

# University of Miami Law Review

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Volume 66  
Number 4 *Volume 66 Number 4 (Summer 2012)*  
*Eleventh Circuit Issue*

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Article 2

7-1-2012

## Foreword

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### Recommended Citation

Honorable Paul C. Huck, *Foreword*, 66 U. Miami L. Rev. 899 (2014)  
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# University of Miami Law Review

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VOLUME 66

SUMMER 2012

NUMBER 4

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## FOREWORD

### University of Miami Law Review Eleventh Circuit Issue

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As Judge Stanley Marcus observed in the inaugural issue of the *University of Miami Law Review's* Eleventh Circuit issue, which is now in its fifth year, scholarly critique of the work of the courts is not only a useful academic exercise, but is essential to the ongoing development of the law.<sup>1</sup> Indeed, articles from this publication have been cited in over 50 judicial opinions. I am confident that this year's submissions, while not linked by a common theme or, for that matter, an exclusive focus on the decisions of the United States Court of Appeals for the Eleventh Circuit, will be highly useful to judges, lawmakers, and practitioners throughout the region.

Since the publication of last year's Eleventh Circuit issue, the court has welcomed its newest member, Judge Adalberto J. Jordan. He was appointed to fill the seat vacated by Judge Susan H. Black in 2011 upon her decision to take senior status after nearly two decades of distinguished service. As Judge Jordan's colleague on the Southern District of Florida bench for the last twelve years, I can attest that, not only is he an outstanding jurist, but an even finer human being. We are fortunate to

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1. Seldom, however, do United States District Court Judges have the opportunity to comment on the work of their courts of appeal. In our system of justice, of course, critique typically flows in the opposite direction. *See, e.g.*, *United States v. Prouty*, 303 F.3d 1249, 1252 (11th Cir. 2002) ("We easily conclude that error occurred in this case and that it was plain."). I am therefore grateful for the opportunity to contribute to this Eleventh Circuit issue of the *Law Review*—although I do so with great trepidation.

have him join the Eleventh Circuit. Notably, like the five student authors featured in this review, Judge Jordan served as an editor of the *Law Review*, and was published three times during his time as a student at the University of Miami School of Law.<sup>2</sup>

Judge Jordan's elevation to the Eleventh Circuit has come at an opportune time. After a one-year decline in 2010, the court's caseload is once again on the rise. During the 2011 calendar year, while operating with only 10 active circuit judges (of the 12 authorized by Congress), a total of 6,455 new appeals—from nine district courts stretching from Key West, Florida to Florence, Alabama—were docketed in the Eleventh Circuit. The court also disposed of 6,309 appeals during this period, which means that, on average, each judge, including the six senior judges, was responsible for the preparation of 394 decisions. Despite this fact, in 2011, appeals decided on the merits by the Eleventh Circuit were disposed of, on average, within a remarkable 8.3 months from the filing of the notice of appeal. Meanwhile, fewer than 8.4% of these cases resulted in a reversal of the trial court's decision. For this I am personally grateful. And, as Judge Marcus optimistically noted in a recent speech to the Federal Bar Association's South Florida chapter, a "low reversal rate may suggest, among other things, [ ] that we've come a long way in achieving the rule of law."<sup>3</sup> Further, "these figures speak to the real effort by judges from every background seeking to do the right thing," and "may be worth keeping in mind when you hear another lament about the increasing politicization of our nation's courts."<sup>4</sup>

Not only was the Eleventh Circuit busy in 2011, but it was also confronted with several important and complex cases that are certain to have lasting implications, both regionally and nationally. Three of these cases, in my view, were especially noteworthy and deserve mention here.

Unquestionably, the Eleventh Circuit decision that garnered the most public attention in 2011 was the court's ruling in *Florida ex rel. Attorney General v. U.S. Department of Health and Human Services*.<sup>5</sup> There, the court considered the constitutionality of Congress's 2010

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2. See Adalberto Jordan & Steven H. Naturman, Foreword, *Selected Comments on 1986 Immigration Reforms*, 41 U. MIAMI L. REV. 997 (1987); Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693 (1987); Glenn Gerena & Adalberto Jordan, Comment, *United States v. Doe and Its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records*, 40 U. MIAMI L. REV. 793 (1986).

