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Robert C. Byrd and the Fourth Circuit Court of Appeals

Robert Bruce King

_U.S. Court of Appeals for the Fourth Circuit_

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I. INTRODUCTION

Robert Carlyle Byrd has served West Virginia with great distinction in the United States Senate since 1959. As the longest-serving senator in the history of our State (and soon, of the United States), he has been involved in — and supported — the appointment of seventy-five percent of the West Virginians to have served on the United States Court of Appeals for the Fourth Circuit. As a result, Senator Byrd has manifested a major impact on the jurisprudence of the Fourth Circuit — the second-highest federal court with jurisdiction in West Virginia — for nearly fifty years.

Prior to Senator Byrd’s first election to the Senate in 1958, only two West Virginians, Nathan Goff of Harrison County (appointed by President Harrison in 1892) and Elliott Northcott of Cabell County (President Coolidge, 1927), had served on the Fourth Circuit Court of Appeals. Since that time, six West Virginians have so served: Herbert S. Boreman of Wood County (President Eisenhower, 1959); John A. Field, Jr. of Kanawha County (President Nixon, 1971); Kenneth K. Hall of Boone County (President Ford, 1976); James M. Sprouse of Mingo County (President Carter, 1979); M. Blane Michael of Grant County (President Clinton, 1993); and this author.1

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1 The author is a graduate of West Virginia University, securing an A.B. in 1961 and a J.D. in 1968. He presently serves as a United States Circuit Judge for the Fourth Circuit.

As the author of this submission, I have, to the extent feasible, excluded myself from consideration in it. Suffice it to say that I was appointed to the Fourth Circuit Court of Appeals in 1998 by President Clinton, on the basis of the support of Senator Byrd, for which I am exceedingly grateful.
Article II of the Constitution vests the President with the power to appoint federal judges, but only with the advice and consent of the Senate. Over the history of our Republic, the Senate's role of advice and consent has made home-state senators key players in the process of selecting and appointing the judges of the lower federal courts. By customary practice, a senator has the power to veto the confirmation of a judicial nominee from the senator's home state. Accordingly, Presidents generally accord great weight to the views of the home-state senators in selecting a nominee. Senator Byrd has proven particularly suited for his role in the judicial selection process, especially as that process relates to West Virginia and the federal courts with jurisdiction here. Indeed, Senator Byrd earned a law degree, with honors, from the American University Washington College of Law in June 1963, after ten years of part-time studies while serving in the House of Representatives and in the Senate. And, in 1971, Senator Byrd was himself seriously considered by President Nixon for an appointment to the Supreme Court of the United States.

This submission seeks to assess and document Senator Byrd's very substantial impact on the Fourth Circuit Court of Appeals, and seeks to accomplish this purpose by explaining the background and the contributions of the judges (other than this author) Senator Byrd has supported for Article III appointment.
to that court.\footnote{Article III, section 1 of the Constitution provides:
The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
U.S. Const. art. I, § 2.} As further explained below, three of these judges — Herbert S. Boreman (Eisenhower), John A. Field, Jr. (Nixon), and Kenneth K. Hall (Ford) — were appointed by Republican Presidents. The other two, James M. Sprouse and M. Blane Michael, were appointed during the administrations of Presidents Carter and Clinton, respectively. In all, five Presidents and three West Virginia senators (Robert C. Byrd, Jennings Randolph, and John D. Rockefeller IV) have been involved in the appointment process of these five judges; Senator Byrd has been the constant.

This author contacted certain knowledgeable colleagues for comments on Senator Byrd’s contributions to the Fourth Circuit. Among them were Judge Joseph Robert Goodwin, who has served as a district judge in the Southern District of West Virginia since 1995, and whose own appointment was sponsored by Senator Byrd. Judge Goodwin offered the following, which appropriately sets the stage for this entire submission:

With the exception of Judge Boreman, I know or knew well each of the men recommended by Senator Robert C. Byrd to the Fourth Circuit Court of Appeals. The sense of community and shared values that make West Virginia special mark each of these men. Each was and is openly proud of his West Virginia heritage. It is clear to me that Senator Byrd sought out men of character whom he found worthy of a high trust. He found six modest and pragmatic men who shared the qualities that are character. These were men with sound judgment, keen intelligence, and a West Virginian’s sense of fairness.

I won’t talk about Judge M. Blane Michael or Judge Robert B. King although I know them best. They “grade my papers” on appeal and it would not be appropriate to polish the apple, even with the shine of truth.

I’ll start with Judge Herbert S. Boreman, who took senior status soon after I was admitted to the bar. I remember two things. First, I walked by his closed chambers during my first visit to the federal court in Parkersburg. I was told he was ill. I now use those chambers. Second, while I know little of his ju-
dicial career, I remember a dissent he wrote. In Massie v. Henry, he expressed his view that the length of a schoolboy’s hair was a fair subject for regulation by local school officials and not a constitutional question. I believe that Senator Byrd would have agreed with him. The Senator picked people whom he knew well and trusted not to be “activist judges.” Judge Boreman was a sensible and pragmatic jurist — no “activist.”

Judge John A. Field, Jr. was the Chief United States District Judge in Charleston when I was admitted to the bar in 1970. He had a keen mind and relaxed confidence perfectly suited to the bench. Senator Byrd was extremely familiar with Jack Field’s prior public service and his unrivaled reputation for fairness. Judge Field plainly possessed the essential attribute of character that is Senator Byrd’s litmus test for public service.

I knew Judge James M. Sprouse from his days as a candidate for governor. His slogan was “the man the mountains made.” Judge Sprouse was indeed shaped by his dedication to West Virginia. Few have served this State with such distinction. While principled and tough, his persona was modest, gentlemanly, and self-effacing. Senator Byrd knew him well from the campaign trail and from his service as a Justice on the Supreme Court of Appeals of West Virginia. Senator Byrd’s recommendation of Judge Sprouse to the Fourth Circuit followed his pattern of recommending only persons he knew well and trusted to serve with honor.

Gerry Hall, the elegant and astute wife of Judge Kenneth K. Hall, referred fondly to one of the bedrooms in their Charleston home as “the Byrd’s nest.” Senator Byrd was a frequent guest. Of the six appellate judges appointed after recommendation by Senator Byrd, K. K. Hall was personally closest to the Senator. Judge Hall and the Senator were of the same generation. They had similar backgrounds in rural West Virginia. They enjoyed immensely one another’s company. Once again, personal knowledge of Judge Hall’s character, scholarship, and judgment surely played the key role in his appointment to the federal bench. Judge Hall’s opinions reflect the same fierce love of the Constitution found in the ringing oratory of Senator Robert C. Byrd.

9 455 F.2d 779, 784 (4th Cir. 1972) (Boreman, J., dissenting).
It is a great tribute to Senator Byrd that he recommended judges who were as fiercely committed to judicial independence as he is to the independence of the United States Congress.\(^\text{10}\)

In addition to having been supported for appointment to the Fourth Circuit by Senator Byrd, the five West Virginia judges examined here are shown to have had a great deal in common. They grew up in West Virginia (at least three of them poor) as part of established and hard-working West Virginia families. They were each scholars of note in their undergraduate and law school careers. They each practiced law in a West Virginia county seat, representing West Virginia citizens in a variety of legal proceedings. They were also each substantially involved in political endeavors for their respective parties and candidates, and they were all involved in public service prior to being appointed to the court of appeals. In their respective periods of service on the Fourth Circuit, these men demonstrated common characteristics in dispensing their judicial duties. Of note, it can be said of each that: (1) politics always stopped at the courthouse door; (2) cases and controversies were decided on the basis of the facts and the applicable legal principles, and always without fear or favor; and (3) commonly used labels for judicial philosophy — such as conservative, liberal, activist, strict-constructionist, and the like — are difficult (or impossible) to assign. Senator Byrd and West Virginia can rightfully be proud of the service and judicial performance of these judges, who consistently demonstrated sound judgment, intellect, instinctive courtesy and collegiality, exemplary judicial temperament and demeanor, all coupled with old-fashioned West Virginia pragmatism, values, and common sense.

With this background in mind, I turn to a more comprehensive review of these five West Virginia judges and thus to Senator Byrd's contribution to the jurisprudence of the United States Court of Appeals for the Fourth Circuit.

II. HONORABLE HERBERT S. BOREMAN (1959-1982)

Herbert Stephenson Boreman, a grandnephew of West Virginia's first governor, was born on September 21, 1897, in Middlebourne, the county seat of Tyler County, West Virginia, a sparsely populated Ohio River border county.\(^\text{11}\)

\(^{10}\) Letter from Joseph Robert Goodwin, United States District Judge for the Southern District of West Virginia, to author (Feb. 17, 2006) (on file with author).

\(^{11}\) See Tom Stafford, Clerk of Court, United States District Court for the Northern District of West Virginia, History of the United States District Court for the Northern District of West Virginia 25 (1984) (unpublished manuscript, on file with author) [hereinafter Northern District of West Virginia History]. Judge Boreman's great-uncle was Arthur I. Boreman, the first governor of West Virginia and an active force behind the State's creation. See id. See also John A. Field, Jr., Senior United States Circuit Judge for the Fourth Circuit, Memorial for Judge Herbert S. Boreman at the Executive Session of the Judges, 52d Judicial Conference of the United States Judges of the Fourth Circuit 51 (July 2, 1982) (transcript on file with author) [hereinafter Boreman Judicial Conference Memorial]; Memorial Committee, Wood County Bar, Memorial to United
Judge Boreman was the third West Virginian to serve on the Fourth Circuit Court of Appeals, and the first to be supported by Senator Robert C. Byrd, then newly elected to his first term in the Senate. Judge Boreman’s career spanned more than sixty years of law practice in both the public and private sectors, and culminated in more than twenty-two years on the Fourth Circuit. As a newspaper reporter once aptly described him, Judge Boreman “had a judicial bearing long before he went on the bench.”

Judge Boreman attended public schools and, in his early years, earned money by working at an automotive garage, in a steel mill, and in a bank. Following his graduation from high school in 1915, he attended West Virginia University, earning a degree from the College of Law in 1920. After graduating from law school, Judge Boreman entered the practice of law in Parkersburg, Wood County, West Virginia. In the 1920s and early 1930s, he served as an Assistant United States Attorney for the Northern District of West Virginia, as a divorce commissioner for Wood County, and as the elected Wood County Prosecuting Attorney. He thereafter returned to private practice in Parkersburg.

Judge Boreman, a Republican, was elected in 1942 to represent Wood County in the West Virginia Senate, and he won re-election to the state senate in 1946. It was during his service in the state legislature that Judge Boreman first

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12 Boreman Judicial Conference Memorial, supra note 11, at 52-53.
14 See Fourth Circuit History, supra note 13, at 481; Wood County Bar Memorial, supra note 11, at 1.
15 See Northern District of West Virginia History, supra note 11, at 25.
16 See BICENTENNIAL COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, JUDGES OF THE UNITED STATES 46 (2d ed. 1983) [hereinafter JUDGES OF THE UNITED STATES]; Northern District of West Virginia History, supra note 11, at 25.
17 See JUDGES OF THE UNITED STATES, supra note 16, at 46.
caught Senator Byrd’s eye. Senator Byrd entered the West Virginia House of Delegates in 1947, representing Raleigh County. At that time, Judge Boreman was serving as the state senate’s minority leader, a post he held from 1947 to 1950. Senator Byrd later remarked that, although Judge Boreman “had no occasion to know me as a newcomer to the legislature, I had occasion to know him and to know of him. He was very well liked by his colleagues in the state legislature. He made an exemplary record there...”

In 1948, Judge Boreman won the Republican nomination for Governor, but lost in the general election to his Democratic opponent. Judge John A. Field, Jr., his successor on the Fourth Circuit, first met Judge Boreman during his gubernatorial campaign:

A strikingly handsome man who carried himself almost militarily erect, well groomed and conservative in his dress, he looked every inch a Governor. There was nothing flamboyant about his campaign speeches — they were forthright and confined to the issues, and while he was always gracious and cordial to those he met, he was not the type of individual to be slapped on the back by ward-heelers nor did he in any way conduct what might be termed a one-gallused campaign. The truth is his dignity and innate sense of propriety simply would not permit him to engage in such political charades... He would have made a great Governor... Judge Field acknowledged and emphasized, however, that by losing a great Governor, West Virginia had “gained a great judge.”

On June 22, 1954, Judge Boreman was nominated by President Eisenhower for a judgeship in the Northern District of West Virginia, to replace Judge William Eli Baker. He was confirmed by the Senate less than a month

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19 See Nomination of Herbert S. Boreman (of West Virginia) To Be United States Circuit Judge for the Fourth Circuit: Hearing Before the Subcomm. on Nominations of the S. Comm. on the Judiciary, 86th Cong. 5 (1959) [hereinafter Boreman Court of Appeals Nomination Hearing] (statement of Sen. Robert C. Byrd (D-W. Va.)).
20 See BYRD, supra note 6, at 42-43.
21 See W. Va. S. Res. 5.
22 Boreman Court of Appeals Nomination Hearing, supra note 19, at 5 (statement of Sen. Robert C. Byrd (D-W. Va.)).
23 See Boreman Judicial Conference Memorial, supra note 11, at 51. Judge Boreman was defeated by Okey L. Patteson of Fayette County. See Northern District of West Virginia History, supra note 11, at 25.
24 Boreman Judicial Conference Memorial, supra note 11, at 52-53.
25 Id. at 53. S
26 See Federal Judicial Center, Boreman, Herbert Stephenson, http://www.fjc.gov/ history/home.nsf (follow “Judges of the United States Courts” hyperlink; then search “Biographical Di-
later, on July 21, 1954. Judge Boreman served as a district judge for the next five years; because Parkersburg did not then have a federal courthouse, he “rode the circuit,” holding court principally in Wheeling, Elkins, and Martinsburg, and travelling great distances over arduous routes. As later observed by Judge Field:

Judge Boreman conducted his work on the trial bench with the same industry, thoroughness and precision which had been his hallmark as a practicing attorney. While he ran a “tight ship,” he treated the attorneys and parties who appeared before him with his characteristic courtesy and consideration. Attentive to detail in both the procedural and substantive areas of the law, it was indeed a rare occasion when any of his cases were reversed on appeal.

When Senator Byrd entered the Senate on January 3, 1959, one of his first acts was to support the elevation of Judge Boreman to the Fourth Circuit Court of Appeals. On January 20, 1959, Judge Boreman was nominated by President Eisenhower to fill the Fourth Circuit seat of Chief Judge John J. Parker of North Carolina, who had recently passed away. Judge Field recalled that Judge Boreman’s “appointment was warmly received by his brothers on the appellate bench for he was by both temperament and ability a happy complement to their ranks.” Initially, though, Judge Boreman declined to accept the elevation: he enjoyed presiding over the give and take of the trial court and wanted to remain there. Judge Boreman agreed to sit by designation until someone could be found to take Judge Parker’s seat. After a few months,
however, when little effort had been made to find a permanent replacement, Judge Boreman accepted the appointment.34

Appearing with West Virginia’s senior senator, Jennings Randolph, at Judge Boreman’s confirmation hearing on June 10, 1959, Senator Byrd urged the Senate’s judiciary committee to approve the appointment, observing that Judge Boreman “has through the years enjoyed an excellent reputation throughout the state.”35 Senator Byrd described Judge Boreman as “a man who is loved and respected by his people, a man who will bring honor, dignity, and ability to the high position for which he has been nominated.”36 Judge Boreman’s nomination to the court of appeals was also backed by, among others, The West Virginia State Bar and the American Bar Association’s Standing Committee on the Judiciary, which unanimously supported his appointment.37 He was confirmed by the Senate on June 16, 1959, and took his oath of office later that month.38 After twelve years on the Fourth Circuit, Judge Boreman assumed senior status on June 15, 1971.39 He continued hearing cases in Richmond through April of 1976, was honored with a special sitting in Parkersburg in the early fall of 1978, and remained a Senior Judge until his death on March 26, 1982, at his home in Parkersburg.40

Judge Field, who succeeded Judge Boreman on the Fourth Circuit in 1971 and served with him throughout the period of his senior status, praised the quality of Judge Boreman’s work on the court:

Sharp and succinct, his opinions were models of clarity. To borrow a phrase from the late Judge Armistead Dobie [of the Fourth Circuit], they were “clear as crystal, crisp as bacon.” In a word, he was a lawyer’s judge. The quality of his meticulous and precise judicial craftsmanship did not go unnoticed by his peers.41

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34 See id. (citing Telephone Interview with Edward Colbert, Partner, Kenyon & Kenyon, and Former Law Clerk to Judge Boreman (Dec. 1, 1997)).

