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March 9, 2003The Power of the FourthBy DEBORAH SONTAG

he 19th-century courthouse that houses the United States Court of Appeals for the Fourth Circuit sits across from a CVS and a Dress Barn on a desultory stretch of Main Street in Richmond, Va. The entrance -- peeling "Pull" sign, metal detector, dim lobby -- is not awe-inspiring. But upstairs in the courtrooms, beneath the pendulous chandeliers and the oil portraits of former jurists, a hush prevails. Whether or not the judges are on the bench, people whisper. It is as if they tacitly accept that the atmosphere should continue to be rarefied even as the judicial process becomes increasingly polluted by politics.

This 148-year-old building, once the site of the Confederate Treasury, is where you go if you are appealing the decisions of federal judges or juries in Virginia, West Virginia, Maryland, North Carolina or South Carolina. It's the last stop before the Supreme Court, which, given how few cases the highest court actually hears, essentially makes it the court of last resort for those seeking justice in this region.. Let the plaintiff beware, though; the Fourth Circuit is considered the shrewdest, most aggressively conservative federal appeals court in the nation.

On the last Tuesday in February, Lisa Ocheltree of Lexington, S.C., settled warily onto a hardwood bench in a courtroom carpeted in billiard-table green. Several years ago, Ocheltree won a substantial jury verdict in a sexual-harassment suit against her former employer. The jury found that vulgar language, crude sexual commentary and sexual acting-out created an extremely hostile working environment for Ocheltree as the sole woman in a costume-production workshop. But a three-judge panel of the Fourth Circuit overturned that verdict late last year. "Were they telling me that I should have just sucked it up?" Ocheltree asked. She petitioned the full court to reconsider the panel's 2-to-1 decision, and the judges agreed to take her case en banc, which they hardly ever do.

And so all 12 judges were about to file in and take the bench, affording a rare glimpse at the dynamic of the entire court. Ocheltree's lawyer was nervous: a three-judge panel of the Fourth Circuit provides a grilling, but this would be a full-court press. Ocheltree, however, was determined not to be intimidated.

"Just because I'm a blue-collar worker doesn't mean I'm gonna let the black robes scare me," she said. "It may be the South, but it's the 21st century."

Geographically, the Fourth Circuit, one of 13 federal courts of appeals, is not the most southern. But it is singularly genteel: its judges descend from the bench to shake lawyers' hands after oral arguments.. And as recently as 1999, Chief Justice William H. Rehnquist led the Fourth Circuit's annual judicial conference in a traditional rousing sing-along that included "Dixie." This always offended civil rights lawyers and the few African-American lawyers in attendance. But it never surprised them.

It was not until the year 2001 that the Fourth Circuit, which has the largest African-American population of any appellate jurisdiction, became the final federal appeals court to be racially or ethnically integrated. Many consider the court to be a legacy of Strom Thurmond and Jesse Helms because the former senators from the Carolinas played a key role in shaping it through patronage appointments and obstructionism. Indeed, President Bush's most recent appointment to the Fourth Circuit, Dennis W. Shedd, is a former chief of staff to Thurmond; his pending nominee, Terrence Boyle, is a former Helms aide unsuccessfully nominated by Bush's father more than 10 years ago.

Although President Bush may or may not get the chance to name a new Supreme Court justice this year, he is busy trying to fill 25 federal appeals court vacancies, including 3 on the Fourth Circuit, with the backing of a newly Republican Senate. He already has 16 nominees waiting for confirmation. And despite the occasional Democratic filibuster, he appears poised to transform the federal judiciary -- which includes 179 appeals judges at full strength -- back into an overwhelmingly conservative bench. In 12 years between them, Ronald Reagan and George H.W. Bush established a Republican majority on every appeals court. Clinton, facing stiff resistance from an opposition Senate for six of his eight years, pushed that back somewhat so that Bush inherited a Republican majority on 8 of the 13 appellate courts, with 3 more poised to swing Republican through his appointments. And those appointments, because they are for life, could reverberate for generations. Judge H. Emory Widener Jr. of the Fourth Circuit, who i

As Bush makes his selections, his staunch conservative supporters tout the Fourth Circuit as a model to emulate, and liberals view it anxiously as a harbinger of doom. That's because the Fourth Circuit, which has eight Republican and four Democratic appointees, is not only conservative but also bold and muscular in its conservatism. It is confident enough to strike down acts of Congress when it finds them stretching the limits of the federal government's power and hardheaded enough to rule against nearly every death-row defendant who comes before it.

