3 BAR ASSOCIATION FOR THE THIRD FEDERAL CIRCUIT

On Appeal

February 2013
Volume VII, Number 1

U.S. CONGRESS ENDS THIRD CIRCUIT'S OVERSIGHT OF FIVE-YEAR-OLD VIRGIN ISLANDS SUPREME COURT

Andrew Simpson, St. Croix, U.S.V.I. and Peter Goldberger, Ardmore, PA

The Virgin Islands Supreme Court had a special reason to celebrate the new year: on December 28, 2012, President Barack Obama signed a bill that removed the Third Circuit's oversight of the V.I. Supreme Court and heralded a significant milestone in the Territory's path toward greater self-governance. Decisions of the V.I. Supreme Court on issues of local law are now unreviewable by any federal court. Decisions implicating the U.S. Constitution or federal law will be subject to certiorari oversight by the U.S. Supreme Court, just like the decisions of any state supreme court.

But why did the Third Circuit, a federal appeals court, previously have oversight over a non-federal court like the V.I. Supreme Court? Article IV, sec. 3 of the U.S. Constitution gives Congress the authority to make "all needful Rules and Regulations respecting the Territory or Other Property of the United States." Consequently, when the United States acquired the Territory of the Virgin Islands from Denmark on March 31, 1917, Congress imposed a governing structure upon the Territory. Initially, it was placed under the administrative rule of the U.S. Navy—there was no local executive or legislature. For the existing judicial system, Congress provided that the Third Circuit would have appellate jurisdiction over all cases arising in the Territory, including those that formerly had been reviewable by the courts of Denmark. *Clen v. Jorgensen*, 265 F. 120, 121 (3d Cir. 1921).

(continued on page 2)

THIRD CIRCUIT UPHOLDS LAW RESTRICTING PRESS ACCESS TO POLLING PLACES, CREATING CIRCUIT SPLIT

PG PUBLISHING CO. V. AICHELE, NO. 12-3863, (3D CIR. JAN. 15, 2013)

Thomas S. Jones and Hayley A. Haldeman, Jones Day
Pittsburgh, PA

In January, the Third Circuit waded into the constitutional waters surrounding press access to polling places during Election Day. Applying the "experience and logic test" to the voting process, the Third Circuit recently ruled that the First Amendment right of access—which permits the press to gather news—may be limited in the context of polling places. *PG Publishing Co. v. Aichele*, No. 12-3863, 2013 WL 151124, --- F.3d --- (3d. Cir. Jan. 15, 2013). The opinion by Judge Greenaway, Jr., writing for a panel that included Judge Hardiman and Judge Vanaskie, upholds a Pennsylvania law restricting media access to polling places during elections. The opinion rejects the Sixth Circuit's analysis of a similar statute, creating a split between the circuits.

The decision affirmed the Western District of Pennsylvania's ruling that the statute did not violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. Plaintiff, PG Publishing Company ("PG"), publisher of the *Pittsburgh Post-Gazette*, filed a section 1983 suit in July 2012 against the Pennsylvania Secretary of State and the Allegheny County Board of Elections alleging the unconstitutionality of 25 Pa. Stat. Ann. § 3060(d).

(continued on page 3)

FOR MORE INFORMATION ABOUT THE THIRD CIRCUIT BAR ASSOCIATION, PLEASE CONTACT US AT:
3cba@thirdcircuitbar.org
OR VISIT US AT:
www.thirdcircuitbar.org

U.S. CONGRESS ENDS THIRD CIRCUIT'S OVERSIGHT OF FIVE-YEAR-OLD…—continued from page 1

Clen, a landlord-tenant dispute, was the first case from the Virgin Islands to reach the Third Circuit. The unique relationship between the local V.I. court system and the Third Circuit evolved over the years, but it existed in some form from 1917 until the beginning of this year. The second case to reach the Circuit from the Territory was *Soto v. United States,* 273 F. 628 (3d Cir. 1921). That decision provides a great example of the unusual issues that can arise when a federal court exercises appellate jurisdiction over local cases.