35 Boreman Court of Appeals Nomination Hearing, supra note 19, at 5 (statement of Sen. Robert C. Byrd (D-W. Va.)). It was acknowledged during the confirmation hearing that Senator Randolph and Senator Byrd, as the home-state senators, approved Judge Boreman’s nomination by “blue slip.” See id. at 1 (statement of presiding Sen. Olin D. Johnston (D-S.C.)).

36 Id. at 5-6 (statement of Sen. Robert C. Byrd (D-W. Va.)).

37 See id. at 1-2 (statement of presiding Sen. Olin D. Johnston (D-S.C.)).

38 See Fourth Circuit History, supra note 13, at 481; Boreman FJC Biography, supra note 26.

39 See Boreman FJC Biography, supra note 26.

40 See Boreman Judicial Conference Memorial, supra note 11, at 51; Boreman Portrait Dedication, supra note 11, at 4; Boreman FJC Biography, supra note 26. It has been said that Judge Boreman’s “final opinions, written in his 80th year, were composed with the same clarity, preciseness and thoroughness of those published almost three decades earlier.” Boreman Portrait Dedication, supra note 11, at 4.

41 Boreman Judicial Conference Memorial, supra note 11, at 54.
Judge Field recalled that another Fourth Circuit colleague, Judge Donald S. Russell of South Carolina, himself “not given to idle hyperbole,” once acknowledged one of Judge Boreman’s opinions by proclaiming:

“I cannot but be dazzled by the closely reasoned and exhaustive opinion you have prepared . . . . And it is written in a style and with a clarity that should serve as a model in opinion writing. Seldom have I ever read an opinion that deals so authoritatively with its subject matter.”

During his tenure on the Fourth Circuit, Judge Boreman authored more than three hundred published majority opinions, along with more than fifty separate opinions, either concurring, dissenting, or both. His Fourth Circuit colleague, James Braxton Craven, Jr. of North Carolina, once observed that, having served during the “good old days” when the court heard just a couple hundred (in contrast to a couple thousand) appeals a year, Judge Boreman was “the last of us who would listen to counsel with whom he agreed for 30 minutes.” His judicial service also placed him in the thick of the issues of the day, including the desegregation of public schools in the wake of the Supreme Court’s 1954 decision in Brown v. Board of Education, the implementation of the Civil Rights Act of 1964, and the prosecution of Vietnam-era “draft dodg-

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42 Id. at 54-55.
43 Judge Boreman also wrote eleven published majority opinions and one dissent as a district judge while sitting by designation on the Fourth Circuit. These figures, and similar figures provided for the other judges discussed herein, were calculated from searches of LEXIS and Westlaw.
44 J. Braxton Craven, Jr., United States Circuit Judge for the Fourth Circuit, How to Win an Appeal, Materials Considered by the Conferees and Referred to in the Panel Discussions at the Fourth Circuit Student Advocacy Conference Held at Richmond, Virginia, 87 F.R.D. 159, 216 (Sept. 18, 1978).
45 347 U.S. 483 (1954). Judge Boreman participated in dozens of school desegregation cases, some of which were heard by three-judge panels, see 28 U.S.C. § 46(b) (authorizing the courts of appeals to sit in three-judge panels), but many of which were heard by the court en banc. Judge Boreman himself penned opinions in at least two such matters. See Wheeler v. Durham City Bd. of Educ., 346 F.2d 768, 773 (4th Cir. 1965) (“A freedom of choice system, to warrant approval, must operate to prevent discrimination and not merely to correct conditions which have been deliberately created by unlawfully discriminatory procedures.”); Bradley v. School Board, 317 F.2d 429, 438 (4th Cir. 1963) (“[T]he appellants . . . are entitled to an order enjoining the defendants from refusing admission to any school of any pupil because of the pupil’s race. The order should prohibit the defendants’ conditioning the grant of a requested transfer upon the applicant’s submission to futile, burdensome or discriminatory administrative procedures.”).
46 Judge Boreman authored one of the early opinions involving the “disparate impact” theory of liability under Title VII of the Civil Rights Act of 1964, addressing the legality of facially neutral employment policies that disproportionately disadvantage members of a protected group and, thus, preserve the effects of prior discriminatory practices. See Griggs v. Duke Power Co., 420 F.2d 1225, 1232 (4th Cir. 1970) (holding that an employer’s educational and testing requirements could pass muster under the Act so long as there was a genuine business purpose for them
ers” and antiwar protesters. In *United States v. Cassiagnol*, for instance, the court affirmed the loitering and disorderly conduct convictions of four defendants who had been involved in an antiwar protest at the Pentagon. Judge Boreman, writing for the court, rejected the defendants’ constitutional challenge to the federal rules and regulations underlying their convictions, emphasizing the nature of the conduct at issue, i.e., that “of persons on government property and not on public streets, highways, or parks.” Holding that the rules and regulations at issue were neither unconstitutionally vague nor overbroad, Judge Boreman explained:

These rules and regulations, all of which were prominently posted in the area in which the demonstration took place, gave clear notice that certain conduct on government property was prohibited. The regulation in question made it clear that “unseemly and disorderly conduct” and “unwarranted loitering . . . and assembly” on this property were proscribed. It would not require a high degree of intelligence or understanding for one to reasonably conclude that breaking through a line of United States marshals who were lined up between the demonstrators and the Pentagon, a government building of highly strategic importance to the defense of the United States, could subject him to charges for disorderly conduct or that remaining on government property which was closed to the public during nonbusiness hours . . . beyond the expiration of the demonstration per-

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and they were adopted without any race-based discriminatory intent), *rev'd in part*, 401 U.S. 424, 432 (1971) (concluding that, although it was not error for the court to examine the employer’s intent, “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability”). Additionally, Judge Boreman was on the first Fourth Circuit panel to hear an appeal concerning a civil rights practice known as “employment testing,” or applying for employment in order to determine whether an employer discriminated in its hiring. *See Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971). In his separate opinion, Judge Boreman concurred in the panel majority’s approval of an injunction against Cone Mills, on the ground that the company had violated the Civil Rights Act by failing to hire the plaintiffs, African-American women qualified for the job. *See id.* at 87, 88 (Boreman, J., concurring in part and dissenting in part). Judge Boreman dissented, however, from the panel majority’s award of attorneys’ fees under the circumstances presented, in which a number of “testers” had been recruited to apply at various local plants and sign complaints against any companies not offering them employment, without selecting the lawyers representing them or taking an active and informed role in the litigation. *See id.* at 89 (Boreman, J., concurring in part and dissenting in part). “In short,” Judge Boreman observed, “this entire case smacks of nothing but manufactured litigation and, to employ a rather harsh but well known characterization — ‘ambulance chasing’ — with the plaintiffs themselves serving merely as puppets or as pawns in the game.” *Id.* at 90 (Boreman, J., concurring in part and dissenting in part).

47 420 F.2d 868 (4th Cir. 1970).

48 *Id.* at 873.
mit could subject him to charge for disorderly conduct or unwarranted loitering and assembly.49

Judge Boreman’s opinion vacated the convictions of two other protestors, however, on the ground that the trial judge’s exhaustive questioning and chiding comments indicated that he had prejudged those defendants’ guilt. Judge Boreman admonished that, although a trial judge is entitled to propound questions to witnesses and correct the erroneous statements of lawyers, “it is incumbent on the judge to conduct himself impartially and without the obvious indication of continual agitation and hostility toward . . . either side.”50 Nonetheless, Judge Boreman expressed sympathy for the presiding judge in the Cassiagnol case, remarking that “it [was] only fair to offer the observation that there was every indication of efforts to convert one trial after another [of the Pentagon protestors] into a ‘three-ring circus’ and to try the patience of the most patient. Judges are only human and it is unfortunate that these obvious efforts were partially successful.”51

One of Judge Boreman’s most highly visible opinions was Goldfarb v. Virginia State Bar.52 In that case, homeowners Lewis and Ruth Goldfarb brought a class action against the bar associations of Virginia and Fairfax County, contending that the bars’ fee schedules, establishing mandatory minimum fees for certain transactions, such as a deed, a will, or a title search, violated the Sherman Act.53 Judge Boreman’s opinion ruled that the Virginia bar was exempt from the antitrust law and that the Fairfax County association had not violated the statute because the practice of law fell within the judicially created “learned profession” exemption to the Sherman Act, and was neither “trade nor commerce.”54 Judge Boreman’s opinion displays both a concern that declaring fee schedules illegal would undermine the ethical practice of law and an appreciation for the role of federal courts in American government:

To hold that the practice of law is subject to the Sherman Act would cast doubt upon the validity of bar admission standards, prohibitions upon advertising, and a multitude of other restrictions upon the practice of law. In our governmental system a legislative body is better equipped to accommodate these re-

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49 Id. at 873-74 (first alteration in original).
50 Id. at 879.
51 Id. at 879 n.11.
52 497 F.2d 1 (4th Cir. 1974).
53 Id. at 3-4.
54 Id. at 13-15.
strictions imposed upon the practice of a profession to the overall design and purpose of the anti-trust laws.\textsuperscript{55}

In its 1975 landmark decision, the Supreme Court reversed, holding that there was no "learned profession" exception to the Sherman Act, that the practice of law was "trade or commerce," and that the minimum fee schedules of the bar associations constituted an illegal restraint of trade.\textsuperscript{56}

Admirably, Judge Boreman was not afraid to admit it when he came to believe he had previously erred. In one instance, Judge Boreman wrote separately to acknowledge a change in his views: "In attempting to minimize my feeling of embarrassment in announcing withdrawal from my earlier position, I might derive some comfort from the statement attributed to . . . Mahatma Gandhi . . . . 'My aim is not to be consistent with any previous statement I have made on a given question, but to be consistent with truth as it may present itself to me at a given moment.'\textsuperscript{57}

In his private life, Judge Boreman always "displayed a wholesome, modest and unassuming character which made him universally popular with all who knew him."\textsuperscript{58} Judge Boreman, a gifted pianist, would often accompany his wife Cornelia, an accomplished violinist, in impromptu concerts for their friends.\textsuperscript{59} The couple had three children.\textsuperscript{60} Judge Boreman was also "a golf player of considerably above average ability," and he "spent many hours at the Parkersburg Elks Club competing at three cushion billiards."\textsuperscript{61} He harbored a deep affection for Parkersburg, a "dignified old city on the banks of the Ohio," and its citizens "took justifiable pride in 'their Judge.'\textsuperscript{62} Indeed, "[a]s a testimonial of the high regard in which he was held, the Wood County Centennial Committee included [him] in its list of Distinguished Wood Countians" as part of the West Virginia Centennial Celebration of 1963.\textsuperscript{63} Judge Boreman also "maintained a keen interest in his alma mater,"\textsuperscript{64} serving on the West Virginia University Board of Governors, as a member and Chairman of the Visiting Committee of the College of Law, and as President of the University's Alumni Association.\textsuperscript{65} In 1970, Judge Boreman was awarded the University's highest

\textsuperscript{55} Id. at 19.


\textsuperscript{57} Shiflett v. Virginia, 447 F.2d 50, 62 (4th Cir. 1971) (en banc) (Boreman, J., concurring).

\textsuperscript{58} Wood County Bar Memorial, supra note 11, at 10.

\textsuperscript{59} See Boreman Judicial Conference Memorial, supra note 11, at 55; Wood County Bar Memorial, supra note 11, at 10.

\textsuperscript{60} See Wood County Bar Memorial, supra note 11, at 9.

\textsuperscript{61} Id. at 10.

\textsuperscript{62} Boreman Judicial Conference Memorial, supra note 11, at 55.

\textsuperscript{63} Wood County Bar Memorial, supra note 11, at 2; see also Boreman Judicial Conference Memorial, supra note 11, at 55.

\textsuperscript{64} Boreman Judicial Conference Memorial, supra note 11, at 51.
honor, the Order of Vandalia, and, in 1978, he was awarded the College of Law’s highest honor, the Justicia Officium Award.66

Upon Judge Boreman’s passing, his Wood County colleagues recalled that he was an “unostentatious perfectionist” who excelled at everything he undertook; with particular respect to his service as “[a] scholarly lawyer and a distinguished judge,” they observed that “he earned and enjoyed the respect of all the members of his profession.”67 Presenting Judge Boreman’s portrait in the Fourth Circuit, Judge Charles H. Haden II, then serving as Chief Judge for the Southern District of West Virginia, remarked: “I have tried to describe a rare man and a Judge for the Ages. Truly, he will be warmly remembered always by those who knew him, and for as long as the law is read and applied, he will be respected by succeeding generations of the legal profession.”68

III. HONORABLE JOHN A. FIELD, JR. (1971-1995)

John A. Field, Jr. was born on March 22, 1910, in Charleston, the state capital and county seat of Kanawha County.69 A Republican, Judge Field nevertheless twice garnered the enthusiastic support of Senator Robert C. Byrd for federal judgeships, first in the Southern District of West Virginia, and subsequently on the Fourth Circuit. Senator Byrd was far from alone in his esteem for Judge Field. Judge Kenneth K. Hall, who twice succeeded Judge Field on the federal bench, has observed: “Every once in a great while, there comes along a person whom everybody likes. Even his adversaries — political, business, or otherwise — think that he is a great man. Such a person was Jack Field.”70 Further praise for Judge Field has been shared by Judge John T. Copenhaver, Jr., who has served in the Southern District of West Virginia since 1976:

With rare good looks, a deep resonant bass voice and a personality and high level of intelligence to match, one could readily imagine the judge on the screen, playing the role portrayed by a Gregory Peck or a John Wayne. Had he pursued a journalism career, one can envision him as an incisive pundit or a network television news anchor. And, of course, he had the option of pursuing state elective office. But work is not steady

65 See id. at 51-52; Wood County Bar Memorial, supra note 11, at 8.
66 See Boreman Judicial Conference Memorial, supra note 11, at 52.
67 Wood County Bar Memorial, supra note 11, at 1.
68 Boreman Portrait Dedication, supra note 11, at 10.
69 See Kenneth K. Hall, United States Circuit Judge for the Fourth Circuit, Memorial Resolution for Judge Field at the Executive Session of the Judges, 66th Judicial Conference of the United States Judges of the Fourth Circuit 81 (June 27, 1996) (transcript on file with author) [hereinafter Field Judicial Conference Memorial].
70 Id. at 80-81.
for a Republican in West Virginia politics — and so we can rejoice that he chose the federal judiciary instead. Surely no one has served with greater distinction as both a trial judge and a member of the court of appeals.\textsuperscript{71}

Judge Field was part of a prominent Charleston family engaged in a wholesale mercantile business known as Thomas, Field & Company.\textsuperscript{72} He was educated in the public schools, graduating from Charleston High School, where he developed an interest in journalism as a sports writer for the school newspaper.\textsuperscript{73} Judge Field went on to attend Hampden-Sydney College, a small men's college near Farmville, Virginia, where he served as Vice-President of the student body and wrote for the local newspaper.\textsuperscript{74} Upon graduation from Hampden-Sydney in 1932, he planned to make journalism his career, "but his father had other ideas."\textsuperscript{75} Judge Field thus entered the University of Virginia School of Law.\textsuperscript{76} At the law school, he served as President of the student body and as a member of the Editorial Board of the \textit{Virginia Law Review}, he became a member of the Order of the Coif, and he graduated in 1935 ranked third in his class.\textsuperscript{77} Throughout his life, Judge Field retained a letter from his father, dated September 29, 1934, congratulating him on a law school honor and offering some sage advice that he apparently took to heart:

It is the sincere hope and prayer of your father that you may continue unspoiled with a serious view of life, taking life seriously but not taking yourself too seriously. And that when you get through your school, you will acquit yourself equally as credibly in actual practice, and I believe you will.\textsuperscript{78}

Following his law school graduation in 1935, Judge Field entered private law practice in Charleston, with the firm of Brown, Jackson & Knight (now

\textsuperscript{72} See id. at 1.
\textsuperscript{73} See id.
\textsuperscript{74} See Portrait Unveiling in Honor of Honorable John A. Field, Jr., United States Circuit Judge, United States Court of Appeals for the Fourth Circuit Sitting En Banc at Richmond, Virginia 6 (Sept. 24, 2003) (transcript on file with author) [hereinafter Field Portrait Unveiling] (statement of Judge Robert B. King).
\textsuperscript{75} Charter Meeting of the Inn, supra note 71, at 1.
\textsuperscript{76} See id. at 1-2.
\textsuperscript{77} See id. at 2; Field Portrait Unveiling, supra note 74, at 6-7 (statement of Judge Robert B. King).
\textsuperscript{78} Field Portrait Unveiling, supra note 74, at 20-21 (statement of William C. Field, Esq., Son of Judge Field).
Jackson Kelly). He then enlisted in the Navy in 1944, during World War II, entering with the rank of lieutenant and commanding a twenty-seven-member gunnery crew on a liberty ship manned by the Merchant Marine. Judge Field’s Navy service included sea duty in both the European and Pacific theaters, and he was discharged in late 1946, after the War had ended.