3. Hon. Stanley Marcus, Circuit Judge, U.S. Court of Appeals for the Eleventh Circuit, Address at the Federal Bar Association, South Florida Chapter, Luncheon Meeting: Some Issues Facing the Eleventh Circuit Court of Appeals (Mar. 14, 2012).

4. *Id.*

5. 648 F.3d 1235 (11th Cir. 2011).

healthcare reform legislation.<sup>6</sup> In a 207-page opinion prepared jointly by Chief Judge Joel F. Dubina and Judge Frank M. Hull, in which Judge Marcus concurred in part and dissented in part, the court concluded that a critical component of the legislation—its requirement that persons not covered by a government-funded health program purchase and maintain health insurance from a private company (i.e., the “individual mandate”)—is unconstitutional. “The structure of the Constitution,” the court explained, “interposes obstacles by design, in order to prevent the arrogation of power by one branch or one sovereign.”<sup>7</sup> “We cannot ignore these structural limits on the Commerce Clause because of the seriousness and the intractability of the problem Congress sought to resolve in the Act.”<sup>8</sup>

With the United States Supreme Court expected to rule on the government’s appeal of the Eleventh Circuit’s decision later this year, it is likely that the case will be remembered more for the Supreme Court’s opinion than for the opinion of the appellate court.<sup>9</sup> However, cases such as this one also define the legacies of the courts from which they originate—and the legacy of the Eleventh Circuit is a proud one. Indeed, in another landmark commerce clause case decided almost fifty years ago, *Heart of Atlanta Motel v. United States*,<sup>10</sup> the judges of this circuit<sup>11</sup> helped set the stage for numerous judicial decisions and further legislative development in the area of civil rights.<sup>12</sup> Whether or not the Supreme Court affirms the Eleventh Circuit’s ruling on the constitution-

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6. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the “Act”).

7. *U.S. Dep’t of Health and Human Servs.*, 648 F.3d at 1312.

8. *Id.* The court also rejected the government’s argument that the individual mandate is a tax enacted pursuant to the Taxing and Spending Clause. *Id.* at 1313–14. See U.S. CONST. ART 1 § 8.

9. See Adam Liptak, *In Health Act, Roberts Given Signature Case*, N.Y. TIMES, March 12, 2012, at A1 (New York edition) (“The decision in this case, expected by June, will . . . shape, if not define, the chief justice’s legacy. Chief Justice Roberts is just 57, and he will probably lead the Supreme Court for an additional two decades or more. But clashes like the one over the health care law come around only a few times in a century, and he may well complete his service without encountering another case posing such fundamental questions about the structure of American government.”).

10. 231 F. Supp. 393 (N.D. Ga. 1964), *aff’d*, 379 U.S. 241 (1964).

11. At the request of the United States Department of Justice, the *Heart of Atlanta Motel* case was heard by a three-judge panel in Atlanta, comprised of Chief Judge Elbert Tuttle of the Fifth Circuit and District Judges Frank A. Hooper and Lewis R. Morgan, who were then serving in the Northern District of Georgia. Judge Tuttle and Judge Morgan would both later serve on the Eleventh Circuit following the split of the Fifth Circuit in 1981.

12. For a compelling and in-depth exploration of the important role played by the former Fifth Circuit during this defining period in American history, see Jack Bass, *Unlikely Heroes* (1990), which highlights the remarkable integrity and courage displayed by the judges of that court, all of whom resided in communities in the South where racial tensions were running high. In its implementation of the Supreme Court’s decision in *Brown v. Board of Education*, Bass

ality of the Act's individual mandate, the Eleventh Circuit's carefully crafted opinion will represent a significant contribution to the hotly-contested debate over the reach of Congress's legislative powers.

