Prior to the trial of the deed contest, all parties in interest reached a compromise settlement. The final decree of the state court provided:

[i]hat the mother's life interest in the trust be dissolved; that she continue to hold a life interest in her business properties and residence, . . . that a tract of 42.5 acres be alloted to Ralph [Grafton's brother] in fee, with the understanding that he would support his mother for the rest of her life.

As a result of this state court order, the contingent remainder interest in the residuary trust passed immediately in fee simple to the two churches.

remainder interest is deductible under section 2055. For purposes of this subdivision, the term "farm" means any land used by the decedent or his tenant for the production of crops, fruits, or other agricultural products or for the sustenance of livestock. The term "livestock" includes cattle, hogs, horses, mules, donkeys, sheep, goats, captive-fur-bearing animals, chickens, turkeys, pigeons, and other poultry. A farm includes the improvements thereon.

7 As to these three tracts, Grafton's mother retained a life estate in 18 acres surrounding her home and two one acre tracts of business property. 622 F.2d at 702.

8 "Under the decedent's will, Ralph (Grafton's brother) received only a life interest in approximately 7.5 acres of land." 38 T.C.M. (CCH) at 336, n.2.

9 "The trustees of this residuary trust were given the broad discretion to pay or apply net income of the trust, and if income was insufficient, the corpus of the trust, to or for the benefit of the mother." Id. at 335.

10 "Indeed, no renunciation of the will by any heir was ever filed with the Superior Court of Alexander County, North Carolina." Id. at 339, n.9.

11 622 F.2d at 712.

12 Id.
In preparing the tax return for Grafton's estate, the executor claimed an estate tax charitable deduction under section 2055 of the Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1969, for the value of the property received by the churches. Upon the disallowance of the claimed charitable deduction by the Commission of Internal Revenue, the executor petitioned the Tax Court of the United States for a redetermination. The Tax Court upheld the disallowance and the executor appealed to the Fourth Circuit Court of Appeals.

Two issues confronted the court regarding the estate tax treatment of the fee simple interest passing to the two churches as a result of the deed contest compromise. First, did the churches' fee simple interest pass by inheritance? Second, did Grafton's remainder interest in the three tracts pass to the churches under an exception to section 2055(e)(2) of the Internal Revenue Code of 1954, as amended by the Tax Reform Act of 1969? The Fourth Circuit, in a per curiam opinion, answered both of these questions in the negative and affirmed the decision of the Tax Court.

As his primary argument, the executor of the Burgess estate claimed that the compromise settlement [consent judgment] of the deed contest was similar to the will contest compromise found in Lyeth v. Hoey. Drawing this analogy, the executor asserted that the fee simple title passed to the churches

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13 See note 5 supra.
14 The Tax Court stated that "The dispute between the parties is over the effect that the consent judgment has upon the allowability of the deduction under section 2055." 38 T.C.M. (CCH) at 338. Going further the Tax Court said, "The question to be decided is whether the fee simple interests ultimately received by the churches passed under the decedent's will or whether they were first received by the mother and then transferred to the churches. A charitable deduction would be allowable in the first instance, but not in the second." Id. at 338.
15 See note 5 supra.
16 305 U.S. 188 (1938). The executor also relied heavily on a line of cases which hold generally that if the status of the recipient as an heir-or beneficiary is what enabled him to obtain his compromise share, then the compromise interest passed by bequest or inheritance under the Federal revenue statutes. See In re Sage's Estate, 122 F.2d 480 (3d Cir. 1941); Thompson's Estate v. Comm'r., 123 F.2d 816 (2d Cir. 1941); But see Estate of Morris v. Comm'r., 25 T.C.M. (CCH) 974 (1966); Robbins v. Comm'r., 111 F.2d 818 (1st Cir. 1940). For a discussion of will contests see Kemp, How to Achieve Optimum Income, Gift, and Estate Tax Benefits in a Will Contest, 38 J. TAXATION 285 (1973); Kemp, Federal Tax
by bequest or inheritance and therefore qualified for the estate tax charitable deduction under section 2055. The Fourth Circuit, in accord with the Tax Court's decision, refused to accept the executor's contention. The court distinguished the Burgess factual situation from the circumstances in Lyeth. The court pointed out Lyeth, "involved an heir to a will contest and thus, was framed from beginning to end in a testamentary setting." In contrast, the Burgess case dealt with a "suit challenging the validity of deeds signed, sealed and delivered before [Grafton's] death and without reference to a testamentary environment or context." The beneficiaries in Burgess did not adhere to the testamentary plan but rather "redistributed the property of the deceased when they settled the suit aimed at striking down the questioned conveyances." The result of the deed contest and the compromise which followed did not reflect the donative intent of Grafton Burgess, but rather evidenced the contractual agreement of the parties in interest.

