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**THE HISTORY OF THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF WEST  
VIRGINIA**

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*Forest J. Bowman, Esq.\**

BENJAMIN FRANKLIN KELLER.....	730
GEORGE WARWICK MCCLINTIC.....	739
HARRY EVANS WATKINS .....	743
BENJAMIN FRANKLIN MOORE .....	746
JOHN A. FIELD, JR.....	755
SIDNEY L. CHRISTIE .....	760
DENNIS RAYMOND KNAPP .....	765
KENNETH K. HALL .....	768
CHARLES H. HADEN, II.....	773
JOHN T. COPENHAVER, JR. ....	781
ROBERT J. STAKER .....	789
WILLIAM MATTHEW KIDD .....	793
ELIZABETH V. HALLANAN.....	795
DAVID A. FABER.....	803
JOSEPH ROBERT GOODWIN.....	812
ROBERT CHARLES CHAMBERS .....	819
THOMAS E. JOHNSTON.....	826
CONCLUSION.....	829

The *Charleston Gazette* (“*Gazette*”) for Wednesday, January 23, 1901, screamed out the day’s top news: “Queen Victoria Is Dead. Passes Peacefully Away With Family at Her Side. Prince of Wales Becomes King Edward Seventh.” Other headlines trumpeted the burning of the Grand Opera House in Cincinnati and an “Indian Outbreak” in the Indian Territory, that vast territory north of Texas which would later become the state of Oklahoma.<sup>1</sup> Nowhere in the paper was there a word about the fact that President William McKinley had

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<sup>1</sup> CHARLESTON GAZETTE, Jan. 23, 1901, at 1.

signed a bill dividing the State of West Virginia into two judicial districts, with a separate federal judgeship authorized for each district, although this news would be of infinitely more importance to the area covered by what was even then called "The State Newspaper" than the news the *Gazette* featured that day.<sup>2</sup>

The same was not true in Bluefield, West Virginia where *The Bluefield Daily Telegraph* ("Telegraph") had tracked the progress of a congressional bill to create a second federal judicial district for the state. The newspaper there understood the significance of the legislation. With a population of 4,650, Bluefield had an opportunity to enter the ranks of Clarksburg, Wheeling, and Charleston as West Virginia cities with a federal building and a federal judicial court stop. A new building, new employment opportunities, a new judge, and all the prestige the United States government could offer a turn-of-the-century mining town in the extreme southern part of the state, were inducements too grand to ignore.

West Virginia had been organized as one judicial district with one judgeship by the Act of June 11, 1864, which provided that the court should sit at Clarksburg, Wheeling, and Charleston.<sup>3</sup> As the state grew and commerce expanded, the need for a second United States District Court for West Virginia became apparent to most of the state's leaders. So, on December 5, 1900, Congressman Alston G. Dayton, a Republican of Barbour County, introduced a bill to create a second federal district court for the state. The bill became known as the "Dayton Bill."<sup>4</sup>

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<sup>2</sup> Charleston already had a federal building where a federal judge sat every April and September. Very likely, the news that a new federal district had been created for southern West Virginia was just too close to home and not nearly as "newsworthy" or "glamorous" as the death of England's monarch, or Indian troubles in the West, or a "general alarm" fire in Cincinnati.

<sup>3</sup> Act of June 11, 1864, ch. 120, 13 Stat. 124 (1864). Prior to that, what is now West Virginia had been part of the District of Virginia. When Virginia became the third state to be divided into two districts with a separate judge for each, all of what is now West Virginia became a part of the United States District Court for the Western District of Virginia. The District of West Virginia created in 1864 was given *circuit* court jurisdiction, which was different from the current Circuit Court of Appeals jurisdiction, being greater than the United States District Courts then and now, but less than United States Circuit Courts of Appeals today. An 1891 act abolished the appellate jurisdiction of the circuit courts over appeals from the district courts and sent all such appeals to the Circuit Court of Appeals for the circuit. In 1911 the circuit courts were abolished and the district courts became the only court of the federal system exercising all jurisdiction defined in the statutes. At the second meeting of The West Virginia Bar Association, held in Charleston on January 19-20, 1887, W. P. Hubbard of Wheeling proposed a resolution "to obtain legislation by Congress to repeal the special statute conferring Circuit Court powers on the United States District Court within the State, and to provide for holding sessions of the Circuit Court at the places where the District court now sits." The resolution was referred to committee and carried forward as unfinished business for a couple of meetings and then disappeared from the records. PROCEEDINGS OF THE WEST VIRGINIA BAR ASSOCIATION, pp. 9-11, 1886-1892.

<sup>4</sup> Act of January 22, 1901, ch. 105, 31 Stat. 736 (dividing West Virginia into two judicial districts). The Act listed the counties to be included in the Northern District and stated, "the southern district includes the residue of said State of West Virginia, with the waters thereof." Thus the twenty-four Counties of Jackson, Mason, Putnam, Roane, Clay, Braxton, Webster, Poca-

President McKinley's signing of the Dayton Bill was not mentioned in the *Telegraph*, although over the preceding few weeks the *Telegraph* had followed what it called the "Bill to Divide the State" with great interest as it had worked its way through the Congress. On January 11, for example, the *Telegraph* reported a "Warm Discussion of Federal Court" when the Senate Judiciary Committee took up the bill. The *Telegraph* article stated that E. L. Butterick, J. W. St. Clair and Judge Stiles, all of Charleston, and E. L. Delliker, clerk of the United States Circuit Court, of Parkersburg, had appeared before the committee to oppose the bill. Those appearing in favor of the bill, according to the *Telegraph*, were three of West Virginia's four congressmen, Blackburn B. Dovener, Alston G. Dayton, and David E. Johnson; West Virginia's senior United States Senator, Stephen B. Elkins; Judge T. L. Henritze of McDowell County; and a Mr. Taylor, also from McDowell County.<sup>5</sup> While the *Telegraph* headline described the hearing as "warm," it could perhaps be more properly described as "hot." Congressman Dayton opened the discussion in favor of the bill. He explained that it was favored by The West Virginia Bar Association, a non-partisan body; that the bill had been endorsed by every West Virginia Congressman for the past two years; and that every member of the present and incoming state administration, with one exception, favored the bill. Mr. Butterick followed Congressman Dayton and pointed out that Judge Jackson, who was then West Virginia's sole federal district judge, opposed the bill. Judge Stiles then took the floor and argued that the land suits heard in the federal courts were largely from the territory embraced in the new district and that the court should be kept as far as possible from the scene of the litigation. J. W. St. Clair<sup>6</sup> rose and declared that the state had done without two federal courts so far and, in his opinion, "could do without two a while longer." When E. L. Butterick spoke, he said Governor Atkinson was in favor of the bill because he wanted to be a federal judge, and that Attorney General Rucker wanted it for the same reason. Butterick was in the process of reading from an editorial to this effect from the *Gazette* when Senator George Frisbie Hoar of Massachusetts,<sup>7</sup> chairman of the Committee, stopped him. Senator Elkins then closed the hearing with a strong

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hontas, Nicholas, Kanawha, Cabell, Wayne, Lincoln, Mingo, Logan, Boone, Fayette, Raleigh, Wyoming, McDowell, Mercer, Summers, Greenbrier, and Monroe made up the Southern District.

<sup>5</sup> *Warm Discussion of Federal Court*, BLUEFIELD DAILY TELEGRAPH, Jan. 11, 1901 at 1.

<sup>6</sup> St. Clair, originally from Christiansburg, Virginia, was a Fayetteville lawyer and the great-grandfather of James W. St. Clair, who now practices in Huntington. St. Clair was known as "General" St. Clair, in an age when many men were given honorary military titles such as "Captain" and "Colonel." He had a varied practice, representing plaintiffs and defendants, including the C & O Railroad, and miners organized against the coal companies. He was a very successful lawyer and his elaborate home in Fayetteville had a ballroom on the third floor. The home is now the Dodd-Payne-Hess Funeral Home. The *Telegraph's* designation of General St. Clair as being from Charleston was obviously an error.

<sup>7</sup> Senator Hoar had been a member of the Electoral Commission created by act of Congress to decide the contests in various states in the disputed Presidential election of 1876.

ten-minute presentation in favor of the measure. The *Telegraph* article concluded with: "The friends of the bill are confident of its early adoption."<sup>8</sup>

Two days later, the *Telegraph* declared in a front-page headline, "Bill Passed In Committee." A sub-headline, reading "Necessitates Public Building," explained at least part of the intense interest in the new federal district court in Bluefield, as opposed to the lesser interest in the measure in Charleston. Bluefield, the article stated, would "get" the court and "[t]his will necessitate an appropriation for a public building at Bluefield."<sup>9</sup> This was, then, an important civic advancement for Bluefield, and the *Telegraph* had very properly been interested in keeping its readers up-to-date. Charleston already had a federal courthouse, so the measure was not of pressing importance to that city. But for Bluefield the bill was very big news.

On January 15, the *Telegraph* reported under "Items from the Nation's Capitol Concerning West Virginians," that the creation of the additional judicial district "will bring to Washington a host of office seekers from all parts of the state."<sup>10</sup> The *Telegraph* went on to say, "[n]umerous applications are being received by the senators and representatives from their constituents who are anxious to be court commissioner, clerks, etc., as provided for under the provisions of the bill."<sup>11</sup> The following day, under the headline, "Politicians and Patronage," the *Telegraph* reported that a conference of leading Republican politicians would convene in Charleston "to decide upon the federal patronage of the state . . . ." The article boldly stated that "Governor [George W.] Atkinson will be rewarded with the federal judgeship under the new bill." Atkinson was the sitting governor, but his term was due to expire on March 4, 1901. The article concluded with the words, "[t]here is no doubt but that the President will approve the measure as it had the endorsement of Attorney-General Griggs."<sup>12</sup>

The following morning, the *Telegraph* recanted a bit from its solemn assertion that Governor Atkinson would be the new judge in the Southern District with another equally solemn and, ultimately, equally incorrect, pronouncement. "The announcement is made today," the article stated, "that Hon. Malcolm Jackson, of Kanawha County, a lawyer of great ability and a member of the present legislature, has the backing of [United States Senators from West Virginia] Elkins and Scott, and is almost sure to secure the prize."<sup>13</sup>

Indeed, following the excitement of the creation of the new judicial district, the matter of the appointment of the new judge became a very lively matter for discussion. On June 9, 1901, the *Telegraph* reported that "the contest has

<sup>8</sup> *Warm Discussion of Federal Court*, *supra* note 5, at 1.

<sup>9</sup> *Bill Passed in Committee*, BLUEFIELD DAILY TELEGRAPH, Jan. 13, 1901, at 1.

<sup>10</sup> *Items from the Nation's Capitol Concerning West Virginians*, BLUEFIELD DAILY TELEGRAPH, Jan. 15, 1901, at 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Federal Court at Bluefield*, BLUEFIELD DAILY TELEGRAPH, Jan. 17, 1901, at 1.

<sup>13</sup> *Federal Judgeship*, BLUEFIELD DAILY TELEGRAPH, Jan. 18, 1901, at 1.

become so bitter that even the West Virginia senators, Elkins and Scott, have for the time being become estranged, and each almost defies the other to act in the matter without first consulting the other.” During the preceding three months, the contest, the *Telegraph* said, had boiled down to Z. Taylor Vinson, of Huntington; Judge Warren Miller, of Ripley; former Governor Atkinson, of Charleston; and B. F. Keller, of Bramwell. Governor Atkinson was said to have the support of three-fourths of the bar, but he was ruled out by President McKinley because of his age, fifty-four years. The article went on to state that Keller, who was seven years younger than Governor Atkinson, had the support of Senator Scott and “the leading lawyers and politicians in the southern tier of counties.” But he was considered too inexperienced by the bar at the northern end of the state, and they had so notified the senators and the President. Vinson was described as a “good Democrat,” but he had the support of Congressman Hughes, the Republican representative from the state’s Fourth District, and other influential Republicans, including Senator Elkins. Senator Elkins had offered a compromise to Senator Scott in the person of Elliott Northcott, of Huntington, or Malcolm Jackson, of Charleston, but Senator Scott rejected both names. The *Telegraph* concluded by saying that “it looks as though the president will be the one to back down and consent to name ex-Governor Atkinson, the only man supported by the two senators.”<sup>14</sup>

Four days later the *Telegraph* reported that “Northcott Said to Be Leading.” The writer of the article got exceedingly clever, stating:

The surface indications, in the language of the oil fields, are that the Northcott well is by no means a “duster,” and may prove to be a “big producer.” His stock in the judicial contest has perceptibly risen.<sup>15</sup>

At the foot of this article was another, headlined “Here’s Another Story.” This article reported that the long contest for the judgeship was about to be settled. Col. Z. Taylor Vinson was to be married to “one of Virginia’s most charming daughters at Richmond,” and Col. Vinson was to be handed his commission as judge as a wedding gift from Senator Elkins, who was a warm personal friend of Vinson. This information, the article noted, came from “those in close touch with Colonel Vinson’s forces.”<sup>16</sup> But the rumors continued to fly. The following day, the *Telegraph* reported that the appointment would go to either Northcott, Jackson, or Vinson.<sup>17</sup>

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<sup>14</sup> *Atkinson May Yet Win Out*, BLUEFIELD DAILY TELEGRAPH, June 9, 1901, at 1.

<sup>15</sup> *Northcott Said to Be Leading*, BLUEFIELD DAILY TELEGRAPH, June 13, 1901, at 1.

<sup>16</sup> *Alleged That Judgeship Will Go to Vinson as Wedding Gift*, BLUEFIELD DAILY TELEGRAPH, June 13, 1901, at 1.

<sup>17</sup> *Judgeship is Still in the Air*, BLUEFIELD DAILY TELEGRAPH, June 14, 1901, at 1.

Finally, on Tuesday, June 18, the *Telegraph* announced the appointment of B. F. Keller, of Bramwell, as the District Judge. Former Governor Atkinson was named United States Attorney for the new district. The “battle” for the appointment was over.<sup>18</sup>

Keller’s appointment was a recess appointment by President McKinley. He was formally nominated by President Theodore Roosevelt on December 5, 1901, Roosevelt having assumed the Presidency on McKinley’s death on September 14, 1901. The Senate confirmed the appointment on December 17, 1901, and Judge Keller received his commission the same day.

#### BENJAMIN FRANKLIN KELLER

Benjamin Franklin Keller was born in Boalsburg, Pennsylvania, just outside State College, on April 21, 1857.<sup>19</sup> A tall and robust man,<sup>20</sup> he received

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<sup>18</sup> *B.F. Keller Appointed Judge*, BLUEFIELD DAILY TELEGRAPH, June 18, 1901, at 1. Keller’s appointment was dated June 18, 1901, but the *Telegraph* article for that same date announced that the paper had received news “yesterday afternoon” announcing that Keller had been appointed. Most likely the *Telegraph* had received news that Keller’s appointment was imminent.

As for Governor Atkinson’s failure to attain the judgeship, it is not clear that it was terribly important to him. In a letter addressed to “Dear Boggs,” dated October 22, 1899, the Governor wrote to the man who was apparently the Governor’s private secretary:

You and I are about the same age. You have been my true and trusty friend. I brought you to West Virginia as you well know, and I have always stood by you, and there never was a time when I didn’t accept you as my friend.

If I should be called hence in advance of you, I want you to see that the following inscription is placed upon my monument (and I will provide the monument unless I am called very soon), viz:

George W. Atkinson. Born in Kanawha County, Va., June 29, 1845, Died \_\_\_\_\_. He tried to be honest; he would not lie; he never intentionally wronged his fellow men; he sought on all occasions to life up his fellows; he was a friend of the poor and the helpless; he never stole a dollar or a cent; and his purpose was ever to do what he could to make the world broader and better and nobler and grander because he lived in it.

In a postscript, Atkinson added, “I care nothing about having on my monument a record of any public position I have held. All that is chaff. It is what a man is inside and not the public positions he had held that should be considered.” Atkinson never got his wish. One side of his monument contains a cross. At the head of the cross is the word “Father.” Under one arm of the cross is inscribed “George Wesley Atkinson, 1845-1925.” On the side of the monument facing Charleston are the words: “Christian-Statesman-Scholar-Gentleman.” JOHN G. MORGAN, WEST VIRGINIA GOVERNORS 1863-1980, 63-64 (Charleston Newspapers 1980).

Elliott Northcott would later have his day. On April 6, 1927, President Calvin Coolidge named him to the United States Court of Appeals for the Fourth Circuit on April 6, 1927. He served until his retirement on October 15, 1939. Thomas F. Stafford, *History of the United States District Court for Northern West Virginia*, 41 (1977) (unpublished manuscript, on file with author).

<sup>19</sup> Of the sixteen judges appointed in the Southern District, as of January 1, 2001, Judge Keller was one of two who was not born in West Virginia. The other was Judge Ben Moore.

<sup>20</sup> *Obituary of Judge B.F. Keller*, CHARLESTON GAZETTE, Aug. 10, 1921.

his B.S. degree from Pennsylvania State College in 1876, and his M.S. degree from there in 1879. In 1882 he obtained an LL.B. from Columbian University in Washington, D.C. (now George Washington University). He married Miss Mercy J. Baldy of Danville, Virginia, in 1882, and, in May 1891, opened a law practice in Bramwell, Mercer County, where he practiced actively until his appointment to the federal bench.<sup>21</sup> He was elected the twenty-ninth president of The West Virginia Bar Association in 1911.<sup>22</sup>

Judge Keller's appointment was a popular one. The *Telegraph* reported, "Appointment of Mr. Keller Well Received Throughout the State." Quoting from the Charleston *Mail-Tribune*, the article stated:

The appointment of Hon. B. F. Keller to be judge of the newly created southern district of West Virginia is an admirable one, and it is hailed with satisfaction and delight by the people and bar of the district in which he is to serve, and from which he hails.

Judge Keller is a fine man and a good lawyer of eighteen years' experience in the practice of his profession. He is a man of great force of character, and, while a Republican and a party man sound in the faith, has never been a partisan in the offensive sense of the word . . . .

Here in Charleston, where the new judge is more or less well known among the bar, Democrats, as well as the Republicans, express themselves as pleased over the selection, and paid high encomiums to his character and ability.<sup>23</sup>

The following morning, the *Telegraph* reported that the appointment of Judge Keller was "a signal victory for Senator Scott." Scott and President McKinley were very close, the *Telegraph* reported, and this close personal relationship "had a good deal to do with the appointment of Keller."<sup>24</sup> In any event, it was good to have the battle over. As the *Telegraph* put it:

Both senators are feeling jubilant over the end of the judgeship contest, as it has proven a thorn in the side to both of them even

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<sup>21</sup> *B.F. Keller Appointed Judge, supra* note 18, at 1

<sup>22</sup> *Keller Dead; District Judge 20 Years*, CHARLESTON GAZETTE, Aug. 9, 1921, at 1.

<sup>23</sup> *Gratification is General*, BLUEFIELD DAILY TELEGRAPH, June 20, 1901, at 1.

<sup>24</sup> *Couldn't Please Everybody*, BLUEFIELD DAILY TELEGRAPH, June 21, 1901, at 1.

[sic] since the bill creating the new judicial district was signed by the president.<sup>25</sup>

The new court convened in Bluefield for the first time on Tuesday, December 3, 1901.<sup>26</sup> The *Telegraph* reported in detail the arrival of Judge Keller, Clerks Keatley and Berhnelm, United States Attorney (and former Governor) George W. Atkinson, Atkinson's assistant, Elliott Northcott, and Atkinson's private secretary, Hollister Rummel on the morning train. The paper speculated that the

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<sup>25</sup> *Gratification is General*, *supra* note 23, at 1. The *Telegraph* appears not to have been above taking commercial advantage of the news and speculation regarding Judge Keller's selection. At the end of the column on the selection of Judge Keller was an advertisement titled "The Judgeship" with a cartoon of three formally-dressed gentlemen drinking beer. The ad read, "People who know and appreciate the good things of life, people who possess taste as to eatables and drinkables, people who believe in being happy instead of morose, are always good judges of beer as of other beverages. Their 'say so' is worth something. A hint, therefore, from them means a whole lot. Good judges unanimously endorse Hoster's Famous Beer. Follow their lead and you will make no error." The placement of this ad immediately following the extensive article on the new judgeship was unlikely to have been a coincidence.

<sup>26</sup> The court met in the Bluefield City Hall. The minutes of the Board of Directors of the City of Bluefield for January 17, 1900, reflect that the Common Council of the city offered City Hall, "a large brick building which is well adapted and suited for a Court House," to the United States Government, free of charge, for five years, "for the purpose of holding its courts in and all necessary purposes connected therewith." The offer was conditioned on the passage of the Dayton Bill and the designation of Bluefield as one of the places at which a term of the court shall be held. The resolution did its part to boost Bluefield, noting that:

[T]he City of Bluefield is a thriving and growing town with at present a population of about seven thousand inhabitants and is situated upon the Norfolk and Western Railway and in proximity to the Coal Fields and Mining region, and in view of its location and situation it would be one of the most desirable and accessible points in the Southern part of West Virginia for a term of the United States Court to be held.

The offer was apparently accepted because the *Telegraph* for Wednesday, December 4, 1901, under the heading "Federal Court Meets Here," proudly announced: "The first session of the federal court at Bluefield, for the southern district of West Virginia, convened yesterday." The article went on to say that Judge Keller and his retinue "inspected the court room, offices, etc., and expressed themselves as well satisfied with the arrangements." While the article did not state precisely where the court met, an article printed in 1939, under the headline, "U.S. Court Here is 38 years Old," noted:

For several years after the beginning of the court here, the old city hall building was used in which to conduct the trials. But few civil cases were tried, the court's business being devoted almost entirely to the criminal docket and such civil matters as was considered largely routine.

Judge Keller had not been confirmed by the United States Senate when court convened in Bluefield, his confirmation not taking place until December 17, 1901. But, as his appointment was a recess appointment, he was permitted to sit until the Senate acted. The *Gazette* of Wednesday, December 18, 1901, noted Keller's confirmation by the Senate the day before with little fanfare. *West Virginia Appointments Confirmed*, CHARLESTON GAZETTE, Dec. 18, 1901, at 1. Indeed, the formal confirmation was anticlimactic and the real news was his recess appointment by President Roosevelt on June 18, 1901.



cases before the court for this first term would not consume a great deal of time, most of them being violations of the internal revenue law. This was a polite way of saying that these were untaxed (meaning “homemade”) alcohol or “moonshine” cases or charges of selling liquor without a license. These sorts of cases made up a great deal of the dockets for United States District Courts in those days.<sup>27</sup>

One of the first cases heard, however, was not an illicit liquor matter, but a charge of possession and passing of counterfeit money. Nan Staton, described in the paper as “a white woman,” was accused of passing lead five cent pieces on a store keeper at Iaeger in McDowell County.<sup>28</sup> The following day the paper reported she had been acquitted of the crime.<sup>29</sup>

On Friday, December 6, the Bluefield Bar Association gave a banquet in honor of Judge Keller. The bill of fare was a trencherman’s delight, with baked Florida snapper, Canvasback duck, roast quail on toast, asparagus tips, and champagne among the delights offered. Lest the champagne be wasted, ten toasts were offered (all followed by the appropriate responses), beginning with the toastmaster’s toast to Judge Keller and running the gamut from toasts to “Bluefield,” to “the ladies,” and to “the moonshiner — his past, present, and future.”<sup>30</sup> The Sunday *Telegraph* continued its effusive coverage of the banquet. In addition to the toasts reported on the day before, the Sunday paper noted *speeches* by Judge Joseph M. Sanders,<sup>31</sup> M. F. Metheny, W. Walter McClagherty, of the Bluefield bar, Isaac E. Christian, of the Oceana bar, and Dr. Holland, who is otherwise unidentified but most likely was George C. Holland, who served as Mayor of Bluefield from November 9, 1898, to May 31, 1900. Dr. Holland’s flowery speech was extensively quoted in the article and, after the fashion of the day; he appears to have left no noun – proper or other-

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<sup>27</sup> Howard B. Lee, who served as West Virginia’s Attorney General from 1925 to 1933, said of Bluefield during Prohibition (which of course was not law in West Virginia until the passage of the Prohibition Amendment to the state constitution in 1912): “In my town of Bluefield it was jokingly said that the bootleggers were so numerous that they had to wear identifying insignias on their coat lapels so they would not lose time soliciting each other.” HOWARD B. LEE, *MY APPALACHIA* 21 (McClain Printing Co. 1977).

Prior to the enactment of the Prohibition Amendment, the problem was not the *sale* of liquor, a prohibited substance, but the sale of liquor *without paying the federal tax* thereon. Bluefield was ideally suited for problems with the illicit sale of alcohol. It was on the main line of the C&O Railroad and was more or less the portal to the southern West Virginia coal fields from the famous moonshine districts of Virginia and the mountains of North Carolina. Population in the coal fields was booming, there was plenty of work, and this combination meant that there was an abundance of money available with which to purchase what the West Virginia Prohibition Amendment later called “intoxicating malt, vinous or spirituous liquors.”

<sup>28</sup> *She Circulated Spurious Coin*, BLUEFIELD DAILY TELEGRAPH, Dec. 5, 1901, at 1.

<sup>29</sup> *Federal Court*, BLUEFIELD DAILY TELEGRAPH, Dec. 6, 1901, at 4.

<sup>30</sup> *In Honor of Judge Keller*, BLUEFIELD DAILY TELEGRAPH, Dec. 7, 1901, at 1.

<sup>31</sup> Judge Sanders served eight years on the bench of the Ninth Judicial Circuit of West Virginia (1896-1904) and also served three years on the Supreme Court of Appeals of West Virginia (1904-1907).

wise – unmodified.<sup>32</sup> While it appears, as the old-time newspapers used to report on such occasions, that “a good time was had by all,” it must have been a *very long* evening. Indeed the *Telegraph* reported that the banquet “did not end yesterday morning until such a late hour that all of the interesting proceedings could not be gotten in the issue of that day.” The article on the banquet was followed immediately with this brief item:

When the federal court convened yesterday morning, the cases against George and James Champ, for perjury and intimidation of witnesses, respectively, were called, and were postponed until the June term, the prisoners being referred to Commissioner Maynard for bail, which was given.

After disposing of these cases the court adjourned, and the officers have returned to their various homes.

With appropriate pomp and circumstances, and extensive coverage by the *Telegraph*, the federal court had come at last to Bluefield.

As the *Telegraph* stated when reporting on the court’s first session in Bluefield, many of the early cases appear to have been untaxed alcohol cases, for the *Gazette* of May 7, 1902, reporting on “Cases Disposed of at Yesterday’s Session” of the federal court, listed a number of guilty pleas followed by a fine of \$100 and thirty days in jail, the sort of sentence imposed for such violations by Judge Keller in his first session in Bluefield.<sup>33</sup> The following day, the *Gazette* reported on the trial of Ned Helzel, the Adams Express Company’s agent at Ripley in Jackson County who was indicted for illegally selling liquor. As the *Gazette* reported, “it seems that Ripley is a ‘prohibition’ town. There are no licenses there to sell liquor and the community has been worked up very much over the frequent and flagrant violations of the license laws.”<sup>34</sup> Helzel had allegedly been involved in a scheme with “liquor houses in Kentucky and else-

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<sup>32</sup> His references to court personnel included “the *popular and agreeable* Keatley, the *experienced and efficient* Bernhelm, the *genial* Holbrook, the *generous* Maynard, the *witty* Ritz, [and] the *courteous* Bowman.” (“Ritz” was Harold A. Ritz, who later served as Judge of the Eighth Circuit of West Virginia, United States Attorney for Southern West Virginia, and as a member of the Supreme Court of Appeals of West Virginia from 1917 to 1922. “Maynard” was likely Frank Maynard, a long-time member of the Bluefield Bar, although what court position he held at that time is unknown. “Holbrook” was G. J. Holbrook, a member of the first executive committee of the Mercer County Bar and toastmaster for the banquet. “Keatley,” “Bernhelm,” and “Bowman” are unidentified.) Holbrook spoke of the “*popular, agreeable and pleasant* officers who serve in the various federal districts.” He ended his references to the court personnel with the hope that “as you trod the paths of ‘officialdom’ may you ever find them strewn with *thornless, sweet and fragrant* flowers.”

<sup>33</sup> *Federal Court, A Number of Cases Disposed of at Yesterday’s Session*, CHARLESTON GAZETTE, May 7, 1902, at 4.

<sup>34</sup> *United States Court. An Interesting Case that Came from Ripley for Trial*, CHARLESTON GAZETTE, May 8, 1901, at 5.

where” whereby liquor would be sent C.O.D. to the Adams Express Company office in Ripley and then forwarded by agents of the liquor houses to local residents via forged orders. Helzel had been indicted and tried in state court on the same charges earlier but was acquitted. After what the *Gazette* called “a warmly contested trial,” Helzel was acquitted in federal court. The article listed five other liquor cases before the federal court that day, with two convictions and three acquittals.<sup>35</sup>

On November 30, 1919, the *Gazette* had a bit of fun with the federal court’s actions of the preceding day:

A remarkable thing happened in United States district court yesterday morning. When the case of the United States versus Ten Gallons of Whiskey was called, the defendant came into court without a friend or claimant. There was no one in this moonshine-torn state to plead for leniency for Ten Gallons, and the court could do nothing else than order the defendant destroyed.

This proceeding was repeated, but with lesser cause for wonderment, in the libel cases of the government against four and one-half bottles Injection Zip; versus thirteen dozen boxes Black Caps; versus Cummings Pill Mass; versus Santal Oil. No owners appeared in behalf of the defendants and orders of destruction were entered.

These cases were brought under the pure food act and the Reed amendment, where the whiskey was involved.

The *Gazette* went on to report that twenty-one cases on the Saturday trial calendar were disposed of by Judge Keller and Assistant United States District Attorney Joseph N. Kenna in less than an hour.<sup>36</sup>

Problems began to “heat up” in the southern coal fields in April 1912 when the miners in the Paint Creek and Cabin Creek areas demanded a nine-hour day, better housing, and payment in money instead of company store scrip. The mine operators resisted, hired private guards, and placed machine guns at

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<sup>35</sup> *Id.* In his message to the Legislature in 1903, Governor Albert B. White asked the Legislature to find a remedy for what he called the “C.O.D. liquor business,” a practice of sending shipments of liquor from points outside the state to communities where it wasn’t legalized. He said:

It is the custom in too many instances for traveling agents to take a list of names, partly or wholly fictitious, and ship in packages of liquor consigned to those names. Then it is the practice for unscrupulous agents of these transportation companies to ‘claim’ one of these packages and pay for it and take it away.

MORGAN, *supra* note 18.

<sup>36</sup> *Defendant, Ten Gallons, Had No Friend in Federal Court*, CHARLESTON GAZETTE, Nov. 30, 1919, at 28.

tipples and other vantage points around the mines. The miners smuggled in their own weapons and prepared for battle. Nothing happened until the latter part of May, when the village of Mucklow on Paint Creek was fired upon. A week later a man was killed during a second attack. In late July, the miners and guards had another pitched battle at Mucklow, in which at least one of the guards was killed and others were injured. On July 26, 1912, the Governor called out the National Guard. One company was sent to the scene, "and it was necessary to protect several thousand people and patrol an area of 12 to 15 miles in length," according to Governor Glasscock's report to the Legislature. Peace reigned until late August, and all but four companies of troops were withdrawn. Then, there was another outbreak and martial law was declared by the Governor on September 2, 1912. From then it was an on-again off-again situation with periods of peace interrupted by disturbances which led to the institution of martial law.<sup>37</sup> On the night of September 5, 1919, 5,900 armed bituminous coal miners were marching to close the non-union coal mines in Logan County. They had assembled on Lens Creek, 15 miles from Charleston. Governor John J. Cornwell, accompanied by his secretary and a stenographer, drove to Lens Creek over the rough, unpaved roads of that day and talked all but 500 of the most determined miners into disbanding. The following day these 500 men, still carrying rifles, were joined by 2,800 others as they continued their march across the mountains toward Logan County. Governor Cornwell sent word that he would ask for federal troops if they crossed the Coal River, the dividing line between Logan and Boone Counties. The warning was effective, and the band broke up. But it was not the end.<sup>38</sup>

Federal Court was back in session in Charleston on December 5, 1919, and the coal field problems were on the "front burner." On December 6, Judge Keller issued a temporary restraining order against 540 officials and members of the United Mine Workers of America (UMW). The order covered all of UMW District 29 and that portion of District 17 within the jurisdiction of Judge Keller and restrained the UMW officials and members from continuing to participate in and encourage a general strike that had shut down the coal fields and, in the words of the restraining order, "restrict[ed] the supply and distribution throughout the United States of a necessary," that is, coal.<sup>39</sup> The miners, meanwhile, planned a 30,000-man armed march into Logan County to close the coal field there. But they were warned by Governor John J. Cornwell that an armed march would be regarded as an insurrection. Cornwell asked for federal troops, which were sent promptly, and the armed march never materialized.<sup>40</sup> But the miners were still on strike throughout the nation. On December 6, 1919, the

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<sup>37</sup> MORGAN, *supra* note 18, at 81-82.

<sup>38</sup> *Id.* at 102-03.

<sup>39</sup> *540 Officials of Miners are Restrained by Judge Keller*, CHARLESTON GAZETTE, Dec. 7, 1919, at 1.

<sup>40</sup> MORGAN, *supra* note 18, at 103.

very day that Judge Keller was restraining the UMW organizing activities, United States Attorney General A. Mitchell Palmer had met quietly with John L. Lewis of the UMW and offered to give a presidential bituminous coal commission the authority to consider an additional wage increase, if the miners would return to work. Lewis accepted the compromise, and the miners returned to work. The Presidential commission, which was named the Bituminous Coal Commission, raised miners' wages seventeen percent, which nearly equaled the inflationary loss of their real income during World War I. Nonetheless, labor problems continued, with the growth of open-shop coal mines continuing unabated and the West Virginia government, along with federal officials, having firmly shown that they would use force to protect the open-shop mines from union organizers. The problems would continue into the term of service of Judge Keller's successor.<sup>41</sup>

The issuance of the temporary restraining order may have been quite stressful for Judge Keller for two days later, on December 8, he suffered a disabling stroke.<sup>42</sup> The judge was confined to his bed in his Virginia Street home until the following April when he went to the Whyne Leonard Sanatorium in Atlantic City, New Jersey, in an effort to effect a recovery.

Judge Keller was not a wealthy man, and when he was forced to retire from active work on the bench, his friends offered a bill in Congress through Representative Wells Goodykoontz of Mingo County creating the position of associate judge for the United States District Court for Southern West Virginia. The object of the bill was to provide an associate judge to do the work in the district while continuing the salary of Judge Keller.<sup>43</sup> The *Gazette* reported that there were three "formidable candidates" for the associate judgeship, George W.

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<sup>41</sup> RICHARD D. LUNT, *LAW AND ORDER VS. THE MINERS, WEST VIRGINIA, 1907-1930* 90 (Archcon Books 1979).

<sup>42</sup> *Obituary of Judge B.F. Keller, supra* note 20. The judge may have been ailing for some time because the *Charleston Daily Mail* of December 8 reported that Judge C. A. Woods, of Marion, South Carolina, a member of the United States Circuit Court, had come to Charleston "to assist Judge Keller in the handling of the heavy docket." *Judge Woods Presides. Assisting Judge Keller in Federal Court in Land Case*, CHARLESTON DAILY MAIL, Dec. 8, 1919, at 1. The article suggested that Judge Woods had been requested some time earlier but "owing to the pressure of business in his circuit, he was delayed." It is difficult to know if Judge Woods' arrival was merely fortuitous or if Judge Keller's health had been failing for some time. The only mention of any physical problem was a reference in the judge's obituary of his "affected hearing." The articles surrounding his death made particular note of the fact that he had never missed a term of his court until his stroke.