Judge Field resumed private practice in Charleston in 1947, with a single law partner. That same year, he was also elected to a four-year term on the Charleston City Council. Following his election to a second such term in 1951, he served as the Council’s President and as the Chairman of its Finance Committee. In 1956, Judge Field was the Republican nominee for a statewide office, that of Attorney General of West Virginia. He lost to his Democratic opponent, Wally Barron; in a race that has been won by the Democrat in every election since 1932, Judge Field made a strong showing, however, losing by only two percent of the vote. A Republican did win the governorship in 1956, affording Judge Field — a popular Republican who had a choice of positions in the new administration — the opportunity to leave private practice for the marquee post of State Tax Commissioner. “The two factions of the Republican Party,” Judge Hall explained, “after a lot of bickering, selected the one qualified lawyer everybody liked, and so Jack Field

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79 See id. at 7 (statement of Judge Robert B. King).
80 See Charter Meeting of the Inn, supra note 71, at 2; Field Judicial Conference Memorial, supra note 69, at 81.
81 See Nomination of John A. Field of West Virginia To Be a U.S. Circuit Judge, Fourth Circuit: Hearing Before the Subcomm. on Nominations of the S. Comm. on the Judiciary, 92d Cong. 5 (1971) [hereinafter Field Court of Appeals Nomination Hearing] (statement of Sen. Robert C. Byrd (D-W. Va.)).
83 See Morgan, supra note 82, at 28.
84 See id.
86 See id.
87 Id. at 3.
became the Judge of the Southern District of West Virginia. No criticism of their choice ensued, either then or throughout Jack's illustrious career.\textsuperscript{89}

Judge Field's home-state senators — Senator Jennings Randolph and, in the first year of his first term in the Senate, Senator Byrd — indicated their support for the appointment by submitting "blue slips" to the Senate and supporting confirmation at his August 3, 1959 judiciary committee hearing.\textsuperscript{90} Senator Byrd recommended Judge Field "without any reservations," observing that he had "known the nominee for many years, and although we are not members of the same political party, I can have only the utmost respect and high regard and appreciation for the excellent example that John Field has set in his conduct of public office."\textsuperscript{91} When asked by a judiciary committee member whether the office of State Tax Commissioner calls for a "judicious temperament," Senator Byrd responded, "It does . . . ."\textsuperscript{92} Elaborating, he explained:

> It calls for, if one is to discharge the duties of the office in the proper manner, it calls for someone who has a judicious temperament, and I can say that this nominee has certainly made an excellent record in the discharge of the duties of that office. He has earned the commendation and the plaudits of other public officials in both parties. He has never used that office as a springboard for political activity. He has been most fair in his treatment of the employees of the office in both parties, and we Democrats in West Virginia think that John Field is one of the finest kind of individuals that can hold an office, be it appointive or elective . . . .\textsuperscript{93}

Judge Field was confirmed by the Senate as a district judge on August 12, 1959.\textsuperscript{94} The following day, the Charleston Gazette characterized the move from State Tax Commissioner to district judge as a "long step," but observed

\textsuperscript{89} Field Judicial Conference Memorial, supra note 69, at 82.
\textsuperscript{90} Judge Field's selection as a district judge also was backed by the Standing Committee on the Federal Judiciary of the American Bar Association and by The West Virginia State Bar. See Field District Court Nomination Hearing, supra note 82, at 1 (statement of presiding Sen. Olin D. Johnston (D-S.C.)).
\textsuperscript{91} Id. at 5 (statement of Sen. Robert C. Byrd (D-W. Va.)).
\textsuperscript{92} Id. at 7 (statement of Sen. Robert C. Byrd (D-W. Va.)).
\textsuperscript{93} Id. (statement of Sen. Robert C. Byrd (D-W. Va.)).
\textsuperscript{94} See Field FJC Biography, supra note 88. Judge Field received his commission on August 13, 1959. See id. Judge Copenhaver has noted that, "[a]s fate would have it, that very day the leading candidate for the 1960 Republican nomination for Governor unexpectedly died. Had Judge Field not been appointed to the federal bench, he could have been a formidable candidate for the governorship and would have had an excellent opportunity to prevail in the 1960 general election." Charter Meeting of the Inn, supra note 71, at 4.
that Judge Field was "used to taking long steps. He's built that way, physically and intellectually." The newspaper concluded:

He can't know at this point how well he will do as federal judge or whether his temperament will match the job.

But in his mind's eye is what may be termed the "lawyer's ideal" of a judge.

"A judge," Field said, "fulfills his responsibility to the cause of justice if he conducts a court to which any attorney or litigant can come, secure in the feeling that he will get the best that the judge can give him — an honest determination of the case."

That's the kind of judge that Field wants to be. There are many who expect him to attain that ideal in stride.

Judge Field went on to serve as the Chief Judge in the Southern District of West Virginia from 1959 until 1971. According to Judge Hall, lawyers liked to appear before Judge Field, because "[h]e was unfailingly courteous and accommodating, and his courtroom was a place of dignity. He hadn't a pompous cell in his body. The respect [Judge Field] thereby commanded far exceeded anything he could have demanded." Moreover, he was widely known as an exceedingly fair jurist. "More than once, some of his former political opponents were charged with crimes in his court, and he offered to recuse himself. So certain were these erstwhile adversaries of Judge Field's integrity that they declined his offer and requested that he preside over their trials," Judge Hall has recalled. "He did. They were convicted. And by the way, not one complained on a personal basis about the way Judge Field conducted his trial."

95 Morgan, supra note 82, at 28.
96 Id.
97 See Field FJC Biography, supra note 88.
98 Field Judicial Conference Memorial, supra note 69, at 82. There were, of course, necessary limits on Judge Field’s patience. Judge Copenhaver has recalled that, "[o]n the occasion of an injunctive hearing respecting a march that was about to take place during Vietnam days, [Judge Field] interrupted to instruct an attorney, whose expansive argument commenced with the Magna Carta, that he had only three minutes left to get from the Battle of Runnymede to the present." Charter Meeting of the Inn, supra note 71, at 5.
99 Field Judicial Conference Memorial, supra note 69, at 82. One of those former political opponents was former Governor Wally Barron, the Democrat who had defeated Judge Field in his run for Attorney General. See Field Portrait Unveiling, supra note 74, at 8 (statement of Judge Robert B. King). When Barron was indicted in 1971 for corruption in his later position as Governor, "he specifically declined to seek a new judge or a venue change, asserting that Judge Field was the fairest judge he could ever have." Id. (statement of Judge Robert B. King).
Judge Copenhaver has described Judge Field as "an industrious judge who did much of his own research and opinion writing," who would "engage but one law clerk when two were authorized" and sought "to crisply decide the issue before him and avoid engaging in dictum." According to Judge Copenhaver, Judge Field's opinions "were uniformly scholarly and concise," and "[h]e approached every issue independently and with sensitivity and an appropriate degree of compassion." Some of that sensitivity and compassion was directed to "the people of Appalachia and . . . the plight in which they sometimes found themselves." As Judge Copenhaver has recounted:

When a moonshiner would occasionally be brought before him, his concern would focus upon whether the defendant was using copper pipe with good welds to distill his product rather than tubes made of or bound together with lead. Those who used copper would be treated with greater leniency. When Judge Field was elevated to the court of appeals, one moonshining family, one or two of whose members had come before him, came to Beckley to wish him well in his new position and express their regret that he would no longer be serving on the trial bench. They had gone copper.

On September 8, 1971, President Nixon nominated Judge Field for the Fourth Circuit seat made open when Judge Herbert S. Boreman took senior status. Judge Field once again received the support of Senator Randolph and Senator Byrd, by "blue slip" and personal appearance at his confirmation hearing, and he received a unanimous rating of "well qualified" from the Standing Committee on the Federal Judiciary of the American Bar Association, as well as full support and recommendation of The West Virginia State Bar. During Judge Field's September 21, 1971 confirmation hearing, Senator Byrd remarked, "The record that this distinguished judge has compiled in his tenure during the last 12 years as a federal district judge causes me great pride in urging the confirmation of his nomination as a circuit judge." Senator Byrd also pointed out that, during his time as a district judge, Judge Field had on numerous occasions sat by designation on the Fourth Circuit. "He is a man of great

100 Charter Meeting of the Inn, supra note 71, at 6.
101 Id.
102 Id.
103 Id.
104 See Field FJC Biography, supra note 88.
105 See Field Court of Appeals Nomination Hearing, supra note 81, at 1-2 (statement of presiding Sen. Roman L. Hruska (R-Neb.)), 11 app.
106 Id. at 6 (statement of Sen. Robert C. Byrd (D-W. Va.)).
107 See id. (statement of Sen. Robert C. Byrd (D-W. Va.)).
ability. He is a great judge and a great individual. He is a man of outstanding character and of unblemished reputation,” Senator Byrd observed. “I would summarize his potential in the words of [the] President of The West Virginia State Bar by simply stating he is the best of the best.”

Judge Field was confirmed as a judge of the Fourth Circuit on the very day of his hearing, September 21, 1971. He assumed senior status on April 1, 1976, continued to hear cases into the mid-1980s, and remained a member of the court until his death on December 16, 1995, at his home in Naples, Florida. During his tenure, he wrote more than 130 published majority opinions and more than twenty separate opinions. Judge Copenhaver has remarked that Judge Field was an extraordinarily well-liked and respected colleague to the other Fourth Circuit judges:

The Court of Appeals for the Fourth Circuit has long been noted for its collegiality. When Judge Field joined the court the other members already knew him well. His gregarious nature and juristic skills quickly made him their own favorite judge. He proved to be persuasive with his colleagues on the circuit bench, at times changing the opinion of the majority in the course of preparing his dissent. In one such instance, his dissent in the three-judge panel decision became the basis of the opinion of the en banc majority for whom he wrote in 1977 in the case of Moore v. Hampton Roads Sanitation District Commission.

Judge Field’s close friend on the Fourth Circuit and fellow Nixon appointee, Judge H. Emory Widener, Jr. of Virginia, has fondly reminisced about the “gripes” pairing them against other members of the court. In particular, Judge Widener recalled “the best one we had”:

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108 Id. (statement of Sen. Robert C. Byrd (D-W. Va.)).
109 See Field FJC Biography, supra note 88.
110 See Field Judicial Conference Memorial, supra note 69, at 83; Field FJC Biography, supra note 88.
111 As a district judge sitting by designation on the Fourth Circuit, Judge Field authored nine published majority opinions.
112 Charter Meeting of the Inn, supra note 71, at 8. In the case mentioned by Judge Copenhaver, Moore v. Hampton Roads Sanitation District Commission, the plaintiffs had alleged “that their oyster beds leased to them by the Commonwealth of Virginia had been destroyed as the result of the improper operation of a sewage disposal system by the defendants.” 557 F.2d 1030, 1037 (4th Cir. 1977) (en banc). Writing for the en banc majority, Judge Field held that the district court lacked federal admiralty and maritime jurisdiction over the dispute, which involved “purely local activity subject to the laws and jurisdiction of the state.” Id. at 1038.
113 Field Portrait Unveiling, supra note 74, at 4 (statement of Judge H. Emory Widener, Jr.).
There was a dope dealer in Wytheville[, Virginia.] called Roger Davis. And Roger made the mistake of making an addict out of the wife of a boy who was in Bland Penitentiary. And the boy got very upset about the fact that Roger had made an addict out of his wife and he said to the authorities at Bland, “If you will find some excuse to let me out for a couple of weeks, I’ll nail Davis for you.” So they did, and he did. The next thing we know, Roger Davis was being tried at the Circuit Court of Wythe County for selling dope to this girl and also sending marijuana into Bland, and [the state trial judge] gave him two 20-year sentences to be served consecutively.

The federal district judge got upset about the length of that sentence for selling marijuana only twice and set aside the sentence as disproportionate.\footnote{114 See Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977).} Jack and I were on the panel that heard that case, and we got about as upset as the district judge did, except for the opposite reason. So we set aside that decision of the District Court\footnote{115 See Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978). Judge Widener wrote the opinion for the unanimous three-judge panel, which included Judge Field, as well as Judge Hall.} and the Court of Appeals got just about as upset with Jack and me as we had been with the [District] Judge, and we got vacated.\footnote{116 See Davis v. Davis, 601 F.2d 153 (4th Cir. 1979) (en banc). Judge Field, then on senior status, heard oral argument as a member of the en banc court, but he withdrew from further participation in the case once 28 U.S.C. § 46(c) was amended in 1978 to strike out a provision that had permitted senior judges to participate in en banc rehearings of matters in which they had sat on the original panels. The prohibition against the participation of senior judges in en banc rehearings lasted until 1982.}

The Supreme Court then took cert in that case and vacated the Court of Appeals, sent it back.\footnote{117 See Hutto v. Davis, 445 U.S. 947 (1980).} The Court of Appeals got stubborn and affirmed the District Court again.\footnote{118 See Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc).} They just wouldn’t take it lying down. And the next thing you know, the Supreme Court took cert again.\footnote{119 See Hutto v. Davis, 454 U.S. 370 (1982).} \footnote{120 Id. at 375.} I will read you the conclusion of that opinion. It says: “Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts, no matter how misguided the judges of those courts may think it to be.”
I gave you that as [Judge Field's] epitaph . . . .\textsuperscript{121}

Despite his disagreement with the district judge in the \textit{Davis} case, Judge Field was universally appreciated and admired by the district judges of the circuit, probably because he was perceived as "one of them" and had a keen understanding of the difficulties facing the trial bench in rendering rulings in the heat of battle. In one appeal, for instance, Judge Field called the reversal of contempt charges imposed by the lower court "one more regrettable step which undercuts the authority of the already beleaguered district judges who are charged with the orderly administration of justice in the trial arena and, unlike us, do not live in the sterile and sometimes unrealistic environment of the appellate ivory tower."\textsuperscript{122}

Of Judge Field's many own decisions, the one regarded as his favorite was a district court opinion issued by him with little fanfare in 1967. As Judge Hall has explained:

\textit{[A]s any judge knows, one's favorite opinions aren't necessarily the most significant opinions. One of Jack's favorites was, of all things, a patent infringement case he heard while on the district bench. The case was called Pavement Salvage Company v. Anderson's-Black Rock, Inc.}\textsuperscript{123} The dispute was over a machine that could lay strips of asphalt paving without creating a seam between them. Jack held that the machine was not a patentable invention because it was simply an obvious combination of parts known to prior art. Jack filed away his opinion without even publishing it, and it probably would have melted into oblivion if it weren't for our court of appeals.

The Fourth Circuit reversed Jack.\textsuperscript{124} Now his opinion was not only unpublished, but it was wrong.

Well, the Supreme Court gave Jack a sweet vindication. The opponents of the paving machine inventor had been granted certiorari, and Jack received a phone call from the Court, requesting that he dig up his, by then, two-year-old opinion and publish it. Justice Douglas then wrote a short opinion for the unanimous Court that adopted much of Jack's reasoning.\textsuperscript{125}

\textsuperscript{121} Field Portrait Unveiling, \textit{supra} note 74, at 4-6 (statement of Judge H. Emory Widener, Jr.).

\textsuperscript{122} United States v. Snider, 502 F.2d 645, 665 (4th Cir. 1974) (Field, J., dissenting from denial of rehearing en banc).