Of utmost importance in the court's decision was the fact that had the will operated, the executor would not have been able to claim an estate tax charitable deduction. This situation would have arisen because Grafton's will created non-deductible "split-interests" by conveying a life estate to Grafton's mother and a remainder interest to the two churches. If the executor's Lyeth analogy was accepted, then the beneficiaries of Grafton's will would have been converting a "split-interest" trust into an...


11 See note 5 supra.
12 622 F.2d at 703.
13 Id.
14 Id.
15 Id.
16 Id.
17 Where beneficiaries have entered religious orders and entered contractual agreements to pass all their property to the order, the Commissioner has held such transfers to be nondeductible from the decedent's estate. Rev. Rul. 55-759, 1955-2 C.B. 607; Rev. Rul. 55-760, 1955-2 C.B. 607.
18 In Robbins v. Comm'r, 111 F.2d 828 (1st Cir. 1940), the court refused to allow a will contest settlement to take the place of the will for estate tax purposes because a charitable deduction would not have been allowed under the will as written.
19 A "split-interest" may be defined as a transfer made for both private and charitable purposes.
outright transfer, thereby achieving a tax savings. Prior case law has established that this "is not permissible."²²

Based on this reasoning, the Fourth Circuit concluded that the fee simple interest passed to the two churches by purchase, not inheritance, and was therefore not deductible.²³ In reaching this conclusion, the court has made clear that the holding of Lyeth does not extend beyond will contests into nontestamentary disputes.²⁷

As an alternative argument, the executor claimed that the "split-interest" property consisting of Grafton's remainder interest in three tracts, which passed by his will into the residuary trust, constituted one of the section 2055(e)(2) "split-interest" rule exceptions.²⁸ These exceptions are carved out of the general disallowance language of section 2055(e)(2) and allow an estate tax charitable deduction where the property transferred "is a remainder in a personal residence or farm or an individual portion of the decedent's entire interest in the property."²⁹ While the Fourth Circuit acknowledged that Grafton conveyed his entire remainder interest in the three tracts, it noted that interest did not flow through a charitable remainder annuity trust,³⁰ charitable remainder unitrust,³¹ or a pooled income

²² 38 T.C.M. (CCH) at 338. See Underwood v. United States, 407 F.2d 608 (6th Cir. 1969); Robbins v. Comm'r, 111 F.2d 828 (1st Cir. 1940); and Paris v. United States, 381 F. Supp. 597 (N.D. Ohio 1974).
²³ 622 F.2d at 703.
²⁷ It is important to note that even if "split-interest" property in a nonqualifying trust under section 2055(e)(2)(A) passes directly to a charitable entity as a result of a will contest, a charitable deduction still might not be allowable. Rev. Rul. 77-491, 1977-2 C.B. 332.
²⁸ The "split-interest" remainder issue involved in Burgess is the same as was involved in Ellis First Nat'l Bank v. United States, 550 F.2d 9 (U.S. Ct. Cl. 1977). In Ellis, "[t]he crux of the dispute between the parties is whether section 2055(e) allows a deduction only for an outright gift of a remainder interest in a residence or farm, i.e., one not in trust, or permits, as well, a deduction for a remainder interest in a residence or farm that is in a trust but not one of the trusts specifically sanctioned by the Act." Id. at 15. The Ellis court stated that one of the trusts sanctioned by section 2055(e)(2) must be utilized to gain the charitable deduction. Id. at 16. For a concise discussion of the House and Senate reasoning behind the 1969 enactment of section 2055(e)(2), see Estate of Brock v. Comm'r., 71 T.C. 901, 908 (1979).
²⁹ See note 5 supra.
³¹ For an illustration of a charitable remainder unitrust see Rev. Rul. 72-395,
FOURTH CIRCUIT DEVELOPMENTS

fund as required by section 2055(e)(2)(A). The court, therefore, found the executor's argument to be without merit because Grafton's devise of his remainder interest was neither outright nor via a qualifying trust as set forth by section 2055(e)(2)(A).