<sup>43</sup> *Keller Dead; District Judge 20 Years, supra* note 22, at 1. The Act provided for the appointment of an additional judge in the Southern District, but further provided that "whenever a vacancy shall occur in the office of the district judge for the southern district of West Virginia senior in commission such vacancy shall not be filled, and thereafter there shall be but one district judge in said district." Act of June 25, 1921, ch. 30, 42 Stat. 67 (1921) (creating an additional judgeship for the Southern District of West Virginia) (emphasis added). Thus, the Act was specifically designed to provide for a judge to sit during and after Judge Keller's illness but that on Judge Keller's death, his judgeship (being "senior in commission" to the judge appointed under this Act) should lapse.

McClintic of Charleston, Judge James French Strothers of Welch, and Elliott Northcott of Huntington.<sup>44</sup> McClintic, the paper said, was “generally believed to have the inside track.” Judge Strothers, who had what the *Gazette* called a delegation that was “numerically stronger and in quality representative of the Republican party leadership in the fifth congressional district,” had accompanied his delegation to Washington to meet with the state’s two senators.<sup>45</sup> Strothers did not meet with the senators himself, but his delegation pleaded his case for him. Northcott, on the other hand, saw the senators in his own behalf. V. Taylor Vinson of Huntington, who had been mentioned as a possible choice for the judgeship in 1901, along with State Tax Commissioner, Walter S. Hallanan, and Mrs. Lena Lowe Yost, associate chairman of the Republican State Executive Committee, also appeared on behalf of Northcott. McClintic, who the *Gazette* reported was favored by Senator Sutherland, was said to be “standing by quietly.” The *Gazette* reported:

The candidates and their friends have it doped out that Senator Sutherland will practically make this appointment. Senator Elkins joining in the endorsement of any one his colleague may nominate. This is based on the theory that as Senator Elkins named the judge in the northern district, it is entirely agreeable for him to reciprocate by letting Senator Sutherland name the judge in the down-state district. This being true, or believed to be true, the present “drive” being made by the Strother and Northcott groups is being directed especially at Senator Sutherland. They hope to jar him loose from McClintic, having reason to believe that he is strongly inclined to recommend the Charleston candidate.<sup>46</sup>

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<sup>44</sup> *Judgeship Bill Passes House; McClintic Now Leads Contest*, CHARLESTON GAZETTE, June 22, 1921 at 1. When Senators Stephen B. Elkins and Nathan B. Scott were trying to reach agreement on the selection of the first Southern District judge in 1901, Senator Elkins had suggested Northcott as a compromise choice. But Scott had rejected his name. *Atkinson May Yet Win Out*, *supra* note 14, at 1.

<sup>45</sup> *Judgeship Bill Passes House*, *supra* note 44, at 1. Howard Sutherland and Davis Elkins were the state’s two senators. Sutherland, a Republican from Randolph County, served from 1917 to 1923. Elkins, a Republican from Monongalia County, served from 1919 to 1925.

<sup>46</sup> *Id.* McClintic had served as attorney for Senator Sutherland in the fall of 1916 when his election to the United States Senate was contested by his Democratic opponent, W. E. Chilton, of Charleston. As a leader in the Committee of House of Delegates as well as floor leader, McClintic led the fight against the repeal of the direct primary law, which was vital to Senator Sutherland’s career. Labor opposed McClintic’s appointment, primarily because, as a member of the House of Delegates from Kanawha County from 1919 to 1921, he had favored the “Mingo County Jury Bill” and was also in favor of the creation of what was known as the state constabulary, which is now the Department of Public Safety or, more familiarly, the West Virginia State Police. The Mingo County Jury Bill had come out of the Mingo-Logan Mine War. In May 1920 guards from the Baldwin-Felts Company arrived in Matewan to evict miners who were out on strike. Sid

Senator Sutherland was not “jarred loose” from McClintic and, on July 19, 1921, President Warren Harding appointed him to the federal judgeship. Judge McClintic took the oath of office August 4, 1921. Four days later, Judge Keller passed away in the Whyne Leonard Sanatorium in Atlantic City.<sup>47</sup>

GEORGE WARWICK MCCLINTIC<sup>48</sup>

George Warwick McClintic was born at Mill Point, in Pocahontas County, on January 14, 1866, just two and a half years after West Virginia was created. He was educated in the local public schools and at Roanoke College, from which he received an A.B. degree in 1883. In 1886 he graduated from the College of Law of the University of Virginia with an LL.B degree. He went west for a spell and in 1886 came to Charleston where he entered into a law partnership with Wesley Mollohan. He served as city attorney for Charleston from 1915 to 1917. In 1919 he was elected to the House of Delegates where he served as chairman of the Judiciary Committee as well as Floor Leader and was instrumental in the passage of the Good Roads Amendment of 1920 to the West Virginia Constitution, which was ratified by a vote of nearly two to one.

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Hatfield, Matewan’s police chief, forced the guards to leave because they were without a court order that would enforce the eviction. When the guards returned to Matewan with the proper documents, a gunfight broke out, which would go down in history as the “Matewan Massacre.” Three miners, including the town’s mayor, and seven guards from Baldwin-Felts, including Albert Felts (the brother of the Baldwin-Felts Agency owner), were left dead or dying on the streets of Matewan.

In January 1921, Sid Hatfield stood trial for the murder of Albert Felts and was acquitted by a jury drawn from Mingo County residents. Later that same month, Mercer County Delegate Joseph Sanders introduced a bill that would allow a presiding circuit judge to call a jury from another county in a criminal case. Although the United Mine Workers of America strongly opposed the bill it passed, a clear indication that the government was on the side of the coal industry in the struggle.

Sid Hatfield did not escape repercussion for the massacre. In August 1921, he and a companion were assassinated by two Baldwin-Felts guards on the McDowell County Courthouse steps while proclaiming their innocence to their alleged involvement in the shooting-up of a coal camp. A crowd of spectators observed the killings, but when the court ruled that the guards had acted in self-defense (even though Hatfield and his companion were unarmed), no one came forward to say otherwise. *Matewan*, UNITED MINE WORKERS OF AMERICA, <http://www.umwa.org/history/matewan.shtml>.

<sup>47</sup> *Keller Dead; District Judge 20 Years*, *supra* note 22, at 1. Ironically, one of the arguments against appointing former Governor Atkinson to the judgeship that Judge Keller assumed had been the Governor’s age – he was nearly seven years older than Judge Keller. As it developed, Gov. Atkinson lived almost four years after Judge Keller’s death, and five and a half years after he became incapacitated.

<sup>48</sup> Much of the otherwise uncited biographical material on Judge McClintic is taken from a booklet titled, *In Memoriam*, published by the United States District Court for Southern West Virginia, which contains proceedings before that court on Thursday afternoon, November 12, 1942, memorializing Judge McClintic.

Judge McClintic was an avid camper and fisherman and more than one participant in the memorial services before the United States District Court for Southern West Virginia on November 12, 1942, made reference to his passion for the outdoors. Robert Spilman, a member of the Kanawha County Bar, related a story that day which cast a special light on the judge's essential humanity:

He was a confirmed camper, and many years ago during the trout season Judge McClintic's party was camped at the forks of Cranberry River in Pocahontas County, an inaccessible spot upon a turbulent stream. He had gone down the river fishing and a short time before dark as he was coming up he passed an abandoned camp where those who had used it had left a hound, then in the last stages of starvation, — a hound they had brought there probably for the purpose of chasing the King's deer, which had strayed off or was purposely left behind. At any rate the dog was so weak he couldn't stand. There was no pathway up Cranberry to the McClintic camp. The river was the only route and it was three miles up stream. It was about as much as a man could do usually to wade that three miles carrying nothing heavier than a trout rod, but the Judge picked up that starved hound in his arms, carried him the whole distance and kept him until he broke camp. He took him back to his farm at Swago and as it turned out got a fine dog that was famous in that country for many years.

Then Mr. Spilman concluded the story with these words:

The incident is merely an illustration of a characteristic trait that made it, as his Clerk has said, almost impossible for him to sentence a woman to prison where it meant taking her away from a home where she was needed, no matter how guilty she was.

Seven months later, at the Fourth Circuit Judicial Conference, Judge Ben Moore added his measure of Judge McClintic:

His likes and dislikes among men, lawyers and judges were definite and pronounced. There were many who thought him harsh and abrupt; and so he was, at times. But his harshness was usually that of the frank, honest man towards those who he felt were dissembling; and his abruptness was that of the plain, blunt man who sometimes loses patience with indirectness and circumlocution.

Unquestionably there was a certain roughness about this man; a certain asperity; and acerbity of temper and demeanor which



sometimes had its effect upon proceedings in his court. But these qualities did not penetrate beneath the surface of his personality. Those who knew him best were well aware of his innate kindness and his sympathy for the weak and unfortunate.<sup>49</sup>

Judge McClintic was one of the first United States District Judges to make extensive use of the probation system, and during his twenty years on the bench he made use of it in thousands of cases. Indeed, one of the speakers at the Judge's memorial service referred to the Judge as "the father of probation and parole," not only in his court but in the state courts of West Virginia.<sup>50</sup> He was known as a harsh judge for those who violated the highly unpopular Eighteenth Amendment to the United States Constitution, the prohibition amendment. In his autobiography, *Heritage of Freedom*, Judge Ben Moore said:

McClintic had served through the roaring twenties, and had acquired a wide reputation as the bootleggers' nemesis. During the years when the Eighteenth Amendment and the Volstead Act were the law of the land, the federal court of southern West Virginia was little else than a police court. I have seen McClintic in a single day hand out prison sentences to almost a hundred defendants.<sup>51</sup>

Judge Moore described Judge McClintic as one of "an old school of federal judges who ruled their courts with an iron hand. They knew their power, and they did not hesitate to exercise it to the fullest extent." Judge Moore said that Judge McClintic "paid lip service" to the principal that a defendant is presumed innocent until proved guilty.<sup>52</sup>

Judge McClintic was not afraid to exercise the power of the federal court, even in small matters. Robert M. Richardson of the Bluefield Bar re-

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<sup>49</sup> Hon. Ben Moore, Judge, United States District Court for Southern West Virginia, Remarks at the Fourth Circuit Judicial Conference in Asheville, North Carolina (June 11, 1943).

<sup>50</sup> Hon. Julian F. Bouchelle, Judge, Circuit Court of Kanawha County, West Virginia, Remarks at the Memorial Service for Judge McClintic Before the United States District Court for Southern West Virginia (Nov. 12, 1942).

<sup>51</sup> HON. BEN MOORE, *HERITAGE OF FREEDOM* 143-44 (T.S. Denison & Co. 1957). Howard Lee described Judge McClintic as "that hard-boiled, whiskey-hating Federal Judge." LEE, *supra* note 27, at 23.

<sup>52</sup> MOORE, *supra* note 51, at 144. Judge Moore said McClintic "regarded himself as an arm of the law, dedicated to do battle against crime, particularly if the crime involved illegal liquor. Arrest to him was strong indication of guilt, and indictment almost positive proof. He would have fitted well in a French court, where the defendant must prove himself innocent, instead of the prosecutor's being obliged, as in American courts, to prove him guilty. McClintic's passions were so strong that he was nearly always led to associate the defendant's attorney with his client as the partaker in some measure of the unholy grail which the judge always saw at the prisoner's lips." *Id.* at 144-45.

called attending a court proceeding in the federal courthouse one hot summer day when he was a young boy. Having no air conditioning, the big front windows of the courtroom were wide open. Judge McClintic was having difficulty hearing some of the witnesses because of the truck traffic on Federal Street. McClintic solved the problem by having the federal marshal stop traffic on Federal Street until the court session was over. As Mr. Richardson related it, “[i]t was a good little lesson to me as to the power and authority of the Federal Court.”<sup>53</sup> And it was a good insight, as well, into Judge McClintic’s willingness to exercise that power.

One of Judge McClintic’s most notable “battles” occurred in relation to the mine disturbances that had plagued the southern West Virginia coal fields for nearly a decade. The United Mine Workers had sought to organize the miners in the region, but many of the miners had signed employment contracts with the Red Jacket Consolidated Coal & Coke Company, the largest coal operation in Mingo County. Under the contract with Red Jacket, each miner had agreed “that he will not belong to, or affiliate in any way with” any union and “will not knowingly work in or about any mine where a member of such organization is employed” on penalty of losing his job. Red Jacket, in turn, agreed not to employ union labor.<sup>54</sup> Union organizers pleaded with the miners not to be intimidated into signing individual employment contracts. But some men, desperate for work, did sign the contracts.

In the early 1920’s, Red Jacket was joined by 315 other coal operators, virtually every open-shop mine in southern West Virginia, in a suit to protect their individual employment contracts. In 1923, Judge McClintic granted the operators a permanent injunction against UMW organizing activities. The UMW appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which upheld Judge McClintic’s injunction. The United States Supreme Court declined to hear the case on a writ of certiorari, and Judge McClintic’s injunction held.<sup>55</sup>

On March 2, 1937, while sitting in Lewisburg, Judge McClintic declared the West Virginia state penitentiary at Moundsville a “shame and a disgrace” because “2,500 [prisoners] are crowded into a place built for 800.” He added that the “[Greenbrier] county jail is a disgrace to itself, to its citizens and humanity.” That same day he gave five minor liquor law violators probation.<sup>56</sup>

Judge McClintic assumed senior status on March 1, 1941, and died at his home on Kanawha Boulevard in Charleston on September 25, 1942. His obituary stated that he was “one of only three judges of the 84 federal district judges in the nation who consistently and continuously tried to enforce the fed-

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<sup>53</sup> Letter from Robert M. Richardson, Law Firm of Richardson, Kemper, Hancock, & Davis, in Bluefield, West Virginia, to Hon. David A. Faber, Judge, United States District Court for Southern West Virginia (Dec. 5, 1944) (on file with author).

<sup>54</sup> LUNT, *supra* note 41, at 93-95.

<sup>55</sup> *Id.* at 94-96.

<sup>56</sup> *Prison Conditions Hit by M’Clintic*, CHARLESTON GAZETTE, Mar. 3, 1937, at 1.

eral prohibition laws.” It dwelt also on his role as an enforcer of the prohibition status noting that “[f]requently, in one day, he disposed of 125 prohibition cases in his court.” Judge McClintic’s body was cremated and the ashes buried at Spring Hill Cemetery in Charleston.<sup>57</sup>

#### HARRY EVANS WATKINS

Sometime in the 1930’s it became apparent that the caseload in the two United States District Courts in West Virginia had increased to the point where two judges were inadequate for the workload. In 1937, Congress acted to resolve the situation in a very practical, and somewhat unusual, fashion. Instead of creating a third district in the state, Congress authorized the appointment of a third judge for the State to serve in both the Northern and Southern Districts.<sup>58</sup> Appointment to this so-called “roving judgeship” went to Harry E. Watkins of Fairmont, who was a good friend of United States Senator Matthew M. Neely, also from Fairmont. At the time of his appointment Judge Watkins was thirty-eight years and four months old, the youngest person ever appointed as a United States District Judge.<sup>59</sup> Years later, at the unveiling of Judge Watkins’ portrait after his death, this story was told regarding the appointment of the thirty-eight-year-old Fairmont lawyer:

It may be apocryphal, but rumor has it that when Senator Matthew M. Neely, the mentor and sponsor of Harry E. Watkins, took him to interview Mr. Franklin D. Roosevelt when the appointment was being considered, the President turned to Senator Neely and remarked, “Do you mean to say that you want me to appoint this youth as a United States Judge?” The interview continued and the fact that the adequacy of Harry. E Watkins’ credentials and qualifications were made apparent is attested by the subsequent appointment.<sup>60</sup>

Judge Watkins was born at Watson, near Fairmont, in Marion County, on November 6, 1898. After graduating from Fairmont High School in 1917, he attended what was then known as Fairmont State Normal School for one year.

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<sup>57</sup> *Judge McClintic Dies at Home*, CHARLESTON GAZETTE, Sept. 26, 1942, at 1.

<sup>58</sup> Act of June 22, 1936, ch. 695, 49 Stat. 1805 (1936) (providing for the appointment of an additional district judge for the Northern and Southern districts of West Virginia). Initially the authority to appoint a third judge was to be temporary but it was made permanent on February 10, 1954. See Act of Feb. 10, 1954, ch. 6, 68 Stat. 8 (1954) (providing for the permanent appointment of additional circuit and district judges).

<sup>59</sup> Much of the otherwise uncited biographical material on Judge Watkins is taken from the records of a special joint session of the United States District Courts for Northern and Southern West Virginia on the occasion of the unveiling of a portrait of Judge Watkins. *IN MEMORIAM*, *supra* note 48.

<sup>60</sup> The story was told by Judge Charles F. Paul.

In 1918 he enlisted in the United States Army Signal Corps and after the war ended and he was discharged, he entered West Virginia University, graduating with an LL.B degree in 1923. While an undergraduate at WVU he was a fraternity brother (and pledge brother) of Judge Charles Ferguson Paul, who later became a United States District Judge for Northern West Virginia. Judge Paul recalled that Watkins, who served as treasurer and business manager of Delta Tau Delta fraternity, kept the fraternity afloat by his skillful management of all of the fraternity's business dealings during the recession that followed World War I:

Some of the brothers had a hard time rigging together the monthly dues and the room and board charges, and it was one of Harry Watkins' jobs to do the best he could to keep the brothers current. He did that with tact, but with firmness. Not only that, but he was the purchasing agent. He made the menus. He bought the food. He handled the help, to the end that a fraternity that was facing a deficit – and apparently a fast-mounting deficit – was placed on its feet. For that, all of us were grateful.

At a ceremony marking the retirement of Judge William E. Baker of the Northern District of West Virginia, Judge Watkins attributed his own selection as West Virginia's "roving" federal judge to the chance purchase of a pair of second-hand shoes:

Some twenty years ago, I tried my first case before Judge Baker. I lost the case, but left court with a second-hand pair of shoes which I purchased from His Honor for \$3.50. With the exception of the \$2 I paid for a marriage license, that was the best investment I ever made. At that time, the mountain people of West Virginia thought a federal judge was really somebody. Of course, the shoes were too large, but how I strutted in wearing the shoes of a federal judge. A few years later, Congress passed a bill authorizing the appointment of a third judge for West Virginia, – a so-called roving judge – who was supposed to rove about over two districts of the state, and step eventually into Judge Baker's shoes upon a vacancy in the Northern District. I am superstitious [sic] enough to believe that had I not purchased those shoes from the Judge, and practiced wearing

them, I would never have been appointed to that roving judgeship.<sup>61</sup>

On at least one occasion, Judge Watkins' position astride both of West Virginia's federal judicial districts caused some difficulty. Judge Ben Moore recalled that, in the early days of his service on the bench, Judge Watkins decided to appoint Charles Lively as Clerk of the United States District Court in Southern West Virginia, and so, informed Judge Moore. Moore told Watkins quite plainly that he would not agree since he felt that, as the *resident* judge in Southern West Virginia, he had at least the moral right to name the court's clerk. Nonetheless, with the concurrence of Judge McClintic, Judge Watkins made the appointment.<sup>62</sup> Moore sprang into action and, with the help of United States Senator Harley Kilgore and Homer Hanna, a close political confidante of Governor Matthew M. Neely,<sup>63</sup> got the statute relating to the appointment of clerks of the federal district courts amended. The new law provided that the deciding voice in making appointments in a federal judicial district should rest in the *resident* district judge and never in a roving judge, except in the district where the roving district judge resided when he was appointed. In Judge Watkins' case, this was the Northern District of West Virginia.<sup>64</sup>

Judge Moore did not make his appointment immediately. His choice for the job, Homer Hanna, a prominent Charleston lawyer and political figure, was busy helping Governor Neely run the executive branch of state government. When Neely finally consented to release Hanna to take the clerk's position, Judge Moore made the appointment. Judge Moore then said this about the struggle over the power to appoint the clerk:

It might be thought from what I have said about the dispute between Judge Watkins and me over naming the clerk that our relations have been unfriendly. Nothing could be farther from the truth. I know few men for whom I have a warmer feeling of affection and respect, and I believe the feeling is reciprocated. Our friendship is cordial and unaffected. Our philosophy of the law and our ideas with reference to the administration of justice are essentially the same. He even agrees with me now that Homer Hanna is the ideal clerk of the court.

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<sup>61</sup> Photostatic copy of a typewritten manuscript, apparently edited in Judge Watkins' hand, apparently delivered at a ceremony marking Judge Baker's retirement. Judge Baker served from 1921 to 1954.

<sup>62</sup> Judge Moore was commissioned United States District Judge for Southern West Virginia on March 27, 1941, and, thus, was subordinate in seniority to Judge Watkins whose commission as United States District Judge for Northern and Southern West Virginia was dated March 3, 1937.

<sup>63</sup> Hanna had served as campaign manager for Governor Neely. MOORE, *supra* note 51, at 150-151.

<sup>64</sup> *Id.* at 149-51.

Judge Watkins was initially given charge of the court points at Huntington in the Southern District and Clarksburg and Parkersburg in the Northern District. When Judge Baker died in 1954, Judge Watkins became the Chief Judge in Northern West Virginia and shared the district workload with Judge Baker's successor to the bench, Judge Herbert S. Boreman.

During his tenure on the bench, Judge Watkins served as a member of the Judicial Conference of the United States, and for a number of years he was chairman of the Conference's Committee on the Operation of the Jury system. In that capacity, he prepared reports and appeared before congressional committees considering legislation on matters relating to the jury system. He was active in bar association matters and frequently attended meetings of The West Virginia State Bar, The West Virginia Bar Association, the American Bar Association, and the Inter-American Bar Association. He served as a delegate of the American Bar Association to an international conference in London and represented various groups in other international meetings in Europe and South America.<sup>65</sup>

Judge Watkins was an avid golfer, hunter, and fisherman. He was an enthusiastic supporter of the WVU Mountaineers in all their athletic endeavors and was recognized as an expert bridge player.

Judge Watkins died of a massive heart attack on June 6, 1963, while attending a dinner meeting of the Marion County Bar Association that was honoring West Virginia Supreme Court Judge Frank Haymond on the occasion of his fiftieth anniversary as a lawyer. Judge Watkins had just addressed the Association when he suffered his heart attack.<sup>66</sup>

#### BENJAMIN FRANKLIN MOORE<sup>67</sup>

Judge Ben Moore<sup>68</sup> was born on January 1, 1891, in Salyersville, the county seat of Magoffin County, in eastern Kentucky.<sup>69</sup> Born into poor circumstances, he was the only judge ever appointed to the bench of the Southern District of West Virginia without a formal legal education. Indeed, of the seven

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<sup>65</sup> Stafford, *supra* note 18, at 38–39. See also IN MEMORIAM, *supra* note 48, at 8 (recalling the special joint session of the United States District Courts for Northern and Southern West Virginia on the occasion of the unveiling of a portrait of Judge Watkins).

<sup>66</sup> Stafford, *supra* note 18, at 39.

<sup>67</sup> Any otherwise uncited factual information about Judge Moore is taken from Judge Moore's autobiography. See MOORE, *supra* note 51.

<sup>68</sup> Judge Moore apparently preferred "Ben Moore" to "Benjamin Franklin Moore" or "Benjamin F. Moore." In his autobiography, *Heritage of Freedom*, the author is identified simply as "Judge Ben Moore." MOORE, *supra* note 51.

<sup>69</sup> Judge Moore was one of only two judges from the Southern District of West Virginia to have been born out of state. The other was Judge Keller, who was born in Pennsylvania.

boys in his family, only three acquired a high school education. Judge Moore was not one of them.<sup>70</sup>

In his autobiography, Judge Moore recalled that “at the age of sixteen I had not the remotest expectation of ever being a lawyer, much less of becoming a judge.”<sup>71</sup> His first job – at the age of sixteen – was as a runner for the Kanawha Valley Bank in Charleston. From there he rose to become a general bookkeeper. After four years at the bank, he left to become the auditor of the Charleston Interurban Railroad Company. (Judge Moore later wrote that, while they called him the auditor, “it was merely the job of a clerk.” The high-sounding title, he opined, had “been used to supply a deficiency in salary.”)<sup>72</sup> While working for the streetcar company, he enrolled in a night class in the study of law. At the completion of his course he took the West Virginia bar exam and failed. A few years later he lost his job at the streetcar company over a misunderstanding involving the placement of advertising cards, and he undertook once more to prepare to take the state bar exam by a regimen of self-study at the Supreme Court Library in Charleston. After six months he took the bar and passed. It was 1915, and he was now a lawyer.<sup>73</sup>

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<sup>70</sup> The Moore family moved to Charleston in 1907 and the plan was for young Ben to enter high school. However, the move was made in the middle of the school year and Ben was persuaded to go to work in a drugstore operated by his older brother Henry. (Henry apparently did not pay Ben a salary but gave him a textbook on geometry and a History of the Peloponnesian War. Diligent study of these two works, Henry assured Ben, would prepare him for high school.) The drugstore failed and Henry tried to recoup his losses “at the gaming table.” As Judge Moore later wrote: “Whereas he had theretofore merely ‘lost his shirt’ in the drug business, he had now lost the shirts of the rest of us as well.”

Henry failed to show up for work one morning and it was discovered that he had fled the city for an unknown destination. Creditors closed the drugstore and young Ben joined the other brothers in a note for \$10,000 to settle up the affairs of Moore’s Pharmacy. He would not be out of debt for ten years.

It was only later, while in his first “real” job as a runner for a Charleston bank, that he enrolled in the International Correspondence School of Scranton, Pennsylvania, from whence he ultimately received the equivalent of a high school diploma. Moore regretted not having attended high school. He later wrote in his autobiography:

It was not easy to give up the ambition to acquire a high school diploma. I think my wildest dreams and aspirations reached no higher than that. None of the boys in my family expected to do anything but work hard for his living. As I now recall, my own hope was to reach the stage where I could earn a salary of one hundred dollars a month. Such a monthly salary represented for me a condition of ease and security.

MOORE, *supra* note 51, at 76-80, 88-89; *In Memoriam*, a publication of proceedings before the United States District Court for Southern West Virginia on Friday, January 9, 1959, memorializing Judge Moore, p. 15.

<sup>71</sup> MOORE, *supra* note 51, at 83-84.

<sup>72</sup> *Id.* at 89.

<sup>73</sup> His admission to the bar was a close thing. As he later wrote:

When I again took the bar examination, at the expiration of that six months, I passed with flying colors. Had I waited for a later examination, or had I not

Years earlier Moore, a member of Charleston's Baptist Temple, had met Miss Willa Samms of St. Albans at a church function. Following what Moore called "a long courtship," the two were married in 1913. The union was a happy one. As Moore later wrote, "not a ripple of discord disturbed the placid surface of our married life until her death in 1939."<sup>74</sup>

Early in his legal career he tried to become a city councilman, and later, City Clerk of Charleston. Both efforts failed. Undaunted, he threw himself into civic affairs, becoming a member of the newly-formed Lions Club<sup>75</sup> and the Masonic lodge. It was through Masonry that he formed his friendship with Homer Hanna, whom he later appointed Clerk of the Southern District Court following the dispute with Judge Watkins which was recounted earlier. His biography in the 1955 *West Virginia Blue Book* noted that he was the first president of Good Will Industries of Charleston and "currently [a] member [of the] Board of Directors," an indication that the judge considered his involvement with this organization significant.<sup>76</sup>

In the election of 1940, Moore was elected Judge of the Court of Common Pleas of Kanawha County with the help of his own connections in the labor movement and his friend Homer Hanna, who was a powerful force in the Neely wing of the Democratic Party.<sup>77</sup>

In late 1940, when Judge McClintic let it be known that he was about to retire because of his health, it appeared that the judgeship would go to Jo N. Kenna, then a member of the Supreme Court of Appeals of West Virginia. Kenna had been publicly promised the position in a speech delivered by United States Senator Matthew M. Neely. But Kenna had fallen into disfavor with the United Mine Workers, without whose support an appointment to the federal bench in West Virginia would have been difficult to secure. Even so, as Moore pointed out in his autobiography, Neely would have been unlikely to repudiate a public promise. However, when the time arrived to appoint McClintic's successor, Neely had left the United States Senate to assume the office of Governor of West Virginia. The senior United States Senator from West Virginia, Harley M.

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passed the tests at this one, I would have had no further opportunity to qualify as a West Virginia lawyer. Before the date of the next succeeding bar examination arrived, the legislature had passed an act making two years resident study a minimum requirement for budding lawyers.

I had got [in] under the wire.

*Id.* at 90, 102-03.

<sup>74</sup> *Id.* at 93. In August 1941, he interrupted a trial in progress and drove back to his hometown of Sayersville, Kentucky, where, with only a few relatives present, he married for a second time, to Cecile Bryant Colby.

<sup>75</sup> He was the first president of the Charleston Lions Club and was referred to as the "founder of Lionism" in West Virginia. *Moore Confirmed a U.S. Judge*, CHARLESTON GAZETTE, Mar. 21, 1941, at 9.

<sup>76</sup> WEST VIRGINIA BLUE BOOK 39, 376 (J. Howard Myers ed.) (1955).

<sup>77</sup> MOORE, *supra* note 51, at 136-41.



Kilgore, who was then the dispenser of federal patronage in West Virginia, recommended Moore, who had been elected Common Pleas Judge only four months earlier, for the federal judgeship. With the favorable endorsement of Van A. Bittner, the head of the UMW in West Virginia (and a close friend of Homer Hanna), Moore was appointed by President Roosevelt.<sup>78</sup>

In the mid 1950's, Moore suffered a heart attack, and his doctor told him that onions would strengthen his heart. The judge loved hamburgers and, on most days, would have a hamburger with a thick slice of onion on each side of the meat patty. (Apparently his doctor either did not know that hamburgers were not particularly good for the heart or did not know the judge was eating them.) He also took a nap every day on an oversized leather couch he had had built for his tall frame for this very purpose.<sup>79</sup>

Judge Moore was possessed of a phenomenal memory and could sing all four verses of at least seventy-five hymns and could quote at length passages from the King James Bible.<sup>80</sup> His former law clerk, retired Supreme Court Justice George M. Scott, recalls that on the drives to and from court in Bluefield, his bailiff, Martin Moore, would drive and Scott would ride in the front passenger seat. With Judge Moore and Homer Hanna in the back seat, the four would begin singing. Justice Scott recalls that all four of them could get through the first verse of most hymns pretty well, but only the judge could routinely sing all verses of all the hymns.

The judge loved golf<sup>81</sup> and, weather permitting, would play every Wednesday afternoon. If court were in session as noon on Wednesday arrived, the judge would announce, "Court is adjourned until 9:00 o'clock tomorrow morning." This ritual was not affected by the fact that the parties and their lawyers and witnesses (often from out of town) were in the courtroom and ready to proceed.<sup>82</sup> The judge was also, like Judge McClintic before him, intolerant of outside noise during the summer when the courtroom windows had to be kept

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<sup>78</sup> *Id.* at 147-49. *Moore Named Federal Judge*, CHARLESTON GAZETTE, Mar. 2, 1941, at 1.

<sup>79</sup> Following Judge Moore's death, the couch "floated around" various federal buildings and is now in Judge Robert B. King's reception area.

<sup>80</sup> Interview with Hon. John T. Copenhaver, Jr., United States District Judge for the Southern District of West Virginia and former law clerk of Judge Moore (Mar. 28, 2001).

<sup>81</sup> The judge came to golf late in life, as he did to bowling. But he became both a good golfer and bowler. *Id.*

<sup>82</sup> Interview with Hon. George M. Scott, retired Justice of the Supreme Court of Appeals of West Virginia and former law clerk of Judge Moore (Mar. 20, 2001). Judge Moore's Wednesday afternoon game was played at the Kanawha Country Club. The judge hated for anything to interfere with his golf game. Once, while playing golf with his law clerk, John Copenhaver, in Bluefield it came up a terrible rain. The two stood under a tree and waited for the rain to abate. Judge Copenhaver recalls that he wanted to get out of the rain in the worst way but Judge Moore kept looking at the sky and finally saw a patch of blue. He told Copenhaver, "There's an old saying that if there's enough blue in the sky to make a pair of Dutchman's britches, it's going to get better. Let's wait." And they did. Interview with Hon. John T. Copenhaver Jr., *supra* note 80.

open because they lacked air-conditioning. In the 1960's when Quarrier Street was opened from Summers Street to Capitol Street, immediately beside the federal courthouse, the construction was often noisy. On several occasions Judge Moore sent a bailiff down to shut down the construction until the court session was over.<sup>83</sup>

The judge also liked to play poker, and, when holding court out of town, he would play with the Assistant United States Attorneys, his law clerk, Homer Hanna, and local members of the trial bar, with a \$0.25 limit. The judge had a rule he called "Roodles," in which if a hand had a full house or more, the quarter limit would double. No one objected.<sup>84</sup>

In 1942, Judge Moore sat as one of a three-judge panel that upheld members of the Jehovah's Witnesses sect in their contention that their school-age children did not have to salute the American flag.<sup>85</sup> The panel did so in the face of a 1940 United States Supreme Court decision in which the Court had said requiring students to salute the flag cannot be held a violation of their religious rights.<sup>86</sup> In spite of this opinion, the panel on which Judge Moore sat granted the injunction requested by the Jehovah's Witnesses. The panel's opinion was a ringing endorsement of the freedom of religion:

The salute to the flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden, we think, by the fundamental law. This court will not countenance such tyranny but will use the power at its command to see that rights guaranteed by the fundamental law are respected.<sup>87</sup>

After the panel granted the injunction, the West Virginia Board of Education appealed directly to the Supreme Court, which reversed its prior holding in *Minersville School District v. Gobitis* and upheld the decision of Judge Moore and his colleagues.<sup>88</sup>

Over the years it became Judge Moore's custom to sit for a month or so every year in some federal judicial district where the workload was heavier than it was in the Southern District of West Virginia. In the spring of 1948, while on

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<sup>83</sup> Interview with Hon. Robert B. King, Circuit Judge, United States Court of Appeals for the Fourth Circuit & W. Warren Upton, Counsel, Jackson Kelly PLLC, Former United States Attorney for the Southern District of West Virginia and Former Law Clerk to Judge John A. Field, Jr., in Charleston, WV (Mar. 14, 2001).

<sup>84</sup> Interview with Hon. John T. Copenhaver Jr., *supra* note 80.

<sup>85</sup> *Barnette v. W. Va. State Bd. of Educ.*, 47 F. Supp. 251 (S.D. W. Va. 1942).

<sup>86</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940), *overruled by* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>87</sup> *Barnette*, 47 F. Supp. at 255.

<sup>88</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

a visit to the United States District Court in Washington, D.C., he was assigned to hear a motion to dismiss the indictments in the case of *United States v. Congress of Industrial Organizations, et al.*<sup>89</sup> In that case, the CIO had openly violated Section 304 of the Labor Management Relations Act<sup>90</sup> by expending money on behalf of a candidate in an election in the Third Congressional District of Maryland. The CIO and its president, Philip Murray, were indicted for violation of the Act. The CIO argued that Section 304 of the Act was an unconstitutional violation of the guaranties of the Bill of Rights, particularly those of the First Amendment. The government, on the other hand, argued that Congress had the power to abridge First Amendment rights if it considers such a course necessary in maintaining the purity and freedom of elections.

Following the hearing on the motion to dismiss the indictments, Judge Moore received a telegram from the columnist Westbrook Pegler. Pegler was a hard-hitting, red-baiting, “take-no-prisoners” journalist who was famous for speaking first and thinking later. The telegram said:

I have been told . . . that you were politically a partisan of unions before becoming judge and that your political sponsors for appointment to bench included Bittner, Blizzard and Townsend, Counsel for client to which it is vitally important that Murray and CIO be acquitted stop Assuring you of my great respect for your court<sup>91</sup> . . . what person selected you of all judges to go to Washington to try this case stop . . .<sup>92</sup>

Judge Moore discussed the telegram with Chief Judge Laws. They concluded the telegram was nothing less than a veiled threat that if the case were decided otherwise than as Pegler wished, Judge Moore would face Pegler’s journalistic outrage. Judge Moore’s telegram in reply read:

Since your sending telegram to me[,] which was received yesterday morning while decision of criminal case was under consideration[,] constituted gross impropriety if not contempt of court, I do not feel justified in making any answer other than to say your information is largely incorrect and your deductions from that which is correct are entirely misleading.<sup>93</sup>

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<sup>89</sup> 77 F. Supp. 355 (D.D.C. 1948).