\textsuperscript{124} \textit{See} Pavement Salvage Co. v. Anderson's-Black Rock, Inc., 404 F.2d 450 (4th Cir. 1968).

This case was a favorite of Jack's for more than just the obvious pleasure of being declared right by the final arbiter of rightness. For one thing, Jack found pleasing irony in the adoption of his opinion by Justice Douglas, who was not exactly his philosophical soulmate. I suppose a thing like patent law can bring us all together.126

Outside the courthouse, Judge Field was addicted to the game of golf and sought to learn from the very best players.127 Although he was a very fine golfer, his height— he stood nearly six feet, five inches— was a disadvantage to his game.128 Nevertheless, as Judge Copenhaver has recalled, "he persevered in a life-long attempt to improve his swing. So much so that one of his golfing friends once was heard to say, 'Wouldn't you think a smart fellow like that would figure out that it's not going to get any better?'"129

While "the law was his vocation" and golf "his avocation,"130 "Judge Field was devoted, above all else, to his family."131 He had met his first wife, Elaine, while an undergraduate student and married her during his first year of studies at law school.132 The couple had two sons, John III and William.133 Elaine Field died in 1973, shortly after Judge Field became a member of the Fourth Circuit.134 In 1980, he married his second wife, Connie, who became a good friend of his sons and their families.135 Judge Field was extremely proud that his sons followed in his footsteps, becoming prominent lawyers in their own right.136 In 1972, when John A. Field III was sworn in as the United States Attorney for the Southern District of West Virginia, Judge Field administered the oath of office.137 After asking permission "to indulge in a few personal remarks,"138 Judge Field expressed the following to his son: "I hope you will serve the people of the Southern District of West Virginia with the ability I

126 Field Judicial Conference Memorial, supra note 69, at 83-84.
127 See Charter Meeting of the Inn, supra note 71, at 9; Field Portrait Unveiling, supra note 74, at 9-10 (statement of Judge Robert B. King).
128 See Field Portrait Unveiling, supra note 74, at 9-10 (statement of Judge Robert B. King).
129 Charter Meeting of the Inn, supra note 71, at 9-10.
130 Id. at 9.
131 Field Portrait Unveiling, supra note 74, at 9 (statement of Judge Robert B. King).
133 See id. at 2.
134 See id. at 8.
135 See id.; Field Judicial Conference Memorial, supra note 69, at 85.
136 See Field Judicial Conference Memorial, supra note 69, at 84-85.
138 Id. at 4 (statement of Judge John A. Field, Jr.).
know you have, conscientiously and without fear or favor, and I certainly, both as a Judge in the Federal Court and as your father, want to wish you Godspeed in your new endeavor.”

In addition to his son, four of Judge Field’s former law clerks went on to serve as the United States Attorney for the Southern District of West Virginia. As Judge Hall once put it, “To say that there has been something of a Field dynasty in that office would be no overstatement.”

For all of his former law clerks — an “Alumni Association” twenty-seven members strong which regularly gathered for reunions — Judge Field “was a great teacher, mentor, friend, confidant, and he was always available to share in the good times and the bad.” According to Judge Hall, Judge Field’s “most estimable qualities — integrity, erudition, and humility — have been passed on through his mentorship of this bevy of fine lawyers.” Although scattered geographically, all but two of Judge Field’s former law clerks attended his funeral, at the church where he was a charter member, Village Chapel Presbyterian Church in Charleston.

This author had the honor of serving as a law clerk to Judge Field, in 1968 and 1969, during his time as a district judge. I also was pleased to speak at the unveiling of his portrait in the Fourth Circuit, where I shared these observations with the colleagues, family, and friends who had gathered to honor him:

As a member of the federal judiciary until 1995, Judge Field was scholarly, non-pretentious, and courageous. He was characteristically sensitive and respectful to every lawyer, every litigant, juror, or witness in his Court. He also possessed an unwitting and self-deprecating sense of humor, appearing never to take himself seriously.

As a judge, John A. Field, Jr. was simply the best. He could cut to the dispositive issue, simplifying the most complex disputes, better than anyone I have ever known. He was respected by all who knew him as even-handed and fair, and his reputation was exemplary in every respect.

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139 Id. at 5 (statement of Judge John A. Field, Jr.).
140 See Field Judicial Conference Memorial, supra note 69, at 84.
141 Id.
142 See Field Portrait Unveiling, supra note 74, at 11, 13, 15 (statement of W. Warren Upton, Counsel, Jackson Kelly, Former United States Attorney for the Southern District of West Virginia, and Former Law Clerk to Judge Field).
143 Field Judicial Conference Memorial, supra note 69, at 84.
144 See Charter Meeting of the Inn, supra note 71, at 8.
145 Field Portrait Unveiling, supra note 74, at 8 (statement of Judge Robert B. King).
IV. HONORABLE KENNETH K. HALL (1976-1999)

Born February 24, 1918, in Greenview, Boone County, West Virginia, on the Spruce Fork of the Little Coal River, Kenneth Keller Hall — widely known as “K. K.” — was a close personal friend of Senator Robert C. Byrd and the first fellow Democrat among the Fourth Circuit judges from West Virginia supported by him. Judge Hall, an only child, was reared fatherless and in poverty in his native Boone County, where he attended the public schools, in the midst of the southern West Virginia coalfields. As later observed by his colleague Judge M. Blane Michael, “Young K. K. Hall was not scarred by poverty, however. He was a scrapper, and his early experiences instilled in him the best of qualities: industry, perseverance, fairness, and loyalty.”

Judge Hall graduated in 1936 from Scott High School in Madison, the county seat of Boone County. He thereafter remained in West Virginia, studying for a time at New River State College in Montgomery (now the West Virginia University Institute of Technology) and Morris Harvey College (now the University of Charleston), and working for the State Road Commission and as a blue-collar employee at a Union Carbide plant in the Kanawha Valley. During World War II, soon after the attack on Pearl Harbor, Judge Hall enlisted in the United States Navy, serving from 1942 to 1945. He was a gunnery officer aboard the aircraft carrier Bunker Hill in 1945 for the Battle of Okinawa, during which the great carrier sustained massive damage and the crew hundreds

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147 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LX-LXI (statement of Judge Robert B. King).

148 M. Blane Michael, United States Circuit Judge for the Fourth Circuit, Memorial Resolution for Judge Hall at the Executive Session of the Judges, 70th Judicial Conference of the United States Judges of the Fourth Circuit 98 (June 29, 2000) (transcript on file with author) [hereinafter Hall Judicial Conference Memorial].

149 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LXI (statement of Judge Robert B. King). At Scott High School, while serving as team captain and fullback for the football team, Judge Hall’s “irrepressible spirit was never more apparent,” in that, “[o]n play after play, he would plunge into the opposing line with abandon, notwithstanding his slender frame.” Hall Judicial Conference Memorial, supra note 148, at 98.

150 See Nomination of Kenneth K. Hall To Be United States Circuit Judge for the Fourth Circuit: Hearing Before the Subcomm. on Nominations of the S. Comm. on the Judiciary, 94th Cong. 1-10 app. (1976) [hereinafter Hall Court of Appeals Nomination Hearing]; In Memoriam: Honorable K. K. Hall, 216 F.3d at LXI (statement of Judge Robert B. King).

151 See Hall Judicial Conference Memorial, supra note 148, at 98-99; Hall Court of Appeals Nomination Hearing, supra note 150, at 1-10 app.
of fatalities from kamikaze raids. Judge Hall had enlisted in the Navy as a raw seaman and was discharged as a highly decorated full lieutenant, having participated in eleven major battles in the Pacific theater.

Following the War, Judge Hall attended law school on the GI bill, graduating from the West Virginia University College of Law in 1948, where he "distinguished himself as a scholar and a thinker" and served on the West Virginia Law Review. He engaged in private practice in Madison from 1948 to 1953. During most of that time frame, from 1949 to 1952, he also served as the Mayor of Madison, winning two elections to that post, each time by a unanimous vote. The position of mayor afforded him his first experience on the bench, in that the mayor acted as municipal judge. It also paved the way for his introduction to Senator Byrd. As the story goes:

It was 1951, and Senator Byrd wanted to run for Congress the next year in the old Sixth Congressional District, which included Boone County. Senator Byrd, who was from Raleigh County, needed some help in Boone County, and someone told him to go see K. K. Hall.

....

The two met, and they liked each other instantly. A short time later, at the beginning of 1952, Senator Byrd filed for Congress, and K. K. Hall for circuit judge. In the primary, there were three strong Democratic factions, and they were bitter rivals. None of the factions backed Senator Byrd; he was an outsider.

153 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LXII (statement of Judge Robert B. King); Messina, supra note 146, at A1.
154 Robert B. King, United States Circuit Judge for the Fourth Circuit, Remarks at the Memorial Service for Judge Hall at the Charleston Baptist Temple 1 (July 12, 1999) (transcript on file with author) [hereinafter Remarks of Judge Robert B. King].
157 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LXI (statement of Judge Robert B. King).
158 See Nomination of Kenneth K. Hall of the State of West Virginia To Be a United States District Judge for the Southern District of West Virginia: Hearing Before the Subcomm. on Nominations of the S. Comm. on the Judiciary, 92d Cong. 5 (1971) [hereinafter Hall District Court Nomination Hearing] (statement of Sen. Robert C. Byrd (D-W. Va.)).
One Saturday night, one of the factions held a rally in Van, in Boone County, and Senator Byrd went. The emcee wouldn’t let the Senator speak. The next Saturday night, the same faction had a rally in Nellis, and Senator Byrd decided he’d go to that one, too. But this time he took two things with him: his fiddle and K. K. Hall. The same thing happened. The emcee wouldn’t let the Senator speak. Right after the meeting, the crowd went outside for free pop, and ice cream, and cake.

Senator Byrd stayed in the hall, and in a few minutes he started playing his fiddle. In the meantime, Judge Hall was outside working the crowd. The judge was telling everybody, "Why don’t you go back inside and see Robert Byrd. He’s going to play his fiddle, and he’s good at it. You’ll like him." Pretty soon, the entire crowd was back inside, pop and ice cream in hand. By this time, Senator Byrd was in concert form, and he made a great campaign speech, too. But it was K. K. Hall who reassembled the crowd, and he did it with a big smile and an occasional nudge or a pat on the back.

Senator Byrd and Judge Hall went on to win their elections, and the rest is history . . . .

At the age of only thirty-four, Judge Hall became a state circuit judge, serving two eight-year terms on the circuit court for Boone and neighboring Lincoln counties (West Virginia’s 25th Judicial Circuit), from 1953 to 1969. He then briefly resumed private practice in Madison, followed by service as a hearing examiner for the Social Security Administration.

Judge Hall — “a great story teller” who “loved to make people laugh” and “loved to laugh at himself” — often shared a story about his first day as a judge on the state circuit court. As recounted by Judge Michael:

159 M. Blane Michael, United States Circuit Judge for the Fourth Circuit, Remarks at the Memorial Service for Judge Hall at the Charleston Baptist Temple 3-5 (July 12, 1999) (transcript on file with author) [hereinafter Remarks of Judge M. Blane Michael].

160 *See Justices and Judges 1999, supra* note 156, at 226; *Hall Judicial Conference Memorial, supra* note 148, at 99. Judge Hall was elected to his second term on the state circuit court without opposition in the primary or general elections. *See Hall District Court Nomination Hearing, supra* note 158, at 5. And, he has been credited as the first judge of the 25th Judicial Circuit to allow African Americans and women to serve as jurors. *See* Maryclaire Dale, *Longtime Judge Kenneth K. Hall Dies at 81*, *CHARLESTON GAZETTE*, July 9, 1999, at A11. Judge Hall’s career as a state court judge came to an end after he failed to win election to the Supreme Court of Appeals of West Virginia in 1968, seemingly marking “the only time in his career [that] he was unsuccessful.” *In Memoriam: Honorable K. K. Hall*, 216 F.3d at LXI (statement of Robert B. King, United States Circuit Judge for the Fourth Circuit).

161 *See Justices and Judges 1999, supra* note 156, at 226.

His first term of court would begin on the third Monday in January 1953, and there would be a big crowd from all over Boone County. He wanted to show at the very beginning that his court would be conducted with dignity and decorum. Things would start, of course, with a proper opening of court by the sheriff, who was also the bailiff.

Judge Hall believed that the sheriff might need a little help with the opening, so the judge wrote it out and instructed the sheriff to practice. For several days before the term began, the sheriff could be heard reciting his opening.

You know how it goes: “Silence. All present will arise. The judge of the Circuit Court of Boone County. Oyez, oyez, oyez, silence is now commanded under pain of fine and imprisonment, while the Honorable Judge, K. K. Hall, of the Circuit Court of Boone County is presiding. All persons with motions to make, pleas to enter, and actions to prosecute, come forward and ye shall be heard. God save the State of West Virginia and this Honorable Court.”

Finally, the first day of the term came. The sheriff, and Judge Hall in his new robe, were ready. When the clock struck exactly 9:30, the sheriff threw open the door, stepped into the courtroom, and shouted: “Stand up! Here he comes! God save us all!”

Despite the inauspicious call to order at the advent of his long judicial career, Judge Hall garnered praise and respect throughout his time on the bench. A staunch Democrat, he was twice nominated by Republican Presidents (on the advice of Senator Byrd) to serve on the federal courts, both times to replace Judge John A. Field, Jr. First, on November 22, 1971, President Nixon nominated Judge Hall for a position on the United States District Court for the Southern District of West Virginia. During his Senate confirmation hearing on December 1, 1971, Senator Byrd, along with Senator Jennings Randolph, spoke on Judge Hall’s behalf. After saying that he had “known [Judge Hall] personally and followed his career for 20 years,” Senator Byrd gave Judge Hall

163 Id. at 1-2.

his "unqualified endorsement." Senator Byrd described Judge Hall as "a conscientious person," "a man of unquestioned character and reputation," and "a man of hard workings," who possessed "vigorous thoughts" and was "rooted in the soil in the state which he would be serving." Following his hearing, on that same day of December 1, 1971, Judge Hall was confirmed by the Senate as a district judge.

Judge Hall’s service on the district court, from 1971 to 1976, came at “a time of great turmoil and tragedy in West Virginia’s coalfields,” when “events ranged from bitter wildcat strikes to the Buffalo Creek flood disaster.” And “Judge Hall often found himself at the center of the tumult.” Perhaps most famously, he permitted survivors of the Buffalo Creek disaster to seek damages for the psychological trauma they experienced in witnessing the horrific 1972 flood. He also “banned the state’s outdated abortion law, presided over the violent school textbook controversy [in 1974 and 1975,] and declared wildcat mine strikes illegal.” For a time in 1974, Judge Hall and his family were guarded round-the-clock by federal marshals. In the end, though, “his firm shepherding of the cases before him played a key role in restoring peace and binding the region’s wounds.”

On August 26, 1976, President Ford nominated Judge Hall to the Fourth Circuit seat that had been vacated by Judge Field. Appearing again with Senator Randolph on behalf of Judge Hall, Senator Byrd acknowledged during the September 1, 1976 confirmation hearing that he was proud to have supported Judge Hall’s appointment five years earlier as a district judge. Senator Byrd praised Judge Hall’s “reputation of being an extremely hard-working jurist” and “of dealing severely with defendants found guilty of crimes of violence and serious drug offenses,” and he observed that Judge Hall was “credited with hastening the end of the violence in the school textbook controversy in southern West Virginia last year by his prompt, judicial action against those who were

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165 Hall District Court Nomination Hearing, supra note 158, at 5 (statement of Sen. Robert C. Byrd (D-W. Va.)).
166 Id. at 6 (statement of Sen. Robert C. Byrd (D-W. Va.)).
167 See Hall FJC Biography, supra note 164.
168 Hall Judicial Conference Memorial, supra note 148, at 99.
169 Id.
172 See id.
174 See Hall FJC Biography, supra note 164.
175 See Hall Court of Appeals Nomination Hearing, supra note 150, at 1-6 (statement of Sen. Robert C. Byrd (D-W. Va.)).
bombing the schools involved in that controversy.” Finally, Senator Byrd opined that Judge Hall’s “distinguished record as a trial judge, his unflinching application of Constitutional law as interpreted by the Supreme Court, and his courage and dedication to hard work which have historically moved his caseload quickly, [would] make him an outstanding Circuit Judge.” With the formal support of his home-state senators, as well as the approval of the American Bar Association’s Standing Committee on the Federal Judiciary, Judge Hall was confirmed by the Senate as a judge of the Fourth Circuit on the very day of his confirmation hearing.

