



Fed Tide

October 2013

The Newsletter of the Tidewater Chapter of the Federal Bar Association

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PRESIDENT'S MESSAGE

R. Johan Conrod Jr., Kaufman & Canoles, P.C.



Welcome to the Fall 2013 edition of the *Fed Tide*. This year has flown by, but your chapter has accomplished quite a bit in the last several months. In the time since we sent you the first edition of *Fed Tide*, the chapter has co-sponsored two presentations of “Lawyers Without Rights: Jewish Lawyers in Germany Under the Third Reich,” received a chapter achievement award at the FBA’s annual meeting in Puerto Rico (thank you, Susan Blackman and Stephen Jackson for spearheading the application process for that award), and co-sponsored both the FBA annual meeting and the Federal Public Defender’s office annual seminar for criminal defense lawyers. We’re on the brink of hosting U.S. Magistrate Judge Tommy Miller’s seminar on Sanctions in Federal Civil Cases, and we have lined up a very special year end luncheon to put a bow on 2013. We’ll kick off 2014 with the annual Introduction to Federal Practice seminar in January, and our incoming president Larry Dash will preside over the festivities for the rest of the year.

In this edition of *Fed Tide*, you’ll find further details on some of these happenings, as well as a Q&A with Magistrate Judge Tommy Miller, a long-time member of our local federal bench and – perhaps most importantly – a former chapter president of your FBA. As always, we hope you’ll find this information useful – and we hope you’ll contribute your own news, notes and articles of interest for future editions. Until next time, thank you for reading.

Johan Conrod

Tidewater FBA Chapter 2013 Chapter Activity Presidential Achievement Award

Each year the FBA seeks to recognize the accomplishments that outstanding FBA chapters have made throughout the year. Two levels of recognition are awarded: (1) Presidential Achievement Awards, and (2) Presidential Excellence Awards. The Tidewater Chapter is honored to have been selected as a recipient of a 2013 Chapter Activity Presidential award! This award was presented at the Awards Luncheon on September 28, 2013 at the FBA Annual Meeting and Convention in San Juan, Puerto Rico.

This award is due in large part to the resounding success of the Lawyers Without Rights and Law Day events co-sponsored by the FBA and held in April and May this Spring. The Tidewater Chapter would like to thank all who contributed and participated, including two of our very own Federal Judges – The Honorable Henry Coke Morgan and The Honorable Mark S. Davis.

A Reflection on Law Day 2013 – *by Susan Blackman:*

The theme of the Law Day event was "Eroding & Restoring the Rule of Law: From Hitler's Decree to the Nuremberg Trial." We began with a reception during which attendees viewed the exhibit created by the German Federal Bar called "Lawyers without Rights." The exhibit depicts Hitler's early action, within the first two months after he became Chancellor, to bar Jewish lawyers and judges from appearing in German courts. The Exhibit shows what happened to the Jewish lawyers and Jurists who were affected by this decree. The panel discussion following the reception was moderated by Susan R. Blackman of Willcox & Savage, P.C., the Vice President of the Hampton Roads Chapter of the FBA.

The panel included a federal judge and an accomplished film producer who restored the film of the Nuremberg trial, which her father had been assigned by the U.S. War Department to create after World War II. The Producer, Sandra Schulberg, talked about the bold decision made by U.S. Supreme Court Justice Robert Jackson to use film evidence during the trial of Nazi War Criminals. Justice Jackson, who also served as Chief Prosecutor for the United States during the trial conducted by the Allied countries, also made the remarkable decision to film the trial itself, so that the people of Germany - and the world - could see that these defendants were given a fair trial including the chance to defend themselves against the charges they faced. Ms. Shulberg showed clips of "Nuremberg: Its Lesson for Today" during the panel discussion. (She also made the whole film available for viewing in the Theater by those audience members who wanted to see it after the formal program concluded.)