<sup>90</sup> 29 U.S.C. § 141 et seq. This Act is more popularly known as the “Taft-Hartley Act.”

<sup>91</sup> Judge Moore described Pegler’s comment about his great respect for the court as “a hedge, I suppose, against a possible charge of contempt of court.” MOORE, *supra* note 51, at 201.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 201.

Judge Moore granted the defendants' motion to dismiss the indictment, finding that Section 304 of the Taft-Hartley Act was "an unconstitutional abridgment of freedom of speech, freedom of the press and freedom of assembly." Westbrook Pegler took off after Judge Moore. As Moore recalled in his autobiography:

As I expected, Pegler made good his threat. Beginning . . . only a few days before the case was to come up in the Supreme Court for argument on appeal, he let go in my direction with both barrels. Before he was through he had devoted four of his daily columns to castigating me. He made it plain, as only Pegler can do, that I was a crooked labor politician who had been selected by Chief Justice Vinson, my "old hill-billy friend" as he called him in a subsequent letter to me, to go to Washington and sit in this case for the express purpose of deciding it in a particular way. Pegler raked up an old damage suit in which I had been reversed by the Court of Appeals, and devoted considerable space to a sarcastic discussion of that trial. He grudgingly conceded that the opinion in the Murray case . . . was a literate piece of work, but suggested that it had probably been written by my law clerk.<sup>94</sup>

Judge Moore's decision in *United States v. Congress of Industrial Organizations, et al.* was unanimously affirmed by the United States Supreme Court.<sup>95</sup>

In the fall of 1952, Judge Moore was called on to decide a case with enormous political and economic ramifications for southern West Virginia. In its 1947 session, the state Legislature had established the West Virginia Turnpike Commission and authorized it to sell bonds to finance the construction of eighty-six miles of north-south turnpike through some of the most mountainous terrain in the state.<sup>96</sup> The bonds would be paid off solely by the revenue generated by tolls.<sup>97</sup> The legislation creating the Commission had grandiosely described the road to be built as a "modern express highway" and declared that it should embody "every known safety device including center division, ample shoulder widths, longsite distances, the by-passing of cities, multiple lanes in

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<sup>94</sup> *Id.* at 209-10.

<sup>95</sup> *See* U.S. v. Congress of Indus. Org., 335 U.S. 106 (1948). Judge Moore later wrote, "only four of the justices agreed with me that the challenged section of the act was unconstitutional. Of the other five, four thought the law was inapplicable to the situation. Mr. Justice Frankfurter thought, or said he thought, that the case had come to the Supreme Court through some sort of collusion between the parties, and therefore would have dismissed it without decision." Moore, *supra* note 51, at 210.

<sup>96</sup> 1947 W. Va. Acts 139, § 1.

<sup>97</sup> *Id.* at § 5.

each direction and grade separations at all intersections with other highways and railroads . . . .<sup>98</sup>

However, early traffic studies suggested that the mountainous terrain of the projected route and the expected light volume of traffic for the first several years of operation would make it impossible to finance a four-lane turnpike initially. Therefore, the Commission decided that it would build the turnpike in stages, Project A from U.S. Route 60 near Charleston to Princeton, and Project B from Princeton to the Virginia state line. Both projects, however, would be of only two lanes. At some later date, when traffic, and the resulting revenues, justified it, the other two lanes, along with the center division, would be built.

The *Gazette* was outraged and began a campaign against the two-lane turnpike, but the project was moving ahead. By the end of the summer, ninety-six million dollars of bonds had been sold, on which interest was accruing at the rate of about ten thousand dollars a day. On August 29, 1952, with the roar of two powerful engines, construction on the Turnpike began on the edge of the Bluestone River Gorge, near the little Mercer County village of Camp Creek. However, in early September, Governor Patteson, obviously reacting to the uproar caused by the *Gazette*, asked Attorney General John G. Fox for an opinion as to the Turnpike Commission's decision to proceed to build a *two-lane* turnpike. The Attorney General opined that the Turnpike Commission's powers were limited by the legislative act to the construction of a four-lane highway and that the only recourse was a legislative amendment broadening the Commission's powers. He suggested that the Governor halt construction.<sup>99</sup>

The Turnpike bonding company brought a declaratory judgment action to get the matter before the courts.<sup>100</sup> Judge Moore ruled that the Act merely listed certain results, which were expected to be accomplished by the creation of the Turnpike Commission, one of which was the construction of high-speed main roads which would be provided with every known safety device. "Included among these safety devices (but by no means the only one)," the Judge wrote, "is the device of multiple lanes in each direction." The commission had provided for a four-lane turnpike, and the judge noted:

It has decided that such a project cannot be financed at once; but it has further concluded, from the best expert advice obtainable, that it can be financed in stages. Therefore, it has determined to embark upon a project which, while consisting at first of only two lanes, is to evolve by stages into a four-lane turnpike.<sup>101</sup>

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<sup>98</sup> MOORE, *supra* note 51 at 214.

<sup>99</sup> MORGAN, *supra* note 18, at 199; MOORE, *supra* note 51, at 212, 224-229.

<sup>100</sup> See *Guaranty Trust Co. of N.Y. v. W. Va. Turnpike Comm'n*, 109 F. Supp. 286 (S.D. W. Va. 1952).

<sup>101</sup> MOORE, *supra* note 51, at 229, 232.

Judge Moore held, in simple terms, that the Turnpike could be built in stages, consisting of just two lanes in the beginning, so long as there were good intentions to add two more.

In 1956, Judge Moore was involved in a case with implications far beyond the boundaries of the Southern District of West Virginia. The case involved Mrs. Dorothy Krueger Smith,<sup>102</sup> who was convicted by a United States Army general court-martial for murdering her husband, whom she had accompanied on his assignment to Japan in the early 1950s. Following her conviction, Mrs. Smith was incarcerated in the Federal Reformatory for Women at Alderson, West Virginia. Her father, General Walter Krueger, a retired United States Army general,<sup>103</sup> filed a petition for a writ of habeas corpus in the United States District Court for Southern West Virginia on the ground that the provision of the Uniform Code of Military Justice, which extended jurisdiction of courts-martial to civilians accompanying armed forces abroad in peacetime, was unconstitutional. Because Mrs. Smith was a civilian and not subject to trial by court-martial, the General argued, her conviction must be set aside.<sup>104</sup>

General Krueger's petition frankly stated that the effort to secure his daughter's release stemmed from the decision of the United States Supreme Court in *United States ex rel. Toth v. Quarles*,<sup>105</sup> in which the Court had held that because courts-martial are not required to provide all the protections of constitutional courts, the trial by court-martial of a civilian entitled to trial in an Article III court<sup>106</sup> is unconstitutional. Judge Moore found *Toth* to be distinguishable, since the defendant in *Toth* was a civilian residing in the United States. The writ of habeas corpus was denied, and Mrs. Smith was sent back to the Federal prison in Alderson. On appeal, the Supreme Court of the United States affirmed Judge Moore's discharge of the writ, agreeing with Moore that the Uniform Code of Military Justice provision extending jurisdiction of courts-martial to civilians accompanying armed forces abroad in peacetime was not unconstitutional.<sup>107</sup>

Judge Moore was the first Chief Judge of the Southern District, the position having been created by the Congress in 1948. He served as Chief Judge from 1948 until his death.

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<sup>102</sup> Mrs. Smith was the daughter of General Walter Krueger, commander of the United States Army, 6th Army, in the Pacific theater of operations during World War II. See Cushing Memorial Library at Texas A&M University; Inventory of the General Walter Drueger Papers: 1943-1945, available at <http://www.lib.utexas.edu/taro/tamucush/00077/tamu-00077.html>.

<sup>103</sup> General Krueger retired in 1946, after leading the Sixth Army in the occupation of the Japanese mainland. *Id.*

<sup>104</sup> *United States ex rel. Krueger v. Kinsella*, 137 F. Supp. 806, 811 (1956).

<sup>105</sup> 350 U.S. 11 (1955).

<sup>106</sup> *Id.* E.g., an Article III court of the United States Constitution, such as United States District Courts.

<sup>107</sup> *Kinsella v. Krueger*, 351 U.S. 470 (1956).

Judge Moore died on September 25, 1958, while playing golf at Hot Springs, Virginia. He teed off and followed his ball about 125 yards down the first fairway. There he suffered a fatal heart attack, collapsed, and was dead upon arrival at the hospital.<sup>108</sup> Judge Moore left this life as he had lived it, in the midst of action. He would have approved.

JOHN A. FIELD, JR.<sup>109</sup>

On Tuesday morning, May 12, 1959, the *Gazette* contained an article headlined: "Senate Panel Eyeing Judgeship for Field."<sup>110</sup> The piece began: "John A. Field, Jr., the tall, handsome scion of one of Charleston's most prominent families, was nominated in Washington Monday for the judgeship of the United States District Court in Southern West Virginia."<sup>111</sup> The *Gazette* went on to say that West Virginia Senators Robert C. Byrd and Jennings Randolph had announced that they had no objection to President Eisenhower's selection of the Republican, who was at the time State Tax Commissioner of West Virginia.

Judge Field was born March 22, 1910, in Charleston. During his four years at Charleston High School he did some sports writing for *The Bootstrap*, the school newspaper.<sup>112</sup> When the time came to go to college, he chose Hampden-Sydney College, a small men's college in Prince Edward County, Virginia. At this institution, the liberal arts program placed great emphasis on classical studies, including three years of Greek.<sup>113</sup> Hampden-Sydney College was a small college with an enrollment of only 250 students, about 30 of whom were from Charleston. He soon knew everyone and by his junior year he was elected vice president of the student body. He continued to be interested in journalism and wrote college "squibs" for the *Farmville Herald*, a weekly newspaper published in a town seven miles from Hampden-Sydney.

It was in Farmville that he was introduced, by what he later described as "some well-intentioned" fraternity brothers, to Elaine C. Goode, a student at

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<sup>108</sup> *Judge Moore's Rite Scheduled at 2 P.M. Today*, CHARLESTON GAZETTE, Sep. 27, 1958, at 12; *Stricken on Golf Course: Judge Moore is Dead*, BECKLEY POST-HERALD GAZETTE, Sept. 26, 1958, at 1.

<sup>109</sup> Any otherwise uncited factual information about Judge Field is taken from comments made during the memorial service and personal interviews cited in this section.

<sup>110</sup> *Senate Panel Eyeing Judgeship for Field*, CHARLESTON GAZETTE, May 12, 1959, at 13.

<sup>111</sup> *Id.* Judge Field's father was a prominent Charleston business man who was for many years President of Thomas-Field & Co., a large wholesale establishment. John G. Morgan, *John A. Field Jr. Confirmed, 'Long Step' No Novelty to New U.S. Judge*, CHARLESTON GAZETTE, August 13, 1959, at 28.

<sup>112</sup> Morgan, *supra* note 111, at 28. On September 22, 1927, when Gene Tunney defeated Jack Dempsey in the famous "long count" heavyweight championship fight, the 17-year-old Field listened to the fight on the radio and wrote a story about it for *The Bootstrap*.

<sup>113</sup> Field was told he would have to take three years of Latin or Greek at Hampden-Sydney. He had taken two years of Latin in high school, and, thinking that was enough of a bad thing, he signed up for Greek. *Id.*

what is now Longwood College. Miss Goode graduated from college in 1930, but romance blossomed. On April 1, 1933, she and “her lanky twenty-three year-old suitor” were married in Chase City, Virginia.<sup>114</sup> At the time of his marriage, Judge Field had received an A.B. degree from Hampden-Sydney and was enrolled at the University of Virginia School of Law. He found law school foreign, worse, he later said, than Greek or Latin. His old study habits that had yielded average grades at Hampden-Sydney were inadequate. However, he buckled down and studied harder than ever before and began to make top grades. The hard work paid off. He was named Associate Decisions Editor of the *Virginia Law Review*, ranked third in his class at graduation, and was named to the Order of the Coif, a honor accorded to only the top ten percent of a graduating class.<sup>115</sup> In keeping with his gregarious nature, he was also named President of the Student Body at the law school.

Following graduation, Field practiced with the firm of Brown, Jackson & Knight<sup>116</sup> until 1943, when he entered the United States Navy as a lieutenant, junior grade. After attending Navy gunnery school, he was assigned to a Liberty ship, manned by the Merchant Marine but with a naval gun crew of twenty-seven men. Field was the gunnery officer. The ship sailed to Antwerp, Belgium, with four locomotives on the foredeck and two ocean-going tugs on the afterdeck. For the next six weeks the port endured German V-1, or “buzz bomb,” attacks nightly, with an occasional attack by the heavier V-2s. The war in Europe ended before the port was seriously damaged. He returned by ship to New York, went through the Panama Canal to the West Coast, and from there to Guam. He came back to California as the war was nearing its end.<sup>117</sup>

He entered solo practice of law in Charleston soon after the war ended and in 1947 entered the political arena for the first time, getting elected city

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<sup>114</sup> Elaine Goode Field was born February 27, 1909. She and the Judge were the parents of two sons, John A. Field, III, who later became United States Attorney for the Southern District of West Virginia, and William C. Field, a Charleston lawyer. Following Elaine’s death on February 8, 1973, Judge Field married a second time, to Colleen (Connie) Ball, of Charleston, who survived the Judge.

<sup>115</sup> Morgan, *supra* note 111, at 28.

<sup>116</sup> Now Jackson Kelly, PLLC. Once, while with Brown, Jackson & Knight, Field and William O’Farrell went to Wayne County to try a case against Milton Ferguson, in front of Ferguson’s relative, Judge C. W. Ferguson. Milton Ferguson had made an offer to settle and Field & O’Farrell refused the offer. The jury was seated in the box and Judge Ferguson said to the jury:

We have here two high-powered lawyers from Brown, Jackson & Knight, one of the biggest, and most prosperous law firms in West Virginia. Bill O’Farrell is the biggest lawyer in that firm. Field here has a deep bass voice and you will tremble when you hear him. They’re going up against our own little home boy, Milton Ferguson . . . two biggies to pick on one little lawyer.

Field leaned over to O’Farrell and said: “Give Milton Ferguson what he wants and let’s get the hell out of here!”

Interview with C. E. Bert Goodwin, Esquire, in Ripley, W. Va. (Feb. 3, 2000).

<sup>117</sup> Morgan, *supra* note 111, at 28.



councilman-at-large. Re-elected in 1951, he became president of the council and chairman of its finance committee. In 1950 he was a Republican nominee for the House of Delegates but lost in the general election. In 1952 he ran for the Republican nomination for state attorney general, but was defeated in the primary.<sup>118</sup> In 1956 he was unopposed in the primary, ran well in the general election in which Cecil Underwood was swept into the governorship, but was defeated by W. W. Barron.

According to Morgan, Field could have any position he wanted in the new Republican administration, and on January 26, 1957, Governor Underwood appointed him State Tax Commissioner. The following year the Legislature embarked on a statewide property revaluation survey to equalize property assessments in the 55 counties, and it was Commissioner Field's job to provide administrative leadership for this program. It was while this program was underway, with Commissioner Field appearing regularly before the new state Tax Study Commission and trying to work with the various interests affected by the revaluation survey, that Judge Moore passed away. Charleston lawyers Paul Chambers and Howard Klostermeyer were mentioned as possibilities to replace Judge Moore, but top Republicans could not agree on which of the two.<sup>119</sup> When the two candidates canceled each other out for the nomination, Field's name surfaced for the first time and he was nominated to the bench on May 11, 1959. He was confirmed by the Senate on August 12, 1959, and received his commission on August 13, 1959.

Judge Field was a "laid back" individual who was noted for the kindness and consideration he displayed to those who appeared in his court. His generosity and kindness were openly demonstrated one day when, while conducting a trial, one of the witnesses was unable to read a document from the witness stand because he had forgotten his glasses. Judge Field leaned over and loaned his eye glasses to the witness. (In all the excitement, the witness forgot to return the glasses to the judge when he had finished testifying. Judge Field had to remind the witness, who was very much embarrassed.)<sup>120</sup>

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<sup>118</sup> *Id.* Field lost in the primary to John L. McIntire of Fairmont who was himself defeated in the general election by Democrat John G. Fox.

<sup>119</sup> *Id.* Klostermeyer had supported United States Senator Robert Taft of Ohio for the Republican presidential nomination in 1952 while Chambers supported General Eisenhower for the nomination. Six years later, when Judge Moore died and the vacancy on the bench occurred, the West Virginia Republican leadership was still split between the supporters of Taft and those who had gone with Eisenhower.

<sup>120</sup> W. Warren Upton, IN MEMORIAM: A SERVICE OF WITNESS TO THE RESURRECTION, IN MEMORY OF JOHN A. FIELD, JR. 15, at Village Chapel Presbyterian Church in Charleston, W. Va. (Dec. 19, 1995) [hereinafter SERVICE OF WITNESS]. Upton also recalls that Judge Field had a dark blue suit which he saved for funerals and other formal occasions. Otherwise, he always wore penny loafers, gray slacks, and a brown blazer. On one occasion his blazer was getting threadbare and he asked Upton to take it down to the shoe shop and have some shoe polish put on the spots where the lining was beginning to show through. Interview with W. Warren Upton, *supra* note 83.

However, the judge was not without his own pet peeves. For example, he had an intense dislike of chewing gum, and, as his former law clerk, W. Warren Upton, once noted, “[T]here was hell to pay if anyone appeared in the courtroom with a mouth full of chewing gum. It was not a pretty scene. Court did not proceed until the offending substance was properly removed.” On another occasion “he almost broke his gavel,” which he seldom used, when a spectator in the back of the courtroom put a cigarette in his mouth. The judge himself smoked, but he wasn’t about to let a smoker interrupt the decorum of his court.<sup>121</sup>

Judge Field loved golf, but, because of his height, his swing was too loose and disjointed. Nonetheless, he took his golf game seriously and sought to improve it. On one occasion he attended a golf academy in Florida, conducted by Davis Love, Jr., who was the preeminent teaching golf professional in the country in his time. After watching the judge hit a few golf balls, Love told him his swing looked like “a can of fishing worms.” Undeterred, the judge continued to work on and enjoy his game.<sup>122</sup>

In 1967 Judge Field decided a patent case<sup>123</sup> and his ruling, originally in unpublished form, was appealed to the Fourth Circuit. The Court of Appeals promptly reversed Judge Field.<sup>124</sup> The United States Supreme Court agreed to hear the case. After hearing the argument of counsel, Judge Field received a call from the Supreme Court asking him to publish the opinion he had written. Justice William Douglas adopted, for the most part, Judge Field’s “prior unpublished opinion as the majority opinion of the United States Supreme Court, thereby reversing the Fourth Circuit.”<sup>125</sup> Judge Field was “very proud of this ac-

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<sup>121</sup> SERVICE OF WITNESS, *supra* note 120, at 15.

<sup>122</sup> *Id.* at 9-10; Interview with Judge Robert B. King, & W. Warren Upton, *supra* note 83. His interest in golf may also have led him to the selection of a law clerk. Judge Robert B. King’s stepfather, Buster Gregory, was the caddy master at the Greenbrier and Judge Field knew him from playing golf there over a period of twenty years or so. Mr. Gregory told Judge Field that King was in law school and Judge Field encouraged Mr. Gregory to have King call him about a clerkship. King’s stepfather repeatedly urged him to contact Judge Field and finally, while on Thanksgiving break during his third year in law school (1967), King stopped by Judge Field’s office for an interview. Judge Field said, “Buster told me you were coming to work here. You can go to work in the middle of June.” Judge King is fond of telling that he was hired as Judge Field’s law clerk *because of his golf handicap!* (Golfers with the capacity to evaluate Judge King’s golfing ability have been unwilling to comment.)

<sup>123</sup> See *Pavement Salvage Co. v. Anderson’s - Black Rock, Inc.*, 308 F. Supp. 941 (S.D. W. Va. 1967). Judge Field had decided that the plaintiff’s method of asphalt paving designed to avoid what is known as a “cold joint” was not a patentable invention and, thus, there was no reason to rule on plaintiff’s claim of patent infringement. *Id.* at 946. As noted, the opinion was originally unpublished and was published only after Justice Douglas suggested that Judge Field do so. SERVICE OF WITNESS, *supra* note 120, at 17.

<sup>124</sup> See *Pavement Salvage Co. v. Anderson’s - Black Rock, Inc.*, 404 F.2d 450 (4th Cir. 1968).

<sup>125</sup> SERVICE OF WITNESS, *supra* note 120, at 17; *Anderson’s - Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969).

complishment, even though it involved Justice Douglas, with whom . . . [Judge Field] was not philosophically attuned on many issues.”<sup>126</sup>

When Judge Field ascended to the bench, the United States District Court met in the old federal building (which is now the Kanawha County Public Library) on Capitol Street in Charleston. Field and the Clerk of the Court, Virgil Frizzell, did not want to move to the new facility that was then being built on Quarrier Street. They wanted to stay on Capitol Street and make that building a true “courthouse” with multiple courtrooms and have the new building on Quarrier Street be a “federal building” with offices for various federal agencies but with no courts sitting there. When the Quarrier Street facility was ready for occupancy, Judge Field had a serious case of shingles that affected his eyes. Therefore, he was much concerned about lighting in the courtroom and made the government improve the lighting in the courtrooms before moving into those facilities. Near the witness stand were two doors, one leading to a holding cell and one to a stairwell leading down to a windowless jury room on the fourth floor. Not wanting his juries to have to travel up and down steps and deliberate in a windowless room, Judge Field had the jury room moved to a room on the fifth floor that had a window. He also had the witness stand moved from the side *away from* the jury to the side *toward* the jury, which was why there were two witness stands in the courtroom.<sup>127</sup>

When the court moved to the Quarrier Street facility, Howard Spurlock, the court bailiff, and W. Warren Upton, Judge Field’s law clerk, supervised the packing and transporting of the court’s belongings. The actual move was made in trucks belonging to the Mayflower Transit Corporation. For years thereafter, Howard Spurlock liked to tell that he and Upton had “come over on the Mayflower.”<sup>128</sup> In one sense, they had.

In 1971, after twelve years on the District bench, Judge Field was elevated to the United States Court of Appeals for the Fourth Circuit. At that time, Judge Field was the first judge to be appointed to the Fourth Circuit bench from

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<sup>126</sup> SERVICE OF WITNESS, *supra* note 120, at 18.

<sup>127</sup> As Judge King and Mr. Upton described the problem with the jury box, the witness stand was originally “stage right,” whereas the jury box was “stage left.” Judge Field had the General Services Agency (GSA), which is responsible for all federal buildings, add a jury box between the judge and the jury. The second jury box was thereafter occasionally used by a court clerk. The problems with the new courtroom were caused by the fact that the Quarrier Street Federal Building was built by GSA without judicial supervision, the construction having taken place during the interval between Judge Moore’s death and Judge Field’s elevation to the bench. By the time Judge Field took his seat on the court (in the “old” Federal Building on Capitol Street) GSA had built the Quarrier Street facility pretty much as the bureaucrats at GSA had seen fit. Interview with C. E. Bert Goodwin, *supra* note 116; Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>128</sup> Interview with Howard Spurlock, long-time bailiff to the United States District Court for Southern West Virginia, in Charleston, W. Va. (February 3, 2000).

a seat on the United States District Court for the Southern District of West Virginia.<sup>129</sup>

Judge Field was a very forceful and persuasive judge on the Fourth Circuit bench. Several times, in the preparation of a dissent, he changed the opinion of the majority of the court, with his dissent ultimately becoming the majority opinion. One such case was *Moore v. Hampton Roads Sanitation District Commissioners*.<sup>130</sup> The case was decided in October of 1976, and a petition for rehearing en banc was granted. On July 13, 1977, Judge Field, as a Senior Circuit Judge, wrote the majority opinion for the court which, for the most part, had been his dissenting opinion prior to the petition for rehearing.

In April 1, 1976, after nearly five years on the Fourth Circuit bench, Judge Field took senior status. He passed away on December 16, 1995, at the age of eighty-five.<sup>131</sup>

#### SIDNEY L. CHRISTIE<sup>132</sup>

Sidney L. Christie was born April 17, 1903, in the Monroe County community of Sinks Grove.<sup>133</sup> He was the youngest child of thirteen children born to Lewis F. and Malinda Christie. After attending grade school in Sinks Grove, Christie attended Alderson Academy in Alderson, West Virginia.<sup>134</sup> In September 1923 he enrolled in Dunsmore Business College in Staunton, Virginia, from which he graduated in December 1924. At that time his brother Sam was practicing law in Keystone, McDowell County, and the twenty-two-year-old business college graduate began working in Sam's office as a secretary. After two-and-a-half years in his brother's law office, he enrolled in the Cumberland University School of Law, where his brother Sam had also gone to law

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<sup>129</sup> Judge Field was named to the Fourth Circuit bench to fill the vacancy created in June of that year by the retirement of Judge Herbert S. Boreman of Parkersburg. When Judge Field took senior status, Judge K. K. Hall, who was then a judge of the United States District Court for the Southern District of West Virginia, became the second judge from this district to be elevated to the Fourth Circuit. All the time Judge Field was on the district bench he only had one law clerk, although he was entitled to two. He said that one law clerk was more than he could keep up with. When he went on the Fourth Circuit, however, he finally had two law clerks.

<sup>130</sup> 557 F.2d 1030, 1035 (1977) (Field, J., concurring in part and dissenting in part).

<sup>131</sup> After the Judge learned that he had a terminal illness, he said to his wife, Connie, and his son, Bill: "It's been a hell of a run." SERVICE OF WITNESS, *supra* note 120, at 20.

<sup>132</sup> Any otherwise uncited factual information about Judge Christie is taken from comments made during the memorial service and personal interviews cited in this section.

<sup>133</sup> Sinks Grove was the site of the first public school in what is now West Virginia. The school was established in 1829, when Sinks Grove was known as Rocky Flats, Virginia. Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>134</sup> Information regarding Judge Christie's early education is taken from a biographical questionnaire prepared for the Bicentennial Committee of the Judicial Conference of the United States, completed by Helen Christie, Judge Christie's widow.

school. Christie received an LL.B. degree from Cumberland in 1928.<sup>135</sup> Following graduation he returned to Keystone and opened a law practice in the same building as his brother Sam.<sup>136</sup>

He threw himself into community and state involvement, particularly in the political arena, becoming a member of the Keystone City Council, the State Road Commission of West Virginia (where he also served as chairman), the Citizens Advisory Committee for McDowell County Schools, the Advisory Committee for Bluefield State College (by appointment of the State Board of Education), and the McDowell County Bar Association (where he served as president). He was also a member and president of the Keystone Rotary Club and a thirty-second degree Mason.<sup>137</sup>

On December 24, 1936, he married Helen Dillon and they had two daughters and a son. Christie continued to practice in Keystone for some years, then moved to Welch, the county seat of McDowell County, and then back to Keystone. For twenty-eight years he served as Divorce Commissioner of the Circuit Court of McDowell County.<sup>138</sup> In 1960 Christie, by then a power in McDowell County Democratic politics,<sup>139</sup> was a candidate for the judgeship of the Eighth Judicial Circuit of West Virginia.<sup>140</sup> During that campaign he met and became a good friend of Senator John F. Kennedy, who was running for President in West Virginia's Democratic primary. One evening early in the campaign, Kennedy and his aides, who were known by the nickname "The Irish Mafia," came to Christie's office. Christie was then leaning toward supporting Kennedy's opponent in the race, United States Senator Hubert H. Humphrey. Leaving Kennedy's aides in the reception room, Kennedy and Christie entered Christie's office to talk politics. When the two emerged, three hours or so later, Christie had become a supporter of Senator Kennedy. Following that meeting, Christie leapt into action on behalf of Kennedy and is still credited with having much to do with Senator Kennedy's victory in southern West Virginia.<sup>141</sup>

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<sup>135</sup> Cumberland University sold its School of Law to Samford University in 1961. It is now known as Samford University's Cumberland School of Law and is located with Samford in Birmingham, Alabama. *Cumberland School of Law*, 2006-2007 CATALOG 165.

<sup>136</sup> Memorial Services for Honorable Sidney L. Christie, Judge of the Northern and Southern Districts of West Virginia at the United States Federal Courtroom, Huntington, W. Va. (June 14, 1974) (Statement of Charles Tutwiler, Esquire).

<sup>137</sup> Judge Christie's Biography, in the WEST VIRGINIA BLUE BOOK, 459 (1965).

<sup>138</sup> *Id.*

<sup>139</sup> It would be quite accurate to say that he was a power in Southern West Virginia politics, for his influence was felt over many of the counties south of the Kanawha River and U.S. Route 60. The late Harry Ernst, then a staff writer for the *Charleston Gazette*, said of him: "Christie, a lawyer at nearby Keystone, headed the county organization, which has a reputation for showing other counties what Democratic togetherness really means." HARRY W. ERNST, *THE PRIMARY THAT MADE A PRESIDENT: WEST VIRGINIA 1960* 18 (McGraw-Hill 1962).

<sup>140</sup> Judge Christie was unopposed in both the primary and general election.

<sup>141</sup> The story of Judge Christie's meeting at his office with then-Senator Kennedy was related by his former law clerk, John H. Tinney, moments after he learned he had won the West Virginia

Christie was elected Judge of the Eighth Judicial Circuit in the general election of 1960 and was sworn in to his new job on January 3, 1961. The judge was quickly recognized as a serious, fair, and hard-working judge, which was no surprise to those who had known him as a practicing lawyer. He typed his own orders and correspondence with two fingers on an old manual Underwood typewriter that he kept in his office and did much of his own legal research.<sup>142</sup>

After Judge Harry E. Watkins, the “roving” judge for West Virginia’s two federal judicial districts, died in June 1963, Judge Christie was a natural choice of President John F. Kennedy to succeed Judge Watkins. This appointment was pending at the time of President Kennedy’s assassination, and Judge Christie’s commission was ultimately signed by President Lyndon B. Johnson. His nomination was confirmed by the United States Senate on April 30, 1964, and he received his commission on May 1. His induction ceremony was held in the Federal Courthouse in Bluefield on June 8, 1964.<sup>143</sup>

Given his intense involvement in Kennedy’s 1960 Presidential campaign in southern West Virginia in 1960, there were some who had misgivings about this appointment. But these concerns were soon put to rest by the fair and considerate way the judge ran his courtroom.<sup>144</sup>

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primary. Kennedy is quoted as saying, “That Sid Christie — he’s quite a guy.” Stafford, *supra* note 18, at 52. Stafford also relates in his book, *AFFLICTING THE COMFORTABLE, JOURNALISM AND POLITICS IN WEST VIRGINIA* 77 (2005), that Kennedy remarked, “That Sid Christie . . . He said we’d win there and even told me how many votes he could deliver to me.” If you place the vote percentages Kennedy received on a county map of West Virginia, the strength of his vote in relation to McDowell County becomes obvious. Generally speaking, the closer the county was to McDowell, the higher was Kennedy’s percentage of the vote. Kennedy received 84% of the Democrat vote in McDowell County. He received the following percentages of the Democrat vote in the other counties south of the Kanawha River and U.S. Route 60: Boone, 56%; Cabell, 47%; Fayette, 65%; Lincoln, 45%; Logan, 45%; Mercer, 69%; Mingo, 58%; Monroe, 63%; Putnam, 45%; Raleigh, 68%; Summers, 54%; Wayne, 50.1%; and Wyoming, 79%. *WEST VIRGINIA BLUE BOOK*, 333-34 (1961).

<sup>142</sup> Interview with Howard Spurlock, *supra* note 128.

<sup>143</sup> There was some opposition to Judge Christie’s nomination because he was “too old.” Following President Kennedy’s assassination, Christie’s commission “sat” in the Oval Office for some time. Senator Robert C. Byrd called President Johnson to urge him to move on the nomination. The President replied, “Bob, he’s too old,” to which Senator Byrd replied, “he wasn’t too old when President Kennedy decided to nominate him.” The commission was signed. Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>144</sup> At Judge Christie’s memorial service Charles F. Bagley stated:

As Russell [Furbie of Fairmont] said, we didn’t know much about Judge Christie when he was appointed. We had some misgivings, to tell you the truth, so I called my good friend Charlie Tutwiler, who is a fountain of information on any subject, and talked to him about it and Charlie told me very simply. He said, “You’re going to be proud of Judge Christie,” and that’s exactly the way all the members of the Huntington division felt about Judge Christie.

Memorial Service for Honorable Sidney L. Christie, *supra* note 136 (statement of Charles F. Bagley, Esquire).

Charles Bagley of Huntington recalled how, in his first pretrial conference with the Judge, he turned to the lawyers and said, “When do you want to try this case?” As Mr. Bagley put it:

Our mouths fell open. Nobody had asked us in a long time what we wanted about anything. We thought the judge would get over it soon, but he didn’t. He was always as considerate as he could be to the lawyers and to the litigants, to members of the jury, [to] everybody that was associated with him in the courtroom and in the trial of cases.<sup>145</sup>

Judge Christie never forgot his humble roots. Once, when handling arraignments on moonshining cases, he saw an old moonshiner he knew from McDowell County waiting his turn to enter a plea. Judge Christie told the prosecutor to “Bring him up here ahead of the rest. He has a long way to go to get home.”

He was also somewhat informal in the courtroom. On one occasion, when the prosecutor was trying to get evidence admitted in a drug case, defense counsel kept objecting. Finally, Judge Christie held an *ex parte* sidebar conference with the *witness* and admitted the evidence.<sup>146</sup>

He was also considerate of court personnel. When a lawyer sanction he had imposed was on review in the Fourth Circuit, and the argument was scheduled on June 6, 1971, Judge Christie informed Robert B. King, the United States Attorney who was familiar with the case, of the hearing date. King told Judge Christie the hearing would have to be rescheduled or someone else would have to handle it because King’s wife was due to give birth on that date. Christie told King he wanted him to handle the appeal because he knew the case best, and he should go to Richmond because “there is nothing you can do for her [King’s wife, Julia] now.” King went to Richmond and handled the argument. Judge Christie never forgot the sacrifice. Every year until he died, Judge Christie sent King’s daughter, Carrie (whom the judge insisted on calling by her given name, “Caroline”) a gift on her birthday.<sup>147</sup> When the wife of his clerk, Maury Taylor, who is now a United States Magistrate Judge in Huntington, had a baby, Judge Christie became concerned about the family. One day he called Taylor into his office and asked, “Are you going to be home tonight?” Taylor said he would, whereupon Judge Christie said, “Good. I’m going to take your wife to the movies. She hasn’t been out of the house since she gave birth and she deserves a night off.”<sup>148</sup>

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<sup>145</sup> *Id.*; Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>146</sup> Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>147</sup> *Id.*

<sup>148</sup> Interview with Maury Taylor, Judge, United States Magistrate, in Charleston, W. Va. (Feb. 7, 2001).