Although Judge Hall’s appointments to federal judgeships “resulted directly from the strong recommendations of [his] close friend, Senator Robert C. Byrd,” the appointments were plainly based on superb “qualifications and proven ability.” At his Fourth Circuit investiture ceremony in Charleston on September 26, 1976, Judge Hall promised to “administer your laws and protect your freedoms.” Judge Hall went on to achieve “extraordinary success — perhaps success beyond his dreams — but he neither forgot nor shunned his humble roots,” Judge Michael has observed. “Through perpetual good humor, unfailing courtesy, and strict attention to duty, he displayed a true thankfulness for the blessings bestowed upon him. His keen understanding of the troubles and hopes of the common people made him a very wise man, not just a very smart man.” Indeed, “Judge K. K. Hall was ideally suited for his job.”

As a judge on the court of appeals, Judge Hall penned 450 published majority opinions and more than 200 separate opinions. His friend and Fourth Circuit colleague, Judge H. Emory Widener, Jr. of Virginia, has observed that, during their decades of service on the Fourth Circuit, he and Judge Hall “were in 1,810 cases together . . . , and in 145 of those cases one of us dissented. So that’s an agreement rate of 92 percent, which isn’t bad for a Byrd [D]emocrat and a Nixon [R]epublican.”

Judge Michael has characterized Judge Hall as “a staunch defender of individual liberties,” and described Judge Hall’s opinions, in which “he used his

176 Id. at 1-6 to 1-7 (statement of Sen. Robert C. Byrd (D-W. Va.)).
177 Id. at 1-7 (statement of Sen. Robert C. Byrd (D-W. Va.)).
178 See id. at 1-1 to 1-2 (statement of presiding Sen. Roman L. Hruska (R-Neb.)).
179 See Hall FJC Biography, supra note 164.
180 In Memoriam: Honorable K. K. Hall, 216 F.3d at LXI (statement of Judge Robert B. King).
182 Id. at LXIV (statement of Judge H. Emory Widener, Jr.).
wit to great effect," as "crystal clear." In Memoriam: Honorable K. K. Hall, 216 F.3d at LXIV (statement of Judge M. Blane Michael). In support of the proposition that Judge Hall "was the best at combining wit and intellect to make a point," id., Judge Michael cited the example of Kopf v. Skyrn, a civil action in which it was alleged that police had used excessive force against a suspect in a pizza store robbery. See 993 F.2d 374, 375-76 (4th Cir. 1993). In ruling that the suspect's later conviction for the robbery was not relevant to the excessive force inquiry, Judge Hall ruminated on the Fourth Amendment, writing that "[w]e must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply." Id. at 379-80.

In support of the proposition that Judge Hall never forgot the common man," and that "[h]is opinions reflected his belief that the law should be the servant, and not the master, of the people." Among Judge Hall's many important and memorable opinions was certainly his concurring opinion in Faulkner v. Jones in 1995. In Faulkner, the plaintiff had filed suit against the Citadel, a public military college located in South Carolina, asserting that its policy of admitting only male students contravened her rights to equal protection under the United States Constitution. Prior to Faulkner, the Fourth Circuit had wrestled with the application of equal protection principles to all-male military colleges in its decisions addressing constitutional challenges to the gender-based admissions policies of the Virginia Military Institute ("VMI"). In its first VMI decision, in 1992, the court concluded that "afford[ing] VMI's unique type of program to men and not to women" contravened the Equal Protection Clause, but left it to Virginia to fashion, in the first instance, an appropriate remedy. Virginia responded not by permitting women to attend VMI, but by establishing a parallel program called the Virginia Women's Institute for Leadership at Mary Baldwin College. In its second VMI decision, in 1995, the Fourth Circuit held that the establishment of the parallel program cured the constitutional violation and that VMI could therefore constitutionally exclude women.

Against the backdrop of the VMI decisions, the court in Faulkner concluded that the exclusion of women from the Citadel contravened the plaintiff's equal protection rights because South Carolina had not provided a parallel program for women. The court then directed that Ms. Faulkner be admitted to

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186 In Memoriam: Honorable K. K. Hall, 216 F.3d at LXIV (statement of Judge M. Blane Michael). In support of the proposition that Judge Hall "was the best at combining wit and intellect to make a point," id., Judge Michael cited the example of Kopf v. Skyrn, a civil action in which it was alleged that police had used excessive force against a suspect in a pizza store robbery. See 993 F.2d 374, 375-76 (4th Cir. 1993). In ruling that the suspect's later conviction for the robbery was not relevant to the excessive force inquiry, Judge Hall ruminated on the Fourth Amendment, writing that "[w]e must always remember that unreasonable searches and seizures helped drive our forefathers to revolution. One who would defend the Fourth Amendment must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply." Id. at 379-80.

187 Hall Judicial Conference Memorial, supra note 148, at 100.

188 51 F.3d 440 (4th Cir. 1995).

189 Id. at 442.


191 VMI I, 976 F.2d at 892.

192 Id. at 900.

193 VMI II, 44 F.3d at 1233.

194 Id. at 1239.

195 Faulkner, 51 F.3d at 446.
the Citadel unless the State could establish a parallel program for women within a specified period of time. Although Judge Hall joined the opinion for the court, he wrote separately to express his view that the court had erred in the VMI cases by permitting Virginia to establish a parallel program instead of mandating that VMI admit women. In remarkably prescient language, Judge Hall concluded his concurrence with the following words:

I suspect that these cases have very little to do with education. They instead have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later. The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy. Though our nation has, throughout its history, discounted the contributions and wasted the abilities of the female half of its population, it cannot continue to do so. As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

A little more than a year after Faulkner was decided, the Supreme Court vindicated Judge Hall’s position, ruling that the parallel program Virginia had established at Mary Baldwin College was insufficient to justify excluding women from VMI and mandating that VMI discard its policy of excluding women on the basis of gender.

Judge Hall will also be remembered for his dissenting opinion in Bever v. Gilbertson, which, like his opinion in Faulkner, reached the result ultimately embraced by the Supreme Court. In Bever, the West Virginia Department of Highways terminated a large number of lower-echelon employees in the face of severe budget restraints. Several of the terminated employees filed suit against various public officials, including then-Governor John D. Rockefeller IV, alleging that they had been fired solely or principally on the basis of their political affiliation. Governor Rockefeller and other defendants moved for summary judgment on the basis of qualified immunity, but the district court ruled that they were not entitled to the defense. The defendants then sought to

196 Id. at 450.
197 Id. at 451 (Hall, J., concurring).
198 Id. (Hall, J., concurring).
200 724 F.2d 1083 (4th Cir. 1984).
201 Id. at 1085.
202 Id.
203 Id.
appeal the district court’s ruling to the Fourth Circuit pursuant to 28 U.S.C. § 1291, asserting that a denial of qualified immunity fell within the collateral order exception to the final judgment rule. The panel majority dismissed the appeal, ruling that a denial of qualified immunity was not immediately appealable within the collateral order exception. In his opinion dissenting from the majority’s ruling, Judge Hall wrote that “[d]enying appellate review irreparably harms not only these public officials, but also the public at large and the very concept of immunity.”

The defendants thereafter petitioned the Supreme Court for certiorari. Their petition was denied, but on the same day, October 29, 1984, the Court granted certiorari in Mitchell v. Forsyth, to address the very issue raised in Bever — whether the denial of qualified immunity fell within the collateral order exception. Once again, the Supreme Court reached the result anticipated by Judge Hall, ruling that a denial of qualified immunity is a collateral order and immediately appealable.

No discussion of Judge Hall’s work on the Fourth Circuit would be complete without mention of his opinion for the court in Bob Jones University v. United States. In that case, Bob Jones University challenged on statutory and constitutional grounds the decision of the Internal Revenue Service’s (the “IRS”) to deny the university the tax-exempt status it normally accorded to charitable organizations. The IRS had denied the university tax-exempt status because the university’s express policy of expelling students who engaged in interracial dating or marriage conflicted with the statutorily expressed federal policy against racial discrimination. Writing for the court, Judge Hall rejected each of the university’s arguments, focusing especially on the federal government’s “compelling” interest in enforcing its policy against racial discrimination. The Supreme Court thereafter granted the university’s petition for certiorari, and it not only affirmed Judge Hall’s ruling but reached that result through reasoning closely tracking that employed by Judge Hall in his opinion for the Fourth Circuit.

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204 Id. The collateral order exception was first developed by the Supreme Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).
205 Bever, 724 F.2d at 1089.
206 Id. at 1093 (Hall, J., dissenting).
210 639 F.2d 147 (4th Cir. 1981).
211 Id. at 149.
212 Id. at 150.
213 Id. at 153.
Judge Hall assumed senior status on February 24, 1998, his eightieth birthday. Drawing on his knowledge of Judge Hall collected over forty-five years, Senator Byrd commented that "I am sorry to hear that Judge Hall has elected to take senior status, but I know that he will continue to give of his experience and talent in that capacity." Judge Hall indeed did so, continuing to hear cases until his death on July 8, 1999, in Charleston.

During the period of his senior status, Judge Hall saw the completion of The Robert C. Byrd United States Courthouse in Charleston. The resident offices of West Virginia's Fourth Circuit judges and the headquarters of the Southern District of West Virginia have been housed there since the Courthouse's dedication in May of 1998. Senator Byrd had secured the necessary funding for the $81 million building, and Judge Hall was instrumental in steering its design and construction. His good friend and colleague, Judge J. Harvie Wilkinson III of Virginia, who was Chief Judge of the Fourth Circuit when the new courthouse was dedicated, observed that it was a project into which Judge Hall "poured much energy and love." Indeed, Judge Hall "considered the Robert C. Byrd United States Courthouse a lasting monument to West Virginia, and to the government and country that he loved and served." He worried, though, that the stunning building would infect its inhabitants with "judgeitis," a term he used to describe "the inflated sense of self-importance that sometimes afflicts occupants of the bench." He had preached consistently over the

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215 See Hall FJC Biography, supra note 164.
216 Messina, supra note 146, at A1.
217 See Hall FJC Biography, supra note 164.
218 During the dedication ceremony for the new courthouse, on May 28, 1998, Senator Byrd had occasion to speak of its architectural beauty and its importance to the pursuit of justice, declaring:

Would anyone deny that the sacred quiet of a soaring cathedral can lift man above his mean and ordinary preoccupations and bring his tattered, fragile spirit nearer to the majesty of his God? Winston Churchill, in a debate regarding the construction of the House of Commons, which had been destroyed by bombs observed: "We shape our buildings and afterwards our buildings shape us." Let us, then, dedicate this magnificent new Federal Building and Courthouse to the fervent hope that its beauty and majesty will ever inspire all who enter here to remember the higher verities, and, like Socrates, fearlessly and faithfully seek after honesty, justice, and the cleansing fulfillment of truth.

BYRD, supra note 6, at 702-03.
219 In Memoriam: Honorable K. K. Hall, 216 F.3d at LX (statement of Judge J. Harvie Wilkinson III).
220 Remarks of Judge Robert B. King, supra note 154, at 2.
221 In Memoriam: Honorable K. K. Hall, 216 F.3d at LX (statement of Judge J. Harvie Wilkinson III).
years against "judgeitis," as "[h]e was entirely unconcerned with the trappings of office and would not tolerate pretentiousness."222

In his private life, Judge Hall was devoted to his family — his wife Gerry, who had been his high school sweetheart, and his son Keller — as well as to his community.223 He was a faithful member of the Baptist Temple in Charleston, where he had taught Sunday School for many years.224 He was also active in Rotary International, once serving as a district governor in West Virginia,225 and in scouting, earning the Boy Scouts of America's Silver Beaver Award for his adult volunteer service.226 He was an avid rose grower and golfer.227 With respect to the latter, Judge Hall was known to joke that he "only wanted to play [golf] during daylight hours," and only "on the days that ended in Y."228

Judge Hall also loved West Virginia and his alma mater. He was a passionate supporter of West Virginia University athletics, and it was a great source of pride for him that many of his law clerks had followed in his footsteps at the University's College of Law.229 Judge Hall was deeply admired by his law clerks, who were considered to be part of the Halls' extended family, and for whom Judge Hall "served as an inspiration and as a mentor."230 One of these former law clerks, speaking on behalf of the many, has observed that "[w]e marveled at his judicial wisdom, his pragmatic approach, his punctuality, his industry, his civility, his compassion and his willingness to make the difficult decisions and to take a stand even when it meant standing alone, even when it meant being unpopular and even when it meant enduring the threat of harm."231 Another former law clerk has remarked that Judge Hall "loved his wonderful wife, Gerry, and his son, Keller, his country, his state, his church, and his

222 Id. at LXII (statement of Judge Robert B. King). While other judges chose "conservative blue, green or gray carpet" for their chambers, Judge Hall "rolled out the red," explaining that "I want people to wake up when they come in . . . . [Red is] just a good color. It seems like it's full of life, serenity, comfort and strength." Margie Mason, Associated Press, Security Concerns Color Building's Perception; But Charleston's New Federal Courthouse 'Is a Very Public Place,' Say Its Occupants, CHARLESTON GAZETTE, Apr. 5, 1998, at C1.
223 Hall Judicial Conference Memorial, supra note 148, at 98, 100-01.
224 See id. at 100.
225 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LXI (statement of Judge Robert B. King).
226 See Hall Judicial Conference Memorial, supra note 148, at 100.
228 See In Memoriam: Honorable K. K. Hall, 216 F.3d at LXII (statement of Judge Robert B. King).
229 See id. at LXI-LXII (statement of Judge Robert B. King).
230 Id. at LXI (statement of Judge Robert B. King).
231 In Memoriam: Honorable K. K. Hall, 216 F.3d at LXIX (statement of Cynthia Turco, Vice President, Craven Regional Medical Center, and Former Law Clerk to Judge Hall).
friends, and he loved this court. He loved the challenge of service it provided, as well as the intellectual fellowship of his colleagues . . . .”

Judge Hall’s final appearance as a federal judge was on October 23, 1998, when — though ailing — he served as the de facto “master of ceremonies” and administered the oath at this author’s investiture as his successor on the Fourth Circuit. Then-Chief Judge Wilkinson introduced Judge Hall as “a great friend of mine from the first day that I ever set foot on the Court,” and emphasized that “I really want everybody in this room to understand just what a special part K. K. plays in the life of the Fourth Circuit.”

He has entertained us with his store of folk wisdom, and he has inspired us by his devotion to the State of West Virginia, and he has enlightened us with his understanding of human nature, and he has educated us with his ability to infuse the rule of law with great wisdom and common sense.

Many of you know that K. K. has battled illness with his customary courage and cheer, and we remain hopeful and optimistic about the future. And I just want to say that it is K. K.’s presence and Gerry’s presence that have caused the sun to shine on this occasion . . . .

Sharing uproarious tales of a paternity dispute, a novice churchgoer, and a randy senior citizen, as well as one in his collection of favorite “frog stories,” Judge Hall had many of those gathered for the investiture literally falling off their seats with laughter. He momentarily took a more serious tone introducing Senator

232 Id. at LXVIII (statement of Michael Keller, Assistant United States Attorney for the Southern District of West Virginia and Former Law Clerk to Judge Hall).


234 Id. (statement of Judge J. Harvie Wilkinson III).

235 “Most of you people know how I like frog stories,” Judge Hall remarked, “and I heard one lately that I think I can get through this crowd with.” King Investiture Ceremony, supra note 233, at 47 (statement of Judge Kenneth K. Hall).

[This princess in one of the tropical countries was bathing out by the pool with her retinue, and she heard somebody say, “Hello.” And she looked around and saw this great big green frog, and she said, “Did you say something?” And he said, “Yes.” He said, “I’m not really a frog. I am a prince. And I’ve been turned into a frog, and I’ll have to remain that way until a condition is performed.” She said, “What is that?” He said, “Well, I need to spend the night on a velvet pillow in the boudoir of a princess.” She says, “I’m a princess and I’ve got a velvet pillow.” And so she took him into the castle. And then the next morning, he woke up and he was a prince again. So
Byrd, but Judge Hall ultimately could not resist telling a funny story about his dear friend:

It is my distinct privilege and pleasure to introduce . . . our senior senator in the United States Senate. I have known him probably longer than anybody else here, almost fifty years, I expect it is, and we have been friends all that time, and a greater and better man I do not know. He has been a friend to the people in West Virginia and almost their savior in some ways in building our state.