Soto was a criminal case that began with an investigation into a ship-board murder allegedly committed by two sailors. The investigation was conducted by a Police Court established by local Virgin Islands law. In keeping with the European model of criminal procedure, which was followed in the V.I. at that time as a result of the Islands' Danish heritage, a judge presided over the investigative proceedings. The judge called the witnesses, who gave testimony. Then the two suspects were asked if they wished to rebut the testimony. Upon the completion of the investigation, criminal charges were filed in the federal district court. The same judge (from the Police Court) presided over this case, along with four "lay-judges" he selected to serve with him. The prosecution relied upon the written record from the Police Court to establish guilt. The seamen were offered the opportunity to call witnesses but chose not to. (On appeal, the Third Circuit noted that the "choice" was illusory, as all witnesses had long since departed on the ship.) The district court found one of the seamen guilty of murder and sentenced him to death; the other seaman was convicted as an accomplice and sentenced to six years.

On appeal, the Third Circuit noted that Congress had provided that the judicial procedure established by Danish law should continue to apply in the Territory, "in so far as compatible with the changed sovereignty." While Danish law had been followed scrupulously in the case, the Third Circuit explained, the right of an accused to confront witnesses—in contrast, interestingly, to the right to trial by jury—was a fundamental element of due process of law that had to be provided to an accused on U.S. territory. Consequently, the Court reversed the convictions and remanded for a new trial.

Until the last five years, the nature of the Third Circuit's relationship to the Virgin Islands' judicial system remained fundamentally similar to when *Soto* was decided. Over the years, as Congress slowly granted the Territory greater self-governance, the jurisdiction of the local courts expanded; but, the one constant was the Third Circuit's role as the final authority on issues of local law.

In 1984, Congress authorized the local legislature to create a Supreme Court of the Virgin Islands, but provided that for the first 15 years of its existence, the Third Circuit could review decisions of that court via writ of certiorari. The Circuit's Judicial Council was also directed to report every five years to Congress "as to whether [the Supreme Court] had developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States" from its final decisions.

In 2004, the Virgin Islands legislature established a Supreme Court and the court assumed jurisdiction January 29, 2007. In accordance with its mandate from Congress, the Third Circuit established local rules for considering writs of certiorari to the Virgin Islands Supreme Court. In the first case in which it granted certiorari, the Circuit held that it would defer to decisions of the Supreme Court of the Virgin Islands on matters of local law unless it found the decisions to be manifestly erroneous. (The Third Circuit Bar Association provided commentary on the Court's proposed certiorari rules and, as part of that commentary, urged the Court to announce the standard of review for such cases at its earliest opportunity.) With President Obama's signature, that era of review is coming to an end. (The law removes Third Circuit oversight from all cases filed December 28, 2012 and later.)

While a jurisdiction's highest court might understandably chafe at the idea that another court could review its decisions on local law, the Supreme Court of the Virgin Islands never expressed any such frustration. Instead, it simply went to work. In its first five years of existence, the court issued 152 precedential opinions. Notably, in six years of review, the Third Circuit never reversed the court. The Supreme Court's list of accomplishments is impressive. It enjoys a reputation for prompt and professional disposition of its appeals; it has established an efficient electronic document filing system that puts it at the cutting edge of state supreme courts (as of 2010, only 15 states had implemented appellate e-filing systems); it has modernized and professionalized the attorney discipline system; it has adopted rules of judicial discipline; it streams oral arguments live on the Internet; and it has published its performance objectives and measures for the next five years. In short, it is a fully functioning, highly professional, supreme court. Indeed, rather than being subject to oversight, it could serve as a model for state high courts throughout the United States.