The judge was a hard worker, toiling away at the office Monday through Saturday and on Sunday morning.<sup>149</sup> Huntington lawyer Charles Bagley recalled how Judge Christie once set a hearing on a motion he had brought for Memorial Day. That hearing interfered with a long-standing golf game that Mr. Bagley had scheduled, so Bagley talked to opposing counsel, worked the matter out, prepared an order for the judge's signature, and sent it to him in the mail with a letter saying there would be no need for the hearing. Bagley received a letter back from Judge Christie saying he had signed the order, canceled the hearing, and set the case down for pretrial *on Memorial Day!*<sup>150</sup>

The judge also considered himself over-paid as a United States District Judge. He said the salary<sup>151</sup> was fine for a federal judge in a place like New York City where the cost of living was high, but that it was too much for a judge in southern West Virginia.<sup>152</sup>

In 1972, Judge Christie narrowly missed being in the center of one of the more significant (and emotional) cases to appear in the United States District Court for Southern West Virginia. In February of that year, a dam used by a coal company to filter the black waste-water from its coal-cleaning plant had collapsed and ravaged a seventeen-mile valley of small coal mining towns in Logan County. Known as the Buffalo Creek Disaster, the flood killed over 125 people and left thousands more without homes or possessions. Some of the survivors of the flood asked Gerald M. Stern of the Washington, D.C. firm of Arnold & Porter to represent them. Stern filed suit against Pittston Coal Company, and Pittston moved to dismiss the case on the grounds that it did not own the dam that had burst, but that the dam belonged to one of its subsidiaries, the Buffalo Mining Company. Stern fought back, insisting that Pittston was the rightful defendant in the case. Shortly after Stern filed his response to Pittston's motion to dismiss, Judge Christie recused himself from the case because he and the president of the Pittston Company were old friends. The case went then to Judge Knapp, the next most senior judge in the District. Knapp decided, however, that he was too busy to take the case, and so it went to Judge K. K. Hall, then the only other federal district judge in southern West Virginia.<sup>153</sup>

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<sup>149</sup> Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>150</sup> Memorial Service for Honorable Sidney Christie, *supra* note 136 (statement of Charles F. Bagley, Esquire).

<sup>151</sup> When Judge Christie was appointed in 1964 the salary of a United States District Judge was \$22,500. The Judicial Salary Act of 1964 increased the salary to \$30,000. Federal Employees Salary Act of 1964, Pub. L. No. 88-426, 78 Stat. 400 (1964).

<sup>152</sup> Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

<sup>153</sup> Mr. Stern learned of Christie's recusal from Zane Gray Staker, the Pittston Company's counsel. Stern described Staker as "a legendary trial lawyer from Kermit, West Virginia." GERALD M. STERN, *THE BUFFALO CREEK DISASTER* 76-77 (Random House 1976). Zane Gray Staker was the brother of Robert B. Staker, who later became a judge of the United States District Court for Southern West Virginia.



Judge Christie was no enemy of the coal miners. Once, when Joseph R. Goodwin appeared *ex parte* before Judge Christie to have the judge sign a restraining order against miners, the judge said, "Well, I'll sign this, but don't come back because I'm not going to put any coal miners in jail over this." This Goodwin interpreted to mean, "I'm not going to get my order enforced."<sup>154</sup>

In the fall of 1973, Judge Christie became ill and on October 30 of that year underwent surgery for removal of a benign brain tumor. He recovered significantly and returned to work but became ill again in January 1974. On Friday, February 15, 1974, he died in a Huntington convalescent home. He was buried in Woodlawn Cemetery at Bluewell, in Mercer County, West Virginia.<sup>155</sup>

#### DENNIS RAYMOND KNAPP<sup>156</sup>

Dennis R. Knapp was born at Red House, in Putnam County, on May 12, 1912. He was educated in the public schools of Putnam County and received an A.B. degree from the West Virginia Institute of Technology in 1932 and an M.A. from West Virginia University in 1934. He returned to Putnam County and began teaching school, and in 1935, at the age of twenty-three, he was named Superintendent of Schools of Putnam County. After two years in this job he went back to school and in 1940 received an LL.B. degree from the West Virginia University College of Law. He had an exceedingly "low key" personality but beneath his quiet manner lurked a brilliant mind, which was demonstrated by his ranking third in his class upon graduation from law school.<sup>157</sup>

Following service in World War II, he entered private practice in Nitro, West Virginia. He was named city attorney in 1948, a position he held until 1956 when, although a Republican, he was elected judge of the Court of Common Pleas of heavily-Democratic Kanawha County. Always popular with voters of both parties, he was re-elected to a second eight-year term in 1964.

In 1968, he was the Republican candidate for the Supreme Court of Appeals of West Virginia. On November 3, two days before the election, Knapp and Republican gubernatorial candidate Arch A. Moore, Jr., were passengers in a helicopter that was approaching a football field at Hamlin, where they were to participate in a political rally. The pilot saw a power line, moved to avoid it, and hit a flagpole. The helicopter crashed with a thud. Judge Knapp broke his

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<sup>154</sup> Interview with Joseph R. Goodwin, Judge, United States District Court for Southern West Virginia, in Charleston, W. Va. (August 9, 2000).

<sup>155</sup> THE ADVERTISER, Huntington, W. Va., Feb. 15, 1974, at 1-2.

<sup>156</sup> Any otherwise uncited factual information about Judge Knapp is taken from comments made during personal interviews cited in this section.

<sup>157</sup> Interview with C. E. Bert Goodwin, *supra* note 116. Goodwin was a law school classmate of Dennis Knapp and his brother, Velmer Knapp. *Id.*

collarbone and several vertebrae.<sup>158</sup> He lost the election to the incumbent, Judge Fred H. Caplan and, after several weeks of recuperation, returned to the bench of the Court of Common Pleas of Kanawha County.

On December 22, 1970, he was appointed judge of the United States District Court for the Southern District of West Virginia by President Nixon and began a career marked with patience, firmness, and an abiding belief that most matters could be resolved by the parties themselves if they would only talk through their differences.<sup>159</sup>

Judge Knapp arrived on the federal bench at a time when the courthouse bristled with activity stemming from frequent “wildcat strikes” in the southern coal fields and appeals of black lung and Social Security claims. With labor disputes numbering as many as forty a month, Judge Knapp later estimated that he handled more labor disputes than any other judge in the country.<sup>160</sup> His reputation as a judge who settled matters helped calm the emotions of both sides in the often acrimonious labor disputes. Judge Joseph R. Goodwin said of Knapp, “He epitomized judicial patience. He would listen to one side, then the other, until neither had anything left to say. Then he would just sit there quietly and say, ‘Well, can’t you boys settle this matter?’” Once, when Goodwin was present as counsel, Judge Knapp left the room for two and a half hours. “Nobody knew where he went,” Judge Goodwin recalled. But the matter was settled.<sup>161</sup>

Knapp himself said in a 1982 interview:

I try to be a mediator more than anything else. As long as you can get the two sides talking and keep up a dialogue, you can

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<sup>158</sup> Moore, who was elected Governor the following Tuesday, broke several ribs. He was taken from the helicopter and placed on a bench used at football games. After resting for a while he arose, pale and shaken, and addressed the crowd briefly. MORGAN, *supra* note 18, at 375; *U.S. District Judge Dennis Knapp Dies*, CHARLESTON GAZETTE, (Charleston, W.Va.), Dec. 27, 1998, at 1A.

<sup>159</sup> In 1990 Judge Knapp was handling litigation that grew out of a United Mine Workers strike of The Pittston Company in southern West Virginia. While judges in Virginia dealing with the same strike issued contempt orders resulting in \$64 million in fines levied and the arrest of hundreds of miners, Judge Knapp quietly presided over extended negotiating sessions in which each side aired their grievances. As the judge’s handling of the situation appeared to be leading to a settlement, Grant Crandall, one of the lawyers representing the UMW, said: “Judge Knapp is the consummate settler. He realizes something many don’t. That is that these parties are going to have to be dealing with each other for a long time. The tensions that are involved in such a situation require a sophisticated approach and he has applied that approach.” Jack McCarthy, *Knapp Not a Judge with Itchy Jail Finger*, CHARLESTON GAZETTE, Jan. 16, 1990, at 9A.

<sup>160</sup> *U.S. District Judge*, *supra* note 158, at 1A.

<sup>161</sup> Judge Goodwin says he thought enough of this practice that he has done it as well. Interview with Judge Joseph R. Goodwin, *supra* note 154.

usually spot what the real problems are. Most times the dispute is over matters in which both sides share a little of the blame.<sup>162</sup>

Judge Knapp spent much of the 1970s and early 1980s trying to recover the sixty million dollars lost when the Charleston-based Diversified Mountaineer Corporation, a savings and loan chain, went bankrupt. Knapp recalled this case as “arduous, worrisome [and] burdensome.” It was, by every measure, a “big” case. When the first creditors’ meeting was held, there were so many creditors they had to meet in Charleston’s Municipal Auditorium. As Judge Knapp recalled it, “The first floor was pretty well full, and they were shouting from the galleries.” But Judge Knapp understood how they felt and why they were upset. “Quite a few were women whose husbands had died. They had put the insurance money in there, everything they had.” After eleven years on the case, Knapp’s trustees recovered 99.38 cents on the dollar for the firm’s depositors.<sup>163</sup>

In 1979 a stolen plane carrying more than ten tons of marijuana crashed at Charleston’s Kanawha County Airport.<sup>164</sup> Nine people, including two Kanawha County Deputy Sheriffs, went to trial for allegedly organizing or protecting the delivery.<sup>165</sup> Halfway through the four-month trial, Judge Knapp entered the hospital for a triple bypass heart operation, and a colleague<sup>166</sup> had to take over. However, Judge Knapp returned for sentencing and appeals on what he later called “a very spirited contest.”

In another case he chided the United States Department of Health, Education and Welfare for what he called “clerical dyslexia” for failing to rule on a black lung claim for five years.<sup>167</sup> “Clerical dyslexia,” Knapp wrote, “can, apparently, cause a helpless plaintiff to be lost in a bureaucratic maze.”<sup>168</sup>

In 1983, at the age of seventy, Judge Knapp gave up the position of Chief Judge and took senior status, but he promised to be back at work at nine o’clock the next morning. As he told the *Charleston Gazette*: “I don’t have any hobbies. I’m a workaholic. I may take a day off to visit my children here or there or to see a ball game, but I’m not going fishing or golfing or traveling.”<sup>169</sup>

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<sup>162</sup> *U.S. District Judge, supra* note 158, at 1A. The author of this history recalls serving as an expert witness in a matter before Judge Knapp in the mid-90’s. With lawyers for both sides before him and ready to proceed, Judge Knapp announced: “I’m going to step out for a half hour or so, and when I return, I expect this case to be settled.” A little over a half hour later he returned. The case had been settled, and, perhaps more to the point, both sides were very satisfied with the result.

<sup>163</sup> *Id.*

<sup>164</sup> Now known as “Yeager Airport.”

<sup>165</sup> The case became known in the media, inevitably perhaps, as the “Pot Plane Case.”

<sup>166</sup> Interview with Hon. John T. Copenhaver Jr., *supra* at note 80.

<sup>167</sup> *U.S. District Judge, supra* note 158, at 1A.

<sup>168</sup> *Bostic v. Harris*, 484 F. Supp. 686 (S.D. W. Va. 1979).

<sup>169</sup> *U.S. District Judge, supra* note 158, at 1A.

True to his word, he stayed on the bench. In 1991, he became embroiled in a nasty labor dispute that questioned the way the West Virginia State Police patrolled picket lines in the state.<sup>170</sup> Rum Creek Coal Sales, a subsidiary of A. T. Massey Company, had sued the State of West Virginia, alleging that state police had failed to intervene in violence on the picket line at Rum Creek's Dehue mine in Logan County. The Department of Public Safety replied that state police could not step in because of the state's trespass and neutrality laws. Judge Knapp initially declined to issue an injunction, declaring that labor disputes should be settled through federal mediation. The case was appealed to the Fourth Circuit which sent the case back to Knapp, asking him to reconsider.<sup>171</sup> Judge Knapp then declared unconstitutional West Virginia's 13-year-old trespass law — which permitted workers to trespass on their employer's property during labor disputes. At the same time, he upheld the state's 1919 "neutrality act," which required the State Police to remain neutral in labor disputes. However, while his decision made it clear that workers could congregate on employers' property, he made his position on violence very clear, as well. "Such acts are lawful so long as conducted peaceably and restraint is exercised so as not to lead to injury to persons or damage to, or destruction of, property."<sup>172</sup>

In late October 1998, at the age of eighty-six, Judge Knapp suffered a heart attack and was hospitalized. He never fully recovered and died on Friday, December 25, 1998.<sup>173</sup>

#### KENNETH K. HALL<sup>174</sup>

Kenneth Keller Hall, one of the most colorful judges<sup>175</sup> to ever sit on the United States District Court for Southern West Virginia, was born February 24,

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<sup>170</sup> Rum Creek Coal Sales, Inc., v. Caperton, 926 F.2d 353 (4th Cir. 1991).

<sup>171</sup> Rum Creek Coal Sales, Inc. v. Caperton, 1991 U.S. Dist. LEXIS 11209 (S.D. W. Va. May 3, 1991).

<sup>172</sup> Maryclaire Dale, *Judge Strikes Trespass Statute*, CHARLESTON GAZETTE, Nov. 23, 1991, at 1A.

<sup>173</sup> *U.S. District Judge*, *supra* note 158, at 1A.

<sup>174</sup> Any otherwise uncited factual information about Judge Hall is taken from comments made during the memorial service and personal interviews cited in this section.

<sup>175</sup> Judge Hall was a great storyteller who would often get so tickled at a story he was telling that he would start laughing before he came to the punch line and would often have difficulty getting the punch line out. His introductory remarks to his presentation at the ninety-third meeting of The West Virginia Bar Association in 1977 is fairly typical of his delightful style:

Thank you all. Thank you, Bobby [President Robert Richardson], for such a nice, pleasant introduction. That's one of the best introductions I've had.

I think one of the worst I ever had was maybe not really an introduction. I had a bailiff that just came on the job, and he was supposed to memorize the spiel and say, "All hear ye, Honorable Court," and he ends up, "God save the United States and This Honorable Court," and he forgot it. He didn't remember, and as I started in the door, he said, "Here he comes. God save us all."

1918, at Greenview, on the Spruce Fork of the Little Coal River in Boone County, a community named after his grandfather, V. B. Green. His father, Aubrey Hall, died while Hall was just a child and his mother later married C. C. Hopkins, who later became Sheriff of Boone County.

An outgoing young man, Hall was captain of the Scott High School football team in Madison and went on to play some football at New River State (now West Virginia University Institute of Technology). At New River State he lived in the basement of a faculty apartment building and served as janitor, getting up every night to fire the furnace.

After some time, he transferred to Morris Harvey College in Charleston and still later moved to Washington, D.C. where he accepted a civil service job and enrolled full-time in college. In the meantime, he married Gerry Tabor of Ottawa, Boone County, his high school sweetheart.<sup>176</sup> In 1942, he enlisted in the Navy and earned nine battle stars. He was discharged in 1945 with the rank of Lieutenant.

After World War II, he enrolled in law school at West Virginia University, from which he received a J.D. in January 1948. He returned home to Boone County and entered private practice in Madison, the county seat. After four years of private practice, and two terms as Mayor of Madison,<sup>177</sup> he became a candidate for judge of West Virginia's 25<sup>th</sup> Judicial Circuit – Boone and Lincoln counties.<sup>178</sup> When he was elected that fall, at the age of 34, he was the

When Bobby asked me to speak to you, I asked him what he wanted me to talk about, and he said he really didn't care, but he thought I ought to put in a story or two. And I said, "Well, do they have to be clean?", and he said, "Well, if the same group comes this year that usually comes, it really doesn't matter much about that part of it."

Judge Hall then went on to tell four more stories, during one of which he kept making humorous "asides" and was interrupted by laughter six times. 1977 W. VA. BAR ASS'N, ANN. REP. 25.

On September 22, 1979, at the installation ceremony for Judge Sprouse and Staker, Judge Hall, recognizing that both men had distinguished political backgrounds, said:

And on that point [their political backgrounds], I might say that they can say from this day forward about politics the same thing that a fat lady says when she puts on her girdle — it's all behind me now.

At a memorial service for Judge Hall held before the Fourth Circuit, on October 27, 1999, Judge J. Harvie Wilkinson, III, best summed up Judge Hall's personality:

I suppose the public sees panels of appellate judges in black robes and believes them to be pretty much fungible. Anyone who ever met Judge Hall would be quickly disabused of that.

<sup>176</sup> In one of Judge Hall's humorous asides, he once said of his wife: "Everybody said I went up in the world when I married her, and I said, 'Yes, she was from six miles further up the hollow than I was.'" W. VA. BAR ASS'N, ANN. REP., *supra* note 175 at 26.

<sup>177</sup> According to remarks delivered by Judge King at Judge Hall's memorial service, Judge Hall was elected both times by a unanimous vote.

<sup>178</sup> Judge Hall defeated Republican J. E. Wilkinson, of Hamlin, in the general election in November, garnering 62% of the vote.

youngest circuit judge in the state. He also brought a breath of fresh air to judicial proceedings in an area of the state that had tended to be quite backward. A newspaper article credited him with being the first judge to allow blacks and women to serve as jurors, in order to give defendants a true “jury of their peers.”<sup>179</sup>

Judge Hall was a gregarious individual who could strike up a conversation with anyone. At the time of his death Judge Robert B. King recalled, “he was equally at ease with the movers and the shakers or with coal miners. And he had a story to tell – a funny one – for all of them.”

During his sixteen years on the circuit court bench, Judge Hall showed signs of additional political aspirations. In 1955, he was rumored to be a candidate for governor in the 1956 primary election, but he never filed for that office. In 1968, he filed for the Democratic nomination for Congress from the Third Congressional District,<sup>180</sup> although he later withdrew from this race and ran for the Democratic nomination for the Supreme Court of Appeals of West Virginia. He was defeated by the incumbent, Judge Fred H. Caplan.<sup>181</sup>

Off the bench after sixteen years, Judge Hall accepted a position as hearing examiner for the Social Security Administration, a position that made good use of his judicial background. On November 22, 1971, following Judge John Field’s elevation to the Fourth Circuit bench, Judge Hall was nominated by President Nixon to fill the vacancy left by Judge Field. On the bench, Judge Hall was a most efficient and organized judge. Whereas Judge Field was seldom on time, Judge Hall was strictly punctual.<sup>182</sup> Charleston Lawyer Edison Hill, who clerked for Judge Hall on both the district and circuit courts, said that before a court session, he and the Judge would wait in an anteroom, staring at the clock. Hill recalled that “we literally would stand there, and watch the second

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<sup>179</sup> Maryclaire Dale, *Longtime Judge Kenneth K. Hall Dies at 81*, CHARLESTON GAZETTE, July 9, 1999, at 1A.

<sup>180</sup> Congressman John Slack, who was the incumbent, was easily reelected that year.

<sup>181</sup> Judge Caplan defeated Judge K. K. Hall in the 1968 primary and Judge Dennis Knapp in that year’s general election. He later told the author of this history, who was serving as State Court Administrator, “If you want to become a federal judge in southern West Virginia, the best way to do it is to run against me for the Supreme Court.”

<sup>182</sup> When Warren Upton and Robert King were United States Attorney and Assistant United States Attorney, respectively, they relied on calls from Judge Field’s law clerk to let them know when to head for court. Then they would leisurely make their way up to the courtroom. When Judge Hall went on the bench he began court at the time scheduled, and the clerk never got to call Upton and King. On their first appearance before Judge Hall they were late – a condition that was never repeated. Judge Hall would break for lunch precisely at 12:00 noon. At mid-morning and mid-afternoon he would take a 10 or 15-minute recess. No matter what time he had announced he would return to the bench, he would be there. He would leave his chambers in the middle of motion arguments to return to court. Interview with Judge Robert B. King & W. Warren Upton, *supra* note 83.

hand on the clock, and at the appointed moment, we would enter the courtroom.”<sup>183</sup>

He was also a strict constructionist who decried judicial activism, saying that judges should only referee the law. Nonetheless, he showed a lifelong concern for the rights of the individual, which often left him siding with the underdog. In 1976 when federal prosecutors complained about the *Miranda*<sup>184</sup> decision, which required the police to tell suspects of their constitutional rights, Hall told them their wails reminded him of medieval torturers. He said, “I expect that’s exactly what prosecutors said after they ended the Spanish Inquisition: ‘How are we ever going to get a conviction without the rack?’”<sup>185</sup>

Judge Hall’s years on the district bench coincided with a tumultuous period in southern West Virginia history. During his years on the district bench he banned the state’s outdated abortion law,<sup>186</sup> presided over the violent school textbook controversy,<sup>187</sup> and declared wildcat coal mine strikes illegal.<sup>188</sup> For a time in 1974 he and his family were guarded around-the-clock by federal marshals.<sup>189</sup> The protection was not unwarranted. On one occasion there was a warrant out for a man who appeared in court in the midst of a jury trial over which the judge was presiding. The man came into the courtroom and said to Judge Hall, “I heard you were looking for me.” Judge Hall replied, “Come on up here and let’s talk.” The man approached the bench carrying a paper sack in which he had a .38 caliber pistol for protection. Upon learning that the man had a pistol, Judge Hall was unfazed.<sup>190</sup>

In February, 1972, a coal-waste refuse pile of the Buffalo Mining Company, which had dammed a stream in Middle Fork Hollow in Logan County, collapsed and sent a tidal wave of thick, black water down the Buffalo Creek Valley, killing over 125 people and causing enormous property damage. Gerald Stern, of the Washington, D.C., law firm of Arnold & Porter had brought suit in

<sup>183</sup> Dale, *supra* note 179, at 1A. At Judge Hall’s memorial service Judge J. Harvie Wilkinson, III, recalled the time he, as a very junior judge, was to meet Judge Hall in the hotel lobby at 7:00 p.m. from when they were to head to dinner. Judge Wilkinson had been watching the evening news and did not arrive until 7:05. Judge Hall told him, “Judge Haynesworth can show up at 7:05, but you are expected at seven o’clock sharp.”

<sup>184</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>185</sup> Dale, *supra* note 179, at 1A.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; *Williams v. Bd. of Educ.*, 388 F. Supp. 93 (S.D. W. Va. 1975).

<sup>188</sup> *Consol. Coal Co. V. United Mine Workers*, 362 F. Supp. 1073 (S.D. W. Va. 1974). When Judge Hall ruled against coal miners during the wildcat strikes of the early 1970s, some of the miners called him “Ku Klux Hall” and labeled him a tool of the coal companies. Yet few judges have ever been more compassionate and cared more about people. Interview with R. Edison Hill, founding member, Hill, Peterson, Carper, Bee & Deitzler, PLLC, former law clerk to Judge K. K. Hall, in Charleston, W.Va. (April 9, 2001).

<sup>189</sup> Dale, *supra* note 179, at 1A.

<sup>190</sup> Interview with Howard Spurlock, *supra* note 128.

the United States District Court for Southern West Virginia against Pittston Coal Company, which owned all the stock in the Buffalo Mining Company.<sup>191</sup>

It was a difficult suit to maintain for the plaintiffs would first have to “pierce the corporate veil” and show that Pittston and Buffalo were, in fact, the same entity. That is, they would have to show that Buffalo Mining Company was a division of Pittston. Then they would have to establish that those plaintiffs who had suffered emotional damage, but no accompanying physical damage, were entitled to a recovery. Pittston’s lawyer, the legendary Zane Grey Staker,<sup>192</sup> moved to dismiss the case.

While the motion to dismiss was before the court, Judge Christie disqualified himself from the case because the president of the Pittston Company was one of his oldest friends. The case was then sent to Judge Knapp, who declined to take it on the grounds that he was too busy to handle the case. The case then went to Judge Hall, the only other federal district judge in the Southern District of West Virginia at that time. Judge Hall denied the motion to dismiss and indicated to the lawyers that he intended to move the case along without delay.<sup>193</sup> He also said from the bench, in response to a request from plaintiffs’ lawyer, that he would come to the aid of that counsel in his efforts to gain access to the report of the West Virginia Ad Hoc Commission of Inquiry into the Buffalo Creek Flood, access which had been denied by Governor Arch Moore.<sup>194</sup> This position was consistent with his policy of not permitting parties in the case to seal documents or close the hearings.

During the course of the pre-trial maneuvering, Judge Hall ruled that victims of the flood could recover for mental suffering without having to prove they also suffered physical impact or physical injury, if the plaintiffs could prove Pittston’s conduct was reckless, rather than merely negligent.<sup>195</sup> It was a significant ruling, and one that ultimately permitted recovery by the plaintiffs. The case was ultimately settled for \$13.5 million just days before the trial was to begin. In the epilogue to his book on the case Stern thanked a number of people who had made the book possible. Then he added, “And finally, thanks to Judge K. K. Hall and his law clerk, Stanley Dadisman, two outstanding, sympathetic, courageous public servants.”<sup>196</sup>

On August 26, 1976, Judge Hall was nominated by President Gerald Ford to the seat on the United States Court of Appeals for the Fourth Circuit that

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<sup>191</sup> Prince v. Pittston Co., 63 F.R.D. 28 (S.D. W. Va. 1974).

<sup>192</sup> Zane Grey Staker was the older brother of District Judge Robert Staker and a giant in the West Virginia bar.

<sup>193</sup> See STERN, *supra* note 153, at 306.

<sup>194</sup> After Judge Hall announced in open court that he believed Mr. Stern should have access to this report, the report was immediately made available to him by Governor Moore, without the necessity of a subpoena from the federal court. *Id.* at 103.

<sup>195</sup> *Id.* at 276. This psychological trauma later became known as “survivor’s syndrome.” Dale, *supra* note 179, at 1A.

<sup>196</sup> See STERN *supra* note 153, at 306.



had been vacated by Judge Field (just as he had been nominated to the District bench following Judge Field's ascension to the Circuit bench). Six days later his appointment was confirmed by the Senate, and he received his commission on September 3. Judge Hall served with distinction on the Fourth Circuit bench, taking senior status on February 12, 1998. He passed away at his home in Charleston on July 8, 1999.<sup>197</sup> Off the bench, Judge Hall was an avid golfer and rose grower. He took great delight in bringing fresh-cut roses to his secretaries.<sup>198</sup>

#### CHARLES H. HADEN, II<sup>199</sup>

Charles H. Haden, II, was born April 16, 1937, in Morgantown, West Virginia, the son of the late Charles H. and Beatrice (Costolo) Haden. He was educated in the public schools of Monongalia County and received a B.S. degree in Business Administration from West Virginia University in 1958. In 1961, he received a J.D. degree from the WVU College of Law, where he served as a member of the Board of Editors of the *West Virginia Law Review*. He entered the practice of law in Morgantown with his father in the firm of Haden and Haden. A year later, he was elected to the West Virginia House of Delegates from Monongalia County, leading the field of candidates for the House.<sup>200</sup> After being defeated for reelection in 1964,<sup>201</sup> he was elected to the Monongalia County Board of Education in 1966.<sup>202</sup> In 1967 and 1968, he also served as a member of the faculty of the West Virginia University College of Law. In the summer of 1968, after having been named Republican nominee for Attorney General of West Virginia, on a ticket headed by then-Congressman Arch A. Moore, Jr., Haden resigned from the Board of Education. While Moore

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<sup>197</sup> Dale, *supra* note 179, at 1A.

<sup>198</sup> Interview with R. Edison Hill, *supra* note 188. Hill grew up as a neighbor to Judge Hall in Madison and recalls that many times his errant footballs and baseballs landed in the Judge's rose garden. *Id.*

<sup>199</sup> Any otherwise uncited factual information about Judge Haden is taken from comments made during personal interviews cited in this section.

<sup>200</sup> Haden received 8,777 votes in the general election, surpassing even House Speaker Julius W. Singleton, Jr., of Monongalia County, who received 8,511 votes. Singleton was reelected Speaker at the opening of the 1963 session of the Legislature. This information is available in the Monongalia County Courthouse records.

<sup>201</sup> United States Senator Barry Goldwater of Arizona, the Republican candidate for President of the United States, was defeated by President Lyndon B. Johnson by nearly 16 million votes in the 1964 election. Goldwater carried only six states, all of them in the deep south. His defeat had the reverse "coattail" effect of defeating Republican incumbents across the country. <http://www.nytimes.com/learning/general/special/elections/1964/index.html>. In the race for the House of Delegates from Monongalia County that year, Haden ran fourth, 1,637 votes behind Harry U. Howell, who took the third of the county's three seats in the House. All three of the delegates elected were Democrats. Monongalia County Courthouse records.

<sup>202</sup> In the non-partisan election for the School Board Haden received 7,627 votes, Homer C. Evans, 5,300 votes, and Ruth Ice, 2,919 votes. Monongalia County Courthouse records.

was elected Governor in 1968, Haden was narrowly defeated for Attorney General by the incumbent, Chauncy H. Browning, Jr.<sup>203</sup>

Shortly after Moore took office in 1969, he named Haden State Tax Commissioner.<sup>204</sup> On June 21, 1972, after three and a half years as Tax Commissioner, Governor Moore appointed Haden to the Supreme Court of Appeals of West Virginia.<sup>205</sup> In the general election, on November 7 of that year, Haden became the first Republican elected to the West Virginia Supreme Court since Haymond Maxwell of Harrison County was elected in 1928.<sup>206</sup> In 1975, he was elected Chief Justice of the Court. He was serving in this capacity when he was appointed United States District Judge for the Northern and Southern Districts of West Virginia (the so-called "roving judgeship" that had been vacated on the death of Judge Christie) by President Ford. He was confirmed by the United States Senate on November 20, 1975, and received his commission the following day.<sup>207</sup> At the time of his appointment, Judge Haden was thirty-eight years old, the youngest Federal Judge in the country.

Haden was well received on the federal bench. Lawyers' evaluations published by the Almanac of the Federal Judiciary rated his ability as "quite

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<sup>203</sup> Haden ran unopposed in the Republican primary and was defeated by Chauncy H. Browning, Jr., by 30,000 votes. Governor Arch H. Moore, Jr. was the only Republican elected statewide that year. WEST VIRGINIA SECRETARY OF STATE, OFFICIAL RETURNS OF THE GENERAL ELECTION (1920-1972) 13 (November 5, 1968).

<sup>204</sup> Governor Moore played "cat and mouse" with his executive department appointments. On January 7, 1969, the *Charleston Gazette* announced "Haden to Get State Tax Chief's Post." The article went on to say: "Reliable sources said the appointment has been made but that announcement was being withheld." *Haden to Get State Tax Chief's Post*, CHARLESTON GAZETTE, Jan. 7, 1969, at 9A.

A week later the *Gazette* carried a headline reading: "Moore Team 'Red Hots' Identified." The article explained that "red hots" are inside tips on the identity of athletic teams which supposedly are certain to win their games regardless of what sports writers and bookmakers say. As an example of a "red hot," the *Gazette* named the Baltimore Colts in their recent Super Bowl game with the New York Jets. (This was two days after "Broadway Joe" Namath led the Jets to a 17-6 upset victory over the Colts in Super Bowl III!) The writer went on to say that "adding substance to this report is the fact that Haden, who ran for Attorney General as part of Moore's team, has been house hunting in Charleston." *Moore Team 'Red Hots' Identified*, CHARLESTON GAZETTE, Jan. 14, 1969, at 1A.

Governor Moore made the official announcement of Haden's appointment, along with other members of the Governor's cabinet, at 9:00 a.m., Friday, January 31. At 31, Haden was the youngest of the appointees. John G. Morgan, *With a Flourish, Moore Unveils Team*, CHARLESTON GAZETTE, Feb. 1, 1969, at 1A.

<sup>205</sup> Haden filled the vacancy created by the resignation of Judge Harlen M. Calhoun on May 15, 1972. His elevation to the bench meant that he had served in all three branches of state government, having come from the executive branch, where he served as state tax commissioner, and having previously served in the House of Delegates from Monongalia County.

<sup>206</sup> Haden defeated Cabell County Circuit Judge Russell Dunbar by 22,000 votes and carried 31 of the state's 55 counties. WEST VIRGINIA SECRETARY OF STATE, OFFICIAL RETURNS OF THE GENERAL ELECTION (1920-1972) 13 (November 7, 1972).

<sup>207</sup> Haden was appointed to the seat vacated by Judge Sidney L. Christie.

high.” Some comments include the following: “He has a very high level of ability. I think the world of him. He is very bright and hard working;” and “I give him an A or an A-plus for legal skills.”<sup>208</sup> His pleasant judicial temperament also drew praise, such as “[h]e has an excellent demeanor;” “[h]e doesn’t have any quirks;” and “[h]e is very moderate in the courtroom unless some lawyer really tries to snowball him. Then he’ll be tough.”<sup>209</sup>

Judge Haden presided over a number of important cases during his tenure on the federal bench. Perhaps the most important, certainly the most widely publicized, was the so-called “Mountaintop Removal” case.<sup>210</sup> This case involved the controversy over a type of surface coal mining known as “mountaintop removal.”<sup>211</sup>

As a general rule, decisions of a United States District Judge get little notice outside the legal community. The mountaintop removal case was an exception. From the latter half of 1998 and through 1999, Judge Haden’s rulings on mountaintop removal were front-page news. The case began on July 16, 1998, when the West Virginia Highlands Conservancy and residents of the coalfields in southern West Virginia filed suit in the United States District Court for Southern West Virginia alleging that the West Virginia Department of Environmental Protection (DEP) and the United States Army Corps of Engineers were issuing strip mining permits that violated federal law.<sup>212</sup> While the suit was pending, the Corps of Engineers ceased issuing permits for strip mines, and the DEP requested a change in federal regulations that would make reclamation

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<sup>208</sup> 1 ALMANAC OF THE FEDERAL JUDICIARY 87 (Aspen 2000).

<sup>209</sup> *Id.*

<sup>210</sup> *Bragg v. Robertson*, 72 F. Supp. 2d 642 (S.D. W.Va. 1999).

<sup>211</sup> Judge Haden’s opinion best describes the process:

The coalfields of southern West Virginia are mountainous, with steep wooded slopes. Coal in these mountains is found in seams of varying thickness sandwiched between layers of rock and dirt. In mountaintop removal mining, the rock and dirt overburden or “spoil” is removed, layer by layer, and the coal is mined at the exposed surface, as it appears. The ultimate effect is to remove the mountaintop to a depth where deep mining is the practical method of recovery.

*Id.* at 646. Footnote 4 added:

Mountaintop removal mining means surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill . . . by removing substantially all of the overburden off the bench and creating a level plateau or gently rolling contour, with no highwalls remaining[.]

*Id.* at 646 n.4.

<sup>212</sup> On April 8, 1998, Governor Cecil Underwood signed a bill that relaxed environmental regulations and allowed coal companies to fill stream beds with strip mine waste. Ken Ward Jr., *What Now For Coal? Dire Predictions May Be Overblown, Records Indicate*, SUNDAY GAZETTE-MAIL, (Charleston, W.Va.), Oct. 24, 1999, at 5A.

of the mined land more lenient. Consequently, Judge Haden allowed coal companies to intervene as defendants.

On October 20, 1998, Arch Coal, Inc. issued a 60-day notice to 387 employees warning them of possible layoffs due to the lack of production stemming from the Corps of Engineers' decision to cease issuing permits.<sup>213</sup> This announcement sent shockwaves throughout the state as surface mine employees and their unions faced the prospect of layoffs. At the same time, bumper stickers began to appear bearing the message: "I'm Pro-Mountain, and I Vote." The lines were clearly drawn, and the politics surrounding the issue were intense. Not only were the environmental and economic issues surrounding the matter complex, the case itself was a nightmare. Judge Haden described the subject matter and the arguments as "complex" and the "interplay of statutes and regulations" as "byzantine."<sup>214</sup>

On March 3, 1999, following six days of argument, as well as visits to both past and future mine sites, Judge Haden issued a preliminary injunction against Michael Miano, the Director of the West Virginia DEP, the United States Army Corps of Engineers, and Arch Coal's subsidiaries, prohibiting the issuance of any further permits for the Spruce Fork mine. The injunction also stayed any permits that had already been issued and discontinued mining activities until the entire case could be heard on its merits.<sup>215</sup>

Following the issuance of the preliminary injunction, the parties tried to settle the matter. But two counts in the plaintiff's complaint, both involving a rule concerning the disposal of waste in stream beds, could not be resolved. One count alleged that the Director of DEP was engaged in a pattern and practice of approving buffer zone<sup>216</sup> variances based on permit applications that did not include requisite findings before such variances could be approved. The second count alleged that the Director's authority under the buffer zone rule did not (and could not) extend to permitting activities, and in particular, valley fills that bury substantial portions of intermittent and perennial streams.<sup>217</sup> On Octo-

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<sup>213</sup> *Id.*

<sup>214</sup> Bragg v. Robertson, 54 F. Supp. 2d 635, 639 (S.D. W. Va. 1999).