I am sorry his wife didn't come with him. She usually does. And Gerry and I are real fond of both of them. When he stays home, she makes him mop the kitchen. Maybe I should have asked permission before I told that.

At any rate, it is my great singular pleasure to introduce United States Senator Robert C. Byrd.236

Later in the ceremony, I had the treasured opportunity to speak of the profound impact that Judge Hall, as well as his predecessor Judge Field, had on my life and career:

During the appointment process, I was asked a lot of questions. One request was that I identify the judges who have made the greatest impression on my views of the Constitution

he left, and as he was walking down the stairs, he passed the princess's parents. And do you know to this day, the king and queen don't believe that story about that frog.”

Id. at 47-48 (statement of Judge Kenneth K. Hall). Another of Judge Hall's great frog stories — the favorite of his friend Judge Michael — made his point that judges should be humble:

Two women were walking down a path at a country club. As they crossed a foot bridge over a small stream, they heard a voice say, "help, help." They looked around and finally saw this big green frog beside the bridge.

The frog took a hop toward the women and said, "I'm not really a frog. I'm a federal judge, but a wicked witch turned me into a frog, and the only way I can be turned back is to be kissed by a beautiful lady and either of you fit the bill just fine."

One of the women reached down, picked up the frog and put him in her handbag. The other woman said, "Well, aren't you going to kiss him and turn him back into a federal judge?" The first woman said, "Why no. A talking frog is worth a whole lot more than a federal judge."

In Memoriam: Honorable K. K. Hall, 216 F.3d at LXIII-LXIV (statement of Judge M. Blane Michael).

236 King Investiture Ceremony, supra note 233, at 48 (statement of Judge Kenneth K. Hall).
and our legal system. I identified three. Portraits of two of those three judges grace the entrance to this great courtroom.

On the right as you came into the courtroom today is the portrait of Judge John A. Field, Jr. On the left is the portrait of Judge K. K. Hall, who administered the oath today. Judge Field and Judge Hall, to put things most simply, have been my mentors and my teachers. Without their guidance and support, I would not be here, or even close to being here. They each always expected a great deal from me, and rightfully so. I pledge my every effort to measure up to their expectations.

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Judge John Field . . . gave me the biggest break of my life — a job on his staff when I left law school, plus his guidance over the years until he passed away in 1995.

And Judge K. K. Hall, I simply cannot thank Judge Hall enough. Not just for his steadfast support of me, but more particularly for his service to West Virginia and to this country. He has served more than 45 years as a distinguished state and federal judge, plus distinguished military service under fire in World War II. His example of incisiveness, decisiveness, common sense, and courage inspires all who know him.

V. HONORABLE JAMES M. SPROUSE (1979-1995)

A proud sixth generation West Virginian of Scotch-Irish and Cherokee Indian descent, James Marshall Sprouse was born on December 3, 1923, in Williamson, Mingo County, West Virginia. He applied for a newly created seat on the Fourth Circuit Court of Appeals in the late 1970s, was among five finalists for the judgeship chosen by a bipartisan commission, and was ultimately selected by President Carter as his nominee to the court, with the unequivocal

237 Id. at 61, 65 (statement of Judge Robert B. King).
239 See Fourth Circuit History, supra note 13, at 519-20 (citing Interview with James M. Sprouse, Retired United States Circuit Judge for the Fourth Circuit, in Union, W. Va. (Oct. 7, 1997)).
support of Senator Robert C. Byrd. One of his Fourth Circuit colleagues, Judge J. Dickson Phillips, Jr. of North Carolina, later recalled his introduction to Judge Sprouse:

As a year-earlier Carter appointee, I had anxiously awaited his advent on the court and I remember well the first time I saw him and my immediate physical impression. You couldn’t fail to note the slightly relocated nose in the Jimmy Cagney visage, and I thought, “this fellow looks like he’s been through a few wars.” It of course turned out that he had: amateur boxing wars, World War II battles . . . in Europe, and . . . West Virginia political wars . . . [L]ife had given him a slightly pugnacious look. As things developed, there was certainly an element of pugnacity there, and it . . . served him and the court well. But pugnacity [was] not his defining characteristic. Jim [was not] a judge to be pushed around, but neither [was he] one interested in pushing others around. As well as it can be done, he[] kept his own counsel, avoided “entangling alliances,” and kept his eye on the ball rather than on peripheral matters . . .

Judge Sprouse spent his childhood in the “rough-and-tumble” coal country of Mingo County, starting to work at age twelve as an assistant school janitor to help support his four siblings. At sixteen, Judge Sprouse was the West Virginia Golden Gloves boxing champion in the featherweight division. “It was perhaps this early experience as a boxer that gave Jim a certain firmness and courage that stayed with him as long as he lived,” his successor on the Fourth Circuit, Judge M. Blane Michael, has observed.

Shortly after his graduation from Williamson High School in 1941, Judge Sprouse enlisted in the United States Army — the day after Pearl Harbor was attacked — to fight in World War II. As a private in the Intelligence and Reconnaissance Platoon of the 104th Division, 415th Infantry, he served in the Netherlands, Belgium, France, and Germany, garnering a Bronze Star toward the end of the War for his initiative and bravery in liberating a German-run prisoner-of-war camp. Following the War, Judge Sprouse studied at St.

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242 Sprouse Judicial Conference Memorial, supra note 238, at 39.
243 Id.
244 Id.
245 See Sprouse Obituary, supra note 238, at D6; Sprouse Judicial Conference Memorial, supra note 238, at 40.
246 Id.
Bonaventure College (now University), and he earned a law degree from Columbia Law School in 1949.247 He then served, in 1949, as an Assistant Attorney General of West Virginia.248 Thereafter, he won a place in the first class of Fulbright Scholars, and thus traveled to France to study international law at the University of Paris and the University of the Bordeaux.249

Judge Sprouse served as assistant counsel for the Displaced Persons Commission in 1950 and 1951, and he briefly engaged in private law practice with West Virginia’s oldest law firm, Spilman, Thomas & Battle, in 1951 and 1952.250 Later in 1952, he joined the Central Intelligence Agency.251 He began his CIA career in Washington, D.C., but he was soon assigned to Europe, where he worked as an undercover agent in the early days of the Cold War.252 As Judge Michael has recounted:

Although Jim Sprouse spent much of his young adulthood in Europe, either fighting wars or studying, he never forgot his West Virginia roots. Indeed, Jim believed that he owed a debt to West Virginia, a debt that he wanted to repay by making the state a better place for all. So Jim left the CIA at the end of 1956 and returned to West Virginia, where he was to make his mark in a profound way.

By this time, according to [a family member], Jim was a Jacksonian Democrat. He was a scrapper; he was skeptical of the citadels of privilege; he believed in the protection of individual liberties, and he was determined to devote his life to advancing the cause of the underrepresented.253 In 1957, Judge Sprouse entered private law practice as a sole practitioner in West Virginia’s capital city, Charleston.254 “True to his principles,” Judge Michael noted, “he often represented the underdog.”255 Judge Sprouse once char-

248 See id.
249 See Sprouse Judicial Conference Memorial, supra note 238, at 40.
250 See Fourth Circuit History, supra note 13, at 519 (citing Interview with James M. Sprouse, Retired United States Circuit Judge for the Fourth Circuit, in Union, W. Va. (Oct. 7, 1997)). The Displaced Persons Commission was established by Congress in 1948 to oversee and administer the resettlement in the United States of European refugees driven from their home countries during World War II. See Fedorenko v. United States, 449 U.S. 490, 495 & n.6 (1981).
251 See Sprouse Judicial Conference Memorial, supra note 238, at 40.
252 See id.
253 Id. at 40-41.
254 See id. at 41.
255 Id.
acterized himself as a "generalist" in private practice, which at different times included collaborations with other local lawyers and representation of labor unions. Upon returning to his home state, Judge Sprouse also got immediately involved in West Virginia politics and, by the mid-1960s, he was State Chairman of the Democratic Party. Dubbed "The Man the Mountains Made," Judge Sprouse was the Democratic candidate for Governor in 1968. The West Virginia Democratic Executive Committee heralded Judge Sprouse's primary election victory as "a tribute to the man's own qualities and leadership ability," further observing: "He took his candidacy to the people and everywhere he presented his case in clear, well-thought-out fashion. He didn't hide behind glowing generalities and he didn't sling mud; he offered a program for progress." Judge Sprouse went on to lose the general election "by only a whisker" to his Republican challenger. Undaunted, Judge Sprouse ran in 1972 for a seat as a Justice on the Supreme Court of Appeals of West Virginia, this time winning the election. He left that court to once again seek the governorship, only to be defeated in the 1976 Democratic primary. "In all events," Judge Michael has observed, "Jim was respected by both Democrats and Republicans for his refreshing style of politics. He was straightforward, reassuring, and honest. He always fought fairly and he never engaged in the politics of personal destruction." Similar sentiments have been shared by Forest J. Bowman, the former Hale J. Posten Professor of Law at the West Virginia University College of Law, and an avowed Republican, who came to know Judge Sprouse in 1974 while working with the state supreme court: "[Judge Sprouse was] such a straightforward man, and his willingness to 'call a spade a spade,' was refreshing in a Capitol that had more than its share of politicians who wouldn't dare say what they thought for fear of the next election."  

256 Fourth Circuit History, supra note 13, at 519 (citing Interview with James M. Sprouse, Retired United States Circuit Judge for the Fourth Circuit, in Union, W. Va. (Oct. 7, 1997)).
257 See Sprouse Obituary, supra note 238, at D6.
258 See Sprouse Judicial Conference Memorial, supra note 238, at 41.
259 See West Virginia Democratic Executive Committee, West Virginia Winner: James M. Sprouse 3 (1968) (unpublished campaign manuscript, on file with author).
260 Id. at 2.
262 See Sprouse Judicial Conference Memorial, supra note 238, at 41.
263 See id. at 41-42.
264 Id. at 41.
For over a year-and-a-half I watched this labor lawyer, this politician with political instincts as finely honed as anyone I have ever known, this pugnacious former Golden Gloves fighter, consistently put aside personal feelings and individual opportunities and do what he believed passionately was the right thing to do. For example, when it came time to implement the Judicial Reorganization Amendment of 1974, he joined with then Chief Justice Charles Haden — a leader in the Republican Party — and these two statesmen and jurists put aside political passions and worked together to make the new judicial article a success.266

On July 5, 1979, Judge Sprouse was nominated by President Carter to fill a newly created seat on the Fourth Circuit, the second of three positions created by Congress to increase the size of the court from seven to ten judges.267 Senator Byrd, then serving as the Senate Majority Leader, personally appeared at Judge Sprouse’s July 1979 confirmation hearing before the Senate Committee on the Judiciary, marking the busy Senator’s first appearance at a judiciary committee meeting that year.268 “That doesn’t say much for my attendance,” Senator Byrd quipped, “but it does say a lot for the two nominees who are here today [Judge Sprouse and Judge Robert J. Staker, who went on to serve in the Southern District of West Virginia until his retirement in 2005].”269 Indeed, Senator Byrd emphasized that he wanted the committee and “my fellow West Virginians who are nominees [to] understand, the importance which I give to this occasion.”270

266 Id. at 13-14. Notably, Judge Charles H. Haden II was later appointed by President Ford, in 1975, as a district judge in the Southern District of West Virginia, a position in which he served until his death in 2004, having served as the court’s Chief Judge from 1982 to 2002.


268 See Sprouse Court of Appeals Nomination Hearing, supra note 240, at 285 (statement of Sen. Robert C. Byrd (D-W. Va.)).

269 Id. (statement of Sen. Robert C. Byrd (D-W. Va.)).

270 Id. at 286 (statement of Sen. Robert C. Byrd (D-W. Va.)). The hearing’s chairman expressed appreciation for Senator Byrd’s appearance:

I want the record to show that this committee recognizes the tremendous effort that the majority leader has put forward in the operation of the U.S. Senate, and although he is not always in attendance at the Judiciary Committee meetings, his staff is here, and he is always available to the members of the committee to consult on legislation, and I’ve had the opportunity to do so many times, as other members have had. It’s also a compliment to both of these nominees that Senator Byrd could be here today. I’ve chaired a number
Senator Byrd remarked that his support for Judge Sprouse was "without any equivocation, without any reservation." He described Judge Sprouse as a man "of unquestioned integrity" and "sterling character," who had amassed "solid experience on the bench" and who had commanded and deserved "the respect of [his] peers on the bench and of all in the legal profession of West Virginia." Further, Senator Byrd observed that Judge Sprouse was "highly regarded by [his] fellow citizens" and had set a "splendid example[] to everyone who is proud to call himself a West Virginian."

In addition to Senator Byrd, Judge Sprouse was accompanied at the judiciary committee hearing by Senator Jennings Randolph. Their support impressed Republican Senator Bob Dole, who acknowledged:

Certainly with men like Jennings Randolph and Bob Byrd — I know this may sound trite to everybody, and some feel that all Senators run around applauding each other, but I say it very sincerely — in my 11 years in the Senate, I think when both Senators vouch for something or somebody it's not just because you're from their State. It's because they believe it, and they've checked it, and they know it, and I think that in itself makes it much easier for us if there is some question.

Judge Sprouse was confirmed by the Senate on September 11, 1979, and he subsequently served on the Fourth Circuit for nearly sixteen years.

At least two of Judge Sprouse's Fourth Circuit colleagues have commended him for his "ideal judicial temperament." According to Judge Michael:

"Jim Sprouse had the ideal temperament for a judge. He was steady, considerate, and never raised his voice. Judge Sprouse put a high premium on collegiality. He stood his ground, yet he was able to do this in a way that was always respectful of his colleagues." And, as observed by Judge J. Harvie Wilkinson III of Virginia, who was appointed to the Fourth Circuit by President Reagan in 1984, "all the long years of partisan politics [never affected Judge Sprouse's] outlook on the bench."
He would laugh and say that a Republican president had as much right to appoint a judge as a Democratic president did, and (though this was quite a concession), that a Virginian had as much right as a West Virginian to sit on a federal court. Jim’s blend of combativeness and collegiality produced an ideal judicial temperament. He didn’t dissent often, but when he did, you knew you were in for a rough time. He told me once his nose had got just a bit crooked from so many boxing matches in his younger years. One would never have wished to be one of those in the ring with Jim Sprouse, but one would also never have a fairer fight or a finer friend at the end of the day.278

In the words of another colleague, Judge Francis D. Murnaghan, Jr. of Maryland, Judge Sprouse demonstrated “how important it is to be able to disagree without being disagreeable.”279

As a judge of the Fourth Circuit, Judge Sprouse authored more than 350 published majority opinions and more than sixty separate opinions. Judge Phillips has said that Judge Sprouse, in his opinions as well as his intra-court correspondence, “studiously avoided acrimony, contentiousness, or even the occasional sly dig that is so hard for some of us to avoid.”280 Judge Phillips further described Judge Sprouse’s opinions as “well-crafted, intellectually sound, free of pretentious literary allusions and other flamboyances, and . . . almost invariably ‘right’ on the merits.”281 Another North Carolina colleague, Judge Sam J. Ervin, III, who joined the court within a year after Judge Sprouse did, has acknowledged that he “soon discovered that I would not often go astray if I followed Jim Sprouse.”282

He and I had some common political and legal experiences, and shared philosophical views, so it was not too surprising that we often agreed on judicial questions. When I learned that I was taking a position on a case contrary to Jim’s, it caused me to re-examine my vote — to be sure that I was not missing something. I knew that he believed — as I do — in individual rights and fair trials, so disagreement with him made me uncomfortable. Since we also shared a tendency to be stubborn at times, we did not always convince each other, but we tried.283

278 Id.
281 Id. at 10.
282 Ervin, supra note 267, at 2.
283 Id.
Several of Judge Sprouse’s opinions dealt with First Amendment issues. Writing for the unanimous panel in *American Booksellers Ass’n v. Virginia*, Judge Sprouse deemed unconstitutional a Virginia statute making it unlawful for merchants to display sexually explicit materials “‘in a manner whereby juveniles may examine and peruse’” them. The statute itself did not specify any potential defenses or methods of compliance and, because it was newly enacted, the court was presented with little evidence of its enforcement. Judge Sprouse interpreted the statute to prohibit merchants from displaying sexually explicit materials “so that minors may have access to them” — requiring such burdensome measures as creating separate, monitored adults-only sections in bookstores, and rendering simple measures such as the use of “blinder racks” insufficient. Concluding that the statute was thus overbroad, Judge Sprouse explained that it “discourage[d] the exercise of first amendment rights in a real and substantial fashion” and was “not readily subject to a narrowing interpretation so as to withstand on overbreadth challenge.” On appeal, the Supreme Court of the United States certified questions to the Supreme Court of Virginia, to ascertain the state court’s interpretation of key provisions of the statute, and then remanded the matter to the Fourth Circuit for further consideration in light of the state court’s answers. In light of the state court’s more narrow interpretation of the statute, Judge Sprouse — writing again for the panel — determined that the statute “place[d] a minimal burden on booksellers and represent[ed] a constitutionally permissible exercise of the state’s police powers.”