U.S. District Judge Henry Coke Morgan, Jr. then compared the ending of World War I, which left Germany vulnerable to the rise of a Dictator like Hitler, to the ending of World War II, which included the Nuremberg Trial as a first step toward restoration of the Rule of Law in war-torn Europe, and the Marshall Plan, which helped rebuild Europe and contributed to the long-term alliance that has been maintained between Germany and the United States. Judge Morgan reviewed what the Rule of Law means and provided examples of high points and low points in U.S. history, including times when our country did not treat all persons with justice and equality before the law and instances in which we made great strides in that direction to achieve those noble ideals that are critical to the foundation of our government.

Through its Chapter Activity Fund Grant, the FBA helped make this extraordinary event possible. As a coordinator of this program and another program relating to the Lawyers without Rights exhibit in Norfolk, Virginia, I would have been thrilled to have 150 people sign up to attend this program in Virginia Beach on a work night. I was delighted to learn that we actually had about 350 register to attend; and some showed up at the door without pre-registering! Our Law Day Committee is very happy with those numbers.



Law Day 2013 - Pictured [from the left]: Mark Warmbier (Kaufman & Canoles) John Gardner (Gardner & Mendoza), Johan Conrod (Kaufman & Canoles) ; Mark Slaughter (Willcox & Savage); Sandra Schulberg (Film Producer); U.S. District Judge Henry Coke Morgan, Jr.; Susan Blackman (Willcox & Savage); Robert DeSousa, (national President of the FBA); Erin Ashcroft (Stihl)).

Informal Fall Luncheon and CLE --October 30, 2013 Featuring The Honorable Tommy E. Miller discussing Ethics and Sanctions

Details: October 30, 2013 at 12:00 pm, the Offices of Kaufman & Canoles - Pizza lunch will be provided

Insights from the Bench – A Q&A with The Honorable Tommy E. Miller, United States Magistrate Judge

1. *Best advice you received about how to be an effective Judge?*

After my investiture, I chatted with a number of lawyers. Jack Greer came up to me and said “Have you heard the old saying that it often takes only six months for a good trial lawyer to go bad as a judge?” I am not certain if he was attempting to send a message, but I have often thought of that comment as I am watching a lawyer struggle in court. It helps me remember that trial lawyers lead a tough life. I was behind the podium for many trials, and I try to exercise control over myself so that I won’t achieve Jack’s prediction.

2. *What advice would you give to a young lawyer starting a legal career?*

Ideally, find an area of the law that interests you and practice it with people that you like. You will find that you enjoy the law and life much more.

3. *What constructive comments would you provide to assist lawyers practicing before you?*

Master the rules of procedure in your specialty, the rules of evidence and the local rules. You may learn the substantive law of a case and never use that law again. The rules of practice are important in every case. Make them your friends.

4. *What are some of your pet peeves that you see fairly consistently in the briefs / motions filed with the court?*

Sometimes lawyers make personal attacks on opposing counsel in their memorandums of law. Local Civil Rule 7(F)(1) provides that counsel should file "...a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies." There is no room in the rule for insults.

5. *Are civility and professionalism as strong today as they were 10 years ago?*

In this court, civility and professionalism are stronger than 10 years ago and much stronger than 20 years ago. Law schools and the state and local bar associations have placed a great deal of emphasis on these topics. I am rarely called on to resolve a silly discovery dispute.

6. *What is the best part about being a judge?*

Lawyers laugh at my jokes and my blood pressure is 40 points lower than when I was an Assistant U. S. Attorney.

7. *You used to be the president of the federal bar association...can you share a bit about that experience?*

The Tidewater Chapter of the Federal Bar Association was just getting off the ground in the early 1980s. Richard Glaser asked me to join. I think I was the 10th member. Two years later, I was President. We decided to hold two seminars a year and ask the judges to be the speakers. The programs were successful and we actually put a few dollars in the bank.

8. *Memory or event from your early years that motivated you to study law?*

None!

I was a senior in college in the fall of 1969. I was prepared to get drafted or enlist after graduation in June 1970 and expected to go Vietnam. President Nixon instituted a draft lottery and the first drawing was held December 1, 1969. I received a high number and knew that I would not be drafted. Since I had not thought beyond the draft, I had nothing better to do than to go to law school.