Another significant Eleventh Circuit decision in 2011—one of great importance to the residents of the metropolitan Atlanta area, environmentalists, and others who live or work alongside the Apalachicola-Chattahoochee-Flint River Basin—was the Eleventh Circuit's long-awaited ruling in the *Tri-State Water Rights Litigation*<sup>13</sup> (popularly known as the “water wars”), in which Alabama, Florida, and Georgia have for over twenty years been at loggerheads over the allocation of scarce water resources. The principal issue considered on appeal was whether the United States Army Corps of Engineers had the existing authority to operate Buford Dam (the construction of which resulted in the creation of Lake Lanier) so as to accommodate Georgia's municipal and industrial water needs. The Corps' authority hinged, in turn, on whether water supply was a congressionally-authorized purpose for the construction of the dam. If it was not, then federal law would require the Corps to seek congressional approval before agreeing to further withdrawals.<sup>14</sup>

The district court held in July 2009 that water supply for the city of Atlanta was intended by Congress only as an “incidental benefit” of the construction of the dam, not as an “authorized purpose.” Accordingly, the district court stayed the litigation for three years to allow the parties to obtain Congress's approval for Georgia's water supply requests. At the end of the three years, absent congressional authorization for the withdrawals, the operation of the dam would return to the operation in place in the 1970s—resulting in a potential shortfall of up to hundreds of millions of gallons of water per day for the greater metropolitan Atlanta area.<sup>15</sup>

Before the expiration of the 2012 deadline, however, a three judge panel of the Eleventh Circuit, in a *per curiam* opinion, reversed the district court, finding that the original legislation “clearly indicates that water supply was an authorized purpose of the Buford Project.”<sup>16</sup> The Eleventh Circuit then denied Alabama and Florida's petition for *en banc*

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observes, the Fifth Circuit became “the institutional equivalent of the civil rights movement itself.” *Id.* at 9.

13. *In Re: Tri-State Water Rights Litigation*, 644 F.3d 1160 (11th Cir. 2011). The appeal relates to Phase 1 of the multi-district litigation, which is comprised of four cases consolidated in the U.S. District Court for the Middle District of Florida. Phase 2 of the litigation remains pending in the Eleventh Circuit.

14. *See* Water Supply Act of 1958 § 301, 43 U.S.C. 390b(d).

15. GEORGIA WATER CONTINGENCY TASK FORCE, FINDINGS AND RECOMMENDATIONS at 6 (DEC. 21, 2009).

16. *In Re: Tri-State Water Rights Litigation*, 644 F.3d at 1193.

review, prompting Alabama and Florida to seek review of the decision from the Supreme Court. As of publication, it remains to be seen whether the Supreme Court will hear the case on appeal, or whether the states will finally reach an agreement on the sharing of this scarce and precious natural resource.

Lastly, in a case that could affect the fate of thousands of inmates across the country,<sup>17</sup> the Eleventh Circuit, in *Loggins v. Thomas*,<sup>18</sup> considered the constitutionality of imposing a sentence of life without parole for a homicide committed while the defendant was a juvenile. The defendant in that case, Kenneth Loggins, was originally convicted of murder and sentenced to death by an Alabama state court in 1995. He was seventeen years old at the time of his crime. Following *Roper v. Simmons*,<sup>19</sup> in which the Supreme Court held that the Constitution bars the imposition of the death penalty against a defendant who was a juvenile at the time of the crime, the state court set aside his death sentence and resentenced Loggins to life without parole. Loggins ultimately sought federal habeas relief, based on *Roper* and the Supreme Court's more recent decision in *Graham v. Florida*,<sup>20</sup> arguing that his new sentence was likewise barred under the Eighth Amendment's prohibition of cruel and unusual punishment. The district court denied his petition. Loggins appealed.

The Eleventh Circuit, in a 61-page opinion, explained that "the Supreme Court has *never* held, or even stated in dicta, that the Constitution bars a life without parole sentence for a juvenile convicted of murder."<sup>21</sup> To the contrary, the court observed, the Supreme Court's reasoning in *Roper* "unmistakably implies the validity" of such sentences inasmuch as the Supreme Court, in discussing the deterrent effect of the death penalty in cases involving minors, explained that the possibility of life without parole—a severe sanction in itself, particularly for young persons—is deterrence enough.<sup>22</sup> Moreover, the court added, "objective indicia indicate that there is a national consensus in favor of permitting the imposition of that sentence on juveniles who commit murder."<sup>23</sup> The trial court's decision was affirmed.

As these examples make clear, in a single calendar year, the Elev-

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17. As noted in the opinion, at least 2,465 inmates nationwide are presently serving life sentences without parole for homicide crimes committed when they were juveniles. *Id.* at 1224.

18. 654 F.3d 1204 (11th Cir. 2011).

19. 543 U.S. 551 (2005).