For these reasons, it is not surprising that the Third Circuit—after an investigation and report from a committee comprising Circuit Judge D. Brooks Smith, Senior Circuit Judge Walter Stapleton, and Third Circuit Clerk Marcia Waldron—recommended in its first five-year oversight report to Congress that interim certiorari jurisdiction be terminated. Interestingly, the oversight transition in the Virgin Islands was shorter than the process that took place in Guam, where the Ninth Circuit recommended a transition to local judicial independence after eight and a half years.

Upon receiving the Third Circuit's report, Congress passed Public Law 112-226, which the president signed into law December 28, 2012. The background of the law is recounted in the Third Circuit's December 21, 2012, decision in *Defoe v. Phillip*, 2012 WL 6643863. ***See* Case of Interest, page 3**.

For the Virgin Islands, the change is important and much to be desired. Nevertheless, the end of the Circuit's functioning as a local supreme court will change one aspect of the practice of law in the Territory that many Virgin Islands lawyers will look back upon with great fondness: the Circuit took its oversight role seriously, and as a result, Virgin Islands lawyers enjoyed the privilege of arguing cases before the Third Circuit in far greater numbers than their counterparts in New Jersey, Delaware and Pennsylvania. While the Circuit still will hear appeals from the federal district court in the Virgin Islands, which has the same jurisdiction as any U.S. District Court, the Virgin Islands bar will miss the enhanced interaction it previously enjoyed with the Circuit.

THIRD CIRCUIT UPHOLDS LAW RESTRICTING PRESS ACCESS…—continued from page 1

The statute mandates that "[a]ll persons," other than certain designated individuals such as election personnel and police officers, "must remain at least ten (10) feet distant from the polling place during the progress of the voting." PG claimed that the statute infringed on both its First Amendment right to gather news, particularly because Pennsylvania's then-recently enacted Voter ID Law would be applicable for the first time, and its Equal Protection right, because the statute's inconsistent application permitted reporters to take photographs in different counties. The district court dismissed both claims, and the Third Circuit granted an expedited appeal to resolve the issues before Election Day.

In its opinion, the Court first highlighted that the press has no greater First Amendment rights than the general public; accordingly, any analysis is equally applicable to both. Explaining that the statute only restricts access to a source of information rather than to information itself, the Court clarified that it was the First Amendment "right of access for news-gathering purposes" at stake, and not freedom of speech or the press.

The "traditional forum analysis" used to determine constitutionality in First Amendment cases was therefore inapplicable, though the Court noted that a polling place is a nonpublic forum.

Relying on *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and additional right of access jurisprudence, the Court selected the "experience and logic test," which balances "historical and structural considerations" to determine if a presumption of openness exists. The Supreme Court and the Third Circuit previously used the test to evaluate "access to information about governmental bodies and their actions or decisions." However, while other decisions addressed criminal trials, preliminary hearings, and deportation proceedings, *PG Publishing* marks the Third Circuit's first application of the test to the voting process.

The Court held that the experience and logic test "militate[s] against finding a right of access in this case." Under the test's first prong, which considers whether a place and process have traditionally been open to the press and public, the historical record "demonstrates a decided and long-standing trend away from openness." Although the Court saw more support for PG's arguments in the logic prong, which balances the risks and benefits of public access, concerns of overcrowded polling places and voter intimidation weighed against the establishment of a constitutional right of access.

The Court disagreed expressly with a Sixth Circuit ruling that held unconstitutional a statute similar to Section 3060(d). In *Beacon Journal Publishing Co. Inc. v. Blackwell*, 389 F.3d 683 (6th Cir. 2004), the Sixth Circuit employed the traditional forum analysis—but the Court found that opinion "unpersuasive."

The Court additionally affirmed dismissal of PG's equal protection claims, explaining PG did not show that defendants intentionally treated it differently from other Pennsylvania newspapers.

PG has announced that it intends to petition the Supreme Court for certiorari, citing the split with the Sixth Circuit.