<sup>215</sup> *Id.* at 645.

<sup>216</sup> The "buffer zone rule" reads:

No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect water quantity and quality or other environmental resources at the stream and will not cause or contribute to violations of applicable State or Federal water quality standards.

W. VA. CODE R. § 38-2-5.2 (2001).

<sup>217</sup> Perennial streams flow all year, intermittent streams flow at least six months of the year. Ken Ward Jr., *Valley Fill Mining Outlawed Landmark Ruling Prohibits Mountaintop Coal Operators From Burying State Streams*, CHARLESTON GAZETTE, Oct. 21, 1999, at A1.

ber 20, 1999, Haden ruled in favor of the plaintiffs and declared that valley waste piles could not be created in perennial or intermittent streams.<sup>218</sup> He wrote: "If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration."<sup>219</sup>

The defendants appealed to the United States Court of Appeals for the Fourth Circuit alleging, among other things, that the federal courts had no jurisdiction to hear this matter under the Eleventh Amendment to the United States Constitution.<sup>220</sup> The plaintiffs had argued in the District Court that the court did have jurisdiction under an exception created by *Ex Parte Young*,<sup>221</sup> in which the United States Supreme Court had held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the state itself is immune from suit under the Eleventh Amendment, because, when a state officer violates federal law, he is stripped of his official character and loses the cloak of state immunity.<sup>222</sup> However, the Fourth Circuit ruled that the plaintiffs' suit did not fall within the *Ex parte Young* doctrine because Michael Miano, the Director of the West Virginia Department of Environmental Protection, had been accused of violating *state* law.<sup>223</sup>

The mountaintop removal case was not the only highly-publicized case over which Judge Haden presided. Several years earlier he conducted a jury trial in which Logan County Circuit Judge James Ned Grubb was convicted of bribery, mail fraud, obstruction of justice, and racketeering.<sup>224</sup> Grubb had brokered a deal between Oval Adams, a candidate for Sheriff of Logan County, and Earl Tomblin, a former Sheriff of the county.<sup>225</sup> Tomblin had told Judge Grubb, who was supporting Adams, that he needed two years of work for his social security and state pension benefits and said that he would "donate" \$10,000 to Adams' campaign if Adams would guarantee him part-time employment following his election.<sup>226</sup> The understanding was that if Adams were not elected, Tomblin would get his \$10,000 back.<sup>227</sup>

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<sup>218</sup> Bragg v. Robertson, 72 F. Supp. 2d 642 (S.D. W. Va. 1999).

<sup>219</sup> *Id.* at 661-62.

<sup>220</sup> The Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state." U.S. CONST. amend XI.

<sup>221</sup> 209 U.S. 123 (1908).

<sup>222</sup> *Id.*

<sup>223</sup> Bragg v. W. Va. Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

<sup>224</sup> United States v. Grubb, 11 F.3d 426 (4th Cir. 1993).

<sup>225</sup> *Id.* at 430.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

Following Adams' election, Grubb, at Tomblin's request, reminded Adams about Tomblin's job. Adams hired Tomblin as a part-time investigator for the Sheriff's office. Tomblin received a salary, along with social security, retirement, and other benefits, but he performed little work for the Sheriff's office.

Adams was later charged with conspiracy to transport stolen coal across state lines and, as part of a plea bargain to the conspiracy charge, agreed with the FBI to meet with Grubb and tape their conversations. In two taped conversations with Grubb, in which Adams asked Grubb for advice regarding how to deal with the federal investigation and a summons before a federal grand jury, Grubb suggested several approaches, including lying about or mischaracterizing Adams' deal with Tomblin.

At Grubb's trial, Judge Haden admitted evidence that Grubb, while a practicing lawyer, had his license suspended for advising a bankruptcy client to conceal a financial asset during the bankruptcy proceeding and that he had, while a Circuit Judge, given a speech at Chapmanville, in Logan County, endorsing Adams' candidacy for Sheriff. On appeal to the Fourth Circuit, Grubb contended this evidence should not have been admitted. However, the Fourth Circuit sustained the admission of the evidence. Regarding the evidence of Grubb's suspension from the practice of law for advising a bankruptcy client to conceal an asset, the court stated the following:

The advice Grubb gave to Adams [to lie or mischaracterize his deal regarding Tomblin] was so remarkably similar to that Grubb had given to the earlier bankrupt that the district court admitted the evidence to show whether Grubb "respects the truth as he defines it." This is essentially a question of relevance, and we are of [the] opinion its admission was not an abuse of discretion.<sup>228</sup>

With respect to his speech endorsing Adams' candidacy, the court said "the Chapmanville speech was relevant . . . because it showed Grubb's support of Adams and his motivation for engaging in those criminal acts, as well as Grubb's general intent to use his judicial office as a racketeering enterprise."<sup>229</sup>

Another of Haden's cases made it into the pages of *Reader's Digest*.<sup>230</sup> The case involved the Preece family of Kermit, in Mingo County, on the West Virginia-Kentucky border, and their political allies. Wig Preece, his wife Cooney, and several of their 13 children sold cocaine, LSD, and marijuana from a trailer located in the center of Kermit, directly across the street from City Hall and the police station. The Preeces "owned" Kermit's police chief, David Ra-

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<sup>228</sup> *Id.* at 432.

<sup>229</sup> *Id.*

<sup>230</sup> Fergus M. Bordewich, *Crimes of Mingo County*, *READER'S DIGEST*, Mar. 1991, at 19.

me, who was also married to Wig Preece's daughter, Deborah. Deborah was one of the Preece children who sold drugs from the trailer. According to *Reader's Digest*, the Preeces also "owned" a couple of deputies. The drug-dealing operation was carried out quite openly. Cars would pull up to the trailer at all hours of the day and night, sometimes creating traffic jams. On occasion, the Preeces would hang a sign on the trailer door that read: "Out of Pot — Back in 30 Minutes."<sup>231</sup>

The Preece family influence was not limited to the police force. Family money also supported two political bosses who hand-picked candidates for every county office. The candidates were Larry Hamrick, who ran the local anti-poverty agency and was a leading member of the Mingo County School Board,<sup>232</sup> and Johnnie Owens, the former Sheriff of Mingo County and recent Democratic Party Chairman.<sup>233</sup>

The Federal Bureau of Investigation placed an informant within the Preece organization. The informant posed as a drug dealer who offered to replenish the Preece's stash of drugs. When the Preeces realized they were caught on the drug-related charges, they began to sing. They talked about their connections with the police, the sale of political jobs, and the payoffs and vote-buying that spanned two decades. One by one, their accomplices in these schemes began to talk, and the crime spree came to an end. As *Reader's Digest* described it: "One by one, the men and women who had flouted the law, bought and sold democracy and turned politics into a dirty word came up before Judge Charles H. Haden II. And then down they went."<sup>234</sup>

Judge Haden was also kept busy with work outside the courtroom. In 1979, Chief Justice Warren Burger appointed him to the Committee on the Administration of the Probation System, a position he held until 1986. From 1986 to 1991, and again from 1996 to 2000, he served as a member of the Fourth Circuit Judicial Council. In June 1997, he was elected to a five-year term as the Fourth Circuit District Judge Representative to the 27-member United States Judicial Conference, the first West Virginia judge to receive this honor. In October 1999, Chief Justice Rehnquist selected Judge Haden to serve on the Ex-

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<sup>231</sup> *Id.* at 20.

<sup>232</sup> These two agencies accounted for a large portion of the government jobs in Mingo County, which gave Hamrick control of enormous patronage opportunities as well as the federal money that funded the welfare programs. One example of how Hamrick used his patronage power to help the Preece family occurred in 1985 when Wig Preece's daughter Brenda faced jail for selling drugs to an undercover police officer. Hamrick promised the jury foreman a job for his daughter, and Brenda was found not guilty. *Id.*

<sup>233</sup> Owens charged candidates to be on his slate and then, to assure that his slate won, his workers would find voters in Mingo County who would sell their votes. Once they had sold their votes the voters would ask for assistance at the polls, and a "poll watcher" would step into the voting booth with the voter to make sure he pulled the correct levers. *Id.* at 20-22.

<sup>234</sup> *Id.* at 22-26.

ecutive Committee of the Conference.<sup>235</sup> Judge Haden chaired the District Judge Representatives to the Conference in 1999 and served as Chair of the Executive Committee of the Judicial Conference of the United States.<sup>236</sup>

Judge Haden maintained a continuing interest in public service, serving as President of the West Virginia University Alumni Association in 1982-83,<sup>237</sup> Chair of the West Virginia Public Schools Study Commission in 1987, and as West Virginia Chair of the Bicentennial Commission of the United States Constitution. Moreover, he completed terms as a member of the Visiting Committees of the WVU College of Law and the WVU School of Medicine, and became a member of the Board of Directors of the West Virginia University Foundation in 1986. In 1982, after seven years on the United States District Court bench, the West Virginia Trial Lawyers Association, which had previously named him “Outstanding Appellate Judge in West Virginia” while he was on the State Supreme Court, named him the “Outstanding Trial Judge in West Virginia.” In 2001, Judge Haden was inducted into the Order of Vandalia, the highest award bestowed by West Virginia University for service to the University. That same year, he was the recipient of the WVU College of Law’s highest honor, the *Justicia Officium* award. Three years later, he was inducted into the West Virginia University Alumni Association’s Academy of Distinguished Alumni. Shortly thereafter, the Judge Charles H. Haden, II, Professorship of Law was dedicated at the College of Law in honor of his groundbreaking contributions to the judiciary and the legal profession.<sup>238</sup>

In the meantime, his status as West Virginia’s “roving” federal judge came to an end. On January 14, 1983, the Congress of the United States enacted Public Law 97-471, which provided that “[t]he existing district judgeship for the Northern and Southern Districts of West Virginia shall be authorized as the district judgeship for the Southern District.”<sup>239</sup> Thus, Judge Haden was no longer a “roving” judge but officially became a judge solely for the Southern District of West Virginia. This act also re-drew the Northern and Southern Districts of West Virginia, moving Wood (the county in which Judge Haden then resided) and Wirt Counties to the Southern District, and Braxton, Pocahontas, and Webster to the Northern District. Consequently, Judge Kidd, who was a resident of Braxton county when appointed to the federal bench, was moved to the North-

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<sup>235</sup> The Executive Committee is made up of three Circuit Chief Judges, three District Chief Judges, and the Director of the Administrative Office of the United States Courts. The Executive Committee sets the agenda for the Judicial Conference.

<sup>236</sup> In this capacity, he presided over the Conference in the absence of the Chief Justice of the United States.

<sup>237</sup> He was named Outstanding Alumnus of West Virginia University in 1986.

<sup>238</sup> *Obituary, Hon. Charles H. Haden II*, CHARLESTON GAZETTE, Mar. 22, 2004, at 2A.

<sup>239</sup> Pub. L. No. 97-471, § 96 Stat. 2601 (1983).



ern District.<sup>240</sup> On May 13, 1982, Judge Haden became Chief Judge of the Southern District of West Virginia.<sup>241</sup>

Judge Haden held court at every location in West Virginia where the federal courts sat while he was on the bench. (He never sat in Lewisburg, which is an authorized location for holding federal court, but while he was on the bench no federal judges in West Virginia ever held court there.) Moreover, he heard cases in North Carolina, South Carolina, and the Southern District of Florida, and sat by special appointment on the United States Court of Appeals for the Second and Fourth Circuits.

Judge Haden married Priscilla Ann Miller of Morgantown in 1956. Mrs. Haden spent a career as a school teacher and guidance counselor in Monongalia, Wood, and Kanawha counties. In addition, she served one term on the Kanawha County School Board, where she also served as president. The Hadens had three children, one of whom<sup>242</sup> followed her father into the legal profession, graduating from WVU College of Law in 1986.<sup>243</sup> The Hadens also had ten grandchildren.

Judge Haden passed away at his home in Charleston on March 20, 2004, at the age of 66. Three days later, his body lay in state for public viewing in his courtroom on the seventh floor of the Robert C. Byrd United States Courthouse in Charleston. Governor Bob Wise issued a proclamation officially mourning his passing and ordering all state flags to be flown at half-mast in honor of Judge Haden's "life and legacy of devotion and service to the citizenry of West Virginia."<sup>244</sup>

#### JOHN T. COPENHAVER, JR.<sup>245</sup>

John Thomas Copenhaver, Jr. was born on September 29, 1925, in Charleston, the son of John T. Copenhaver, Sr., and Ruth Roberts Copenhaver.

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<sup>240</sup> *Id.*

<sup>241</sup> WEST VIRGINIA BLUE BOOK 580 (Darrell E. Holmes ed., 2000). Judge Haden had been sworn in to the Federal bench in Charleston, in the Southern District. Otherwise, he could not have become Chief Judge of the Southern District. Six months after becoming Chief Judge, the statute was changed to require that Chief Judges could only serve in that position for seven years. However, Judge Haden, as a sitting Chief Judge, was "grandfathered in" to his position. Thus, while he was at the time of his appointment the youngest federal judge in the country, he was for a time the most senior Chief Judge in the United States.

<sup>242</sup> Amy Haden Sorrells.

<sup>243</sup> The Hadens also had two sons, Charles H. Haden, III, known as "Chuck," who is with General Truck Sales of West Virginia, in South Charleston, and Tim Haden, who is president of a roofing and heating company in Richmond, Virginia.

<sup>244</sup> *Obituary, Hon. Charles H. Haden II, supra* note 238, at 2A.

<sup>245</sup> Any otherwise uncited factual information about Judge Copenhaver is taken from an interview with Hon. John T. Copenhaver, Jr., Judge, United States District Judge for the Southern District of West Virginia, in Charleston, W. Va. (Oct. 30, 2001).

His father was a colorful and controversial Mayor of Charleston who was elected three times as mayor of the capital city.<sup>246</sup>

Young John Copenhaver grew up on the West Side of Charleston, attended Charleston High School and Stonewall Jackson High School for one year each, and graduated from Kentucky Military Institute in 1942 at the age of sixteen. That fall he entered The Citadel where he studied for a year-and-a-half and then entered West Virginia University in the fall of 1942; however, he was called into military service shortly thereafter, serving in the United States Army from 1944 to 1946. In 1947, he received an A.B. degree in Political Science from WVU, and in 1950, he earned an LL.B degree from the WVU College of Law.

Upon graduation from law school he spent one year as law clerk to Judge Ben Moore of the United States District Court for Southern West Virginia. Judge Copenhaver has fond memories of his clerkship with Judge Moore, especially his reputation for candor. Judge Moore once told Copenhaver that Bill Marland (who later became Attorney General and Governor of West Virginia) was his "best law clerk," but that Copenhaver was his "best researcher."<sup>247</sup>

Following his clerkship, he entered the private practice of law with the firm of Copenhaver & Copenhaver.<sup>248</sup> Civic-minded, like his parents,<sup>249</sup> he became active in public affairs, serving as President of the Legal Aid Society of

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<sup>246</sup> He was elected in 1951, 1955, and 1959. Mayor Copenhaver presided over the extension of key city streets, the erection of the Charleston Civic Center, and the building of a multimillion-dollar sewage treatment system. Under his leadership, Charleston became the largest city in the state when an area containing about 15,000 people was annexed.

An activist mayor with a keen eye for publicity, he gained considerable notice when he banned the novel *Peyton Place* from city newsstands and the Kanawha County Public Library. Charleston lawyer A. Guy Stone, with whom the author practiced law in Charleston in the late 1960's, was a friend of Mayor Copenhaver. Mr. Stone used to laugh about how much fun the mayor had with the banning of *Peyton Place*. On one occasion, Mr. Stone recalled, after ranting about the book before a group of reporters, Mayor Copenhaver came back into his office where Mr. Stone was waiting to meet with him. The Mayor told Mr. Stone, "Well, that should keep the reporters busy for a while." Then he laughed and said, "At least the citizens of this city know they have a mayor!" (This story was related to the author of this history in a personal conversation with Mr. Stone.)

Mayor Copenhaver was also a consummate politician. During his tenure in city hall, sports-minded citizens sought to bring a AAA baseball club to the city. An exhibition game was held, and over 5,000 fans showed up. Mayor Copenhaver's friend, Guy Stone, said, "Mayor Copenhaver didn't know much about baseball, but he sure knew what 5,000 fans meant." The *Charleston Senators*, in a AAA league, were soon located in Charleston. Mayor Copenhaver died on August 15, 1959, just four months into his third term. Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>247</sup> Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>248</sup> He never practiced with his father. The elder Copenhaver had been elected Mayor in the spring of 1951, while Judge Copenhaver left his law clerk's job in June of that year. *Id.*

<sup>249</sup> Judge Copenhaver's mother was a long-time member of the Charleston City Council.

Charleston, President of the Municipal Planning Commission of the City of Charleston,<sup>250</sup> Chair and President of the West Virginia Housing Development Fund, and Chair of the Visiting Committee of the WVU College of Law.

In 1958, while in his early 30's, he was named Referee in Bankruptcy for the Southern District of West Virginia, a position in which he acquired a national reputation as a bankruptcy expert.<sup>251</sup> At the time of his elevation to the United States District Judgeship, he was serving as president of the National Conference of Bankruptcy Judges and Chair of the Consumer Bankruptcy Committee of the American Bar Association. Judge Dennis Knapp said of Copenhaver at the time of his elevation to the District bench: "In matters that are highly technical and complicated, he has the ability to wade through them and come up with the proper result, such as the DMC matter."<sup>252</sup>

He shared his bankruptcy expertise in a unique way – he became an Adjunct Professor of Law at West Virginia University and from 1970 to 1976, traveled weekly from Charleston to Morgantown to teach a class in Creditor's Rights.<sup>253</sup> His service to the College of Law was recognized in 1971 when he received the Gavel Award for his outstanding teaching. At the same time, he also served as a faculty member at the Federal Judicial Center, teaching an occasional seminar.

On August 26, 1976, the same day Judge K. K. Hall was elevated from the District to the Circuit bench, President Gerald Ford nominated Copenhaver to the vacancy on the District bench. Like Hall, Copenhaver was confirmed by the United States Senate on September 1, and received his commission on September 3. At the time of his selection for the federal bench, friends of the family described Judge Copenhaver as much like his mother, "meticulous, but patient, and a very gracious person."<sup>254</sup>

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<sup>250</sup> While he served on the Municipal Planning Commission, the members devised a 13-point plan for the city. Twelve of the thirteen projects were completed. The only one not completed was the erection of a ramp to enter the South Side Bridge from the expressway when going west, without crossing under the bridge, going up the ramp by the old C&O station, and crossing over traffic to get across the bridge into downtown Charleston. Judge Copenhaver maintains that this is still a project the city should undertake. Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>251</sup> The position is now known as "United States Bankruptcy Judge." Judge Ben Moore appointed Copenhaver Referee two and a half months before Judge Moore's death. The appointment was for a six-year term, with unlimited re-appointments permitted. When Judge John Field was appointed to the bench, he told Copenhaver, "We're going to be together for a long time." Judge Field later assisted Copenhaver in being appointed to the District bench. *Id.*

<sup>252</sup> Rosalie Earle, *Hall, Copenhaver Win Confirmation*, CHARLESTON GAZETTE, Sept. 2, 1976, at 2A. The DMC matter involved the reorganization of the bankrupt Diversified Mountaineer Corporation, which Judge Copenhaver supervised as Bankruptcy Judge. *Id.*

<sup>253</sup> After teaching at the College of Law for a while, it became apparent that he taught the largest classes in the school. He proudly told his mother of the large enrollment in his classes and she replied, "You must be pretty easy on grades." Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>254</sup> Earle, *supra* note 252, at 2A.

Judge Copenhaver was involved in some far-reaching cases during his days on the bench. Earlier, Judge Hall had presided over a class action lawsuit arising from the disastrous 1972 Buffalo Creek Flood. The case settled in June 1974 for \$13.5 million. The following year, Cross Lanes lawyer Phillip Gaujot filed a class action lawsuit on behalf of 348 juvenile survivors of the Buffalo Creek disaster who had not been parties to the earlier lawsuit. Gaujot's suit sought damages of \$225 million. The Pittston Coal Company lawyers responded with a promise to "fight every one of the new claims in court."<sup>255</sup> The case was assigned to Judge Copenhaver. In 1977, Pittston settled with Gaujot for \$4.8 million. A key to the settlement was the ruling by Judge Copenhaver that five children who were *in utero* at the time of the flood could pursue their claims in court, because medical evidence showed a mother's fright could affect an unborn child. Coincidentally, four of the five claimants were less than six months developed at the time of the flood, a gestation period then considered the age at which a fetus could survive outside the womb.<sup>256</sup>

Judge Copenhaver also facilitated the innovative settlement of a very complex case involving a contaminated chemical company site in Nitro, West Virginia. The Fike/Artel Chemical Company was located in Nitro, on the site of a World War I munitions plant. The company operated as a specialty chemical manufacturing facility before it was abandoned in 1988. In 1983, the United States Environmental Protection Agency had designated the 12-acre site as a priority for cleanup under the "Superfund Act."<sup>257</sup> The settlement Judge Copenhaver oversaw was known as a "global" settlement because it was a settlement involving all parties to the matter, which included 54 defendants, the EPA, other federal agencies, the State of West Virginia, and the City of Nitro. When the EPA first ordered cleanup action, the Agency considered conditions at the site to be extremely threatening. The potential risk to human health and the environment due to fire, catastrophic explosion, and the continual release of hazardous substances led the Agency to take emergency action to remove the threat. Highlights of the settlement included the following:

- Reimbursement by 54 defendants to the United States of \$19.6 million in costs spent by the government for Superfund response actions, representing half of the government's past costs.

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<sup>255</sup> Maryclaire Dale, *After the Flood, the Legal Battle Began*, CHARLESTON GAZETTE ONLINE, <http://www.wvgazette.com/static/series/buffalocreek/BUFF223B.html>.

<sup>256</sup> Jack McCarthy, *Voices Of Buffalo Creek Families Cannot Forget the Day When Their Worlds Were Turned Upside Down*, CHARLESTON GAZETTE, Feb. 23, 1997, at 1A.

<sup>257</sup> The "Superfund Act" is more properly known as the "Comprehensive Environmental Response, Compensation, and Liability Act." The Act was passed by the United States Congress on December 11, 1980. 42 U.S.C. § 9601 (2002).

In addition, the EPA wrote off \$14 million as an “orphan share” by the former owners and operators of the site;<sup>258</sup>

- Reimbursement to the State of \$1.15 million for Superfund response actions and annual funding of \$30,000 to pay state oversight expenses;
- A commitment to clean up soil and groundwater in an amount not to exceed \$59 million, provided that the future land use of the site is industrial;
- A commitment by EPA and the state to support the City of Nitro in its effort to redevelop the site.<sup>259</sup>

In a 1982 case, Judge Copenhaver approved a plea bargain which provided that Westmoreland Coal Company pay \$1 million in penalties for its role in a 1980 methane gas explosion that killed five miners in a Boone County mine.<sup>260</sup> In a case six years later, Wade Carter, who pled guilty to a charge involving transporting stolen cars into West Virginia, appeared before Judge Copenhaver for sentencing. Along with an 18-month stint at the Federal Correctional Institution in Ashland, Kentucky, and three years on supervised release when the prison term was over, the Judge’s sentence further provided that the “defendant participate in a literacy program.” Item #15 of his Supervised Release read: “The defendant shall enroll and remain in a literacy program until he learns to read proficiently and can demonstrate to the Probation Department his ability to read one book a month.”<sup>261</sup>

In 1991, when private, for-profit trade schools were flourishing, Judge Copenhaver ruled that students who had attended a for-profit trade school could avoid liability to banks for educational loans if the behavior of these trade schools was found to be “unconscionable” by the Circuit Court of Ohio County, West Virginia.<sup>262</sup> He held that the Higher Education Act (“HEA”) did not necessarily preempt the West Virginia Consumer Protection Act (“WVCPA”). Thus, students who had attended the Northeastern Business College in Wheeling by obtaining loans through the Guaranteed Student Loan Program could default

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<sup>258</sup> An “orphan share” is money that would have been owed by additional responsible companies that are now defunct.

<sup>259</sup> “Global” settlement announced for Fike/Artel Superfund cleanup, U.S. WATER NEWS ONLINE, May 1997, <http://uswaternews.com/archives/arcrights/7gloset5.html>.

<sup>260</sup> See generally *State ex rel. Perry v. Miller*, 300 S.E.2d 622, 624 (W. Va. 1983).

<sup>261</sup> *United States v. Carter*, S.D. W. Va., Case No. 2:88-00165-02. Judge Copenhaer asks every criminal defendant: “Do you read? Do you read well? Can you write? Can you write well?” Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>262</sup> See generally *Tipton v. Sec’y of Educ.*, 1993 WL 545724, Civ.A. No. 2:90-0105, (S.D. W. Va. Aug. 28, 1992).

on those loans for reasons set forth in the WVCPA, as well as the traditional reasons in the HEA (death, disability, or discharge in bankruptcy). More importantly, Judge Copenhaver ruled that the defenses found in the WVCPA could be asserted against the banks that had provided the loans and the guarantee agencies that took responsibility for collecting payment, just as if the defenses were being asserted against the school itself. This was important because, by the time this suit had been brought, Northeastern Business College had closed and was without assets.<sup>263</sup>

Of all the cases he presided over, however, the Judge found the criminal cases to be the most interesting. He took over the “pot plane” case from Judge Dennis Knapp, when Judge Knapp was hospitalized for heart trouble.<sup>264</sup> While Judge Knapp returned to the case in time for sentencing and appeals, it was, as Judge Knapp himself described it, a very spirited contest.

Judge Copenhaver has presided over four cases that have been appealed all the way to the United States Supreme Court. In three of those cases, Judge Copenhaver’s decisions were upheld by the Supreme Court.

The first was the “pot plane” case.<sup>265</sup> That case involved a question arising from the grand jury indictments. Federal Rule of Criminal Procedure 6(d) provides that only specified persons, including “the witness under examination,” may be present at a grand jury proceeding.<sup>266</sup> In this case, a grand jury had indicted the defendants for drug-related offenses and conspiracy. The grand jury then returned a superseding indictment in which the conspiracy charge was expanded. At the second grand jury hearing, two Government witnesses testified in tandem before the grand jury. Judge Copenhaver refused to dismiss the convictions based on the “tainted” indictment, on the basis of a comparison between the two indictments and the evidence on which the indictments rested, holding that the violation of Rule 6(d) had not harmed the defendants. With respect to a conspiracy charge which had been expanded by the joint testimony, Judge Copenhaver held that the grand jury “had before it ample independent evidence [apart from the joint testimony] to support a probable cause finding of the charges.”<sup>267</sup> On appeal, the United States Court of Appeals for the Fourth Circuit reversed, holding that the simultaneous presences of these two witnesses violated Rule 6(d), and that even though they were later convicted in a jury trial, the verdict had to be set aside on any count for which an indictment was obtained, based on the joint-testimony of the two witnesses.<sup>268</sup> The United States Supreme Court reversed the Fourth Circuit, holding that the petit jury’s guilty

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<sup>263</sup> *Id.*; Jason DeParle, *In Ruling, Hope for Students Deceived by Schools*, N.Y. TIMES, Late Edition, July 15, 1991, at A11.

<sup>264</sup> *United States v. Lill*, 511 F. Supp. 50 (S.D. W. Va. 1980).

<sup>265</sup> *United States v. Mechanik*, 475 U.S. 66 (1986).

<sup>266</sup> FED. R. CRIM. P. 6(d).

<sup>267</sup> *Lill*, 511 F. Supp. at 61.

<sup>268</sup> *United States v. Mechanik*, 735 F.2d 136 (4th Cir. 1984).

verdict established probable cause to charge the defendants with the offenses for which they were indicted and thus rendered harmless any error that may have flowed from the violation of Rule 6(d).

The second case in which the United States Supreme Court upheld Judge Copenhaver involved a truck driver who had been fired for failing a drug test.<sup>269</sup> In this case, an employer sought to vacate an arbitration award that had reinstated a discharged employee. Judge Copenhaver granted summary judgment for the union and the Fourth Circuit affirmed. Certiorari was granted by the Supreme Court. Justice Breyer's opinion held that considerations of public policy, as reflected by the Omnibus Transportation Employee Testing Act of 1991 and Department of Transportation implementing regulations, did not preclude enforcement of an arbitration award ordering an employer to reinstate a truck driver who had twice tested positive for use of marijuana.

Judge Copenhaver's third case upheld by the United States Supreme Court concerned the imposition of sentencing enhancement for a defendant, under the federal sentencing guidelines, for giving false testimony in her defense.<sup>270</sup> In this case, the defendant was charged with conspiracy to distribute cocaine. The government presented five witnesses who had taken part in, or observed, the defendant trafficking in cocaine. As the sole witness in her own defense, the defendant denied the five witnesses' inculpatory statements and claimed she had never possessed or distributed cocaine. Following her conviction, Judge Copenhaver enhanced her sentence, under the United States Sentencing Guidelines, after finding that she had committed perjury in her trial testimony.<sup>271</sup> On appeal to the Fourth Circuit, the defendant's conviction was upheld, but her sentence was vacated because the court found enhancement based on alleged perjury would be unconstitutional since it could result in enhancement of the sentences of all defendants whose testimony is deemed false.<sup>272</sup> The United States Supreme Court overruled the Fourth Circuit on the sentence enhancement, holding that a defendant's sentence could be enhanced under the Sentencing Guidelines if the court found the defendant had committed perjury at trial. As to defendant's contention that an enhanced sentence for her willful presentation of false testimony undermined her right to testify, the court reiterated that a defendant's right to testify does not include a right to commit perjury.<sup>273</sup>

The fourth of Judge Copenhaver's cases to reach the United States Supreme Court involved extortion by a state legislator.<sup>274</sup> In this case, a member

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<sup>269</sup> E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57 (2000).

<sup>270</sup> United States v. Dunnigan, 507 U.S. 87 (1993).

<sup>271</sup> United States v. Dunnigan, No. CR 89-36 (S.D. W. Va. 1990).

<sup>272</sup> United States v. Dunnigan, 944 F.2d 178 (4th Cir. 1991), *reh'g denied*, 950 F.2d 149 (4th Cir. 1991).

<sup>273</sup> United States v. Dunnigan, 507 U.S. 87, 96 (1993).

<sup>274</sup> McCormick v. United States, 500 U.S. 257 (1991).

of the West Virginia House of Delegates had sponsored a bill, sought by an organization of doctors, to extend temporary medical permits for foreign medical school graduates to practice medicine while studying for the state licensing exam. After informing the doctors' lobbyist, during his 1984 reelection campaign, that his campaign was expensive, that he had paid considerable sums out of his own pocket, and that "he had not heard anything from the foreign doctors," the delegate received cash payments from them which he never listed as campaign contributions or reported as income on his 1984 federal income tax return. He was indicted for extorting payments under color of official right and filing a false income tax return. Following his conviction for one extortion count and the tax violation, he appealed. The Fourth Circuit upheld the conviction, holding that an elected official's conviction for extortion under the Hobbs Act does not require proof of a *quid pro quo* – a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act – unless the payments are "legitimate" campaign contributions.<sup>275</sup> The United States Supreme Court overturned the Fourth Circuit, holding that a *quid pro quo* is necessary for a conviction under the Hobbs Act when the official receives a campaign contribution, regardless of whether it is a legitimate contribution. Property is "extorted" in violation of the Hobbs Act, the Court said, only if the payments are made in return for an explicit promise or undertaking by the official to perform, or not to perform, an official act.<sup>276</sup>

Judge Copenhaver is the only person currently employed by the Federal Court to have worked in all three court houses: the Capitol Street building that now houses the Kanawha County Public Library,<sup>277</sup> the Quarrier Street Court House, and the new Robert C. Byrd Court House. Unlike Judge Field, Judge Copenhaver was anxious to move from the Capitol Street building to the then-new building on Quarrier Street.<sup>278</sup>

Outside the courtroom, Judge Copenhaver has a fondness for golf, although he describes his golf game as, "pretty feeble these days." He is also fond of growing flowers and is noted for keeping a beautiful garden. Judge Copenhaver is married to the former Camille Ruth Smith of Parkersburg. They are the parents of three sons, John, III, a Charleston banker, Jim, a Richmond, Virginia, lawyer, and Brent, a Morgantown lawyer. The Copenhaver's have four grandchildren.<sup>279</sup>

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<sup>275</sup> United States v. McCormick, 896 F.2d 61 (4th Cir. 1990).

<sup>276</sup> *McCormick*, 500 U.S. at 273.

<sup>277</sup> Judge Copenhaver clerked for Judge Moore and also worked as a Bankruptcy Referee.

<sup>278</sup> Interview with Hon. John T. Copenhaver, Jr., *supra* note 245.

<sup>279</sup> In keeping with the family's use of the name "John," the Copenhaver's son, Jim, has a son named "Sean," which is Irish for "John." *Id.*



ROBERT J. STAKER<sup>280</sup>

Robert Jackson Staker, the son of Frederick George Staker, Sr., and Nada Frazier Staker, was born in the Mingo County mining community of Kermit on February 14, 1925. He demonstrated his independence at an early age. At birth he was given the name “Jack” Staker. When he was a small boy of three or four, he was sitting on the front steps of his home when some older boys came by. “What’s your name?” they asked. Young Staker’s father had a co-worker named Bob of whom the boy was very fond, so he replied, “Bob.” He was thereafter known as Bob and his name was legally changed to Robert J. Staker only shortly before assuming his position on the federal bench.<sup>281</sup>

Had it not been for his father and high school principal, he may never have graduated from high school. During World War II, three of his four brothers were already in the armed services and only about three of his male classmates still remained in school, the others having joined some branch of the armed forces. But Staker’s parents were not about to permit their fourth child go without a high school education. Staker recalled, “I had heard that if you joined the military in your senior year at school, you would be considered a graduate. I thought if I just quit school, my father would relent and sign my waiver to enlist when I was only seventeen years of age. So, in January, about a month before my 18<sup>th</sup> birthday, I dropped out.” He was mistaken. Two weeks after he dropped out, his principal met with Staker’s father, a long-time agent for the Norfolk and Western Railway. “That’s when the roof fell in and I marched back to school,” Staker recalled. He turned eighteen a few weeks later, but the draft board would not call him into the service until he had finished his last semester in high school. In August 1943, he was drafted into the United States Navy, and after attending a training course at the University of Wisconsin, he served as a radioman on a destroyer in the Pacific until the end of World War II.<sup>282</sup>

After he was discharged, soon after returning to the states, he enrolled in Marshall College<sup>283</sup> in Huntington, and received his pre-law training there and at West Virginia University, in Morgantown, from the latter of which he earned his LL.B. degree in 1952.<sup>284</sup> Following graduation, he entered the private practice of law as a sole practitioner in Williamson, the county seat of Mingo County, on June 6, 1952. Living at home with his parents, he had, by the end of 1952, cleared what he now calls “the magnificent sum of \$290.” As he now

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<sup>280</sup> Any otherwise uncited factual information about Judge Staker is taken from an interview with Hon. Robert J. Staker, Judge, United States District Court for the Southern District of West Virginia, in Huntington, W.Va. (Feb. 7, 2001).

<sup>281</sup> *Id.*

<sup>282</sup> Rosalie Earle, ‘Hillbilly’ District Judge Finds Life as a Referee Demanding, CHARLESTON GAZETTE, Nov. 30, 1979, at 11B; Interview with Hon. Robert J. Staker, *supra* note 280.

<sup>283</sup> Now Marshall University.

<sup>284</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 93-94.

recalls, “in those early years in private practice, I researched every issue dry lest my inexperience would show.” Without a law library of his own, he would cross the Tug Fork River into Kentucky and do research at a law firm in Pikeville.<sup>285</sup> His wife, Sue, whom he married in 1955, must have seen Staker as a young man of promise, and his career reflected that promise. In 1960, he served briefly as Assistant Prosecuting Attorney of Mingo County and, in 1965, helped formed the law firm of Hogg & Staker, where he remained until 1968.<sup>286</sup> That year he ran successfully for the position of Circuit Judge of Mingo County, a position he would occupy with distinction for the next ten years.