In his final argument, the executor contended that the Estate Tax Regulations have the effect of eliminating the exceptions provided by § 2055(e)(2). In construing the effect of the Estate Tax Regulations on the statute, the Fourth Circuit accepted the Tax Court's statement that:

[r]ather than eliminate those exceptions for all situations, these regulations merely deny the use of those exceptions by taxpayers in a situation similar to the petitioners. By requiring such transfers to be either outright or in a trust which would satisfy another subsection of the statute, the regulations clarify an otherwise ambiguous statute.

In light of this reasoning, the Fourth Circuit concluded that the estate tax charitable deduction claimed for Grafton's remainder interest in the three tracts under section 2055(e)(2) was properly disallowed.

James Timothy Meisel

II. INTEREST-FREE LOANS: THE FOURTH CIRCUIT FOLLOWS THE RATIONALE OF Dean v. Commissioner

In 1961 the Tax Court of the United States decided the case of Dean v. Commissioner holding that an interest-free loan from


For an illustration of a pooled income fund see Rev. Rul. 72-196, 1972-1 C.B. 194.

622 F.2d at 703. See note 5 supra.

38 T.C.M. (CCH) at 339-40.

a corporation to a shareholder resulted in no income to the shareholder. The Tax Court in *Dean* reasoned that:

had petitioners [Dean and his wife] borrowed the funds in question on interest-bearing notes, their payments of interest would have been fully deductible by them under section 163, I.R.C. 1954. Not only would they not be charged with the additional income in controversy herein, but they would have a deduction equal to that very amount.

Because of this so-called interest expense "washout," the Tax Court concluded that the borrower received no taxable gain from the interest-free loan under section 61 of the Internal Revenue Code.

In the recent decision of *Suttle v. Commissioner*, the Fourth Circuit Court of Appeals accepted the "washout" theory articulated in *Dean*. While the Tax Court has followed this rationale in several interest-free loan cases subsequent to *Dean*, the Fourth Circuit is the only federal appellate court that has ruled on the issue.

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2. I.R.C. § 163(a) provides that "[t]here shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness."

3. 35 T.C. at 1090. Judge Opper in his concurring opinion asserted that the statement that "an interest-free loan results in no taxable gain to the borrower" is much too broad a generalization to make here. Judge Opper also raised the question of what tax consequences arise when an interest-free loan is used to purchase tax-exempt obligations.

4. I.R.C. § 61 defines gross income as "all income from whatever source derived."

5. 625 F.2d 1127 (4th Cir. 1980). Albert Suttle's wife, Grace E. Suttle, is a party in this suit because a joint return was filed for the years in question.


It is interesting to note that the Commissioner did not appeal the *Dean* decision but did announce a nonacquiescence 12 years later. 1973-1 C.B. 4. Prior to the decision of *Dean*, the Commissioner specifically gave tax-free status to interest-free loans between employers and employees in the "split-dollar" insurance context. This ruling, however, has been revoked and replaced. Rev. Rul. 64-328, 1964-2 C.B. 11. In Rev. Rul. 76-61, 1973-1 C.B. 408 the Commissioner stated that the decision in *Johnson v. United States*, 254 F. Supp. 73 (N.D. Tex. 1966) would not be followed. In *Johnson*, the court held that interest-free loans to children by parents did not constitute gifts within the meaning of the Internal Revenue Code.

7. The Third Circuit Court of Appeals has held that interest-free loans do not
The facts in *Suttle* centered around certain interest-free loans made from Master Chevrolet Sales, Inc. (hereinafter referred to as Master) to Albert Suttle in 1972 and 1973. As president, a member of the board of directors, and a salaried employee of Master, Suttle had borrowed money interest-free from the corporation since 1937. The average balance of these loans during the years in question was around $252,000. Using an interest rate of 5.5 percent, the Commissioner calculated the interest on these loans to be $13,875.51 for 1972 and $20,159.96 for 1973. Going further, the Commissioner concluded that these amounts constituted income and represented an economic benefit to Albert Suttle. The Commissioner issued a notice of deficiency for the unpaid taxes; and, subsequently, the case was argued before the Tax Court of the United States. Following its earlier decision in *Dean*, the Tax Court found in favor of Suttle stating that "[w]e think that our reasoning in *Dean* is correct and is controlling in the instant case, and we follow it." The Commissioner appealed the case to the Fourth Circuit Court of Appeals.