To critics, the Fourth Circuit lacks compassion for the individual. To admirers, the Fourth Circuit is a welcome corrective after years of soft, liberally activist benches, a brilliant court with a healthy respect for the concerns of prosecutors, of business owners, of state officials -- and of the Bush administration, which received deference from the court to treat a United States citizen captured in Afghanistan as an "enemy combatant" who could be detained without charges even on American soil.

Helms once told a North Carolina newspaper that the furor in Washington over judicial nominations was out of whack with the sentiments of the public: "You go out on the street of Raleigh, N.C., and ask 100 people, 'Do you give a damn who is on the Fourth Circuit Court of Appeals?' They'll say, 'What's that?'"

He had a point. Few pay much attention to federal courts below the Supreme Court level. But they should. The appellate courts, created in the late 19th century to relieve overcrowding of the Supreme Court's docket, decide about 28,000 cases a year compared with the highest court's 75 or so. Practically speaking, they have the final say in most matters of law; their reach is broader, if not deeper, than the Supreme Court's itself.

Judges on the Fourth Circuit say that they just follow the Supreme Court's lead. And it is true that the Fourth Circuit is the appellate court closest in thinking to the Rehnquist Court. But the relationship is symbiotic: the Fourth Circuit does not just imitate; it also initiates. It pushes the envelope, testing the

boundaries of conservative doctrine in the area of, say, reasserting states rights over big government. Sometimes, the Supreme Court reins in the Fourth Circuit, reversing its more experimental decisions, but it also upholds them or leaves them alone to become the law of the land. There is a cross-fertilization, which could see its apotheosis this spring: the Fourth Circuit is dominated intellectually by two very different conservative judges, J. Harvie Wilkinson 3rd and J. Michael Luttig, both of whom are leading candidates for the next Supreme Court vacancy.

Judge Karen J. Williams, 52, a tall, slender woman with delicate features and a regal carriage, wrote the decision overturning the jury verdict in Lisa Ocheltree v. Scollon Productions. The federal law that prohibits sexual harassment in the workplace, as she phrased it ever so piquantly, is not a "neo-Victorian chivalry code designed to protect" the "tender sensitivities of contemporary women."

Williams eloped at 17 with her teenage sweetheart, gave birth to four children, taught school, commuted to law school and eventually became a lawyer in her husband's private practice in Orangeburg, S.C. She was appointed by former President Bush in 1992 on the recommendation of Strom Thurmond, a friend of her father-in-law's, then the president of the South Carolina State Senate. At Williams's investiture, Thurmond and her father-in-law reminisced about how they used to double-date.

Williams, in the self-mocking "baby judge" speech that newly appointed jurists make at the annual judicial conference, said that Thurmond "maneuvered my hearings so that I would be the first woman on the circuit and his nominee." Thurmond, she said, liked to be on the cutting edge, and he just plain liked women too. In the course of the confirmation process, Williams added, a Justice Department official pointed out to her that her race was listed incorrectly on her driver's license. "We finally knew then how I got it," she said jokingly, referring to the judgeship. "Not only was I a female, but they had me as a black female." Some laughed; others cringed.