20. 130 S. Ct. 2011 (2010) (holding that the Constitution bars the imposition of a life sentence without the possibility of parole for non-homicidal crimes when the defendant was under the age of eighteen at the time of the crime).

21. *Loggins*, 654 F.3d at 1221 (emphasis in original).

22. *Id.* at 1223.

23. *Id.*

enth Circuit, as the court of last resort in the vast majority of cases, will hear an extraordinarily diverse range of cases. Many will have a lasting impact on our jurisdiction. It is therefore fitting that the articles selected for publication in this issue of the *Law Review* are each very different in subject matter and style. Five of the articles, including a student note on the healthcare reform litigation,<sup>24</sup> touch upon important constitutional issues that are likely to be litigated in our courts for many years to come. Professor Sidhu's article, for example, urges the Eleventh Circuit to reconsider its standard for determining the constitutionality, under the First Amendment, of prison facility grooming standards that require inmates to shave or trim their hair regardless of their religious beliefs.<sup>25</sup> Likewise, Michael Mayer, an Assistant Public Defender for Miami-Dade County, argues that the use of police dogs to determine the presence of contraband in one's home violates the Fourth Amendment's prohibition of unreasonable searches and seizures.<sup>26</sup> Another student note also discusses this issue.<sup>27</sup> Lastly, a jointly-authored student note discusses an unintended consequence of Alabama's recently passed immigration law—namely, according to the authors, its silencing effect on victims of domestic violence.<sup>28</sup> The constitutionality of the immigration law, while not addressed in the note, is expected to be decided by the Eleventh Circuit later this year.<sup>29</sup> I expect the decision in that case will provoke further scholarly debate for inclusion in next year's Eleventh Circuit issue of the *Law Review*.

The remaining articles and notes address timely issues of Florida state law and policy that will be of great practical use to members of the Bar and the public, including the Florida Supreme Court's interpretation of the state's long-arm statute,<sup>30</sup> the impact of the Occupational Safety and Health Administration's "multi-employer doctrine" on Florida tort

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24. Richard Rosengarten, Note, *The Constitutionality of the Individual Mandate*, 66 U. MIAMI L. REV. 1103 (2012).

25. Dawinder S. Sidhu, *Religious Freedom and Inmate Grooming Standards*, 66 U. MIAMI L. REV. 923 (2012).

26. Michael Mayer, *Keep Your Nose Out of My Business—A Look at Dog Sniffs in Public Places Versus the Home*, 66 U. MIAMI L. REV. 1031 (2012).

27. Joseph Magrisso, Note, *Protecting Apartment Dwellers from Warrantless Dog Sniffs*, 66 U. MIAMI L. REV. 1133 (2012).

28. Elizabeth Rieser-Murphy & Kathryn DeMarco, Note, *The Unintended Consequences of Alabama's Immigration Law on Domestic Violence Victims*, 66 U. MIAMI L. REV. 1059 (2012).

29. See *United States v. Alabama*, No. 11-14532-CC (11th Cir. 2011).

30. Michael K. Steinberger, Note, *Internet Solutions v. Marshall: The Overreach of Florida's Long-Arm*, 66 U. MIAMI L. REV. 1089 (2012).

litigation,<sup>31</sup> the nuances of state eviction procedures,<sup>32</sup> “standard search logic” under Florida’s Uniform Commercial Code,<sup>33</sup> and polarizing gaming legislation presently under consideration by the Florida Legislature.<sup>34</sup> I look forward to following the development of the law in these areas, and the authors should take great pride in playing an important role in that process.

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31. Jon M. Philipson, *Owner Beware: OSHA’s Impact on Tort Litigation by Independent Contractors’ Injured Employees against Business Premises Owners*, 66 U. MIAMI L. REV. 987 (2012).

32. Matthew Sackel, *Pay Up or Get Out: The Landlord’s Guide to the Perfect Eviction*, 66 U. MIAMI L. REV. 973 (2012).

33. Kenneth C. Kettering, *Standard Search Logic Under Article 9 and the Florida Debacle*, 66 U. MIAMI L. REV. 907 (2012).

34. Todd Friedman, Note, *Paving the Streets in Gold: A Comparative Analysis of the 2012 Florida Gaming Bill*, 66 U. MIAMI L. REV. 1183 (2012).