On June 14, 1979, President Jimmy Carter nominated Staker to a new seat on the United States District Court for Southern West Virginia.<sup>287</sup> His appointment was confirmed by the Senate on September 11, and he received his commission on September 13. At his swearing-in ceremony on September 22, 1979, at the United States Courthouse in Charleston, Judge Staker spoke briefly as the ceremony was coming to a close.<sup>288</sup> Five weeks later, a staff writer for the *Charleston Gazette* did a feature article on the new judge, headlined “‘Hill-billy’ District Judge Finds Life as a Referee Demanding.”<sup>289</sup> The article presented a revealing insight into the judge’s character.

United States District Judge Robert J. Staker disagreed in a recent hearing with the lawyer’s approach.

“You’re trying to wag the dog’s tail by flicking his ear,” said Staker, pausing briefly to spit tobacco juice into a paper cup that he keeps by his side at the bench.

The silver-haired, distinguished-looking judge would like you to believe he’s a typical product of the coal mining region of Mingo County, where he has lived nearly all his life. “I’m a dyed-in-wool, confirmed hillbilly,” he said in an interview this week.

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<sup>285</sup> Interview with Hon. Robert J. Staker, *supra* note 280.

<sup>286</sup> His brother, Zane Gray Staker, already mentioned as counsel to the Pittston Coal Company in the Buffalo Creek disaster, asked Robert to move to Huntington to enter the practice with him. As Judge Staker recalls it, “I was making a cornbread-living down in Williamson, and Zane assured me I could make substantially more practicing law with him in Huntington. But I was used to being my own boss and enjoyed practicing in Williamson, so I decided to stay there.” Interview with Hon. Robert J. Staker, *supra* note 280.

<sup>287</sup> The position was created by Pub. L. No. 95-486, § 92 Stat. 1629 (1978). The new judgeship was created because of an abundance of cases arising in the Southern District of West Virginia.

<sup>288</sup> Judge Staker was sworn in during the same ceremony in which Judge James Sprouse was sworn in as a United States Circuit Judge. Thus, he spoke after the various dignitaries and the newly-appointed Judge Sprouse. Judge K. K. Hall described the two new judges as diamonds in the rough from Mingo County.

<sup>289</sup> Earle, *supra* note 282, at 11B.

That impression was quickly dispelled by the judge's polysyllabic vocabulary that left at a loss the questioner without a dictionary. Likewise, Judge Staker listed anthropology, archeology and ancient history as pleasure reading matter. He said he especially enjoyed Isaac Asimov's books on popular science subjects.<sup>290</sup>

When he came on the federal bench, he was faced with a backlog of six or seven hundred pending civil cases on his docket. He later noted that it was ironic that he first wanted to become a judge because he hoped to have more time to himself. "I thought the judicial duties wouldn't be so demanding and taxing and so time-consuming. There were so many books I wanted to read and so much I wanted to do that I couldn't find time for." But, when he left the circuit bench in Mingo County, after a decade, he was working as hard as he had been in private practice, and the federal bench was no less demanding.<sup>291</sup>

Judge Staker tackled the several hundred civil cases on his docket, as well as an additional several hundred asbestosis cases that were filed and assigned to him soon after he assumed the federal bench. In a straight-forward manner, he set ten of the asbestosis cases for trial nearly every Monday morning. "After I did that and had tried two of them," he recalled later, "lawyers began settling them." But the process was not without irony. Over one weekend a huge portion of the ceiling in the federal courtroom fell into the jury box. When the General Services Administration, which is responsible for maintaining federal facilities, investigated the ceiling, it was found to be full of *asbestos*! At that time, no trials were scheduled to be heard for some time in the neighboring Wayne County, West Virginia Circuit courtroom. Judge Robert Chafin, the newly-elected judge of that court, had served for several years as Prosecuting Attorney of Wayne County and he had, of necessity, recused himself from criminal cases on which he had worked as prosecutor. As a result, no trials were being held in the Wayne County Courthouse for a while, so Judge Staker tried

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<sup>290</sup> *Id.* If Judge Staker is, as he described himself, a "hillbilly," the commonplace definition of the term will need to be modified. Anyone who knows the judge is well aware of his command of the English language. To those unfamiliar with him, his brief (and very "unhillbilly-like") remarks at his swearing-in ceremony should have provided a hint, even as he spoke of his preference to remain silent that day:

When a person finds himself on the very bottom of the totem pole, a circumstance which is not at all strange to me from time to time, and his remarks of necessity must follow those of such articulate and august gentlemen who have spoken heretofore, perhaps the wisest course would be to follow the Biblical prescription of holding one's tongue and hoping as faintly as one could that someone would count him wise. I see that the program has denied me that faint hope and I must demonstrate otherwise.

Of course, the remarks that followed did anything but support his suggestion that he should have remained silent.

<sup>291</sup> Earle, *supra* note 282, at 11B.

cases in that courtroom until the ceiling of his federal courtroom was cleared of asbestos and completely restored.<sup>292</sup>

Judge Staker's most significant case involved a challenge to the constitutionality of a West Virginia statute that reapportioned electoral districts for the legislature.<sup>293</sup> The plaintiffs argued that the reapportionment violated the Equal Protection Clause of the United States Constitution because voters in some districts had lesser effect and worth than voters in other districts due to a disparity of population in the districts. Additionally, they argued that the legislature had given too much recognition of incumbency in the reapportionment statute. The court ruled against the plaintiffs, holding, among other things, that the deviation from the ideal population did not violate equal protection and that it was not unconstitutional to recognize incumbency in a reapportionment statute. Judge Staker anticipated an appeal to the United States Supreme Court. An appeal was taken and the Court summarily affirmed Judge Staker's decision with no comment.<sup>294</sup>

Because of his demanding workload, Judge Staker rarely published his opinions, as he had little time to edit them for publication. However, after the United States Supreme Court affirmed his decision in the *Holloway* case, Judge Staker did publish the District Court opinion.

In December 1994, after fifteen years on the federal bench, Judge Staker announced that he would take Senior Status at the end of the month. While he would still preside in approximately twenty-five percent of a docket normally carried by an active judge, his elevation to Senior Status meant that lawyers would lose the day-to-day services of a judge they described as "very gracious and very fair to attorneys," "very gentlemanly,"<sup>295</sup> "even handed - he's not plaintiff- or defendant-oriented," and "very fair."<sup>296</sup>

In twenty-six years on the state and federal benches, Judge Robert J. Staker has left his mark. Quiet, unassuming, learned, and extremely hard-working, he has made a multitude of relatives, friends, and associates (including, no doubt, his father's friend and the judge's namesake, "Bob") very proud.

The Stakers are the parents of two sons, J. Timothy Poore, a lawyer with offices in Williamson, and Donald Seth Staker, who resides in Huntington where he is employed by the Western West Virginia Chapter of the American Red Cross.

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<sup>292</sup> Interview with Hon. Robert J. Staker, *supra* note 280.

<sup>293</sup> *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W. Va. 1992).

<sup>294</sup> *Holloway v. Hechler*, 507 U.S. 956 (1993).

<sup>295</sup> The lawyer went on to add, "but don't let that deceive you into thinking that you're conning him." ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 93.

<sup>296</sup> *Id.*

WILLIAM MATTHEW KIDD<sup>297</sup>

William Matthew Kidd was born on June 15, 1918, in the Braxton County community of Burnsville, the second child of Robert H. and Henrietta Kidd.<sup>298</sup> Over the course of his childhood, he cultivated what became a life-long passion for history and politics, with history and great historical figures being his favorite reading subjects.<sup>299</sup>

After graduating from Burnsville High School in 1936, he attended Glenville State College where he received a teaching certificate. From 1938 to 1941, he taught grades one through eight in one-room schools in Braxton County, earning \$100 per month for a nine-month school year. During this time, he continued to visit Glenville where, in 1941, he met his future wife, Madelyn Conrad. As the Judge later recalled, "I was amazed, as was the rest of Glenville, that Madelyn would give this 'Burnsville boy' the time of day." Realizing that the law was his calling, Kidd enrolled in West Virginia University in the fall of 1941 to complete the course work necessary to enter law school. But he continued to travel every weekend to Glenville to visit Madelyn.

When Pearl Harbor was bombed and the United States thrust into war, Kidd enlisted in the Naval Air Corps and was sent to Corpus Christi Naval Air Station for flight training in the summer of 1942. Madelyn, who had graduated *Summa Cum Laude* from Glenville State in only three years with teaching degrees in Mathematics, English, and French, followed him to Corpus Christi. She ran the cash register in the commissary, while Cadet Kidd learned to fly and tried to learn to obey orders, something at which he later said he was never very good. On June 26, 1943, he received his wings and two days later, Madelyn and the newly-commissioned Lieutenant JG Kidd, were married. The following April, his daughter Susan was born. Madelyn and Susan stayed in Glenville while Lt. Kidd went to England as a naval aviator on submarine patrol in the North Atlantic. Following the war, Kidd came home with an Air Medal and the determination to reorient himself to civilian life. He went back to his teaching job in Braxton County where he also owned and operated two service stations.

Law school was never far from his mind. In 1947, he moved his family to Morgantown where he enrolled in the College of Law. In the spring of 1950, during his last semester in law school, he announced his candidacy for the West Virginia House of Delegates from Braxton County. He was elected and served one term.<sup>300</sup>

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<sup>297</sup> Any otherwise uncited factual information about Judge Kidd is taken from comments made during the memorial service cited in this section.

<sup>298</sup> His father served in the West Virginia House of Delegates in 1941-42 and his older brother, Robert Horner Kidd, served in the House in 1978-88.

<sup>299</sup> Memorial delivered in the Circuit Court of Harrison County on May 3, 1999.

<sup>300</sup> His election continued the tradition of family service in the West Virginia Legislature, a heritage reaching back to 1863 that included his father, grandfather, uncle, cousin, and brother Bob. *Id.*

Meanwhile, his law practice flourished due to his hard work and diligence. He was recognized as a savvy and accomplished trial lawyer, a development he once attributed in part to the State Farm Insurance Company's refusal to settle any of his cases. At one time, he had the distinction of having the largest jury verdict returned in Clay county, \$10,000. Possessing an outwardly simple demeanor, Judge Kidd portrayed himself as an unsophisticated country lawyer, a portrayal that could be devastating to those who accepted it. He was, in fact, an intellectually complex man who studied the law assiduously.<sup>301</sup>

He also continued his interest in politics, supporting those Democrats whose philosophies he espoused. One such candidate was Robert C. Byrd, who had been elected to the Senate of West Virginia in the same election that sent Kidd to the House of Delegates. In 1958, when then-Congressman Byrd ran for the United States Senate, Kidd campaigned at his side throughout central West Virginia and the two became life-long friends.

In 1962, Kidd was elected to an unexpired term of Prosecuting Attorney of Braxton County and was reelected for two full terms in 1964 and 1968. In 1974, he was elected to the unexpired term of Circuit Judge of the Fourteenth Judicial Circuit of West Virginia, encompassing Braxton, Gilmer, Clay, and Webster counties. Here he gained a reputation for being fair-minded, warm, compassionate, and knowledgeable about the law.

In the fall of 1979, at the urging of his old friend Senator Byrd, Judge Kidd's name was sent to the United States Senate for confirmation as United States District Judge for the Southern District of West Virginia by President Carter.<sup>302</sup> On December 21, 1979, the last day before the Senate adjourned, Senator Byrd scheduled the confirmation hearing before the Judiciary Committee for the morning, with the full Senate confirmation vote scheduled for that afternoon. Word was sent to Judge Kidd the day before but he was out fishing. When he was finally located, he hastened to Washington that night. The hearing was held the following morning, with Senators Byrd and Randolph sitting by his side. After a unanimous committee vote recommending confirmation, Judge Kidd retired to the Senate balcony to await the confirmation vote. The Senate then began the time-consuming debate and vote on the bailout of the Chrysler Corporation. Judge Kidd eventually left the balcony for a break. When he returned to the balcony, he learned that Senator Byrd wanted him in his office to

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<sup>301</sup> Following his election as Judge of West Virginia's Fourteenth Judicial Circuit in 1974, he frequently called the author of this history, who was serving as State Court Administrator, and requested money to purchase books for his judicial library. On one occasion he said, "I like to get into the books. Very few lawyers do the kind of research I believe is necessary and I like to stay ahead of them." He always got his books. (And a polite "thank you" telephone call invariably followed when the books arrived.)

<sup>302</sup> On October 20, 1978, the United States Congress had created an additional permanent judgeship and a temporary judgeship for the Southern District of West Virginia. Judge Kidd was nominated to the temporary judgeship. Pub. L. No. 95-486, § 92 Stat. 1629 (1978).

congratulate him on the Senate confirmation of his appointment. Judge Kidd had missed the confirmation vote.<sup>303</sup>

Judge Kidd was assigned to Bluefield, where he served for four years. In 1983, Congress reorganized the Northern and Southern Districts of West Virginia and Judge Kidd moved to Clarksburg in the Northern District.<sup>304</sup> For the next eight years, Judge Kidd worked hard, presiding over trials, taking pleas, and sentencing drug dealers and racketeers from north central West Virginia. According to the Administrative Office of the United States Courts, from 1983 through 1990, Judge Kidd sentenced 504 criminal defendants and terminated 2,380 civil cases.<sup>305</sup>

In 1990, Judge Kidd took Senior Status to spend more time with Madelyn and simply slow down. By 1996, Madelyn's health had deteriorated, requiring her hospitalization in Morgantown. For almost two years, he visited with her every day, his devotion never wavering. Madelyn died on November 9, 1998. Six weeks later, just five days before Christmas, Judge Kidd passed away.<sup>306</sup> As the minister said at the judge's funeral, "some people just have to be together at Christmas."

ELIZABETH V. HALLANAN<sup>307</sup>

Since 1951, the *Charleston Gazette* has bestowed the honor of "West Virginian of the Year" on 55 individuals throughout the state. This honor has twice gone to members of a single Charleston family, the Hallanans. In 1952, the *Gazette* selected Walter S. Hallanan following his seventh consecutive suc-

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<sup>303</sup> The only question raised on Judge Kidd's nomination was that of his age. The American Bar Association opposed naming persons over 60 years of age as federal judges. But, with the endorsements of Senators Byrd and Randolph, Judge Kidd's appointment was confirmed. At Judge Kidd's swearing-in ceremony, Senator Byrd recalled that President Lyndon Johnson had raised the same question of Judge Christie's appointment, but the Senator had reminded the President that "Judge Christie wasn't too old when President Kennedy nominated him."

<sup>304</sup> Act of January 24, 1983. Pub. L. No. 97-471, § 96 Stat. 2601 (1983). The Act moved Braxton, Webster, and Pocahontas Counties from the Southern District to the Northern District and Wood and Wirt from the Northern to the Southern District (making the configuration almost "Eastern" and "Western" Districts rather than Northern and Southern). The Act also provided that the "roving" judgeship (then held by Judge Haden) would be a judgeship for the Southern District only. (And, since Judge Haden then lived in Wood County, which was now moved to the Southern District, he was reassigned to the Southern District.) The temporary judgeship, which was then held by Judge Kidd, was made a permanent judgeship for the Northern District. (And, since Judge Kidd was from Braxton County, which was now moved to the Northern District, he was reassigned to the Northern District.)

<sup>305</sup> Memorial delivered in the Circuit Court of Harrison County on May 3, 1999.

<sup>306</sup> *Id.* Judge Kidd died five days before Judge Knapp and six and a half months before Judge Hall.

<sup>307</sup> Any otherwise uncited factual information about Judge Hallanan is taken from an interview with Hon. Elizabeth V. Hallanan, Judge, United States District Judge for the Southern District of West Virginia, in Charleston, W. Va. (July 19, 2000).

successful campaign for Republican National Committeeman and his ascent to second in seniority on the governing board of the national Republican Party.<sup>308</sup> Forty-five years later, the *Gazette* picked Walter Hallanan's daughter, Elizabeth, for the honor, noting "her ground breaking career and a body of work which reflects a courageous mind and a deep devotion to the state."<sup>309</sup>

Elizabeth Hallanan was born on January 10, 1925, in Charleston, the daughter of Walter Simms and Imogene Burns Hallanan. Her father was a long-time newspaperman who, in 1928, plunged himself into Republican politics by being elected Republican National Committeeman.<sup>310</sup> Her mother always said, "That's the most thankless job in the world, politics."<sup>311</sup> Shortly after her father's election as Republican National Committeeman, the Great Depression hit, and the nation – including the state of West Virginia – turned heavily Democrat. Walter Hallanan worked hard to preserve the two-party system in West Virginia, through some very difficult times. "This was his avocation, and he felt so strongly about the importance of a two-party system."<sup>312</sup>

Walter Hallanan was an attentive Methodist, but his daughter was raised in the church of her mother, a recent convert to Catholicism. As a member of a religious minority in West Virginia, Elizabeth Hallanan grew up learning lessons that would serve her well in some of the most difficult decisions she would ever encounter on the bench. While attending the public schools of Charleston, she endured commentary on her faith that the *Gazette* later called "both mischievous and mean." Of her mother's choice to raise her daughter in the church, Judge Hallanan later said, "that was pretty courageous stuff."<sup>313</sup>

Early in her childhood Judge Hallanan made contact with the federal judiciary, albeit in a mischievous fashion. Her home was in the 1500 block of Kanawha Street, which is now known as Kanawha Boulevard. At the far end of that block stood the home of United States District Judge George McClintic. As Judge Hallanan later recalled it, "As a child . . . my friends and I, although we did not know the judge, nevertheless thought of him as that mean, old, federal

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<sup>308</sup> Regarding this significant political accomplishment, the newspaper stated: "Walter S. Hallanan capped the bitterest fight of his political career with election to his seventh term as Republican National Committeeman yesterday, and thus moved into the spotlight of national politics as No. 2 man in seniority on the GOP governing board." Harry G. Hoffman, *Hallanan Wins 7th Term*, SUNDAY GAZETTE-MAIL, May 25, 1952, at 1, 32. Walter Hallanan was the second person named "West Virginian of the Year," the first being former Governor Okey L. Patteson. *Id.*

<sup>309</sup> Lawrence Messina, *Judge Elizabeth V. Hallanan West Virginian of the Year*, SUNDAY GAZETTE-MAIL, Dec. 28, 1997, at 1A.

<sup>310</sup> Hoffman, *supra* note 308, at 1, 32. At the time of his election as National Committeeman he was the youngest person to ever be elected to that position. *Id.* Hallanan was thirty-eight years old at the time of his election. *Id.*

<sup>311</sup> Messina, *supra* note 309, at 1A.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*



judge . . . . [O]n Halloween, as was the custom in those days, Judge McClintic's home had not escaped soaping of some windows."<sup>314</sup>

Judge Hallanan developed a love of both politics and the law while attending Roosevelt Junior High School in Charleston. She was elected president of her class and decided then that she would become a lawyer. "I thought the two went together," she said. "This course I have never regretted. I love the law, period." Known for her intellect, few were surprised when she applied for law school, even though women in law was something of a rarity in those days. In 1948, two years after graduating from Morris Harvey College,<sup>315</sup> she found herself one of only two females in a WVU Law class of 135. Most of her male classmates were agreeable, although she was never invited to join in their study groups. But some of the professors were a different matter. There was one chauvinistic professor who singled her out for blistering questions on the first day of her first class, a tough moment for any first-year law student. "There was another who flunked every girl who came through his class," she recalls. "They got him out after one year, but I still have that 'F' on my record."<sup>316</sup> Three years later, however, she graduated and was admitted to the bar in 1951. Between her terms of public service, she practiced as a name partner in Charleston law firms. But throughout her private practice of law she noticed one constant: no law firm ever interviewed her for a job. "So I made my own law firms," she recalls, "and did just fine."<sup>317</sup>

In 1952, she entered the private practice of law in Charleston, as a partner in the firm of Crichton & Hallanan. Being a woman lawyer at a time when this was rare led to some interesting developments. Her first criminal appointment was to defend a woman of what the Judge calls "some repute," who was charged with malicious wounding, a felony. During their first meeting at the jail, the woman looked at Miss Hallanan and declared, "I don't want no woman lawyer!" Although Hallanan got her client off with a mere assault and battery conviction, the woman never thanked her.<sup>318</sup>

Miss Hallanan's interest in politics had not dimmed during her school days and in 1954 she won the Republican nomination for the West Virginia House of Delegates from Kanawha County. No Republicans were elected from Kanawha County that year but she was back in 1956 and, aided by the twin victories of President Dwight Eisenhower and Governor Cecil Underwood, she won election to the House. Underwood's victory had helped elect 42 Republi-

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<sup>314</sup> Hon. Elizabeth V. Hallanan, Judge, Southern District of West Virginia, Remarks at the Presentation of Portrait of the Honorable Elizabeth V. Hallanan 53 (June 18, 1999) (transcript on file with the author). Judge Hallanan went on to say, "And now he and I are going to be hanging in that room out there together. And I can only hope he has forgiven my, will forgive my childish prank." *Id.*

<sup>315</sup> Now the University of Charleston.

<sup>316</sup> Interview with Hon. Elizabeth V. Hallanan, *supra* note 307; Messina, *supra* note 309, at 1A.

<sup>317</sup> Messina, *supra* note 309, at 1A.

<sup>318</sup> Interview with Hon. Elizabeth V. Hallanan, *supra* note 307.

cans in the 100-member House, but Hallanan remained part of a much smaller minority as one of only three women in the West Virginia Legislature.<sup>319</sup>

A year later, she left the House when Governor Underwood appointed her Assistant Commissioner of Public Institutions, a job that required her to oversee the state's prisons, mental hospitals, and juvenile homes. The knowledge gained on this job would serve her well in the years to come. In 1959 she became the first female judge of a trial court of record in West Virginia, when Governor Underwood appointed her to the newly-created Kanawha County Juvenile Court. On the occasion of her appointment to the bench, the Kanawha County Bar Association gave her a robe. The robe company sent her a form to complete. On it was a diagram of a man and the question, "Is your paunch high or low?" She replied, "I am a woman and do not have a paunch." (Since that time the company's form has had figures of both a man and a woman.)<sup>320</sup>

When the post came up for election in 1960, Judge Hallanan was defeated by an incumbent judge from another court in the circuit. Led by John F. Kennedy, the Democrats dominated the election in Kanawha County that year, but she lost by only 900 votes. "I loved that judgeship," Judge Hallanan said later. "I would have stayed there my entire life."<sup>321</sup>

Not one to let a political defeat drive her from public life, Hallanan was named Executive Director of the West Virginia Association of Colleges and Universities in 1961 and held that position until 1969, when Governor Arch Moore appointed her the first Chairwoman of the Public Service Commission of West Virginia. She later recalled that position as "one of the roughest jobs in the state," and especially disliked the fact that it wasn't as people-oriented as the jobs she had held earlier.<sup>322</sup>

She returned to private practice in 1975, with former Charleston Mayor Elmer Dodson and Stanley Deutsch, two staunch Republicans. It was there, in April 1983, that she received the telephone call from the United States Department of Justice asking if she would be interested in the post of United States District Judge.<sup>323</sup> "Can I give it some thought?" she asked. "Yes," was the answer, "we'll call back tomorrow." They did and she accepted. She later recalled that the rumors of her nomination were on the street before she even knew about the nomination.<sup>324</sup>

When she was in Washington for consideration by the United States Senate, Senator Robert C. Byrd had arranged for the entire Senate Judiciary Committee to be present for her hearing. All members except Massachusetts Senator Ted Kennedy were there. The appearance of the nearly full committee was both

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<sup>319</sup> Messina, *supra* note 309, at 1A.

<sup>320</sup> Interview with Hon. Elizabeth V. Hallanan, *supra* note 307.

<sup>321</sup> *Id.*

<sup>322</sup> Messina, *supra* note 309, at 1A.

<sup>323</sup> *Id.*

<sup>324</sup> Interview with Hon. Elizabeth V. Hallanan, *supra* note 307.

a blessing and a curse, since all of the Senators asked her questions except Delaware Democrat Joseph Biden, who said, “This is the best thing Ronald Reagan ever did.” “I’ve liked him ever since,” Judge Hallanan said later.<sup>325</sup>

She was confirmed by the full Senate on November 11, 1983, and received her commission three days later. Her installation ceremonies in Charleston on December 21, 1983, were presided over by Judge K. K. Hall. In his inimitable fashion, Judge Hall advised the new judge to emulate the humanity of Judge Knapp, the industry of Judge Copenhaver, the vocabulary of Judge Staker, the unflappability of Judge Kidd, the steadfastness of Judge Haden, and the overview of Judge Maxwell. Then he added, “There’s only one thing that I would say that perhaps you shouldn’t try to copy — Judge Haden’s beard.”<sup>326</sup>

Judge Hallanan had her share of noteworthy cases on the federal bench. In fact, her biography in the *Almanac of the Federal Judiciary* devoted nearly a page-and-a-half to her “Noteworthy Rulings.” Among the most difficult of her rulings was in the case in which she declared invalid an amendment to the constitution of West Virginia that required silent prayer sessions in West Virginia public schools.<sup>327</sup> On the bench barely over a year when the case came before her, it involved an amendment to the Constitution of West Virginia that had been approved by 78 percent of those voting in the 1984 election.<sup>328</sup>

In the case, Judge Hallanan quoted extensively from the testimony of an eleven year-old child of the Jewish faith, who told of being harassed because she read a science fiction book during the period of “contemplation, meditation and prayer” instead of praying.<sup>329</sup> Noting that “[f]rom a personal and moral standpoint, however, the decision herein contained is the most difficult one with which this Court has ever been faced and indeed, is likely as exacting as any which will ever come before it,”<sup>330</sup> Judge Hallanan went on to hold that the amendment “cannot withstand constitutional scrutiny and Plaintiffs are entitled to the relief they seek [a declaration that the amendment is unconstitutional as

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<sup>325</sup> *Id.*

<sup>326</sup> Hon. K.K. Hall, Judge, Southern District of West Virginia (at the time), Remarks at the Installation Ceremonies for The Honorable Elizabeth V. Hallanan 12-14 (Dec. 21, 1983) (transcript on file with the author).

<sup>327</sup> *Walter v. W. Va. Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985).

<sup>328</sup> The amendment read:

Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation, or prayer. No student of a public school may be denied their right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum. *Id.* at 1170 (quoting W. VA. CONST. art. III, § 15-a).

<sup>329</sup> *Id.* at 1171.

<sup>330</sup> *Id.* at 1173.

violative of their rights as guaranteed by the First and Fourteenth Amendments to the United States Constitution].<sup>331</sup> Then she added this stinging statement:

This Court cannot refrain from observing that in its opinion a hoax conceived in political expediency has been perpetrated upon those sincere citizens of West Virginia who voted for this amendment to the West Virginia Constitution in the belief that even if it violated the United States Constitution, “majority rule” would prevail. There is no such provision in the Constitution.<sup>332</sup>

Then, to make certain she was not misunderstood, Judge Hallanan concluded: “Finally, the Court observes that nothing in this Order prohibits or impedes the right of any West Virginia citizen, young or old, to pray in his or her own manner, any place, anytime.<sup>333</sup> This Order only prohibits State sponsorship of such prayer.”<sup>334</sup>

Judge Hallanan received over a thousand letters in response to her decision and was called everything from a devil worshiper to an atheist.<sup>335</sup> As she now recalls, “I wanted to shout from the housetops: ‘I have a very deep belief in God and heaven! I’m a devout Catholic!’ But there was no way I could do that.”<sup>336</sup>

In another controversial case, and one that made the pages of *The Wall Street Journal*, Judge Hallanan dismissed a federal environmental clean-up suit and criticized two Justice Department lawyers for concealing the fact that a potential government witness had lied on his résumé.<sup>337</sup>

The United States Department of Justice had sued to recover over \$5,000,000 the Environmental Protection Agency had spent cleaning toxic chemicals from a parcel of land in Minden, West Virginia.<sup>338</sup> But lawyers for defendant Shaffer Equipment Company, a mining equipment concern, learned that the supervisor of the costly clean-up – on whose “science” much of the clean-up was premised<sup>339</sup> – had lied on his résumé. The Supervisor, Robert Ca-

<sup>331</sup> *Id.* at 1177.

<sup>332</sup> *Id.* at 1177-78.

<sup>333</sup> *Id.* at 1178.

<sup>334</sup> *Id.*

<sup>335</sup> Interview with Hon. Elizabeth V. Hallanan, *supra* note 307. The complaints were not always from an anonymous public. As the Judge later recalled: “Certain members of the legislature took advantage of their immunity to call me whatever they wanted.” *Id.*

<sup>336</sup> *Id.*

<sup>337</sup> *United States v. Shaffer Equip. Co.*, 158 F.R.D. 80 (S.D. W. Va. 1994).

<sup>338</sup> *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 452 (4th Cir. 1993).

<sup>339</sup> *Id.* at 453. Caron’s chosen method of removal of hazardous substances from the site, the “solvent extraction method,” was a new and relatively unestablished method. Under this method, contaminated soil is washed on site in methanol to extract the PCB’s. The method was designed

ron, had misrepresented his academic credentials and qualifications in this case and others, falsely claiming to have a bachelor's degree from Rutgers University in Camden, New Jersey, and a master's degree from Drexel University in Philadelphia.<sup>340</sup> He also claimed to have taken courses at Trenton State College and Brookdale Community College. Caron had attended Rutgers but had not completed his class work for a degree. Drexel University, Trenton State College and Brookdale Community College had no record of him.<sup>341</sup>

Caron was expected to be called as a government witness against Shaffer Equipment and had submitted to a discovery deposition. Justice Department lawyer J. Jared Snyder had discovered the problems with Caron's resume by that time, but did not inform the court. Snyder's immediate superior, William A. Hutchins, also knew about the false resumé, but remained silent and continued to press the case against Shaffer Equipment Company.<sup>342</sup>

Judge Hallanan found that Snyder and Hutchins had "violated their duty of candor to this Court with respect to the 'Caron Problem' by repeatedly obstructing Defendants' attempts to uncover Mr. Caron's perjury and failing to reveal what they knew of Mr. Caron's misrepresentations once they learned of it."<sup>343</sup> Stating that the only appropriate sanction for this violation was dismissal, Judge Hallanan dismissed the action and awarded the defendants attorney's fees incurred in responding to the government's misconduct.<sup>344</sup>

On appeal, the Fourth Circuit agreed that the government's lawyers had breached their duty of candor to the court by failing to reveal Caron's misrepresentations. But the court held that dismissal of the case was too severe a sanction.<sup>345</sup> On remand, Judge Hallanan noted that the United States Department of Justice, Office of Professional Responsibility, had refused to find "misconduct"

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to avoid transportation of contaminated soil to a remote landfill for disposal. Although the EPA expended over \$1 million in implementing the solvent extraction plan at the site, the technique was not sufficiently successful to justify its continued use and, about a year after it had begun, Caron directed that the method be abandoned. *Id.*

<sup>340</sup> *Id.* at 454.

<sup>341</sup> *Id.*; Junda Woo, *Judge Throws Out U.S. Lawsuit Over Witness's Resume-Padding*, WALL ST. J., June 18, 1992, at B8.

<sup>342</sup> *Shaffer*, 11 F.3d at 454. At the trial in Beckley, the author of this history testified as an expert witness for Shaffer Equipment Company regarding the duty of the government's lawyers to disclose Caron's false resume. The Justice Department lawyers pressed their argument that the Department was "the world's largest law firm" and that it took time for matters such as the false resume to "go up the chain of command" and for the higher-ups to decide what to do about the matter. The author's response was: "That defense didn't work at Nuremberg and it won't work here." Judge Hallanan later commented that she liked that response. Interview with Hon. Elizabeth V. Hallanan, *supra* note 307.

<sup>343</sup> *United States v. Shaffer Equip. Co.*, 158 F.R.D. 80, 86 (S.D. W. Va. 1994).

<sup>344</sup> *United States v. Shaffer Equip. Co.*, 796 F. Supp. 938, 953-54. (S.D. W.Va. 1992).

<sup>345</sup> *Shaffer*, 11 F.3d at 453.

by Snyder and Hutchins. Instead, the office had characterized their behavior as “repeated exercises of poor judgment.”<sup>346</sup>

Judge Hallanan’s reaction to the response from the Justice Department’s Office of Professional Responsibility was this stinging rejoinder:

With such perfunctory treatment, two complete sentences, given to matters of ethics found to be worthy of at least a dozen paragraphs by the Fourth Circuit, it is no small wonder, but no excuse, that these attorneys behaved as they did. Quite frankly, it shocked this Court to learn of the Department of Justice’s superficial investigation and evaluation of the conduct of these attorneys. We are dealing here with a hodgepodge of bureaucratic bungling and cover up of abysmal proportions.<sup>347</sup>

She then ordered Jared Snyder and William Hutchins to pay from their personal funds \$2,000 and \$2,500, respectively, into the Superfund and further ordered them not to seek reimbursement of these sanctions from their employer.<sup>348</sup>

In a 1997 interview, Judge Hallanan cited the *Shaffer Equipment Company* case as the case of which she was most proud. “They covered it up in my court,” she told the reporter, “and ‘Katie bar the door’ when that happened.” She noted, “I’d like to think of it as the leading opinion in the country on that subject.”<sup>349</sup>

In other cases she has ordered a West Virginia city to pay \$36,000 in back pay to a white male who she found had been discriminated against when he applied for a position as police officer,<sup>350</sup> held that a railroad employee could not recover damages under FELA for the negligent infliction of emotional distress in the absence of a physical cause or a physical manifestation beyond that which is typically associated with emotional distress,<sup>351</sup> and placed the McDowell County Jail under a federal receivership so as to achieve compliance with federal and state constitutional mandates and previous court orders.<sup>352</sup>

Judge Hallanan received a great deal of media coverage during her years on the bench. Perhaps most indicative of how she was regarded throughout her career was an editorial that appeared in the *Charleston Gazette* about the time she was elevated to the federal bench. Noting that West Virginia had not

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<sup>346</sup> *Shaffer*, 158 F.R.D. 80, 87-88.

<sup>347</sup> *Id.* at 88.

<sup>348</sup> *Id.*

<sup>349</sup> Messina, *supra* note 309, at 1A.

<sup>350</sup> *Lilly v. City of Beckley*, 615 F. Supp. 137, 140 (S.D. W. Va. 1985). She also ordered that the plaintiff be offered employment when the next available opening occurred. *Id.* at 141.

<sup>351</sup> *Elliot v. Norfolk & W. Ry. Co.*, 722 F. Supp. 1376, 1378 (S.D. W. Va. 1989), *aff’d*, 910 F.2d 1224 (4th Cir. 1990).

<sup>352</sup> *Shaw v. Allen*, 771 F. Supp. 760, 765 (S.D. W. Va. 1990).

always been blessed with an abundance of public servants with integrity, the writer added that if West Virginians were “to be governed with integrity, they must elect to office men and women of the caliber of a Judge Betty Hallanan.”<sup>353</sup> The theme of this editorial was one that would play out consistently over her career. Fourteen years later, in an article discussing the *Shaffer Equipment Company* case, the reporter concluded by noting that younger lawyers “do not need a Latin phrase on their desks to remind them of principle and courage. Her supporters would say they need to look no further than the life of Elizabeth Hallanan.”<sup>354</sup>

Judge Hallanan assumed senior status on December 1, 1996, and died of complications from emphysema on June 8, 2004.

DAVID A. FABER<sup>355</sup>

When David A. Faber was appointed to the federal bench in 1991, the least of his concerns was familiarizing himself with his new surroundings. He had served for four years as United States Attorney for the Southern District of West Virginia and had seen all the federal courtrooms from the prosecutor’s table.