Once a month, the judges, whose annual salary of $164,000 is higher than that of senators, travel from their home states to Richmond to hear a week of oral arguments. They sit in three-judge panels randomly selected by a computer program and invariably encounter a rich menu of human dramas and hot-button issues. They hear everything from bankruptcy cases to international child-custody disputes, from race discrimination claims to environmental battles over wetlands. In the January hearings, they debated whether Norfolk, Va., could use an anti-loitering statute to keep an elderly couple from protesting abortion on a bridge over a highway and whether animal-control officers in High Point, N.C., were stripping pit bull owners of their Fourth Amendment rights by killing their dogs. They examined three cadets' contention that the mealtime prayer at the Virginia Military Institute was unconstitutional and an Israeli immigrant's appeal of his conviction for interfering with a flight crew when, on the three-month an

The full Fourth Circuit rarely sits to review the decision of one of its three-judge panels. When it does, though, critics say that it uses this en banc procedure to overturn liberal decisions that slip through, and there are plenty of supporting examples. But with Ocheltree, the judges were sitting in reconsideration of a quite conservative decision, one that would greatly limit the ability of employees in the region to make successful claims of sexual harassment. They were also addressing the sensitive issue of the sanctity of jury decisions.

Williams was the author of an infamous decision several years ago. The Fourth Circuit ruled that the liberal Warren Court's landmark 1966 ruling in Miranda v. Arizona was not constitutionally based, and as such that an obsolete Congressional statute trumped it. More than 30 years ago, the statute was a stillborn attempt to overrule the court's holding that criminal suspects must be apprised of their rights through what have become known as Miranda warnings. It was never enforced and largely forgotten until the Fourth Circuit resurrected it. And Williams's decision helped cement the Fourth Circuit's reputation as a judicially active conservative court. But the Supreme Court reversed it, 7 to 2, with Antonin Scalia and Clarence Thomas, the two most conservative justices and President Bush's self-proclaimed favorites, dissenting. In that instance and several others, the Fourth Circuit's effort to nudge the Supreme Court toward greater conservatism backfired. Still, the Supreme Court has upheld 36.5 percent of

The Fourth Circuit does not march in conservative lock step, however, and its intellectually vibrant judges do not constitute an ideological cabal. The court often reaches consensus across the ideological divide; some of its work is nonideological in nature. Sometimes the majority lets liberal decisions stand; other times even the most conservative judges issue opinions that seem to betray their ideological stripes. And often the fiercest legal arguments are not between the liberals and the conservatives but between conservatives themselves.

Yet when it comes to high-profile decisions, the Fourth Circuit tends to divide neatly along party lines. And taken together, those decisions not only bespeak a conservative philosophy of law but also serve a conservative political agenda. Among its many decisions, the Fourth Circuit has upheld the minute of silence in Virginia schools; ended court-ordered busing in Charlotte; upheld state laws that stringently regulate abortion clinics or require parental notification or ban so-called partial-birth abortions; ruled that the Virginia Military Institute could remain all male as long as there was a separate but comparable education for women; upheld a Charleston, S.C., program that tested maternity patients for illegal drug use without their consent and turned the results over to the police; overturned a Virginia prohibition against license plates bearing the Confederate flag; ruled that the F.D.A. didn't have the authority to regulate nicotine as a drug; and, most recently, overruled a West Virginia federal

As the Ocheltree hearing opened in a packed courtroom, the bailiff intoned the traditional blessing: "God save the United States and this honorable court." The judges took their seats in leather swivel chairs, with the brand-new chief judge, William W. Wilkins Jr. of South Carolina, in the center. Wilkins started his career as a clerk to Judge Clement Haynsworth of the Fourth Circuit (whose Supreme Court nomination by Nixon was rejected by Congress) and then went on to become an aide and campaign director for Thurmond. He was the first federal judge appointed by Reagan.

J. Harvie Wilkinson 3rd had technically stepped down as chief judge after seven years, as required by law. But he was sitting just off-center, and he still dominated, he and Luttig, each in his own way.

A warm, gracious and patrician Virginian, Wilkinson, 58, appears slight and owlish in his civilian clothes -- blue blazer, gold buttons -- yet commanding in his robes. The son of a banker, the future judge attended boarding school at Lawrenceville and college at Yale before returning to Virginia to study law. While a law student, he ran as a Republican candidate for Congress; when he got 30 percent of the vote, he jokes, he took it as a mandate to finish law school. He eventually taught law and served as editorial-page editor of The Norfolk Virginian-Pilot. (This didn't keep The Pilot from editorializing against his appointment to the bench in 1983, saying that he lacked courtroom experience.)