As in previous interest-free loan cases, the Commissioner drew an analogy between interest-free loans and the rent-free use of other corporate assets. To support his argument, the Commissioner cited several cases holding that a stockholder's or officer's rent-free use of corporate automobiles, residences and similar property conferred a taxable benefit equal to the fair market value of such usage. The major distinction between constituting constructive dividends. Joseph Lupowitz Sons, Inc. v. Comm'r, 497 F.2d 862 (3d Cir. 1974).

9 *Id.* at 1639.

It is interesting to note that the Tax Court has also held that interest-free loans result in no interest income to the lender. *Combs Lumber Co. v. Comm'r*, 41
interest-free loans and rent-free use of corporate assets, however, is the fact that while loan interest payments are deductible, no such deductions are ordinarily allowed for personal expenditures for transportation and housing. This was the critical point in Dean. Relying on this factor, the Fourth Circuit found the Commissioner's argument to be unpersuasive and held for Suttle.11

It is possible that the entire interest-free loan question will be put to rest permanently in the near future. The Senate Committee on Appropriations has requested that the Commissioner "refrain from instituting any additional cases" involving interest-free loans.12

James Timothy Meisel

B.T.A. 339 (1940); Society Brand Clothes, Inc. v. Comm'r, 18 T.C. 304 (1952); Brandtjen & Kluge, Inc. v. Comm'r, 34 T.C. 416 (1960). By the same token, the Tax Court has held that interest-free loans result in no interest expense deduction for the borrower. A. Backus, Jr. & Sons, 6 B.T.A. 590 (1927); Rainbow Gasoline Corp. v. Comm'r, 31 B.T.A. 1050 (1935); Howell v. Comm'r, 6 T.C. 364 (1960) rev'd on other grounds, 162 F.2d 316 (5th Cir. 1947); D. Loveman & Son Export Corp. v. Comm'r, 34 T.C. 776 (1960).

11 625 F.2d at 1128.

12 Senate Committee on Appropriations Report No. 96-955, Sept. 9, 1980, page 30 provides the following:

The Committee has learned that the Internal Revenue Service has initiated a number of cases concerning interest-free loans claiming that the benefit from low interest or interest-free loans is equal to taxable income.

The Committee is also aware that the tax court ruled against the Internal Revenue Service in the J. Simpson Dean case and at least four other cases on this subject. Additional cases are pending in the fifth and ninth circuit courts of appeals. Therefore, the Committee urges that the Commissioner of the Internal Revenue Service refrain from instituting any additional cases concerning the issue of low-interest loans considered as a benefit equal to taxable income, and requests that IRS prepare and submit a report to the Committee by November 15, 1980, with regard to the IRS rationale for proceeding in a fashion contrary to the court rulings.
FOURTH CIRCUIT DEVELOPMENTS

TORTS

I. THE LOANED SERVANT DOCTRINE AND THE RIGHT TO CONTROL TEST

In Maynard v. Kenova Chemical Co., the Fourth Circuit considered the effect of the loaned servant doctrine on the West Virginia Workmen's Compensation Act. The loaned servant doctrine provides that "[a] servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services."

In Maynard an employee of Manpower Temporary Services (hereinafter Manpower) was sent to perform general labor for the Kenova Chemical Company (hereinafter Kenova). In the course of performing his work for Kenova the employee was injured when a scaffolding collapsed. The employee filed a workmen's compensation claim against Manpower and received a permanent partial disability award. Subsequently, he filed an action in federal district court against Kenova as a third party tortfeasor, alleging that the dangerous and defective condition of the scaffolding was the proximate cause of his injury.

The district court granted Kenova's motion for summary judgment, finding as a matter of law that Maynard, by virtue of the loaned servant doctrine, was the employee of Kenova within the meaning of the West Virginia Workmen's Compensation Act, and, therefore, was precluded by statute from maintaining the action.

On appeal, Maynard denied the status of Kenova as his employer and relied upon Kirby v. Union Carbide Corporation as establishing his right to maintain an action against Kenova. In Kirby there existed a written agreement between DuPont

1 626 F.2d 359 (4th Cir. 1980).
3 Restatement (Second) Agency § 227 (1958).
4 The application portion of the West Virginia Act provides:
Any employer subject to this chapter who shall subscribe and pay into the Workmen's Compensation Fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided, shall not be liable to respond in damages of common law or by statute for the injury or death of any employee ....
5 373 F.2d 590 (4th Cir. 1967).
and Union Carbide which provided that employees supplied by DuPont to Union Carbide would remain DuPont employees. Kirby, an employee of DuPont, was killed while working at a Union Carbide plant. Kirby's personal representative then brought a wrongful death action against Union Carbide. As in Maynard, however, the district court granted the defendant's motion for summary judgment, holding that Kirby was an employee of Union Carbide whose exclusive remedy was under the state workmen's compensation act.