Faber was born in Sissonville, West Virginia, on October 21, 1942, the son of John S. Faber and his wife Elaine (Melton) Faber. His father was a supervisor with Union Carbide but the Faber family had some judicial connections. Faber’s grandfather, Oliver Faber,<sup>356</sup> and former West Virginia Supreme Court Justice (and long-time West Virginia Circuit Judge) Oliver Kessel, were first cousins.<sup>357</sup> Oliver Faber served in the West Virginia House of Delegates and was defeated for reelection by Judge Joe Bob Goodwin’s father in the Democrat landslide of 1932.<sup>358</sup> According to Judge Faber, the Fabers have been Republicans since 1856 when John C. Fremont was the party’s first presidential candidate.<sup>359</sup>

Faber graduated from West Virginia University with high honors in 1964 and in 1967 received his J.D. degree from Yale University, attending both

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<sup>353</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 92.

<sup>354</sup> Messina, *supra* note 309, at 1A.

<sup>355</sup> Any otherwise uncited factual information about Judge Faber is taken from an interview with Hon. David A. Faber, Judge, United States District Court for the Southern District of West Virginia, in Charleston, W.Va. (July 18, 2000).

<sup>356</sup> Named after Commodore Oliver Hazard Perry, a naval hero of the War of 1812.

<sup>357</sup> In typical West Virginia fashion, the connections get more complicated. Justice Oliver Kessel’s daughter, the late Ella Dee Kessel Caperton, was once married to West Virginia Governor Gaston Caperton.

<sup>358</sup> E-mail from Hon. David A. Faber, Judge, United States District Court for Southern West Virginia to the author (Nov. 22, 2005, 06:14:00 EST) (on file with the author).

<sup>359</sup> Jack McCarthy, *Faber Brings Much Experience to Federal Bench*, CHARLESTON GAZETTE, Jan. 27, 1992, at 11A.

schools on scholarships. Following graduation, he practiced briefly with the law firm of Dayton, Campbell and Love in Charleston before entering the Air Force, where he served in the Judge Advocate General's Corps from 1968 until 1972, leaving active service with the rank of captain.<sup>360</sup> That year he joined the firm of Love, Wise, Robinson & Woodrow where he practiced until 1981, when President Reagan appointed him United States Attorney for the Southern District of West Virginia.<sup>361</sup> At Love, Wise, Robinson, & Woodrow, Faber served as counsel for The West Virginia State Bar's legal ethics committee, in which role he argued for the committee before the state Supreme Court.

As United States Attorney, Faber's first interest was in fighting public corruption. The Attorney General of the United States asked Faber, and other United States Attorneys, to make drugs the top priority in their offices. Faber complied with this request but made certain that equal resources were designated for corruption cases. He organized a federal-state political corruption task force and named an assistant, Michael Carey, as its director. The task force concentrated on the county level and led to the convictions of sheriffs or former sheriffs of McDowell, Fayette, and Nicholas Counties.<sup>362</sup>

However, Faber's tenure as United States Attorney saw him involved in pursuing wrongdoing in a wide variety of cases. A St. Albans paving contracting company was convicted of defrauding the United States government and the state by shorting loads of asphalt delivered to state projects.<sup>363</sup> Faber's office also went after individuals involved in arson-for-profit schemes, resulting in the convictions of, among others, a former assistant attorney general of West Virginia, and a former sheriff and deputy sheriff of Nicholas County.<sup>364</sup> A former Westmoreland Coal Company mine superintendent, Kyle Jones, was convicted of criminal mine safety violations following a November 1980 explosion that killed five men. Jones was the first mine superintendent convicted of criminal

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<sup>360</sup> Faber continued his military service by serving in the United States Naval Reserve from 1973 to 1977 and joined the West Virginia Air National Guard from 1978 to 1992, ultimately retiring with the rank of Colonel. ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 89.

<sup>361</sup> David Greenfield, *Reagan Approves Faber for U.S. Attorney Position*, CHARLESTON DAILY MAIL, Nov. 19, 1981, at 12C. The paper reported that Congressman Mick Staton had announced the appointment of the thirty-nine year-old Faber as United States Attorney for the Southern District of West Virginia. *Id.* Faber would replace Robert B. King, who would later be appointed to the Court of Appeals for the Fourth Circuit by President Clinton. *Id.*

<sup>362</sup> McCarthy, *supra* note 359, at 11A. Carey ultimately succeeded Faber as United States Attorney and, in that capacity, directed the investigation and conviction of former Governor Arch A. Moore, Jr. He did not neglect the Attorney General's request to go after drug violations. He began the investigation of former Charleston Mayor Michael Roark for drug violations. Roark resigned as mayor and pleaded guilty to possession of cocaine the year after Faber left the United States Attorney's office. *Id.*

<sup>363</sup> Patty Vandergrift, *Orders & Haynes Pleads Guilty In Scheme To Cheat On Contracts*, CHARLESTON GAZETTE, Nov. 6, 1986, at 1A.

<sup>364</sup> Ron Hutchinson, *Fires on Upswing, Federal Agents Focusing on Arson Profit Schemes*, CHARLESTON DAILY MAIL, Feb. 5, 1986, at 1D.



mine safety violations.<sup>365</sup> Faber also investigated child pornography violations, resulting in an indictment and plea of guilty by a Charleston man under the Crime Control Act of 1984.<sup>366</sup> The United States Attorney's office also went after the promoters of coal tax shelter schemes, under which wealthy individuals were encouraged to invest in limited partnerships in West Virginia coal mines. The investors were promised financial gains from their investments if the mines made money and tax benefits if the mines were not profitable.<sup>367</sup> The office also increased efforts at debt collections which more than doubled cash collections for the federal government in the 1983 fiscal year. The money collected included debts from judgments won in civil suits, tax cases, environmental regulations violations, civil case fines, and repaid debts. The office also cracked down on people who failed to repay federal loans for such things as college assistance and career training.<sup>368</sup>

When Faber stepped down as United States Attorney, the *Charleston Daily Mail* editorialized about him:

Faber has proved himself an excellent steward of the government's – *everyone's* – business. He has worked with those West Virginians who had had enough of public and private corruption – and were willing to do something about it – and he has brought results.

Faber deserves the public's thanks and best wishes in his new career.

Decent West Virginians are sorry to see him go. They can only hope that his replacement will have a similar aggressive spirit.<sup>369</sup>

Following his resignation as United States Attorney, Faber returned to private law practice as a partner with the Charleston firm of Spilman, Battle, Thomas & Klostermeyer. However, he retained his interest in politics. In 1987 he served as an advisor on election laws to former Republican State Chairman John Raese, who was contemplating a run for Governor. He also served as campaign manager in Kent Strange Hall's successful 1991 race for Mayor of

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<sup>365</sup> United States v. Jones, 735 F.2d 785 (4th Cir. 1984).

<sup>366</sup> Ron Hutchison, *Crackdown Planned On Child Pornography*, CHARLESTON DAILY MAIL, Oct. 8, 1985, at 2A.

<sup>367</sup> Ron Hutchison, *Coal Fraud Convictions Aid U.S. Treasury*, CHARLESTON DAILY MAIL, Jan. 7, 1983, at 18A; Ron Hutchison, *Coal Tax Indictments Prompt Investigations*, CHARLESTON DAILY MAIL, April. 8, 1983, at C1.

<sup>368</sup> Ron Hutchison, *State Debtors Pay U.S. 1.2 Million*, CHARLESTON DAILY MAIL, December 5, 1983, at 1A.

<sup>369</sup> Editorial, *David Faber*, CHARLESTON DAILY MAIL, Sept. 9, 1986, at 4A.

Charleston.<sup>370</sup> From 1988 to 1990 he served as a special part-time assistant United States Attorney for the Northern District of West Virginia. In 1988 he served as a delegate-at-large to the Republican National Convention, where he was one of sixteen of the West Virginia delegates for George H. W. Bush.<sup>371</sup> In 1991 he chaired a committee of nine members (representing all major Republican candidates) to recommend changes in the state Republican party bylaws.<sup>372</sup>

On August 1, 1989, President George H. W. Bush nominated Faber to a newly-created seat on the United States District Court for Southern West Virginia.<sup>373</sup> Although he had a strong Republican pedigree, it took a little help from a long-time West Virginia Democrat to secure his seat on the bench. Faber's nomination had come to the Senate in the midst of the fight over the nomination of Judge Clarence Thomas to the United States Supreme Court. At the time it seemed unlikely that the Senate Judiciary Committee would get around to a hearing on Faber's nomination, which was scheduled for February 1992. Faber ran into Judge K. K. Hall, to whom he expressed his concern and Judge Hall placed a call to Senator Robert Byrd on a Thursday in mid-November. On the following Monday, Faber, who was home sick, received a call from the Justice Department requesting his presence in Washington, D.C., the next day. Senator Byrd had arranged for the Senate Judiciary Committee to question five nominees instead of the usual four, and Faber was to be the fifth nominee. The Committee approved of him, and he was confirmed by the Senate on November 21, 1991. He received his commission four days later.<sup>374</sup>

Since going on the bench, Judge Faber has dealt with a myriad of cases, with issues ranging from penalties for violating mine safety laws<sup>375</sup> to sentencing on the largest amount of crack cocaine ever seized in the state.<sup>376</sup> His first controversial decision came in March 1996 when he temporarily enjoined the enforcement of an election law provision passed by the West Virginia legislature in 1995.<sup>377</sup> The law required so-called non-partisan scorecards on candidates' positions distributed within 60 days of an election to bear a disclaimer to identify who was distributing the scorecards and also required the distributors to

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<sup>370</sup> Hall won the election by a 3 to 1 margin (8,212 to 2,466) over Democrat candidate Archie Chestnut. Grant Parsons, *Hall Captures Easy Triumph in Mayor's Race*, CHARLESTON GAZETTE, April 16, 1991, at 1A.

<sup>371</sup> In an interview with Judge Faber on July 18, 2000, he told of sitting with Judge and Mrs. K. K. Hall at a Fourth Circuit Judicial Conference years earlier. Mrs. Hall said to Judge Faber's wife, Debbie, "You are a delightful young couple, honey. You are Democrats, aren't you?" Interview with Hon. David A. Faber, *supra* note 355.

<sup>372</sup> Fanny Seiler, *Democratic Chairman Says He's Not To Blame*, CHARLESTON GAZETTE, May 14, 1989, at 2B.

<sup>373</sup> *Faber, David A.*, <http://www.fjc.gov/servlet/tGetInfo?jid=728>.

<sup>374</sup> Interview with Hon. David A. Faber, *supra* note 355.

<sup>375</sup> *United States v. Stillwell*, 799 F. Supp. 615 (S.D. W. Va. 1992).

<sup>376</sup> *Drug Smuggler Gets 30 Years In Prison*, CHARLESTON GAZETTE, June 22, 1996, at 5A.

<sup>377</sup> *W. Virginians for Life, Inc. v. Smith*, 952 F. Supp. 342, 344 (S.D. W. Va. 1996).

file complicated financial disclosure statements. In August 1996, Judge Faber permanently enjoined the provision and held that it was an unconstitutionally overbroad regulation of issue advocacy.<sup>378</sup>

In 2000, another case from Judge Faber's court caught the attention of the public, and the press. In May of that year he presided over a case that dealt with the beating of a McDowell County man by State Trooper, Gary Messenger, II.<sup>379</sup> Messenger had attended a keg party for a retiring State Police sergeant, while he was supposed to be on duty. Raymond Rose, the alleged victim, who lived across the street from the party site, had called the 911 dispatcher several times during the night to complain about noise coming from the party, which included some gunshots. At some point Trooper Messenger appeared in uniform in the party crowd, which Rose was observing from his balcony. Rose claimed Messenger told him to come downstairs so that he could whip him. Rose again called 911, begging for help. The operators instructed him to put the phone down and leave them connected. A few minutes later, when Rose had not come downstairs, Messenger and others found a door and forced it open. Rose fled with his pregnant fiancée and an 11-year-old niece to an office on the floor below his apartment. Messenger kicked in the door to the office, beat Rose up, and handcuffed him, with the howls of pain punctuated by the sound of blows being recorded on the 911 line.<sup>380</sup> Messenger then placed Rose in a cruiser and beat him again.<sup>381</sup> Rose was eventually charged with several misdemeanors and taken to the county jail. From there, officers took him to the hospital. Messenger claimed that he had only been trying to arrest a hostile, drug- and alcohol-impaired Rose that night. Messenger resigned from the state police within weeks of his encounter with Rose, while the investigation into the incident was still underway.<sup>382</sup>

Messenger was found guilty of assault and sentenced to a prison term of seven years.<sup>383</sup> Judge Faber later commented that the West Virginia State Police

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<sup>378</sup> *Id.*

<sup>379</sup> Lawrence Messina, *Trooper Said, 'You Can't Hide,' Jury Told Alleged Beating Victim Testifies In Federal Trial*, CHARLESTON GAZETTE, May 17, 2000, at 1A.

<sup>380</sup> Lawrence Messina, *Trooper Defends Actions Force Was Necessary to Arrest McDowell Man, Defendant Says*, CHARLESTON GAZETTE, May 19, 2000, at 1A. Rose's fiancée and his niece could be heard wailing in the background as Messenger screamed obscenities at Rose, who was begging for his life. The recording was backed up by other officers who had entered the room with Messenger, who testified they saw Messenger beat an unresisting Rose. *Id.*

<sup>381</sup> Rose suffered several broken ribs, a broken thumb, a bruised lung, and numerous bruises. He spent three days in the hospital. Lawrence Messina, *Ex-Trooper Convicted in Assault Prison Term Of Several Years Possible in Beating Of McDowell County Man*, CHARLESTON GAZETTE, May 20, 2000, at 1A.

<sup>382</sup> Lawrence Messina, *Trooper Went Much Too Far, 2 McDowell Officers Testify 'Don't Hit Me Anymore,' Victim Pleaded, They Say*, CHARLESTON GAZETTE, May 18, 2000, at 1A.

<sup>383</sup> Lawrence Messina, *Former Trooper Sentenced to 7 Years, Messenger Convicted of Civil-rights Violation in Welch Man's Beating*, CHARLESTON GAZETTE, Dec. 5, 2000, at 1A.

Academy should study the case to see what happens “when the rights of citizens of this country are not respected.”<sup>384</sup>

In terms of publicity, however, nothing compared to the court proceedings arising out of the failure of the First National Bank of Keystone, in McDowell County, a bank that had once been identified by the banking industry as the most profitable community institution in the nation.<sup>385</sup> The collapse of the bank was prompted by the over-reporting of Keystone’s assets by more than \$500 million in 1999. (Federal regulators called the organization more of a Ponzi scheme than a bank.)<sup>386</sup> Regulators claimed bank officials falsely listed sold assets as still belonging to the bank and depositors lost more than \$15 million, the portions of their accounts not covered by the Federal Deposit Insurance Corporation. When the bank shut down, its publicly traded stock became worthless, which cost shareholders an estimated \$135 million. Some of the lawsuits arising out of the bank failure alleged that Keystone insiders falsely inflated the stock’s price and then dumped it onto unwitting investors.<sup>387</sup>

Keystone Bank employees Terry Church and Michael Graham were also accused of tampering with microfilmed bank records, burying other records in a trench dug on Church’s McDowell County ranch, and preventing federal bank examiners from reviewing bank records.<sup>388</sup> They were convicted following a four-week trial, and Church was sentenced to four years and nine months in prison while Graham was sentenced to four years and three months.<sup>389</sup> Reflecting Judge Faber’s sense of the seriousness of their crimes, Church and Gra-

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<sup>384</sup> *Week in Review Dec. 3-8, 2000 Legislative Leaders Picked For Session*, CHARLESTON GAZETTE, Dec. 10, 2000, at 7B.

<sup>385</sup> Having once touted itself as “the most profitable community bank in the country,” the bank’s failure was asserted to be possibly “the 10<sup>th</sup> largest bank failure since the Great Depression.” Lawrence Messina, *Up to 400 Boxes of Keystone Files, Damaged, Judge Told*, CHARLESTON GAZETTE, Feb. 11, 2000, at 1C; Lawrence Messina, *Senators Explain Keystone Letters*, CHARLESTON GAZETTE, March 16, 2000, at 3C. On at least one occasion thirty-one lawyers appeared before Judge Faber in this case, prompting one of the lawyers to remark that he had “never see so many lawyers in one room without hors d’oeuvres and an open bar!” Interview with Hon. David A. Faber, *supra* note 355.

<sup>386</sup> *Sentencing for Final Set of Keystone Charges Scheduled, Action Will Mark End of Prosecution of Terry Church*, CHARLESTON DAILY MAIL, May 29, 2002, at 4D.

<sup>387</sup> Messina, *400 Boxes*, *supra* note 385.

<sup>388</sup> Lawrence Messina, *Testimony Contradicts That of Two Keystone Bank Officials*, CHARLESTON GAZETTE, March 14, 2000, at 2A. Church and Graham asserted they were only following their former lawyers’ advice when they filmed over microfilm records and buried other records. *Id.* These lawyers testified before Judge Faber that they never advised such conduct. *Id.*

<sup>389</sup> Lawrence Messina, *Keystone Pair Get Maximum Terry Church and Michael Graham Each Get Over 4 Years in Prison Judge Freezes Millions in Assets Judge Orders Both Immediately to Begin Sentence*, CHARLESTON GAZETTE, Aug. 1, 2000, at 1A. Judge Faber fined Church \$100,000, citing her massive assets. He fined Graham \$7,500 after Graham’s lawyer said Graham’s assets were virtually depleted. *Id.* Church’s conviction was upheld by the United States Court of Appeals for the Fourth Circuit in *United States v. Church*, 11 F. App’x 264 (4th Cir. 2001).

ham were taken into custody after Judge Faber denied defense motions to allow bail for the pair while they appealed their cases. He also denied defense motions to allow them to self-report to prison, stating that the extensive perjury and obstruction they had engaged in would make it “insulting to deserving defendants” to extend the courtesy of self-reporting to these convicted bankers.<sup>390</sup> Three months into his four-year, three-month prison term, Graham pleaded guilty to bank fraud and money laundering charges and agreed to testify for the government in its case against him and other Keystone Bank officials.<sup>391</sup> Ultimately, Church was sentenced to 27 years in prison and ordered to pay \$812,670,629.88, plus interest, as restitution.

In another case, Judge Faber was faced with a criminal defendant whose defense called into question the very existence of the United States government. Rodney Eugene Smith, described as a “quiet, polite and soft-spoken” man, was charged with writing sight drafts on the United States Treasury in violation of 18 U.S.C. § 514.<sup>392</sup> Smith was a believer in the “redemption” movement, which holds that every American’s birth certificate constitutes evidence of ownership of a share in “America, Inc.” According to believers in this movement, large banks and other financial institutions regularly trade in these birth certificates. Believers contend that the international banks which hold these birth certificates as security for some unknown financial obligation have a claim against each citizen for life, unless the citizen “redeems his or her straw man” by perfecting a claim against the straw man. (Under the redemption theory, a citizen’s birth certificate makes him or her a member of Corporate America, which is de-

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<sup>390</sup> Messina, *supra* note 389, at 1A.

<sup>391</sup> Lawrence Messina, *Keystone Official Admits to Fraud, Money Laundering Graham Bargains, Could Become Key Witness Against His Former Colleagues Hanoi Rolls Out The Red Carpet*, CHARLESTON GAZETTE, Nov. 17, 2000, at 1A.

<sup>392</sup> This statute reads:

- (a) Whoever, with the intent to defraud
  - (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;
  - (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States;or
  - (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States, any false or fictitious instrument, document, or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class B felony. . . .

Violations of this statute provide for a maximum period of 25 years imprisonment.

scribed as a “commune.” The citizen is a slave of the commune subject to the regulation and control of the Federal Government.)<sup>393</sup>

Smith was brought into court and questioned by Judge Faber about his filing of “nonsensical” motions. After stating in open court that people have a right to voice opposition to the government, Judge Faber added that Smith was “not entitled to harass and interfere with other people.” He then ordered Smith to have a mental competency hearing exam and scheduled a later hearing on the matter.<sup>394</sup>

In 2002, Judge Faber sat with Fourth Circuit Judge Blane Michael and Northern District of West Virginia Judge Craig Broadwater, as a three judge court in *Deem v. Manchin*,<sup>395</sup> a case brought by groups of plaintiffs, including two West Virginia state senators and a member of the House of Delegates, challenging the senate redistricting plan. The plaintiffs argued that there were impermissible population variances in the redistricting plan passed by the Legislature on September 19, 2001.<sup>396</sup>

The court also permitted a third group of plaintiffs, members of the County Commission of Mason County, to intervene. The three commissioners contended that H. B. 511, as it redistricted the House of Delegates, violated the “three-fifths rule” contained in Article VI, § 6 of the West Virginia Constitution. Article VI, § 6 requires a county containing less than three-fifths of the ratio of representation for the House of Delegates to be attached to some contiguous county or counties to form a delegate district. Mason County has a greater population than the three-fifths of the delegate ratio, but the interveners contended it was denied a delegate because it was split into two districts containing other, more populous counties.<sup>397</sup>

The court found that the redistricting of the senate was constitutional. In the opinion written by Judge Faber, he noted that “[o]ur quest is not to find the best plan, but rather to assess the constitutionality of the plan the legislature has chosen.”<sup>398</sup> After careful consideration of the policy interests involved, the court said the redistricting plan for the state senate served the goals set forth in the legislation, while creating only a slight deviation.<sup>399</sup>

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<sup>393</sup> If this makes no sense, do not be alarmed. You are not alone.

<sup>394</sup> Bill Archer, *Ballard Man Denies Existence of U.S.*, BLUEFIELD DAILY TELEGRAPH, Feb. 19, 2001, at 1.

<sup>395</sup> 188 F. Supp. 2d 651 (N.D. W. Va. 2002).

<sup>396</sup> House Bill 511 redistricted both chambers of the legislature based on the 2000 census.

<sup>397</sup> *Deem v. Manchin*, 188 F. Supp. 2d 651, 654 (N.D. W. Va. 2002).

<sup>398</sup> *Id.* at 658.

<sup>399</sup> *Id.* at 657. The policy interests identified in H.B. 511 were summarized by the court as: (1) “Recognizing established political subdivision lines; (2) making the senatorial districts as compact as possible, consistent with equality of population; (3) forming each district of contiguous territory; (4) maintaining community of interests involved; and (5) crossing county lines only when necessary to preserve the other stated goals.” *Id.* at 656.

As to the claims set forth by the interveners challenging the redistricting of the House of Delegates, the court found it had no federal jurisdiction over this question. While “[t]he challenge to the Senate redistricting was based on inequality of population under the equal protection clause of the United States Constitution,” the court found “[t]he House complaint to be based solely on a specific and unique provision of the West Virginia Constitution regarding the arrangement of counties in House of Delegates redistricting.”<sup>400</sup>

Judge Faber earned an LLM degree from the University of Virginia. He is also the only West Virginian to have been selected for the special degree in the Judicial Process that is conferred only on judges.<sup>401</sup> He was in the class of 1998, and his thesis on Justice Bushrod Washington was published in the *West Virginia Law Review*.<sup>402</sup>

Lawyers’ evaluations of Judge Faber in the *Almanac of the Federal Judiciary* credit him with a high degree of legal ability and emphasize his fairness. One anonymous evaluator said of him, “He does not lean toward either side.” Another said, “He is very, very fair.” The evaluations also note that he is prompt and methodical. One lawyer said of him: “He is a stickler for rules, deadlines and punctuality—but he is reasonable about it.”<sup>403</sup> He once scolded reporters in open court for misinterpreting a restitution order in excess of \$800 million in such a way that it became fodder for NBC’s *Tonight Show* host, Jay Leno.<sup>404</sup>

Judge Faber is an avid fly fisherman who complains that he doesn’t get to fish as much as he would like, ties his own flies, and has fished many of West Virginia’s best trout streams.<sup>405</sup>

Judge Faber has also demonstrated a keen sense of concern for equal rights by acting on his beliefs. He was president of the Army-Navy Club in Charleston in the 1970’s when the first black members were admitted (a matter Judge Faber describes as “almost as controversial as opening the men’s bar to women”). He hired a black Assistant United States Attorney and employed the first and third African-Americans ever to serve as law clerks in the Southern District of West Virginia.<sup>406</sup> He also served on the Membership Committee of

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<sup>400</sup> *Id.* at 659.

<sup>401</sup> E-mail from David A. Faber, *supra* note 359.

<sup>402</sup> David A. Faber, *Justice Bushrod Washington and the Age of Discovery in American Law*, 102 W. VA. L. REV. 735 (2000). Bushrod Washington, a nephew of President George Washington, was the first justice appointed to the United States Supreme Court by President John Adams. *Id.* at 751.

<sup>403</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 89.

<sup>404</sup> Bill Archer, *Faber Becomes Chief Judge for Southern District Federal Branch*, THE ST. J., Jan. 10, 2003, at 3.

<sup>405</sup> *Id.*

<sup>406</sup> E-mail from David A. Faber, *supra* note 359. Judge Elizabeth Hallanan hired the second African-American law clerk, described by Judge Faber as “quite a record for the two most conservative judges.” *Id.*

the Fincastle County Club in Bluefield when the first African-American members were admitted to that club. Judge Faber has also been the recipient of the Fred H. Caplan Civil Justice Award by the West Virginia Trial Lawyers Association.<sup>407</sup>

In the fall of 2002 Judge Charles Haden announced that he was stepping down as Chief Judge of the Southern district of West Virginia. Judge Faber became Chief Judge on December 20, 2002, a position he has held ever since.

JOSEPH ROBERT GOODWIN<sup>408</sup>

Joseph Robert Goodwin, nicknamed “Joe Bob” since childhood, was born in Ripley, West Virginia, two days before Christmas, 1942.<sup>409</sup> His father died young of a heart attack, and his mother remarried a few years later. Their stepfather moved the family first to Columbus, Ohio, and then to Kansas City, Missouri. After graduation from high school, Goodwin returned to West Virginia to attend WVU, where he majored in theater and participated in the Army ROTC program.<sup>410</sup>

Following graduation in 1965, Goodwin entered the Army, as a Second Lieutenant in the Adjutant General’s Corps. He did so well at public speaking in his officers basic course that he was asked to stay at Fort Benjamin Harrison in Indianapolis, Indiana, to teach. He decided to do that rather than to go into the 82<sup>nd</sup> Airborne Division as a Special Services officer. After two years of service, he was ready to get out of the military, but was afraid he couldn’t make it as an actor. His brother, Tom, convinced him to take the LSAT and, after reading an LSAT book the night before the exam, he did remarkably well. He extended his service for six months to reach the rank of captain, then took “terminal” leave (a process in which he used his saved-up leave at the end of his service to get paid) at his new rank of captain.<sup>411</sup>

He and Kay moved to Morgantown in the fall of 1967 where he entered the West Virginia University College of Law. Recalling his brother Tom’s advice that the first semester of law school was “three and one half months of misery for a lifetime career,” he studied all the time, “except on Saturday night and one hour each Sunday night for ‘Mission Impossible.’”<sup>412</sup> Not surprisingly, he did extremely well, graduating first in his class and being named to the Order of

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<sup>407</sup> *Id.*

<sup>408</sup> Any otherwise uncited factual information about Judge Goodwin is taken from an interview with Hon. Joseph Robert Goodwin, United States District Judge for the Southern District of West Virginia, in Charleston, W. Va. (July 19, 2000).

<sup>409</sup> Federal Judicial Center, Judges of the United States Courts – Goodwin, Joseph Robert, <http://www.fjc.gov/servlet/tGetInfo?jid=884> (last visited Feb. 10, 2007).

<sup>410</sup> Tara Tuckwiller, *Wise Finds Strong Allies in Goodwins: The Kingmakers: People Behind the Politics*, CHARLESTON GAZETTE-MAIL, Feb. 11, 2001, at 1A.

<sup>411</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

<sup>412</sup> *Id.*



the Coif, law school's highest honor.<sup>413</sup> "Law School was the first thing in life I was ever really good at," he once recalled, "except for high school football, but I was good at that because I was mean, not skilled."<sup>414</sup> The summer following his first year of law school he clerked for the firm of Jackson, Kelly, Holt & O'Farrell in Charleston. The following summer he clerked for the Charleston law firm of Kay, Casto & Chaney.<sup>415</sup>

On graduation from law school he entered law practice with his brother, Tom. The brothers re-established the Goodwin & Goodwin firm name (tying themselves to their father and uncle, who had established a law practice together in the 1940s) and opened their practice. They had offices in Ripley and Charleston, but for a while they had no business. He recalls they "just stared at the walls and wished for the phone to ring."<sup>416</sup> His brother Tom recalls how Joe Bob used his drama skills to drum up business for the firm. "He said, 'Tom, the reason we're not getting any business is nobody knows we're here.' . . . So he'd load up magazines in his briefcase and say, 'I'm going to the courthouse,' and then go out like he was really busy. . . . [I]t worked. A guy walked in and said, 'I didn't even know you boys were back in town till I saw Joe Bob over at the clerk's office.'"<sup>417</sup> Judge Goodwin recalls that was "one of the few times he got any use out of his undergraduate major [in] theater." Along with their younger brother Steve, Tom and Joe Bob "built one of the most [prominent and] successful law firms in [the state]."<sup>418</sup>

The brothers also became active in politics. "They campaigned for Jay Rockefeller—who offered Tom a job while he was still in law school, which Tom declined—in 1972 and again in 1976."<sup>419</sup> Finally, Rockefeller offered Tom the job as state tax commissioner, a job Tom took "because it would presumably help advance the law firm." A few months later, Rockefeller tapped Tom for the job of chief of staff. In 1980 Tom returned to practice at the law firm. Meanwhile, Joe Bob had served as Chairman of the Jackson County Democrat Party in 1972 and in 1980 became chairman of the state Democratic Party, a position he held until 1986. He also ran unsuccessfully for the state senate in 1980, losing to Senator Orton Jones.

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<sup>413</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 91. His father and his uncle Bert (C. E. Goodwin) were first and second in their classes and his brother Tom was first in his class. Tom and Joe Bob were also selected as Editors-in-Chief of the *West Virginia Law Review*, to serve during their last year in law school. *Id.*

<sup>414</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

<sup>415</sup> Federal Judicial Center, Judges of the United States Courts – Goodwin, Joseph Robert, *supra* note 409.

<sup>416</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

<sup>417</sup> Tuckwiller, *supra* note 410, at 1A.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

He served as Chairman of the Governor's Task Force on Drunk Driving in 1984,<sup>420</sup> but years earlier a friend saw Goodwin display a more "hands on" approach to preventing drunk driving. A friend of his insisted on driving away in an automobile while intoxicated. Goodwin simply laid down in front of the car and refused to move until the driver turned over the keys.<sup>421</sup>

Law practice in Ripley had its lighter moments. He served as Municipal Judge of Ripley in 1972-73. One day a friend who owned a diner called and asked him to come down and get rid of a drunk who was scaring off the customers. Goodwin went to the restaurant and told the drunk he needed to leave. The man asked, "Just who the hell are you?" "I'm the municipal judge here in town," Goodwin replied. Unimpressed, the man said, "Oh, that's big . . . that's really big." As Goodwin recalls, "it kind of put things in perspective."

The restaurant owner also called on the Goodwin firm for advice when he discovered he was wasting a lot of food because people weren't eating all of it. The wasted food was just money lost to the restaurant. The Goodwins studied the matter and recommended smaller plates. "We got our fee *and the old plates*" Judge Goodwin recalls.<sup>422</sup>

Practicing law was a constant learning experience, Goodwin says. He once represented "Candy Man" Johnson, a heroin dealer, by court appointment from Judge K. K. Hall. "I learned much from Candy Man," Goodwin recalls. "For example, at the time, the McDonald's coffee spoon was the universal measurement for heroin." Goodwin pondered his representation of Candy Man for a moment and then added, "Even though Candy Man is dead, the attorney-client privilege survives, so the story ends there." He did finally ask Judge Hall to let him off the case after several appeals because he was spending so much money in representing Candy Man. Judge Hall finally agreed.<sup>423</sup>

During his twenty-five years in private practice Judge Goodwin tried, to a jury, nearly every kind of case. He and his brother tried two first-degree murders in the first year of their practice.<sup>424</sup>

In those early years, Goodwin tried a rape case, an armed robbery case, multiple burglary and larceny cases and, as he put it, "more drunk driving cases

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<sup>420</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 91.

<sup>421</sup> Personal recollection of Kennad Lee Skeen, Esq., Ripley, W. Va. (Spring, 2001).

<sup>422</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

<sup>423</sup> *Id.*

<sup>424</sup> In one of these cases he represented Kenneth Olish, who was indicted for killing Bado Tompkins and brutalizing his wife. Bado Tompkins was the uncle of Roger Tompkins, who served as Majority Leader in the West Virginia House of Delegates and later served as Attorney General of West Virginia. That case resulted in Olish's conviction and a sentence to life without mercy. Goodwin appealed and the Supreme Court reversed the conviction and the case was tried again. Once more Olish was convicted and sentenced to life without mercy. Shortly after that case was concluded, the West Virginia Legislature refused to reinstate the death penalty, at the urging of House Majority Leader Roger Tompkins. Letter from Joseph Robert Goodwin, United States District Judge for the Southern District of West Virginia, to author (May 28, 2004) (on file with author).

than you can shake a stick at.” He also did a lot of divorces and the occasional boundary dispute. He even handled dog bite cases. In one case, he and Ripley lawyer Larry Skeen tried a dog bite case on the lawn near the Justice of the Peace’s office in Ravenswood. The case was tried before a JP jury, which was a rare thing. They gave their stem-winding closing arguments and, around 4:00 p.m. on that summer day, retired to the local beer joint across the street to await the verdict.<sup>425</sup>

Over the years, Goodwin represented a United States Senator in a lawsuit, a Governor in a matter, and the entire West Virginia legislature in a case seeking a substantial pay raise for the legislature. He once represented a television anchor who was charged with drunk driving after being spotted driving a BMW into the Taco Bell on Charleston’s MacCorkle Avenue on flat tires.<sup>426</sup>

To this day, he is proudest of representing individuals who, as he puts it, “had little, knew little, and expected little.” One of his fondest memories is of representing a family whose children had been taken away by the West Virginia Department of Welfare. The caseworker had testified that the children were allowed to stay up too late, eat Vienna sausages, drink too much Coca-Cola, and never took a bath. Goodwin went home and told his wife Kay: “Lock the doors; if the State prevails in this case, they will surely be coming after [the Goodwin’s son] Booth.” Fortunately, he won that case. It was the first case in West Virginia where a judge held that parents had substantial due process rights in such cases.<sup>427</sup>

One day in 1994, he got a call that Senator Robert C. Byrd wanted to see him and that he would “be by.” Goodwin thought that was unusual because if Senator Byrd wanted to see you, you usually went to him. Byrd came by, and they chatted for a while. Then Byrd said, “Joe Bob, I want to make you a federal judge.” Judge Robert Maxwell of the Northern District of West Virginia was going to take senior status, but he was willing to hold up his letter requesting senior status until Senator Byrd had someone lined up to take the position. Goodwin was flabbergasted. He was given little time to consider the offer, which involved a considerable cut in income.<sup>428</sup> He agreed, and Senator Byrd said it was a “done deal,” but he wanted to wait until after the 1994 mid-term elections to make any announcement. Then, in December 1994, Judge Staker announced he was going to take senior status in the Southern District. Senator Byrd called again and asked Goodwin which district he preferred. Goodwin’s reply was, “Whatever you think is best.”<sup>429</sup> President Clinton nominated Good-

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<sup>425</sup> *Id.*

<sup>426</sup> *Id.*

<sup>427</sup> *Id.*

<sup>428</sup> Regarding money, Judge Goodwin said, “To tell the truth, I also didn’t care about the money I made [practicing law.] I sure spent it, but it was not a matter of great interest. My brother still thinks I’m nuts for taking this job.” *Id.*

<sup>429</sup> Interview with Judge Joseph Robert Goodwin, *supra* note 408.

win for Judge Staker's vacated seat in the Southern District on February 28, 1995. He was confirmed by the United States Senate on May 8 of the same year, and the 52-year-old judge received his commission two days later.<sup>430</sup>

Noting that his longtime friend Goodwin is an accomplished magician, Governor Gaston Caperton told the swearing-in audience that Goodwin "didn't become a judge by sleight-of-hand." The Governor jokingly added, "He learned humility in his only race for state senate and as state Democratic Party Chairman." In a more serious vein, Senator Robert Byrd said, "Only one thing endures – character. I believe you have it." Noting that the Goodwins and WVU President David Hardesty and his wife Susan had been neighbors in Ripley, Goodwin added, "David Hardesty offered to write my remarks if I would wear gold and blue robes rather than black. However, knowing that (Marshall University) President (Wade) Gilley would honor me by attending, and being mindful that I will be serving the Huntington division – I decided not only to pass up on his offer, but also to draft these remarks in green ink."<sup>431</sup> (Green and white are Marshall's colors.)