I found my niche in the law during the summer after my 1L year. I was a summer police officer in Virginia Beach assigned to a single man police car. I very much enjoyed the minor investigations that I did, and presenting my cases in court. I focused on criminal law after that summer until I became a judge.

9. *Most unusual / humorous moment in your courtroom?*

Judge Robert Doumar was assigned by the Chief Justice to a case where a Bankruptcy Judge in Detroit sued the judges of the Court of Appeals for the Sixth Circuit. After reviewing dispositive motions, he decided that it was in the best interest of the parties to settle the case. He assigned the settlement proceedings to me. I had a few telephone conferences with counsel and then went to Detroit. I conducted a settlement conference with the Chief Judge of the Sixth Circuit and the Bankruptcy Judge. Needless to say, the situation was unique. After hours of conferring, we reached an agreement that all could live with.

10. What changes have you seen in the practice of law since taking the bench?

Information overloads cause by technology. Instead of a few telephone conversations between two people which were not recorded, we now have strings of emails that begat more strings of emails that are forwarded to more people with and without attachments that begat more emails. Of course metadata is buried in every electronic document and some counsel think they need it all. Electronic discovery seems to overwhelm certain cases.

On the other hand, the visual displays used in courts now certainly beat my hand drawn poster board charts of the 1970s.

EDVA CLERK'S CORNER

*Practical Tips and Announcements
from the Norfolk and Newport News
Divisions Clerk's Offices*



- As of July 15, 2013 all submissions to the Norfolk or Newport News Divisions must be filed electronically, unless the document is excluded from e-filing, such as a sealed document.
- 16-B orders have been recently updated to reflect that counsel should notify the court of a settlement by electronically filing a notice of settlement instead of faxing the court. Please use the "notice of settlement" event in CM/ECF when docketing this notification. The document can be in the form of a letter or a formal pleading. The court requires counsel to submit a proposed dismissal order signed by all counsel within eleven (11) days of the date of the notice.
- Reminder that the civil filing fee increased to \$400.00 effective May 1, 2013.

Clerk's Office, U.S. District Court, Norfolk

Upcoming National FBA Opportunities

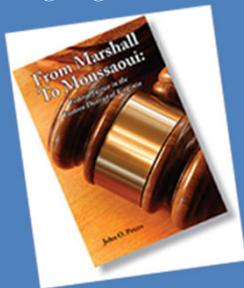
- 15th Annual D.C. Indian Law Conference – Washington, D.C., November 15, 2013. Go to www.fedbar.org/2013-dc-indian-law to register.

FBA CLE WEBINARS

- Emergence of the Mid-Size Law Firm - 1.0 CLE Credit Register online at <https://www.eventbrite.com/event/8288909351>
- Expert, Forensic Analyst, In-House Counsel and Litigator Perspectives on Social Media Evidence – The Key Concepts Every Lawyer Should Know - 1.0 CLE Credit Register online at <https://www.eventbrite.com/event/8591199509>

BOOK LAUNCH --
From Marshall to
Moussaoui: Federal Justice
in the Eastern District of
Virginia - Author John O.

Peters has published a work that reflects on the notable cases that have passed through the Eastern District of Virginia. A book launch party will be held on **November 7, 2013 from 6:15 to 9:00pm** at The MacArthur Square Visitors Center in downtown Norfolk. Remarks by author John O. Peters will be followed by a reception and book signing.



Judicial Candidates
Endorsed for EDVA

Vacancy – United States District Judge James R. Spencer is set to take senior status in March of 2014. Twelve candidates submitted their names for consideration for the judgeship. The candidates were interviewed by various bar groups which make recommendations for the federal judgeship. The VSB rated five contenders as highly qualified: *Norfolk lawyer Alan D. Albert*; *Richmond lawyer Dabney J. Carr IV*; *Richmond lawyer Colline J. Hite*; *Richmond Circuit Judge Clarence N. Jenkins Jr.*; *U.S. Magistrate Judge M. Hannah Lauck*.

These recommendations were then given to Virginia's two U.S. Senators. On August 7, 2013, in a joint letter to President Obama, Senators Mark Warner and Tim Kaine recommended Judge Lauck and Judge Jenkins. Lauck is former law clerk for Judge Spencer. A formal nomination from the President is expected this year.