CASE OF INTEREST

DEFOE V. PHILLIP, NO. 12-1586, 2012 WL 6643863, --- F.3D --- (3D CIR. DEC. 21, 2012)

Paige H. Forster, Reed Smith LLP
Pittsburgh, PA

As explained elsewhere in this newsletter (see **U.S. Congress Ends Third Circuit's Oversight of Five-Year-Old Virgin Islands Supreme Court**, page 1), as of the end of 2012, the Third Circuit will no longer have certiorari jurisdiction over decisions of the Virgin Islands Supreme Court. A week before the president signed the bill ending the Third Circuit's jurisdiction, the Court issued its decision in *Defoe v. Phillip*, which clarified the continuing precedential effect of its past decisions interpreting Virgin Islands local law.

The Virgin Islands Supreme Court was established in 2007 pursuant a federal statute, which also provided that the Third Circuit had authority to review V.I. Supreme Court decisions via writ of certiorari. The question presented to the Third Circuit in *Defoe* was whether Third Circuit precedent interpreting Virgin Islands local law, decided before the 2007 establishment of the Supreme Court, constituted controlling precedent in the V.I. Supreme Court.

The case arose from an accident at a Virgin Islands oil refinery in which an employee driving a company vehicle struck and injured his fellow employee. The Third Circuit had ruled in 2004 that the Virgin Islands worker's compensation statute prevented injured employees from suing their coworkers. The Virgin Islands trial court followed that precedent, but the V.I. Supreme Court reversed, concluding that it was not bound by the Third Circuit's decision.

After granting certiorari, the Third Circuit agreed with the V.I. Supreme Court in an opinion authored by Judge Smith. (Judge Hardiman joined the opinion and Judge Roth concurred, differing only on the scope of the question to be decided.) The Court based its analysis on the statutory language that provided for certiorari oversight by the Third Circuit until the V.I. Supreme Court "developed sufficient institutional traditions to justify direct review by the Supreme Court of the United States." 48 U.S.C. § 1613. The judicial structure of the Virgin Islands, the Third Circuit explained, meant that the V.I. Supreme Court was the final authority on local law, subject only to the Third Circuit's ability to reverse decisions that were manifestly erroneous or "inescapably wrong."

(continued on page 4)

CASE OF INTEREST…—continued from page 3

The Third Circuit concluded that the V.I. Supreme Court's refusal to follow the Third Circuit's 2004 worker's compensation decision was not "inescapably wrong." Although the Court continued to prefer its own interpretation of the statute, it noted that there also was support for the V.I. Supreme Court's interpretation. Affirming the V.I. Supreme Court, the Court noted, permitted the continued development of "indigenous jurisprudence" in the Virgin Islands.

In conclusion, the Third Circuit noted that the V.I. Supreme Court was "on the road to *Erie*" and would soon arrive at its "destination" (the landmark federalism decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), of course, and not the lakeshore city in Pennsylvania), where "federal courts...to defer to local courts on issues of local law." The Third Circuit's affirmance of the V.I. Supreme Court's decision took the territorial court one further step down the road to judicial self-determination, and Congress and the president completed the journey a week later by ending the Third Circuit's oversight. The Third Circuit's ruling in *Defoe*—that the V.I. Supreme Court is not bound by Third Circuit precedent construing or declaring territorial law, even precedent handed down when the V.I. Supreme Court was subject to Third Circuit certiorari review—was further endorsement of a process of developing local law that, by all accounts, has been successful.

FROM THE PRESIDENT'S DESK

The end of 2012 and the beginning of 2013 saw a significant change in the Third Circuit, which is highlighted in this issue: Congress passed, and the President signed into law, a bill that ended that Third Circuit's certiorari jurisdiction over the Supreme Court of the Virgin Islands.