In an interview Judge Goodwin said being a federal judge is "the best job in the world." Then he corrected himself and said, "Second best. The best is your job (nodding toward Professor Bowman), law professor at WVU."<sup>432</sup>

Judge Goodwin says leaving law practice was harder than leaving politics, because he wanted to practice with his son, Booth, who was graduating from Washington and Lee Law School in 1996. "I always wanted to practice with him," Goodwin said. As for politics, he had already left the political arena by the time of his nomination, "except for writing thousand-dollar checks to people." He would still talk politics with others, but he left the active political scene in 1986 after serving as Chair of the State Democratic Executive Committee.<sup>433</sup>

As a Judge Goodwin's level of ability, his impartiality, and his judicial temperament have been highly praised by lawyers practicing before him.<sup>434</sup> He has handled some pretty difficult cases on his way to obtaining those plaudits.

In the 1997 case of *Price v. National Board of Medical Examiners*,<sup>435</sup> three Marshall University School of Medicine students sought to compel the National Board of Medical Examiners to provide them with additional time for medical licensing examination and with separate rooms in which to take the examination on the grounds they suffered from disabilities under the Americans

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<sup>430</sup> Federal Judicial Center, *Judges of the United States Courts – Goodwin*, Joseph Robert, *supra* note 409.

<sup>431</sup> Ron Hutchison, *Goodwin Sworn in as Judge: The Former "Joe Bob" Shuns Nickname as He Takes New Office*, CHARLESTON DAILY MAIL, June 1, 1995, at P1B.

<sup>432</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

<sup>433</sup> *Id.*

<sup>434</sup> ALMANAC OF THE FEDERAL JUDICIARY, *supra* note 208, at 90.

<sup>435</sup> 966 F. Supp. 419 (S.D. W. Va. 1997).

with Disabilities Act (ADA).<sup>436</sup> Two of the three had been diagnosed with Disorder of Written Expression and Reading Disorder and all three had been diagnosed with Attention Deficit Hyperactivity Disorder. The National Board of Medical Examiners denied the requests, “asserting that the alleged impairments did not significantly restrict one or more of their major life activities.”<sup>437</sup> Judge Goodwin held that under the definition of disability in the ADA, the students should be compared to *most people*, not simply other medical students, when determining whether they were substantially limited in any major life activity. Since the three students had successfully completed undergraduate studies,<sup>438</sup> Judge Goodwin declared they were not disabled under the ADA and found for the National Board of Medical Examiners.<sup>439</sup>

In June 1995 a swarm of armed men invaded the Mason, West Virginia, medical office of Dr. Danny Westmoreland.<sup>440</sup> With guns drawn and pointed at patients waiting in the office, the invaders ordered everyone, including a nine-year-old girl, to stand against the wall with their hands over their heads while the agents ransacked the office (which was also the doctor’s home) in search of evidence of fraud and abuse of the health care system.<sup>441</sup> Dr. Westmoreland sought to suppress the evidence seized during the raid on his office on the grounds that the police behavior violated his Fourth Amendment right to be free from “unreasonable searches and seizures.”<sup>442</sup> Judge Goodwin ruled that, because the agents did not direct their unreasonable conduct at Dr. Westmoreland, but rather at patients in the doctor’s waiting room, Dr. Westmoreland’s Fourth Amendment rights had not been violated and the evidence need not be suppressed.<sup>443</sup>

The case went to trial and, at the conclusion of the government’s case, Judge Goodwin directed a verdict for Dr. Westmoreland, saying, “I am appalled . . . I am shocked. And this is something this court will not tolerate. It is one of the most outrageous things I’ve ever heard.” He told the jury, “In our system of justice, it’s a rare occasion when a court is required to enter a judgment of ac-

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<sup>436</sup> 42 U.S.C.A. § 12189 (2000).

<sup>437</sup> *Price*, 966 F. Supp. at 422.

<sup>438</sup> One student had graduated from high school with a 3.4 grade point average (gpa) and from Furman University with a 2.9 gpa. Another was in a gifted program from second grade through his high school graduation, graduating from high school with a 4.2 gpa and was the state debate champion. He was admitted to the United States Naval Academy and eventually graduated from Vanderbilt University with a degree in physics. The third student was a National Honor Student in high school who graduated from Virginia Military Institute with average grades and then maintained a 3.5 gpa at Sheperd College where he earned the necessary science requirements for medical school. *Id.* at 422-24.

<sup>439</sup> *Id.* at 428.

<sup>440</sup> *United States v. Westmoreland*, 982 F. Supp. 376, 378 (S.D. W. Va. 1997).

<sup>441</sup> *Westmoreland*, 982 F.Supp. at 378.

<sup>442</sup> *Id.* at 381.

<sup>443</sup> *Id.* at 382.

quittal without allowing the jury to make its own decision . . . I believe that no reasonable jury person could conclude that this defendant was guilty of each and every element of the offense beyond a reasonable doubt. [Because of these facts,] I take this case from you and grant the defendant acquittal on each count.”<sup>444</sup>

In another case the Attorney General of West Virginia brought suit against the United States Department of Health and Human Services, asking the court to declare unconstitutional and unenforceable a Medicare program which required the state to recoup benefits from the estates of certain deceased Medicaid recipients. Calling the practice of taking homes from the estates of elderly and disabled people who must rely on Medicaid for long-term health care “abhorrent,” the Attorney General asked Judge Goodwin to declare the practice unconstitutional.<sup>445</sup> Goodwin ruled that, even though West Virginia had demonstrated that estate recovery caused harsh consequences to poor West Virginians, the court did not have the authority to appraise Congressional policy choices. It could only decide the constitutionality of the law. He then ruled that the implementation of estate recovery as a condition of receiving federal Medicaid funds constitutional.<sup>446</sup>

In 2000 Judge Goodwin struck down West Virginia’s law restricting certain late-term abortions as unconstitutional. Following the same arguments used in a United States Supreme Court ruling that struck down a similar Nebraska law, he held that the West Virginia statute was written too broadly and could be interpreted to prohibit *all* abortions, placing an undue burden on a woman seeking a legal abortion. Moreover, he noted, the statute provided no exception permitting an abortion when the woman’s health is at risk.<sup>447</sup>

A strong believer in judicial decorum, Judge Goodwin asserts, “It’s the judge’s responsibility to maintain dignity if civility in the courtroom has slipped, it’s the judge’s fault.” Maintaining “if you expect lawyers to act in a certain way, they will,” he holds lawyers strictly accountable for their conduct in trying a case, including the responsibility of being prepared. “I have to be prepared: I try never to be unprepared. I *read* briefs before court. And I expect the lawyers to be prepared.”<sup>448</sup>

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<sup>444</sup> Frank York, *Doctor Seeks Justice After DEA's Clinic Assault*, WORLDNETDAILY.COM, (Feb. 21, 2000), available at [http://www.worldnetdaily.com/news/articles.asp?ARTICLE\\_ID=17428](http://www.worldnetdaily.com/news/articles.asp?ARTICLE_ID=17428).

<sup>445</sup> The Attorney General argued that “the choice of implementing an estate recovery program or losing . . . Medicaid funds [was] so coercive as to make the requirement unconstitutional [as a] violat[ion] [of] the Tenth Amendment.” *West Virginia v. U.S. Dep’t of Health and Human Servs.*, 132 F. Supp. 2d 437, 441 (S.D.W. Va. 2001). The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

<sup>446</sup> *U.S. Dep’t of Health and Human Servs.*, 132 F. Supp. 2d at 444.

<sup>447</sup> *Daniel v. Underwood*, 102 F. Supp. 2d 680, 684-85 (S.D.W. Va. 2000).

<sup>448</sup> Interview with Hon. Joseph Robert Goodwin, *supra* note 408.

Judge Goodwin is especially proud of his wife, who was named Secretary of Education and the Arts in Governor Wise's cabinet and continues in that position in Governor Manchin's cabinet. "She is very active," Goodwin says. "Her résumé is better than mine." Her résumé is, indeed, impressive. Named Daughter of the Year by the West Virginia Society of Washington, D.C., she is one of two public members of the Accreditation Council for Graduate Medical Education. She has served on the Board of Directors of West Virginia University Hospitals as well as on the Board of the West Virginia United Health System. She was chairman of the University System Board of Trustees when that was the governing board for all higher education in West Virginia. She is now on the Policy Commission for higher education. Perhaps her most significant award was her selection as one of four nationally who received the National Public Service Award given by the National Academy of Public Administration.<sup>449</sup>

Judge Goodwin, too, has been a strong supporter of West Virginia University and served as a member of the WVU Board of Advisors from 1981 to 1986. "I care a lot about the University," he says. "WVU is to the state what high schools are to most small towns." He is particularly proud that his former law firm has endowed a professorship at the WVU College of Law in honor of his brother, Tom. The Thomas R. Goodwin Professorship of Law was created with a gift of \$250,000 in 1998. The gift to the College of Law is typical of the Goodwin family's approach to life and service – share yourself and your bounty. This philosophy has paid dividends for all of us.

Asked to describe himself and his career, he says he loved the role of law student. "I knew it the first day I sat in [Professor] Londo Brown's Property I class. I approach every case with no agenda, but with the idea that the law is indeed a brooding, or perhaps more benign, omnipresence."

#### ROBERT CHARLES CHAMBERS<sup>450</sup>

Robert Charles Chambers was born on August 27, 1952, in the Mingo County seat of Williamson, the son of James E. Chambers and Geraldine Kiser Chambers. He graduated from Marshall University with an A.B. Degree in 1974 and in December 1977 he received his J.D. degree from West Virginia University. Upon graduation from law school he went into practice with his father, who was then practicing in Huntington, and took a part-time job as counsel for the State Senate.

While Judge Chambers has called Huntington home since he was a young boy, the Chambers family roots go deep in Mingo County, where his

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<sup>449</sup> Letter from Judge Joseph Robert Goodwin, *supra* note 424.

<sup>450</sup> All otherwise uncited biographical information about Judge Chambers was taken from an interview with Robert Charles Chambers, United States District Judge for the Southern District of West Virginia, in Charleston, W. Va. (February 7, 2001).

family had started the Matewan National Bank.<sup>451</sup> His paternal grandfather, Dan Chambers, was president of the bank when he was elected sheriff of Mingo County in the late 1930's. Tom Chafin, the father of the current Majority Leader of the West Virginia State Senate, Truman Chafin, was Dan Chambers' closest political friend and confidant. On his mother's side, his grandfather Charlie Kiser, was an organizer for the United Mine Workers of America. As Judge Chambers tells it, "my mother's side of the family was in politics in a way, through the UMW, but not in the partisan 'Democrat vs. Republican' fashion."

In the early 1900's, the southern West Virginia coal fields were alive with controversy, with the UMW trying to organize miners and the coal operators opposing unionization. In 1920 seven Baldwin-Felts detectives, who had been hired by the coal operators to stave off unionization, and four townspeople, including C. C. Testerman, the Mayor of Matewan, were killed in what became known as the Matewan Massacre. Sid Hatfield, the Chief of Police of Matewan, and a number of others, including some of Judge Chambers' relatives, were charged with conspiracy, but were acquitted. (In the hallway outside Judge Chambers' office are old family photos, including a 1921 photo of the Matewan Massacre defendants. Included among the defendants in addition to Sid Hatfield, are Ed Chambers, a cousin of Judge Chambers' father; Reese Chambers, Judge Chambers great-uncle; the judge's grandfather, Charlie Kiser; Clair Overstreet, who was married to Judge Chambers' father's Aunt Pearl; and Hallie Chambers, another relative.)

After this acquittal, Sid Hatfield and Ed Chambers were charged with assault growing out of a shooting at the Mohawk coal camp in McDowell County. They stayed out of McDowell County for a time to avoid arrest and prosecution. Finally, a deal was made for them to come to McDowell County and face charges. On August 1, 1921, as Hatfield and Ed Chambers walked up the steps of the McDowell County Courthouse in Welch, they were shot to death by C.E. Lively, a Baldwin-Felts detective. The shooting led to what became known as "The West Virginia Mine Wars." Thus, Judge Chambers' family history has tied him closely to the history and struggles of the people of southern West Virginia.

With a family history of public service it is not surprising that Judge Chambers ran for the West Virginia House of Delegates in the spring following his graduation from law school. As Chambers tells it, in his first month of practice with his father—January 1978, he graduated from law school a semester early—he came into the office as his father was having lunch with a friend and fellow Huntington lawyer, Jack McOwen. Jack was in the middle of convincing Chambers' father that his son should run for office to "get his name out" as a young lawyer. As McOwen explained it, as a newcomer he was unlikely to win, which was good. "You don't want to win; you just want to get your name out." On somewhat of a lark, Chambers agreed. He was the last of seven nominated

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<sup>451</sup> *Id.*



for the house (by six votes) and ran seventh in the general election, good enough to be elected, to the surprise of Chambers' father, Jack McOwen, and Chambers himself.

He took his seat in the House in January 1979. Speaker Clyde See appointed him to the Judiciary Committee and Chair of the Juvenile Law Committee. He was also named Chair of the Legislative Rule-Making Review Committee. (This latter committee had considerable influence because it passed on state administrative rules for agencies.) Speaker See also appointed him to the 1980 Redistricting Committee. In 1985 Speaker Joseph Albright of Wood County appointed him Chair of the powerful Judiciary Committee. He was serving in that capacity in November 1986 when Speaker Albright was defeated for reelection to the House.

As Judiciary Chair, Chambers was a logical choice for Speaker, so he went on the road for the following month, garnering support for the position. On January 14, 1987, as the legislative session was about to begin, he was elected the 53<sup>rd</sup> Speaker of the House of Delegates, the youngest Speaker in West Virginia History.<sup>452</sup> He served as Speaker of the House for ten years. At the time he stepped down, his was the longest tenure in that position in the history of West Virginia.<sup>453</sup> He served a total of nine terms in the House, leaving at the end of the 1996 session.

As Speaker, Chambers became active in the National Conference of State Legislatures, where he rose to become a member of the executive committee. There he established contacts for legislative chairs and their staffs regarding legislative matters across the country. His experience with the National Conference of State Legislatures also allowed him to be an advocate for West Virginia with respect to congressional or administrative policy. In 1992 he testified before the United States Senate Finance Committee on Medicaid funding proposals that he felt would be harmful to West Virginia.

He was a partner in the Charleston law firm of Bucci & Chambers on December 1, 1996, when Judge Hallanan assumed senior status. A few days later, he was in a meeting with an expert witness in preparation for a trial when he was interrupted with an urgent telephone call from Senator Robert Byrd. The senator noted that Judge Hallanan was taking senior status and asked if Chambers had any interest in the position. He did. (Judge Chambers' association with Senator Byrd went back to his days as Speaker of the House when he initiated the tradition of inviting Senator Byrd to address a joint session of the legislature every two years.) He resigned his position as Chairman of the West Virginia State Democratic Executive Committee and things moved smoothly. On June 5, 1997, he was nominated for the District Court seat by President Clinton. On Tuesday, July 22, his confirmation hearing was held before the Senate Judiciary Committee. Chambers was introduced by Senators Byrd and Rock-

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<sup>452</sup> WEST VIRGINIA HUMANITIES COUNCIL, *THE WEST VIRGINIA ENCYCLOPEDIA* (2006).

<sup>453</sup> Robert S. Kiss tied Chambers' record as the longest-serving Speaker of the House in 2006.

efeller, and both men spoke briefly in support of him. His appointment was approved by the Judiciary Committee and was confirmed by the full Senate on September 5, 1997. He received his commission on September 18.<sup>454</sup>

He says his biggest surprise since coming on the bench has been adjusting to the pace, after years of practicing law and engaging in high-level politics.

Among the more noteworthy cases decided by Judge Chambers was *Benjamin H. v. Ohl*.<sup>455</sup> Five plaintiffs, all mentally retarded or developmentally delayed individuals who were eligible for benefits under Medicaid, sought a preliminary injunction under the Medicaid statute<sup>456</sup> claiming that the respondent state agency<sup>457</sup> was violating the Medicaid statute, constitutional due process, and the Americans with Disabilities Act<sup>458</sup> by not providing services. Specifically, the plaintiffs alleged they were denied the opportunity to participate in the Home and Community-Based Waiver program.<sup>459</sup>

In granting the injunction, Judge Chambers found that each of the five plaintiffs had applied for the waiver program and was placed on a waiting list as eligible for waiver services. He found the services being provided to the plaintiffs while on the waiting lists were insufficient to meet the level of services required for ICF/MR eligible individuals. The plaintiffs were, Judge Chambers found, “entitled to either ICF placements or waiver services.” Since the costs per capita for the waiver program were much lower than the costs per capita for the ICF services, Judge Chambers noted that the state would spend far less money by providing waiver services instead of ICF/MR services. While it would be costly in the short term to provide the plaintiffs with waiver services, since waiver services might prevent institutionalizing the plaintiffs and others like them, the long-term budgetary effect would be a significant savings. Since

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<sup>454</sup> Federal Judicial Center, Judges of the United States Courts – Chambers, Robert Charles, <http://www.fjc.gov/servlet/tGetInfo?jid=2722> (last visited Feb. 12, 2007).

<sup>455</sup> Civil Action No. 3:99-0338, 1999 WL 34783552 (S.D.W. Va. 1999).

<sup>456</sup> 42 U.S.C. § 1396 (2000).

<sup>457</sup> The West Virginia Department of Health and Human Resources.

<sup>458</sup> 42 U.S.C. §§ 12101-12213 (2000).

<sup>459</sup> The Medicaid statute permits a state “to provide intermediate care facility (“ICF”) services for mentally retarded or developmentally disabled individuals.” *Ohl*, 1999 WL 34783552, at \*2. An intermediate care facility for the mentally retarded (“ICF/MR”) is defined as “an institution for the mentally retarded or persons with related conditions” in which the primary purpose is to provide health or rehabilitative services for its residents. *Id.* at \*1 (quoting 42 U.S.C. § 1396d(d) (2000)). As described in the *Ohl* opinion:

The Home and Community-Based Waiver program . . . is an alternative to the ICF/MR program. [This] program was adopted by Congress to permit individuals who would ordinarily require residence in a nursing home or an ICF/MR to receive needed services at home or in a home-like setting. Under this program, states may obtain a waiver of certain Medicaid statutory requirements in order to offer “an array of home and community-based services that an individual needs to avoid institutionalization.”

*Id.* at \*2 (citations omitted).

the public interest is served by what Judge Chambers called “careful stewardship of tax dollars,” and since the public would be better served by providing its disabled citizens with the greatest degree of independence and functional capacity, the Medicaid entitlements had provided for services such as those provided under the waiver program. For these reasons, he concluded that the plaintiffs were entitled to a preliminary injunction.<sup>460</sup>

Another noteworthy case decided by Judge Chambers was the case of *Jeffers v. Wal-Mart Stores, Inc.*<sup>461</sup> In that case, Tina Louise Jeffers, a maintenance employee at Wal-Mart’s Huntington store, was required to clean up pesticide products that had fallen from a shelf in the lawn and garden department. At least one product container had broken and leaked its contents onto the floor.<sup>462</sup> Jeffers claimed “she suffere[d] permanent injuries from inhalation of fumes and other exposure to the pesticides as a result of her clean-up efforts.” Her claim, “in part, allege[d] that the products were defectively packaged and contained inadequate warnings.”<sup>463</sup>

Defendant United Industries moved for summary judgment, arguing that Jeffers’ claims based on inadequate labeling and packaging were preempted by the Federal Fungicide, Rodenticide and Insecticide Act of 1947 (“FIFRA”). Jeffers conceded that the labeling portion of her claim was preempted by FIFRA, but contended the product liability claim based on defective packaging was not preempted.<sup>464</sup>

Judge Chambers found that FIFRA’s express preemption did not extend to defective packaging claims in the absence of EPA regulations governing packaging, and the EPA had not promulgated packaging regulations outside of child-resistant packaging.<sup>465</sup> Judge Chambers declined to apply implied conflict preemption to common law design defect claims, despite the EPA’s extensive registration and labeling requirements.

Another case over which Judge Chambers presided had all the elements of an international soap opera. *United States v. Bollin*<sup>466</sup> grew out of a wide-ranging investment fraud scheme where investors were promised enormous profits, supposedly derived from secret trading in debentures issued by European “prime” banks.

In the mid 1990’s, Stephen Oles, a self-described “trader” in the fraudulent investment programs and a man named David Raimer began offering investment programs under the name “Exodus International.”<sup>467</sup> The programs,

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<sup>460</sup> *Id.* at \*17.

<sup>461</sup> 84 F. Supp. 2d 775 (S.D. W. Va. 2000).

<sup>462</sup> *Id.* at 776-77.

<sup>463</sup> *Id.* at 776.

<sup>464</sup> *Id.* at 777.

<sup>465</sup> *Id.* at 784.

<sup>466</sup> 264 F.3d 391 (4th Cir. 2001).

<sup>467</sup> *Id.* at 400.

which were explained by the traders in terms that involved nonsensical descriptions, supposedly involved the trading of European “prime bank” debentures and promised very high rates of return with very little or no risk to investors.<sup>468</sup> The promoters of the programs also claimed that entities such as the Federal Reserve Bank or the World Bank had approved the programs or accepted documents created under the programs.<sup>469</sup>

In July 1995, Dr. Ralph and Rita Touma invested \$750,000 in the Exodus 39 program through Roger Damron, who peddled the investments in and near Huntington. The money was deposited in a bank account in Atlanta<sup>470</sup> after which it was transferred to an account in the Turks and Caicos Islands.<sup>471</sup>

As it developed, the debenture trading programs were complete shams. An expert for the United States Government explained that “investment programs involving the trading of debentures or other financial instruments issued by so-called ‘prime banks’ do not exist.”<sup>472</sup> Instead of placing the money into the bank debentures as the promoters had promised, the money was transferred from Oles to Raimer to yet another promoter named Ernst Tietjen.<sup>473</sup> The funds were used by all three of these individuals for their own purposes.

When the Toumas did not receive the payments they had been promised, they began to call Damron regularly and were put off with the assurance that, while payment was often delayed in these programs, the programs always paid. Finally, in January 1996, after growing tired of being put off, the Tomas reported their dealings with Damron to the FBI. The FBI conducted a search of

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<sup>468</sup> As the Fourth Circuit opinion explained it:

According to the Exodus literature that they distributed, the programs were available on a limited basis to groups of investors whose money would be pooled and delivered to a “prime” bank. The investment principal was supposedly secured by a bank guarantee and, therefore, was never at risk. Millions of dollars in profits were to be generated within a few months from the trading of debentures. For example, one program, “Program 39,” offered a profit of \$73,000,000 in ten months, based on an investment of \$400,000.

*Id.*

<sup>469</sup> *Id.* at 402.

<sup>470</sup> After \$75,000 had been paid to Gary Bollin, a “broker” for the fraudulent investments, and \$275,000 had been retained by Damron.

<sup>471</sup> *Bollin*, 264 F.3d at 400-01.

<sup>472</sup> *Id.* at 402.

<sup>473</sup> “Tietjen was the head of a church known as the Apostolic Order of the Remnant House of Israel (AORHI),” which “existed . . . supposedly for the purpose of funding humanitarian projects. . . . AORHI created other entities, which Tietjen called limited trusts,” for the purpose of holding assets. He also created an entity called General Securities, Ltd., to “assist in the money-making.” Under the cover of these entities Tietjen created official-looking financial documents, such as a “Zero Coupon Prime Capital Note,” and also offered debenture trading programs with very high rates of return. *Id.* If ever the old adage, “If it SOUNDS too good to be true, it IS too good to be true,” should have applied, it is with this group of scoundrels.

Damron's house and, shortly thereafter, a grand jury investigation was convened in Huntington.<sup>474</sup>

Ultimately, Damron pleaded guilty to mail fraud and money laundering and agreed to cooperate with the United States in its investigation of the other conspirators. Bollin, Tietjen, Oles and Raimer, along with others were indicted for criminal acts stemming from the fraudulent investment scheme.<sup>475</sup> Raimer pleaded guilty while Oles fled<sup>476</sup> and remained a fugitive throughout the trial. Ultimately, all four were convicted and sentenced to various prison terms as well as a \$1.2 million forfeiture verdict.

On appeal, the Fourth Circuit found there was sufficient evidence to support the convictions and that the defendants' allegations of violations of the attorney-client privilege and improper admissions of grand jury testimony were without merit.

Judge Chambers is married to Sonia Daugherty Chambers and has five children, Bryan, Lenna, Elizabeth, Emily, and Ellen Mary. According to his former law partner, Charleston lawyer Guy Bucci, Chambers is "a phenomenal father, a real 'Mr. Mom' with all his kids."<sup>477</sup> Bucci also described him as "a dedicated gym rat, committed to working out." He is a superb golfer, too, but rarely plays.<sup>478</sup>

Described by Guy Bucci as "the least paranoid person I have ever met. He has enormous equanimity," he is very non-confrontational, a trait not always found in successful lawyers and government leaders. His successor as Speaker of the House of Delegates, Robert Kiss, places Chambers "on the short list of top-class intellects I have known."<sup>479</sup> Guy Bucci agreed and added, that, "he hides his intelligence by using common sense to solve problems. But when you know him well, you appreciate that there is a first-rate intellect guiding that common sense. As a practicing lawyer, as well as a government leader, his grasp of complex problems, diverse interests, and competing personalities al-

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<sup>474</sup> *Id.* at 403.

<sup>475</sup> *Id.* at 404.

<sup>476</sup> On appeal, Bollin contended that Judge Chambers' exclusion of the fact that Oles had absconded was error because "evidence of Oles' flight would have shown Oles to be a man who manipulated Bollin into participating in the events in this case, and would have been highly probative of Bollin's intent." The Fourth Circuit held, however, that "[a]lthough a co-defendant's flight may be relevant to show the guilt of that defendant, it does not tend to show that another defendant is innocent, at least not where, as here, there can be more than one guilty party." *Id.* at 413 (citations omitted).

<sup>477</sup> Interview with Guy Bucci, Partner, Bucci, Bailey, & Javins L.C., in Charleston, W. Va. (July 11, 2006).

<sup>478</sup> "He always beat me," Bucci admitted in an interview on July 11, 2006. *Id.*

<sup>479</sup> Interview with Robert S. Kiss, Speaker of the House, West Virginia House of Delegates (1996–2006), Partner, Bowles, Rice, McDavid, Graff, & Love, L.L.P., in Charleston, W. Va. (July 11, 2006).

most always ended in a favorable result that everyone took ownership in and all were proud to call their own.<sup>480</sup>

Speaker Kiss also emphasized Judge Chambers' ability to convince a group of diverse people with varying opinions and interests and objects to come together to solve a problem. "One aspect of success in the legislature," Kiss noted, "that is more important than political philosophy or connections is the willingness to work hard. Chuck Chambers was a very hard worker. He also had a tremendous wit. He could laugh at situations and at himself. He put people at ease and didn't take himself too seriously. He took his work *very* seriously, but didn't take himself too seriously. As a result he put people at ease and was able to work out compromises."<sup>481</sup>

This may well be a model description of an effective federal judge.

THOMAS E. JOHNSTON<sup>482</sup>

Thomas E. Johnston was born on September 8, 1967, in Charleston, the only child of William E. Johnston and Betty Jo Walters Johnston. His father was a veterinarian who served as a state and federal meat inspector, and in the late fall of 1967 moved his family to Point Pleasant on the Ohio River where he subsequently opened a private veterinary practice.<sup>483</sup>

Thomas Johnston attended public schools in Point Pleasant and was very active in the Civil Air Patrol. In high school, he considered a career as a military pilot but soon realized his eyesight would preclude that possibility. In the fall of 1985 he entered West Virginia University where he majored in Political Science. He was active in student government, serving on the Student Board of Governors. He was named a Truman Scholar, graduated Summa Cum Laude in 1989, and was elected into Phi Beta Kappa.

He entered the WVU College of Law where he graduated Order of the Coif in 1992. While in law school he was elected Vice President of the Student Bar Association and served as an Articles Editor of the *West Virginia Law Review*.

On graduation from law school he was named law clerk to Judge Frederick P. Stamp, Jr., who was then Chief Judge of the United States District Court for Northern West Virginia. After two years with Judge Stamp he joined the Wheeling law firm of Schrader, Recht, Byrd Companion & Gurley.<sup>484</sup> Two

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<sup>480</sup> Interview with Guy Bucci, *supra* note 477.

<sup>481</sup> Interview with Robert S. Kiss, *supra* note 479.

<sup>482</sup> All otherwise uncited biographical information about Judge Johnston was taken from an interview with Thomas E. Johnston, United States District Judge for the Southern District of West Virginia, in Charleston, W. Va. (July 13, 2006).

<sup>483</sup> The family was living in South Charleston when the future judge was born and moved to Point Pleasant two weeks before the collapse of the Silver Bridge, which occurred on December 15, 1967. *Id.*

<sup>484</sup> The firm is now known as Schrader, Byrd & Companion, PLLC.

years later he went with the Wheeling office of the Charleston-based law firm of Flaherty, Sensabaugh and Bonasso, and in 1998 he joined the Wheeling law firm of Bailey, Riley, Buch & Harman. That same year he was elected Chairman of the Ohio County Republican Executive Committee, and he entered the statewide political arena as a worker in Supreme Court Justice John McCuskey's race for election to West Virginia's highest court.<sup>485</sup>

By the presidential election year of 2000, Johnston became even more deeply involved in politics. Although he was the youngest county chairman in the state, he had been named Chair of Republican County Chairmen in West Virginia. He participated in Shelly Moore Capito's successful effort to be elected to the United States House of Representatives from West Virginia's Second Congressional District. He also served as Campaign Coordinator for West Virginia's Northern Panhandle for Texas Governor George W. Bush's presidential campaign, building the Bush organization from the ground up. He was involved with the State Republican Party, serving as a member of the party platform committee for the state and was an alternate to the 2000 Republican National Convention in Philadelphia.

On September 6, 2001, he was nominated to be the United States Attorney for Northern West Virginia. His nomination was confirmed by the United States Senate in late October and he was sworn into office on October 30, 2001.

As United States Attorney he was, as are most United States Attorneys these days, much involved in drug cases and often worked with the Federal Sentencing Guidelines.<sup>486</sup> He also started three initiatives as United States Attorney. The first involved the building of an anti-terrorism effort in the state, an effort that was also taking place in other agencies across the country following the September 11, 2001 terrorist attacks. The plan involved putting in place an intelligence network that would collect potentially suspicious incidents and assure that the incidents were viewed as a whole. Thus, information regarding a seemingly minor incident in Morgantown, and equally insignificant incidents in Pendleton and Wirt Counties, might be viewed in a different light when all three incidents were reviewed by law enforcement experts looking at the whole picture of suspicious activity in West Virginia.

The second initiative was a novel federal approach to the widespread and too often deadly problem of domestic violence in West Virginia. *Project Safe Homes* was designed by Johnston to provide law enforcement and victim advocates with a new set of tools in their efforts to address and reduce domestic

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<sup>485</sup> McCuskey had been appointed to the Supreme Court by Governor Cecil Underwood in early January 1998, following the resignation of Justice Thomas E. McHugh. On November 3, 1998, he was defeated by Warren R. McGraw in the election to fill the remainder of Justice McHugh's term, which expired on December 31, 2004.

<sup>486</sup> In fact, Judge Johnston has been involved with the Federal Sentencing Guidelines for his entire career: as law clerk to Judge Stamp, as United States Attorney and, while practicing in the private sector, as appointed and retained counsel in the Federal District Court for Northern West Virginia.

violence, a law enforcement issue of substantial importance in the state. Johnston's strategy in *Project Safe Homes* was to combine the vigorous prosecution of federal firearms statutes, including those related to domestic violence, with a message. That message was, "If you are convicted of domestic violence, you lose your guns, all of them, for life." Johnston realized this was a potentially powerful message in a state where firearms ownership and use, especially for hunting, is so treasured. To effectuate this initiative, he worked closely not only with law enforcement, but also with community groups as diverse as the West Virginia Coalition Against Domestic Violence and the state affiliate of the National Rifle Association.

Thirdly, recognizing the relatively elderly population of West Virginia, Johnston started an initiative designed to address crimes committed against this large and sometimes vulnerable segment of the state's citizens. The *Senior Protection Force* brought together law enforcement as well as governmental and private groups, such as the AARP, to address fraud and abuse and neglect of the elderly. This initiative had a heavy emphasis on prevention through education, and Johnston traveled the district giving presentations on how to avoid becoming a victim.

As United States Attorney, Johnston also continued an initiative combating crimes against children in the Northern Panhandle. This initiative was started earlier by Judge Johnston's wife, Lisa Grimes Johnston, herself an accomplished federal prosecutor and a 1988 graduate of the WVU College of Law.

Judge Johnston also tried three cases while serving as United States Attorney (usually sitting as second chair to the Assistant United States Attorney responsible for the case): a case involving traveling across interstate lines to have sex with a minor; a significant drug case; and a case growing out of a bank robbery in Morgantown.<sup>487</sup>

The Johnstons have two children, Joanna Elizabeth ("Joie"), age ten, and Jack Garrett, eight years old. In 2005 Judge Johnston has coached the baseball team on which both his daughter and son played (his wife was the scorekeeper). His wife, Lisa, played varsity tennis at WVU and served as team captain, and was designated the team's most valuable player for three consecutive years. The Johnstons' shared Christian faith is most important to them.

Judge Johnston is widely read, concentrating on political biographies featuring characters as different as President Lyndon Johnson and Peter the Great. He is also interested in American and European history and enjoys fiction, including the novels of Tom Clancy.

Warming to his new career as federal judge, Johnston says while most folks would assume most of his preparation for the job would come from his role as United States Attorney, he actually draws more upon his experience from his time as a law clerk. When faced with a difficult decision, more often than

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<sup>487</sup> His first jury trial in private practice was a first-degree murder trial.



not, he says, he asks himself: “What would Judge Stamp do?” That, he says, has made the transition relatively easy.

At the time of his selection as United States Attorney, he was the second youngest United States Attorney in the country.<sup>488</sup> Now, on the federal bench, he is the youngest United States District Judge.<sup>489</sup>

#### CONCLUSION

Without exception, West Virginia’s federal judges have reflected the high standards our citizens have a right to expect of those who give their lives to public service. Men and women with feet of clay, from widely differing backgrounds and with personal interests as varied as the individuals themselves, they have always conducted themselves in a manner that should make all West Virginians proud. Theirs is a fascinating story, sprinkled with humor, moments of great courage, and persistent dedication to the cause of justice.

“Justice, sir, is the great interest of man on earth,” Daniel Webster said at the funeral of Mr. Justice Story in 1845.<sup>490</sup> The lives and service of the judges of the United States District Court for the Southern District of West Virginia reflect their deep and abiding appreciation of Webster’s sentiments. If the lynchpin of democracy is, indeed, a strong and independent judiciary, the judges of the United States District Court for the Southern District of West Virginia can be a great source of confidence.

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<sup>488</sup> The youngest was Strom Thurmond, Jr., of South Carolina.

<sup>489</sup> Judge David Faber, Remarks at Judge Johnston’s swearing-in ceremony (July 12, 2006).

<sup>490</sup> JOHN BARTLETT, FAMILIAR QUOTATIONS 340 (11th ed. 1938).