Noteworthy Decisions from the Fourth Circuit and EDVA

- **Fourth Circuit Denies Reporter Shield** - Jeffery Sterling, a former CIA agent, was indicted in the Eastern District of Virginia for unauthorized retention and disclosure of national defense information, in violation of the Espionage Act. James Risen is a reporter who published a book which allegedly included classified CIA information leaked from Sterling. When the Government issued a subpoena for Risen to testify at Sterling's trial, the district court quashed the subpoena to the extent it sought Risen's source based on First Amendment reporter's privilege. The Fourth Circuit reversed the district court's order quashing the subpoena and held that no First Amendment reporter's privilege or common law reporter's privilege exists in criminal proceedings.

Chief Judge Traxler explained in the majority opinion that “*Branzburg* simply does not allow for the recognition of a First Amendment reporter's privilege in a criminal proceeding (*Id.* at 24) So long as the subpoena is issued in good faith and is based on a legitimate need of law enforcement, the government need not make any special showing to obtain evidence of criminal conduct from a reporter in a criminal proceeding. The reporter must appear and give testimony just as every other citizen must (*Id.* at 25). . . . We decline the invitation to step in now and create a testimonial privilege under common law that the Supreme Court has said does not exist and that Congress has considered and failed to provide legislatively. If Risen is to be protected from being compelled to testify and give what evidence of crime he possesses, in contravention of every citizen's duty to do so, we believe that decision should rest with the Supreme Court. . . . (*Id.* at 47).” ***US v. Jeffery Sterling, (Traxler) No.11-5028 (July 19, 2013).***

- **No Bivens Claim for Military Sexual Assault** - 28 current and former members of the United States armed forces alleged they were victims of rape and sexual misconduct by fellow service members during their military careers and brought suit against two former secretaries of defense (Rumsfeld and Gates) and sought money damages pursuant *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed the complaint pursuant to the doctrine of judicial abstention noting that the Supreme Court has counseled against the exercise of judicial authority in the military context. The Fourth Circuit affirmed the district court's dismissal and noted that *Bivens* suits are never permitted for constitutional violations arising from military service, no matter how severe the injury or how egregious the rights infringement. The Fourth Circuit explained that “Congress has never created an express cause of action as a remedy for the type of claim that Plaintiffs allege here. And it is Congress, not the courts, that the Constitution has charged with that responsibility. ***Cioca v. Rumsfeld, (Agee) No. 12-1065, at 29-30 (July 23, 2013).***

Tidewater Chapter Membership

Our Chapter's Membership Chair is Mark Warmbier, and he can be reached at mewarmbier@kaufcan.com. We ask our current members to encourage their colleagues or associates to join the FBA. Please contact Mark with any membership questions!

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Members of the Tidewater Chapter are encouraged to submit articles or news information of interest for possible publication in the *Fed Tide*. Please submit any proposed articles or news information to the Editors at the e-mail addresses listed below. The Editors reserve the right to decide on publication, and any articles accepted for publication are subject to editing.