In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, the Fourth Circuit concluded that the University’s sanctions against the Fraternity, for staging an “ugly woman contest” with racist and sexist overtones in a student cafeteria, contravened the Fraternity members’ free speech rights. Writing for the panel majority, Judge Sprouse observed that, “[f]rom the mature advantage of looking back, it is obvious that the performance . . . was an exercise of teenage campus excess. With a longer and sobering perspective brought on by both peer and official disapproval, even the governing members of the Fraternity recognized as much.” Judge Sprouse concluded, however, that “the low quality of entertainment does not necessarily weigh in the First Amendment

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284 802 F.2d 691 (4th Cir. 1986).
285 *Id.* at 693 (quoting Va. Code § 18.2-391(a) (Supp. 1985)).
286 *Id.* at 696.
287 *Id.*
288 *Id.*
292 993 F.2d 386 (4th Cir. 1993).
293 *Id.* at 389.
inquiry,” and “that the Fraternity’s skit, even as low-grade entertainment, was inherently expressive and thus entitled to First Amendment protection.”

Among the many other types of issues addressed by Judge Sprouse during his time on the Fourth Circuit, were civil rights issues. For instance, in *Smith v. Town of Clarkton*, the Fourth Circuit affirmed the district court’s finding that the Town of Clarkton was liable under the Fair Housing Act of 1968 and the Fourteenth Amendment for withdrawing from a multi-municipality housing authority and, thus, effectively blocking construction of fifty public housing units in Clarkton in conjunction with the United States Department of Housing and Urban Development (“HUD”). In his opinion for the panel, Judge Sprouse observed:

Reviewing the evidence in this case, it is impossible to escape the conclusion that racial discrimination of precisely the type condemned by both the Fair Housing Act and the fourteenth amendment’s equal protection clause controlled Clarkton’s consideration of low-income housing. Officials of the community, people of good will, initiated a project that would bring HUD-financed low income housing to an area which desperately needed it. Citizens of ill will, becoming aware that such housing would bring more black citizens from the outlying county area into Clarkton, aggressively mounted public opinion pressure against the municipal officials to block the housing, and those officials succumbed to that racially-inspired pressure.

Judge Sprouse determined, however, that the district court went “one step too far” in “requir[ing] Clarkton to itself construct public housing units from its own locally-generated funds and then maintain them in perpetuity.” Instead, Judge Sprouse explained, the court should have stopped at “[r]equiring Clarkton to reinstate the procedures and plans in place prior to the time of their termination” from the multi-municipality housing authority, and “to aggressively and in good faith pursue those plans.” Nevertheless, Judge Sprouse pointed out that, should Clarkton procrastinate or otherwise fail to proceed in good faith, the district court retained jurisdiction and could act once again.

294 *Id.* at 391.
295 682 F.2d 1055 (4th Cir. 1982).
297 *Smith*, 682 F.2d at 1058-59.
298 *Id.* at 1068-69.
299 *Id.* at 1069.
300 *Id.*
301 *Id.*
Preparing opinions allowed Judge Sprouse the opportunity to guide the
development of his law clerks — forty-four preeminent legal scholars of differ-
ent backgrounds, races, genders, and ages.302 "An inveterate teacher," one of his
former law clerks recalled, "Judge Sprouse gave special attention to developing
the skills of constructing legal arguments and of writing them persuasively —
often to the discomfiture of the clerk." Judge Sprouse also exposed his law
clers to a "simpler life," bringing them to live in Lewisburg, in Greenbrier
County, and teaching them important lessons "about the region and its people,
learned while walking its rivers, exploring its caves and white water, joining
community festivals, and lunching with" the judge.304

Judge Sprouse assumed senior status on the Fourth Circuit on October
31, 1992, when he was seventy years old.305 His workload on the court did not,
however, immediately lighten. As he jested a year later during the installation
ceremonies for his successor, Judge Michael, in October 1993:

A lot of people don’t differentiate . . . between being retired and
being on senior status. But I can tell you, and I wish the news
media would pick this up because word has gotten around that
I’m retired and everybody seems to think that I’m about twenty
years older than what I am to start with and that I’m not doing
anything. On senior status you confer with the Chief Judge
every year and tell him how many months you want to sit. And
so far it hasn’t made any difference between all the other years
I’ve served. So this is a particularly happy circumstance to
welcome my successor so that next year I might be able to tell
the Chief Judge that I’m only going to take half a load.306

Judge Sprouse fully retired from the court on July 31, 1995.307 Explain-
ing his decision to retire, Judge Sprouse remarked that "I’m healthy and have
some things I still want to do and can’t do them as a member of the judici-
ary." One thing not part of his retirement plans was to once again seek the

302 See Geraldine Szott Moohr, One Kind of Legacy: Judge Sprouse’s Law Clerks, 98 W. VA.
303 Id. at 17.
304 Id. at 17-18. Later in his judicial career, Judge Sprouse expanded his role as a teacher,
serving as an adjunct professor from 1992 to 1995 for the Center for Public Administration and
Policy, a graduate department of Virginia Tech. See Sprouse Obituary, supra note 238, at D6.
305 See Sprouse FJC Biography, supra note 267.
306 Installation Ceremonies for M. Blane Michael as United States Circuit Judge for the Fourth
Circuit, United States Court of Appeals for the Fourth Circuit Special Ceremonial Session at the
United States Courthouse, Charleston, West Virginia 8 (Oct. 12, 1993) (transcript on file with
author) [hereinafter Michael Installation Ceremonies] (statement of Judge James M. Sprouse).
307 See Sprouse FJC Biography, supra note 267.
308 Judge Sprouse Leaving, supra note 261, at A8.
governorship: "I hope to be active in a lot of things, but my wife won’t let me be a candidate so there is no use even talking about it," he remarked at the time.\textsuperscript{309} As later observed by Judge Michael, however, "[t]he conventional wisdom in West Virginia is that if Jim Sprouse had run for governor again in 1996, after he retired as a judge, he would have won in a landslide."\textsuperscript{310} Instead, Judge Sprouse managed the campaign of the Democratic gubernatorial candidate.\textsuperscript{311}

 Judge Sprouse also opened a law office in Union, in Monroe County, where he owned a 300-acre farm, Wynderidge, on which he had operated a beef cattle operation for many years.\textsuperscript{312} "Jim’s love of the land was a big source of his inner strength," Judge Michael has remarked, "and he believed that his experience as a farmer made him better at everything he did, including judging."\textsuperscript{313} From 2000 until his death on July 3, 2004, Judge Sprouse and his wife of fifty-one years, June — with whom he had four daughters and one son — divided their time between their home in Charleston and Wynderidge, where Judge Sprouse had restored the historic homeplace and pursued his passion for writing.\textsuperscript{314} Fittingly, upon Judge Sprouse’s passing, his family asked "that a random act of kindness be performed in Jim’s memory."\textsuperscript{315}

VI. HONORABLE M. BLANE MICHAEL (1993-PRESENT)

M. Blane Michael was born in 1943 in Charleston, South Carolina, and reared on a farm in Grant County, West Virginia, where his family raised chickens, cattle, and sheep.\textsuperscript{316} Known and appreciated for his instinctive sense of humor and keen intellect, he has been serving on the Fourth Circuit Court of Appeals for more than twelve years.\textsuperscript{317} On the strong recommendations of Senator Robert C. Byrd and Senator John D. Rockefeller IV, Judge Michael was

\begin{itemize}
\item \textsuperscript{309} Id.
\item \textsuperscript{310} Sprouse Judicial Conference Memorial, supra note 238, at 41.
\item \textsuperscript{311} See Kay Michael, Couple’s First Year a Wild One: Pritt’s Husband Says He Can’t Keep up with Wife’s Frenetic Pace, CHARLESTON DAILY MAIL, Oct. 25, 1996, at A1.
\item \textsuperscript{312} Sprouse Judicial Conference Memorial, supra note 238, at 42.
\item \textsuperscript{313} Id.
\item \textsuperscript{314} See Sprouse Obituary, supra note 238, at D6. Judge Sprouse was also involved in many civic groups and activities during his life. See id. He "was particularly proud to be a member of the American Bar Association, a fellow of the West Virginia Bar Foundation, a member of the Veterans of Foreign Wars, a member of Beni Kedem Shrine, a member of the Jesters, and a 33rd degree Mason." Id.
\item \textsuperscript{315} See id.
\item \textsuperscript{317} See Michael FJC Biography, supra note 316.
\end{itemize}
President Clinton’s very first nominee for a federal judgeship anywhere in the country.318 “Blane Michael was born to be a judge and he’s wanted to be a judge all of his life,” Senator Rockefeller has observed.319 “But I think that the reason that Senator Byrd and I were so intuitively immediate in reaching out to him was our enormous respect for Blane Michael’s integrity. This is called a rock solid human being.”320

Judge Michael “worked his way through school” and “earned honors all along the way.”321 He received an undergraduate degree in 1965 from West Virginia University, where he served as President of the student body, was a member of Mountain and Phi Beta Kappa, and graduated magna cum laude.322 Having been named a Root-Tilden Scholar, he then left West Virginia for the New York University School of Law.323 When he left for law school, Judge Michael’s father drove him from the family farm to the main highway, Route 50, where young Blane boarded a bus for New York City, arriving there at 4 a.m.324 “I was not long off the farm, and that’s how I got started in the law business,” he has recalled.325 While compiling an impressive academic record in law school, Judge Michael began seriously seeing his future wife, Mary Anne, a fellow West Virginian who had served with him in student government at WVU (as Vice President of the student body) and who was also studying at NYU.326 They married in 1968, the same year that Judge Michael graduated Order of the Coif from law school.327

Judge Michael practiced law from 1968 to 1971 with a white-shoe Wall Street firm, Sullivan & Cromwell, and then served in 1971 and 1972 as an Assistant United States Attorney for the Southern District of New York.328 After gaining this experience in New York, Judge Michael moved back to Grant County, “one of the smallest, least populated counties east of the Missis-

318 See Michael Installation Ceremonies, supra note 306, at 24 (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
319 Id. at 23 (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
320 Id. (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
322 See id. at 2 (statement of Sen. Robert C. Byrd (D-W. Va.)); McElhinny, supra note 316, at A11; Michael FJC Biography, supra note 316.
323 See Michael Court of Appeals Nomination Hearing, supra note 321, at 3 (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
324 See McElhinny, supra note 316, at A11.
325 Id.
326 See id.
327 See id.; Michael FJC Biography, supra note 316.
As Senator Rockefeller later explained it, Judge Michael "came back home . . . because his father was dying of cancer. He gave up presumably an enormous potential for private law practice and its rewards in [New York City], and he came back to take care of his father . . . ." In so doing, he "also came back into the bloodstream of West Virginia."

Judge Michael proceeded to serve as a Special Assistant United States Attorney for the Northern District of West Virginia, in 1972, and as a sole practitioner in Petersburg, the county seat of Grant County, from 1973 to 1975. Because of his background in the criminal law, he received many federal court appointments in habeas corpus matters. These appointments afforded him many opportunities as a young lawyer to garner appellate experience, briefing and arguing an array of cases in the Fourth Circuit. He then served as a law clerk to then-Chief District Judge Robert E. Maxwell of the Northern District of West Virginia, in 1975 and 1976.

Judge Michael was something a bit unusual in Grant County: he was a Democrat. Judge Charles H. Haden II, who was appointed in 1975 by President Ford as a district judge in West Virginia, once observed that Judge Michael's political party affiliation may have had an effect on his character: "He's one of these naturally humble individuals, I think a trait he picked up coming from Grant County. Being a Democrat in Grant County teaches one humility."

It was in 1976 that Judge Michael came to the attention of Senator Rockefeller, then the newly elected Governor of West Virginia. Judge Michael served as Counsel to the Governor from 1977 to 1980. During those years, he "worked day and night on behalf of the people of West Virginia," Senator Rockefeller has recalled. "His moral and ethical compass, which is resolute and absolute, helped guide me through my years. His wit and wisdom made the most difficult days more bearable."

On August 6, 1993, President Clinton nominated Judge Michael to the Fourth Circuit seat that had been vacated by Judge James M. Sprouse when he took senior status in October 1992. Senator Byrd later quipped that, when Senator Rockefeller suggested to him that they support Judge Michael for the nomination, “I resisted, and the reason why I resisted was here’s my campaign chairman, 1982, and the only county that I lost in the state was Grant County.” Nonetheless, at Judge Michael’s confirmation hearing on September 23, 1993, Senator Byrd expressed his enthusiastic support for the appointment:

Objectively speaking, by any standard, Blane Michael is unquestionably qualified to serve on the bench of the Fourth Circuit Court of Appeals, but in the nomination of Blane Michael to such a high position of responsibility, the United States and the constituency of the Fourth Circuit Court of Appeals are anticipating the services of a man more than merely objectively qualified to serve as a Federal judge. In Blane Michael, we are contemplating the nomination of a man who is also qualified by

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340 See McElhinny, supra note 316, at A11.
341 See Michael FJC Biography, supra note 316. Judge Michael later had a chance to thank President Clinton for the nomination in a face-to-face meeting in Charleston. Judge Michael recalled:

As I shook his hand, I said, “Mr. President, I know you bought a pig in the poke, but I thank you for sending my name to the Fourth Circuit.” He said, “From what your senators tell me, I don’t think I did buy a pig in the poke.” And then he stopped as he was moving down the line, put both hands on my shoulders, looked me square in the eye, and said, “People with lifetime jobs make me nervous.”


342 Michael Installation Ceremonies, supra note 306, at 28 (statement of Sen. Robert C. Byrd (D-W. Va.)). Judge Michael responded to Senator Byrd’s remark about the 1982 election, recalling: “Somebody asked him the next morning, said, ‘Senator, what do you think about carrying 54 counties?’ And he said, ‘Well, if I had a better campaign manager, I think I could have carried them all.’” Id. at 30-31 (statement of Judge M. Blane Michael).
intellect, by maturity, by integrity, and by already tempered, challenged, and practiced judgment.  

During the hearing, presiding Senator Dianne Feinstein of California posed the following question:

Mr. Michael, you are the first circuit court nominee of a Democratic President to have a hearing before the Judiciary Committee in 13 years and, if confirmed, you are about to embark on a serious test of both character and fortitude. What in your experience has prepared you for your potential elevation to the fourth circuit?

He answered: “One thing the Senators failed to mention was that when I was a boy I was on the State champion chicken-judging team...” Mary Anne Michael was sure that her husband’s witty response had sabotaged his appointment, and that he had, at the crucial moment, “blown it.” But, after a tense moment, Judge Michael’s answer was taken as it was meant, and everyone laughed. The Senate confirmed Judge Michael as a Fourth Circuit judge on September 30, 1993.