Wilkinson was confirmed at the age of 39, and he and Luttig share the experience of having been judicial Wunderkinds. Luttig points out that at the time of his appointment in 1991, he held the distinction of being the youngest judge on a federal appeals court. He was 37.

The two judges share other distinctions as well. They both clerked for Supreme Court justices they still revere -- Wilkinson for Lewis F. Powell Jr. and Luttig for Chief Justice Warren Burger as well as for Antonin Scalia when Scalia was an appeals court judge. Both worked for Republican Justice Departments and participated in judicial selections, Wilkinson under Reagan and Luttig under the first Bush. Luttig shepherded Clarence Thomas through his contentious confirmation, and pictures of Thomas hang on his chambers' walls, including one inscribed "This would not have been possible without you! Thanks so much, buddy!" (Luttig's three clean-cut male clerks will head to the Supreme Court next year to clerk for Thomas, Scalia and Anthony M. Kennedy.)

These similarities between Wilkinson and Luttig, and their keen legal minds, initially created a natural alliance between them. Luttig, a native of Tyler, Tex., said that he used to spend more time talking with Wilkinson than with any other judge on the court. They are still friends, he said. But the years have

clarified the differences in the two judges' styles and their jurisprudence, and they often parry and thrust in their decisions, with Luttig going for the direct and Wilkinson the indirect jabs. Often Wilkinson and Luttig end up voting the same way, but "there's this very antagonistic sideshow," said Rodney Smolla, a University of Richmond law professor.

Wilkinson writes essayish opinions filled with the kind of rhetorical flourishes that I imagine him composing with a quill pen. He often goes beyond facts and analysis to hold forth. He ponders, he digresses, he philosophizes. Wilkinson is the rare judge who speaks publicly and writes books; in his recent "One Nation Indivisible," he assailed affirmative action and ethnic separatism. Occasionally he injects his personal views on, say, racial quotas into his legal opinions. When he takes issue with "my fine colleagues," he does so in the most courtly manner possible, always striving to emulate Justice Powell as "a healer and bridge builder," he said. In fact, taking me by surprise, he grew quite emotional when telling me how rancorously divided the legal community, the political community, even the country has become. His voice grew insistent, then caught, and his eyes moistened.

"I don't believe in throwing salt in people's eyes," he said. "It's very important to me that the country come together. There are so many wounds, and we ought not pick at scabs. The legal culture especially is too polarized. There's too much throwing of pitch and tar and mud."

Luttig, in contrast, is not given to bursts of inspirational speaking and does no public speaking. Down-to-earth and likable in private, he comes across publicly as intense, austere and unsentimental. "He goes out there with piercing ideas and steel-trap analysis," Smolla said. Luttig sees himself as a legal "nerd," worships analytical rigor and composes a hard-boiled, sometimes mathematically logical opinion. He does not hesitate to gore his colleagues if he finds their thinking subpar. "If any opinion is without reasoning or poorly reasoned, I want them to be embarrassed by their analysis so as to continually improve on the process," he told me. He can be particularly scathing toward Wilkinson -- "Judge Wilkinson misunderstands this issue altogether" -- and he'll criticize him for contradicting himself or for making pronouncements that go beyond a specific case.

Attorneys who go before Luttig know about one central event in his life: that his father was brutally murdered nine years ago, that he moved his chambers to Texas during his father's killer's trial and that the killer became a cause c?l?bre for death-penalty opponents before he was executed. Some wonder if it makes him less objective; Luttig has never granted a new hearing to a death-row defendant. He brushes their concerns aside; the experience affected him -- how could it not have? -- but it didn't warp him.

Many lawyers also assume that Luttig is more conservative than Wilkinson. But the law journal Judicature recently evaluated the decisions of six possible Bush nominees for the Supreme Court and found Wilkinson to be furthest to the right -- exceptionally conservative. It found Luttig the second least conservative of the six. "Did you see the Judicature article?" Luttig asked me, and he also made sure that I had read some cases in which he took unexpectedly liberal positions. He is loath to be predictable and eager to be perceived as more moderate in anticipation of a Supreme Court opening.