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- **South Carolina Immigration Statute Preempted by Federal Law -** South Carolina passed a package of immigration laws (“the Act”), including a provision that prohibited illegals from “transporting or moving” within the state in furtherance of avoiding detection. The district court preliminarily enjoined certain sections of the Act on federal preemption grounds. The Fourth Circuit affirmed the preliminary injunction and concluded that “the federal government has clearly occupied the field of regulating the concealing, harboring, and transporting of unlawfully present aliens.” *Id.* at 27. The Fourth Circuit went on to explain that “Younger abstention is inapplicable where, as here, state proceedings have not begun against the federal plaintiffs and the plaintiffs seek injunctive relief to protect their constitutional rights.” *Id.* at 20. ***US v. State of South Carolina, (Davis) No. 12-1096 (July 23, 2013).***
- **Correctional Officer Has Qualified Immunity for Assault of Inmate –** Plaintiff Demetrius Hill sued correctional officer alleging that CO used excessive force against him in violation of his Eight Amendment rights. The district court denied the Defendant’s motion for judgment as a matter of law based on qualified immunity and relied on *Wilkins v. Gaddy*, 55 U.S. 34 (2010), which held that there is no de minimis injury threshold for an excessive force claim. Prior to the *Wilkins* decision, the Fourth Circuit had consistently held that a plaintiff cannot prevail on an excessive force claim if his injuries were de minimis. The Fourth Circuit reversed and held that *Wilkins* was not applicable to Plaintiff’s case since the alleged assault took place in 2007 and the *Wilkins* decision can only be applied prospectively in the context of qualified immunity. Judge Thacker dissented reasoning that even before *Wilkins*, “It would have been readily apparent to a reasonable officer that where a disturbance had already been abated, he could not assault a restrained, compliant, and cooperative inmate for ‘a good solid two minutes,’ punching and elbowing him repeatedly in the abdomen and head, without applying excessive force in violation of the inmate’s Eighth Amendment right to be free from cruel and unusual punishment.” *Id.* At 39. ***Demetrius Hill v. C.O. Crum, (Agee) No. 12-6705 (August 14, 2013).***

Noteworthy Fourth Circuit and EDVA Cases – continued

- **Fourth Circuit Finds Search of Trashcan is Not Fourth Amendment Violation** - Jackson was convicted for drug trafficking and on appeal he alleged that trash pulled from behind his apartment violated the Fourth Amendment and should not have provided basis for warrant – Fourth circuit held that the trash can was sitting on the common property of the apartment complex (and not next to apartment’s rear door) and therefore the trash search was “beyond the apartment’s curtilage”; Court also held that Jackson lacked a reasonable expectation of privacy in the trash can’s contents. Judge Thacker dissented and argued that a clear factual dispute existed as to the location of the trashcan as the photograph exhibits were taken after the fact by police (nearly 6 months after the search). Judge Thacker went on to point out that the trash can was located near the apartments patio area, inside a gated yard to which only apartment tenants had access. Additionally, in order to place the trash out for collection, the tenant would have to take it outside this gated area and place it on the public curb. According to Judge Thacker “the officers’ unjustified probe of Jackson’s trashcan when not left for collection or otherwise abandoned constituted a search falling under the purview of the Fourth Amendment Absent a warrant or the presence of any exception thereto, the officer’s trawling, exploratory search was patently unreasonable. Accordingly, the district court erred by refusing to suppress the evidence tainted by the fruits of the illegal search of Jackson’s trashcan.” *Id.* at 39-40. ***US v. Dana Jackson*, (Niemeyer) No. 12-4559 (August 26, 2013).**
- **Title VII Class Action Against Family Dollar Granted Leave to Amend Complaint --** A group of female managers of Family Dollar stores brought this action claiming that Family Dollar violated Title VII and the Equal Pay Act by paying them less than male managers with similar qualification. Plaintiffs initially relied on *Dukes v. Wal-Mart, Inc.* for certification of their class. However, this case was reversed by the Supreme Court in *Wal-Mart Store, Inc. v. Dukes*. Thus, the district court denied Plaintiffs’ class certification based on the holding handed down in *Wal-Mart* and also denied Plaintiffs’ motion to amend. The district court explained that any amendment would be futile since Plaintiffs’ alleged that they were discriminated against on the basis of their gender as a result of “subjective decisions made at the local store levels” – and under *Wal-Mart* such subjective-decision making class actions were barred. A Fourth Circuit panel reversed (2-1) and remanded the district court’s denial of Plaintiffs’ motion to amend and explained that *Wal-Mart* does not bar all class actions “where subjective decision-making or discretion is alleged.” Instead, a class action brought under Title VII can satisfy the class action commonality requirement if “all managers [] exercise discretion in a common way with[] some common direction,” and the “subjective practice at issue affected the class in a uniform manner.” ***Scott, et. al. v. Family Dollar Stores Inc.*, (Gregory) No. 12-1610 (October 16, 2013).**

LOOKING AHEAD -- Tidewater FBA Chapter’s Annual Luncheon– December 2013 at the Town Point Club.

More info to come soon!