The Fourth Circuit reversed the lower court in Kirby, holding that: (1) the contract between DuPont and Union Carbide, which provided that employees such as Kirby were to remain DuPont employees, was valid; (2) Union Carbide did not treat Kirby as an employee; (3) Union Carbide assumed no responsibility in connection with the compensation award; and (4) in view of the contractual language governing Union Carbide's liability for injury to DuPont employees, Kirby was not such an employee of Union Carbide as to preclude his personal representative from seeking redress against Union Carbide for injuries resulting from its alleged negligence.

Maynard contended that Kirby should be controlling with respect to his claim against Kenova because the same relationship existed between Manpower and Kenova as existed between DuPont and Union Carbide. The Fourth Circuit, however, in a per curiam opinion, rejected this argument on the basis that Kirby was premised on the validity of the contract between DuPont and Union Carbide, whereas no similar contract existed in Maynard. The court also said that the effect of Kirby was partially negated by the West Virginia Supreme Court of Appeals decision in Lester v. State Workmen's Compensation Commissioner, in which the effect of contractual agreements on the

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6 The only agreement between Manpower and Kenova was that contained on the reverse side of the work ticket which Manpower gave to each worker assigned to a temporary job. The language on the ticket provided: "The customer recognizes Manpower's employer-employee relationship with its personnel and accepts the obligation to discuss all matters concerning their employment, job assignments, pay procedures etc., with Manpower." The court found that "[t]his language, in and of itself, fails to establish that there was not an employer-employee relationship between Kenova and Maynard." 626 F.2d at 361.

rights and duties imposed by the West Virginia Workmen's Compensation Act was restricted.⁸

Accordingly the Maynard court affirmed the district court's decision holding that: (1) by viture of the loaned servant doctrine, Kenova became Maynard's special employer; (2) because Maynard had the right to refuse his assignment to Kenova, an implied contract of hire existed between him and Kenova; and (3) the right of Kenova to exercise supervision and control over Maynard established his status as Kenova's employee.

In relying on the right to control test as the determinative element in establishing Maynard's status as Kenova's employee,⁹ the Fourth Circuit returned to an inquiry it had discounted in Kirby. In Kirby the court refused to allow the right to control test to operate to defeat the plaintiff's claim in view of the contractual language contained in the agreement between DuPont and Union Carbide, and because Union Carbide failed to treat the plaintiff as its employee. Whether the same result would now be reached by the Fourth Circuit under similar facts is doubtful given the rule adopted by the West Virginia Supreme Court of Appeals in Lester v. State Workmen's Compensation Commissioner¹⁰ and the reaffirmation of the right to control test contained in Maynard.

The approach taken by the Fourth Circuit in Kirby closely resembles that taken by the Fifth Circuit in Gaudet v. Exxon.

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⁸ Lester held that the rights and duties imposed under the Act are not based upon express or implied contract, but grow out of the employer-employee relationship on which the law imposes certain duties and responsibilities. Thus after Lester the only significance adhering to a contract between employee and employer is the existence of the relationship itself. Once that has been established the rights and duties of the parties are determined by statute. Lester v. State Workmen's Comp. Comm'r, 242 S.E.2d 443 (W.Va. 1978).

⁹ The Maynard court approved the district court's use of the right to control test to determine Maynard's status: "The district court also correctly noted that, under West Virginia law, Kenova's authority to exercise complete supervision and control over Maynard while he was on Kenova's premises established Kenova as Maynard's employer within the meaning of the workmen's compensation statutes..." 626 F.2d at 362. The right to control is also an important factor under the loaned servant doctrine when determining if an employer-employee relationship exists. See RESTATEMENT (SECOND) AGENCY §§ 220, 227 (1958).

In Gaudet the court listed nine factors, including the right to control, to be considered when determining whether an employee is the loaned servant of another, but reasoned that the weight to be accorded each factor depends upon the circumstances of each case and the purpose for which the loaned servant doctrine is evoked. The Fourth Circuit's retreat from this approach in Maynard places it within the company of the Seventh, Eighth, Ninth, and D.C. Circuits, which have all placed substantial reliance upon the right to control test when determining the existence of an employer-employee relationship under the loaned servant doctrine.

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