Many of us "mainlanders" don't have the good fortune to practice in the Virgin Islands, but the 3CBA is active there. 3CBA Treasurer Andy Simpson, who has also held the V.I. district seat on the Board of Governors, has provided us with an informative summary of the evolution of the Virgin Islands courts, why the Third Circuit had certiorari jurisdiction in the first place, and why it has now ended (it's a happy ending, by the way – see the article beginning on page 1). Andy got an assist on the article from 3CBA Vice President Peter Goldberger, who is an expert on Third Circuit local rules and spearheads the representation of 3CBA members' interests whenever the Court issues proposed rules for comment. The article describes some important input the 3CBA provided a few years ago when the Third Circuit was developing its local rules connected to V.I. certiorari jurisdiction.

The Virgin Islands connection illustrates the ways in which the 3CBA continually works to raise the standards of Third Circuit practice, aid the Court in the administration of justice, and provide a voice for Third Circuit practitioners. Our work is important, and it makes a real difference in the Third Circuit. You received an email dues renewal notice in December. If it sank to the bottom of your inbox in the midst of the year-end press, please take a minute to fill out the renewal form, available here, and send in your 2013 dues. The Board has decided to again hold the dues to a modest $40 for the year. Please join or re-join, and get involved as well. We're always looking for newsletter contributors, program planners, and folks who can get involved in other ways.

One of my goals for 2013 is to offer at least one program in each district in the Circuit. I welcome your suggestions. We are also looking at updating (and upgrading) our website, www.thirdcircuitbar.org, to make it more useful for all. In the meantime, feel free to contact me or one of the committee chairs listed on page 5.

Lisa B. Freeland

President, Third Circuit Bar Association

PRACTICE POINTER: NINTH CIRCUIT GUIDES ARE HELPFUL RESEARCH TOOL FOR FOUNDATIONAL APPELLATE ISSUES

On its website, the United States Court of Appeals for the Ninth Circuit posts guides and legal outlines that can be useful for practitioners in the Third Circuit as well. These guides can be found on the Ninth Circuit's homepage by choosing the option, "Guides and Legal Outlines."

The Standards of Review guide defines the various standards (e.g., "de novo, "abuse of discretion," "arbitrary and capricious"), then provides an in-depth compendium of Ninth Circuit cases with the applicable standards of review for a wide variety of cases. Because the articulation of a given standard can of course vary between federal courts of appeals, the cases cited in the Ninth Circuit's guide will generally be a starting point for research within Third Circuit case law. They may be helpful, however, especially when an obscure standard is at issue. The guide contains standards for Criminal Proceedings, Civil Proceedings, and Review of Agency Decisions.

The Ninth Circuit's exhaustive guide on Appellate Jurisdiction may also prove useful in cases containing thorny questions of finality or appeal-ability. The guide is a comprehensive outline of statutory, rule-based, and case-based grounds for appellate jurisdiction. As with the Standards of Review document, further research will be necessary to find the applicable Third Circuit case law—but the Ninth Circuit guide may inform the practitioner's thinking and help to speed research.

Thanks to 3CBA Board of Governors member Andrew C. Simpson for flagging the Ninth Circuit practice guides as useful resources for Third Circuit practitioners.

SAVE THE DATE:

THIRD CIRCUIT REVIEW

MAY 14, 2013
Pittsburgh, PA

Plan on attending this informative CLE featuring Third Circuit judges' reflections on the past year's cases and the evolution of Third Circuit law.

Watch for details in *On Appeal* and your email inbox!