Judge Michael’s installation ceremonies were held on October 12, 1993, at the old federal courthouse in Charleston. There an assemblage of family (including Judge Michael’s wife and their daughter) and friends heard praise for the newest member of the Fourth Circuit bench. Judge Sam J. Ervin, III of North Carolina, then serving as the Chief Judge of the Fourth Circuit, administered Judge Michael’s oath of office and remarked, “I have not looked forward to one of these ceremonies to the extent that I have looked forward to this one since thirteen years ago when I took part in my own.” Judge Michael’s fellow West Virginian on the court of appeals, Judge K. K. Hall, joked that, for his

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343 Michael Court of Appeals Nomination Hearing, supra note 321, at 3 (statement of Sen. Robert C. Byrd (D-W. Va.)). The nomination was also supported by the American Bar Association’s Standing Committee on the Judiciary, whose members unanimously deemed Judge Michael to be “well-qualified” to serve on the Fourth Circuit. See Michael Installation Ceremonies, supra note 306, at 7 (statement of J. Hardin Marion, Standing Committee on the Federal Judiciary of the American Bar Association).

344 Michael Court of Appeals Nomination Hearing, supra note 321, at 12 (statement of presiding Sen. Dianne Feinstein (D-Cal.)).

345 Id. (statement of Judge M. Blane Michael).


347 See id.

348 See Michael FJC Biography, supra note 316.

fellow judges, "[t]his ceremony . . . is sort of like the academy awards that the movie stars have and we've certainly got a star this time."  

Judge Sprouse, who was Judge Michael's predecessor on the Fourth Circuit, remarked that it was "a particularly happy circumstance to have someone with the great qualifications that Judge Michael brings to this court." Elaborating, Judge Sprouse observed:

> You know, we come from many walks of life. I think the diversity of our court is probably one of its great strengths. We have people coming from the bench up through our system from the state system . . . ; directly from academia . . . ; and directly from private practice . . . . I think this is good. I think it's unquestionably good. And if I were to design the characteristics and the life and legal experiences that would fit into this pattern of a person who could not only interpret the law, that's the simplest part of it, to know the bald principles of law, but to apply them to the complex circumstances of all the individuals that come in the federal court system in this day and age, . . . if I were to design one that would perfectly fit this mold, I can't think of a better one than to copy Judge Michael[:] a big city lawyer, a small town, a country lawyer, if you will, and now a midsize city lawyer, someone who served as a clerk to a federal judge, Assistant U.S. Attorney, [and] was counsel to the chief executive of the state . . . .

Judge Maxwell, for whom Judge Michael had served as a law clerk, thanked Senator Byrd and Senator Rockefeller on behalf of all the "West Virginians who have had the privilege and opportunity of knowing M. Blane Michael . . . for bringing this outstanding individual into the federal judicial system." And Judge Haden, then serving as the Chief Judge for the Southern District of West Virginia, remarked:

> I think I would like to say on behalf of all of my colleagues at the district bench that we truly honor and respect and look forward to having Blane Michael sit on [the Fourth Circuit], one of the premier appellate courts in the country and the court that gives us trial judges our instructions with regularity. Knowing Blane's personal characteristics, we know when we receive in-

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350 Id. at 5 (statement of Judge Kenneth K. Hall).
351 Id. at 8 (statement of Judge James M. Sprouse).
352 Id. at 9-10 (statement of Judge James M. Sprouse).
353 Id. at 11 (statement of Judge Robert E. Maxwell).
For his part, Senator Rockefeller expressed regret that, now that he and Judge Michael were serving in separate branches of the government, he could not call on Judge Michael for advice as he had before. "I call him — I won't be able to so much anymore, I'll have to call him as a friend — but I call him instinctively when it is time to get a good judgment, to get good advice." Senator Byrd, a fierce protector of the constitutional separation of powers, took the opportunity to "caution [Judge Michael] about a few things." Keep in mind that the very first section of the very first article of the Constitution of the United States says that all legislative powers herein granted shall be vested in the Congress of the United States . . . which shall consist of the Senate and House of Representatives. And Section 8, keep in mind, that it is the Congress of the United States that has the power to constitute tribunals inferior to the Supreme Court of the United States. And keep in mind also that it is the Senate of the United States that tries all impeachments.

Senator Byrd also expressed his confidence in Judge Michael, though, observing that "[w]e know that you'll be fair." Blane has all of the fine characteristics of a good judge. First of all, he's a good man. He's a good family man, a good husband and a good father. He has a fine reputation. His friends are legion. The man is clearly of integrity, a man of the earth; a man who is big enough to serve us, not too big to know us, one with whom we all will be just as proud. Horace Greeley said, "Fame is a vapor; popularity an accident; riches take leave; those who cheer today may curse tomorrow; only one thing endures, character." Blane Michael has it.

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355 See id. at 23-24 (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
356 Id. (statement of Sen. John D. Rockefeller IV (D-W. Va.)).
357 Id. at 28 (statement of Sen. Robert C. Byrd (D-W. Va.)).
358 Id. (statement of Sen. Robert C. Byrd (D-W. Va.)).
359 Michael Installation Ceremonies, supra note 306 at 29 (statement of Sen. Robert C. Byrd (D-W. Va.)).
360 Id. (statement of Robert C. Byrd (D-W. Va.)).
When Judge Michael got his turn to speak, he used that opportunity to thank his "merit selection committee." As he explained: "Some of you may not know there was one in my case, but there was. The committee had two members: Senator Byrd and Senator Rockefeller."

I am very lucky to have had the chance to work for Senator Byrd and for Senator Rockefeller, both as governor and senator, and I encourage every young lawyer to consider getting involved in government or politics in some way. I had fun at it and I really believe I'm a better lawyer for it. In fact, I believe I'll be a better judge because of it.

I've learned many things from both of our senators. From Senator Rockefeller I've learned the importance of resolve and determination, even in the face of long odds. From him, I have also learned that the foundation of service must be a concern for human need.

From Senator Byrd, I have learned a lesson most valuable to lawyers. Know the rules and know the subject. It's hard to beat somebody who knows the rules. It's harder still to beat somebody who also knows the subject. Senator Byrd's quest for knowledge is truly remarkable.

I am here today because of my two senators and I'm very grateful to both of them.

Judge Michael concluded his remarks by sharing that, "[f]or a good while, I thought that this was the one job in the world that I would really like to have, but I also figured that my side might never have the guy who signed the papers. But here I am and I promise I'll do my best."

Judge Michael has now served on the Fourth Circuit for more than twelve years. During that time, he has authored more than 140 published majority opinions and some ninety separate opinions. "I would say I don't really aspire to any label," Judge Michael has remarked. "I don't think labels are really useful. My job is to approach every case with an open mind, consider fairly and exercise my best judgment about what the law is."
has also explained that, in constructing his opinions, "I always try to begin by telling a good story — an honest and accurate story anyone would want to read. . . . It puts you in position to say how the law ought to be brought to bear on those facts. The facts don’t change the law, but a good statement of the facts helps to make clear how the law applies."367

In *Ocheltree v. Scollon Productions, Inc.*,368 Judge Michael dissented from the panel majority’s opinion, which had reversed the jury’s sexual harassment verdict in favor of the plaintiff, who had been the lone female employee in a workplace permeated by sexual banter and conduct.369 In particular, Judge Michael disagreed with the panel majority’s conclusion that the plaintiff could not show that she was subjected to severe and pervasive harassment *because of her sex.*370 He explained:

In my view, there are two ways in which a reasonable jury could find that much of the sexual banter complained of by *Ocheltree* satisfied the “because of sex” prong. First, a reasonable jury could find that much of the banter was “directed at” Ocheltree in the sense that it was intentionally said in her presence in order to make her uncomfortable and self-conscious about her status as the only woman in the production shop. Second, a reasonable jury could find that even if very few of the sexual remarks were made in response to Ocheltree’s presence in the production shop, her male coworkers’ relentless, graphic descriptions of their sex lives count as sex-based harassment because they portray women as sexually subordinate to men. Ocheltree’s coworkers made her uncomplaining submission to an atmosphere suffused with degrading images of female sexuality an implicit condition of her employment, and this harassment was “because of sex” in the sense that it made the workplace more hostile to Ocheltree precisely because she was a woman.371

On rehearing en banc, a 9-3 majority of the court agreed with Judge Michael’s analysis on the “because of sex” issue, concluding that there was sufficient evi-

367 *Id.*
368 308 F.3d 351 (4th Cir. 2002).
369 *See id.* at 353.
370 *See id.* at 366 (Michael, J., dissenting in part and concurring in the judgment in part). Judge Michael agreed with the panel majority (“with some reluctance”) only that the plaintiff was not entitled to punitive damages. *See id.* at 367 (Michael, J., dissenting in part and concurring in the judgment in part).
371 *Id.* at 370 (Michael, J., dissenting in part and concurring in the judgment in part).
dence to support the jury's finding of liability against the employer and award of compensatory damages.372

As will happen, Judge Michael has also written panel majority opinions only to have them vacated by a different-minded en banc court. For instance, in *Mickens v. Taylor*,373 Judge Michael authored a panel majority opinion awarding a new trial to Mickens, a Virginia prisoner who had been convicted of capital murder and sentenced to death, on the ground that his "lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into."374 As it was by chance later learned, Mickens's lead trial counsel had been representing the murder victim on criminal charges at the time of the victim's death — a fact that the state judge knew or should have known when appointing counsel for Mickens.375 In the panel majority's view, Mickens demonstrated actual conflicts of interest arising from counsel's representation of the victim, including counsel's inability to investigate the victim using information shared during their attorney-client communications.376 By a 7-3 vote, however, the en banc court denied Mickens relief, holding that he "failed to show that [counsel's] conflict of interest adversely affected the quality of his representation," and that prejudice could not be presumed.377 The Supreme Court later affirmed the en banc majority's decision on a 5-4 vote.378

The Supreme Court was more receptive to Judge Michael's position in the landmark criminal procedure decision rendered in *United States v. Dickerson*.379 There, Judge Michael had dissented from the Fourth Circuit panel majority's *sua sponte* ruling — over the objection of the Department of Justice — that a never-enforced federal statute, 18 U.S.C. § 3501, rather than the Supreme Court's decision in *Miranda v. Arizona*,380 governs the admissibility of confessions in federal court.381 In his separate opinion, Judge Michael observed:

> Thirty years have passed since Congress enacted 18 U.S.C. § 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be in-

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373 227 F.3d 203 (4th Cir. 2000).
374 Id. at 218.
375 Id. at 205.
376 See, e.g., id. at 215.
377 Mickens v. Taylor, 240 F.3d 348, 351 (4th Cir. 2001) (en banc).
379 166 F.3d 667 (4th Cir. 1999).
381 Dickerson, 166 F.3d at 671.
voked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501.382

On appeal to the Supreme Court, the panel majority's decision was reversed on a 7-2 vote.383 The Supreme Court's decision, authored by then-Chief Justice William H. Rehnquist, substantially tracked Judge Michael's dissent.

Judge Michael himself has been endorsed for appointment to the Supreme Court, having been recommended by Senator Byrd to President George W. Bush, who was then considering a replacement for Justice Sandra Day O'Connor.384 Senator Byrd remarked at the time: "The bottom line is that our citizens need to have confidence in their highest court . . . . They need to know that the justices . . . have, at the foundation of every decision, a thorough understanding of, and a supreme dedication to, the Constitution of the United States."385 Rather than adopting Senator Byrd's recommendation of Judge Michael, President Bush nominated now-Chief Justice John G. Roberts, Jr. to the Court. That decision that did not, however, faze Judge Michael. "For any lawyer, that's just a distant dream that you don't worry about or think about," he observed. "I have the one job I've always wanted and I'm happy to be here."386

VII. CONCLUSION

Senator Robert Carlyle Byrd's contributions to and impact on the important work of the Fourth Circuit Court of Appeals would be difficult to overstate. As a result of his continued distinguished service in the Senate, Senator Byrd has provided hands-on oversight to the judicial appointment process for West Virginians to the Fourth Circuit, as well as the two district courts in West Virginia.

At the author's request, Judge William W. Wilkins, the present Chief Judge of the Fourth Circuit, as well as Judge J. Harvie Wilkinson III, the Chief Judge of the Circuit from 1996 to 2003, commented on Senator Byrd's contributions to the court. Chief Judge Wilkins, an astute, widely respected, and pragmatic South Carolinian, offered the following assessment:

382 Id. at 695 (Michael, J., dissenting in part and concurring in part).
385 Id. (second alteration in original).
386 McElhinny, supra note 316, at A1.
Senator Robert Byrd always selected and recommended outstanding lawyers from the West Virginia Bar for appointment by the President to the Fourth Circuit Court of Appeals. K. K. Hall and Jim Sprouse are shining examples of this. Not only were they both outstanding legal scholars, but such a pleasure to be with. Like the close friendship that existed between Senator Byrd and Senator Strom Thurmond, the same relationship existed between K. K. and Jim and the South Carolina judges. We regularly entertained each other at dinner, swapping Senator Byrd and Senator Thurmond stories. Not only did these two judges contribute mightily to the jurisprudence of the Fourth Circuit, they also contributed to maintaining the collegiality among our judges, a tradition of which the Fourth Circuit is very proud.\textsuperscript{387}

For his part, Judge Wilkinson, a scholarly and exceptionally gifted Virginia gentleman, made these observations with respect to the West Virginians who have served on the Fourth Circuit:

The appointments to the Fourth Circuit bench from West Virginia have been of exceptional quality. I never knew Judge Boreman and Judge Field except by reputation. That is to say, I served with judges who served with them and held them in the highest respect.

I did have the pleasure of sitting many years with Judge K. K. Hall and Judge Jim Sprouse. Judge Hall brought a shrewd intelligence and homespun common sense to his cases and wonderful humor to our collegial deliberations. Judge Sprouse was someone of gentle demeanor and high principle who never gave vent to anger or permitted his job to become personal in any way. Both men were quintessential West Virginians — Judge Hall was a small town mayor who never forgot the little guy, and Judge Sprouse never allowed his years in New York and Paris to diminish his love of the beauty and genuineness of his home state.

To call their successors two of the finest judges in the country is no exaggeration. Judge Blane Michael is not only a superb jurist and accomplished stylist, but he defines what it means to be fair-minded. Litigants and colleagues may not always agree with Judge Michael, but they do always express

\textsuperscript{387} Letter from William W. Wilkins, Chief Judge of the United States Court of Appeals for the Fourth Circuit, to author (Feb. 13, 2006) (on file with author).
admiration for his exemplary judicial temperament. Blane is also one of the hardest workers and most dedicated public servants I have known. His work has earned national recognition and his presence on our circuit is a gift.

I insisted, over his vigorous protest, that Judge Bob King include my comments on him in this article, because it is important that those beyond the borders of West Virginia know what West Virginians already do — that Bob has brought the indispensable experience of a top-notch practitioner and seasoned litigator to our court. He is a very thoughtful judge and a very talented professional. Together Judge Michael and Judge King add true distinction to our court and have won from both the bench and bar a universal respect.

If this all sounds like high praise, it is well-deserved — every bit of it. One could point out many district judges who have rendered splendid service and whose efforts have won the Fourth Circuit’s great respect. Suffice it to say that this view of West Virginia’s contribution is hardly mine alone — lawyers and lay persons throughout the Fourth Circuit are grateful beneficiaries of West Virginia’s continuing legacy of excellence to the federal bench.388

Given Senator Byrd’s role in their appointment to the federal bench, we should not be surprised that the Fourth Circuit, and the citizens it serves, have richly benefitted from the influence of the Judges Boreman, Field, Hall, Sprouse, and Michael. It is no mere coincidence that these diverse jurists share important attributes — an abiding respect for the rule of law, an eye for detail, an understanding of context, and an appreciation for the proper role of the judiciary — that are critical to the task of judging. Through these judges’ careful work on the Fourth Circuit, Senator Byrd has significantly and forever enhanced the quality of justice available in the five states within its jurisdiction, including our own West Virginia.389

388 Letter from J. Harvie Wilkinson III, United States Circuit Judge for the Fourth Circuit, to author (Feb. 9, 2006) (on file with author). This author is exceedingly grateful to Chief Judge Wilkins and Judge Wilkinson, as well as to Judge Goodwin, for taking the time to provide their kind words and insight.

389 The author acknowledges and expresses his profound gratitude to his senior law clerk, Rochelle Lantz Glover (J.D., West Virginia University, 2000), for her able assistance in the preparation of this article. Finally, the author appreciates the assistance and patience of the editorial board and staff of the West Virginia Law Review.
Editor’s Note: Since Judge King has largely excluded himself from consideration in this article, his Fourth Circuit colleague, Judge Michael, has offered to write a companion piece about Judge King. The companion piece is expected to appear in Issue 1 of Volume 109 of the West Virginia Law Review.