FOUNDING MEMBERS

Arlin M. Adams
Hon. William G. Bassler
Judge Harold Berger
Andrew T. Berry
Gabriel L.I. Bevilacqua
Theresa M. Blanco
Anthony J. Bolognese
Carl D. Buchholz
Robert L. Byer
Candace Cain
Mark R. Cedrone
Jacob C. Cohn
Pamela Lynn Colon
Ian Comisky
Kevin J. Connell
Stephen A. Cozen
Charles W. Craven
Thomas R. Curtin
Jane L. Dalton
Alan J. Davis
Mark Diamond
John T. Dorsey
Alan B. Epstein
David B. Fawcett
Henry L. Feuerzeig
Arlene Fickler
Ann T. Field
Paul J. Fishman
Michael Foreman
Lisa B. Freeland
Steven L. Friedman
Dennis F. Gleason
Alan S. Gold
Sidney L. Gold
Peter Goldberger
Jonathan L. Goldstein
Herve Gouraige
Robert Graci
David A. Gradwohl
Harold Green
Ruth Greenlee
William T. Hangley
James R. Hankle
John G. Harkins, Jr.
Judith E. Harris
Lawrence T. Hoyle, Jr.
Daniel B. Huyett
Carmine A. Iannaccone
Cynthia M. Jacob
John P. Karoly, Jr.
John G. Knorr II
George S. Kounoupis
Ronald A. Krauss
Ann C. Lebowitz
George S. Leone
Arnold Levin
Timothy K. Lewis
James B. Lieber
Jeffrey M. Lindy
Michael P. Malakoff
Edward F. Mannino
Kevin H. Marino
James C. Martin
W. Thomas McGough, Jr.
William B. McGuire
Bruce P. Merenstein
H. Laddie Montague, Jr.
Dianne M. Nast
Sandra Schultz Newman
Karl E. Osterhout
Robert L. Pratter
Brian M. Puricelli
Abraham C. Reich
Raymond J. Rigat
William W. Robertson
Joseph F. Roda
Lawrence M. Rolnick
Stuart H. Savett
James A. Scarpone
Howard D. Scher
Jeffrey M. Schlerf
Deena Jo Schneider
Collins J. Seitz, Jr.
Marcia G. Shein
Theodore Simon
Andrew C. Simpson
Carl A. Solano
Aslan T. Soobzokov
Antoinette R. Stone
Thomas D. Sutton
Peter W. Till
Paul H. Titus
Michael J. Torchia
John D. Tortorella
Joe H. Tucker, Jr.
H. Woodruff Turner
Stacey F. Vernallis
Robert A. Vort
Ralph G. Wellington
Barry M. Willoughby
Nancy Winkelman

FOUNDING FIRMS

Arseneault Whipple Farmer
Fassett & Azzarrello
Bifferato & Gentilotti
Blank Rome LLP
Connolly Bove Lodge Hutz
Cozen O'Connor
Duane Morris LLP
Eckert Seamans Cherin Mellott
Gibbons, PC
Hangley Aronchick Segal & Pudlin
Hoyle Fickler Herschel & Mathes
Marino & Tortorella
Marshall Dennehey Warner
Coleman & Goggin
Reed Smith LLP
Robertson Frelich Bruno & Cohen
Roda Nast
Schnader Harrison Segal & Lewis
Spector Gadon & Rosen
Harkins Cunningham LLP

COMMITTEE CHAIRS

Membership/Dues: Donna Doblick

Rules: Peter Goldberger and Deena Jo Schneider

Programs: Lisa Rodriguez and Bob Vort

Publicity/Newsletter: Colin Wrabley and Paige Forster

Website: Deena Jo Schneider (interim)

OFFICERS

President: Lisa Freeland
Pittsburgh, PA

President-Elect: Peter Goldberger
Ardmore, PA

Secretary: Charles L. Becker
Philadelphia, PA

Treasurer: Andrew C. Simpson
St. Croix, U.S. Virgin Islands

Immediate Past President: Stephen M. Orlofsky
Princeton, NJ

DIRECTORS

Edson Bostic
Wilmington, DE

Donna M. Doblick
Pittsburgh, PA

David Fine
Harrisburg, PA

John Hare,
Philadelphia, PA

Lisa J. Rodriguez
Haddonfield, NJ

Deena Jo Schneider
Philadelphia, PA

Robert A. Vort
Hackensack, NJ

Witold (Vic) J. Walczak
Pittsburgh, PA

Amy Zapp
Harrisburg, PA

Virgin Islands delegate (vacant)

This newsletter is compiled by the 3CBA's publicity/newsletter committee; please address suggestions to the committee's chair, Colin Wrabley (cwrabley@reedsmith.com).