In one case, Luttig took issue with Wilkinson's finding that police officers in Prince George's County, Md., couldn't be held liable for violating the constitutional rights of Nelson O. Robles. The officers had tied Robles to a pole in a parking lot in the middle of the night with a note at his feet stating that he was wanted on an outstanding traffic warrant by a neighboring county. Wilkinson, while condemning the officers for behaving like Keystone Kops, said that they could not have known that they were violating Robles's constitutional rights because it had never been specifically enunciated that what they did was such a violation.

Luttig argued pungently, but unsuccessfully, that Wilkinson's decision should be reviewed by the full court: "I would like to have thought that at this point in our history no court would hold, as did this panel, that law enforcement officers need an opinion from this court in order for them to be on notice that handcuffing a pretrial detainee to a metal pole in a deserted shopping center at 3:00 a.m. in the morning, and abandoning him there, for no law enforcement purpose at all, is unconstitutional."

Wilkinson and Luttig do not like to talk about the possibility that they will be competing for a nomination as soon as this spring if, say, Chief Justice Rehnquist, 78, or Justice Sandra Day O'Connor, 72, steps down. But during Ocheltree's hearing at the Richmond courthouse, the subject was in the air.

Since 1995, for so long that she is beginning to feel and sound like a crusader, Lisa Ocheltree, 41, has been pursuing her claim against Scollon Productions, a manufacturer of life-size costumes for mascots like the South Carolina Gamecock and characters like Tommy Pickles.

She filed suit under a civil rights law, Title VII, that sees sexual harassment as a violation of the prohibition against workplace discrimination because of sex. Some sexual-harassment claims involve a quid pro quo; others, like Ocheltree's, assert a hostile work environment.. Unfortunately for Ocheltree, she has ended up before the appeals court least likely to be sympathetic to any such claims.

Plaintiffs in sexual-harassment suits prevail in only 21 percent of their appeals before the Fourth Circuit, according to a recent Cornell Law Review article. They win, in contrast, 80 percent of the time in the New York-based Second Circuit, which is dominated by Democratic appointees, and 39 percent of the time nationwide.

When Ocheltree, now a U.P.S. employee, worked at Scollon Productions, she was the only woman in an otherwise all-male production shop. Over time, the atmosphere grew more coarse, she said, until it was dominated by sexually explicit conversation and behavior.

A co-worker pinched the nipples of a mannequin while another fell to his knees and simulated oral sex on it. A co-worker teased her with a dirty song while others, including her supervisor, laughed at the show. A colleague tried to get her to react to a photograph of a man with his genitalia pierced. During Ocheltree's trial, a male co-worker said that the other men would routinely fondle the mannequins because they knew it bothered Ocheltree.

Ocheltree complained about the environment during an employee meeting, and she was rebuffed repeatedly when she tried to get an audience with the company's senior executives. After about 18 months at Scollon, she was fired. A federal judge summarily dismissed her complaint, but, representing herself, she appealed that judgment to the Fourth Circuit, which determined that she had grounds for trial. A jury awarded Ocheltree $7,280 in compensatory damages and $400,000 in punitive damages. The judge reduced the damages to $50,000 because Scollon is a small business. Nonetheless, Ocheltree said that her victory restored her "sense of honor and dignity," even though the men at the plant "are laughing to this day."

Scollon Productions appealed the jury's verdict to the Fourth Circuit, contending that Ocheltree's description of the workplace environment was exaggerated and that the crude behavior wasn't directed at Ocheltree anyway. The three-judge panel assigned the case included Williams, Paul V. Niemeyer, appointed by Bush in 1990, and M. Blane Michael, a bow-tie-wearing Clinton appointee from West Virginia. Williams and Niemeyer voted to reverse the jury's decision, and Michael was the dissenter.

It is a role that Michael, who keeps a large photograph of Clinton's inauguration on his chambers' walls, often exercises. There have been other instances in which it has pitted him against Williams too, although he told me that their personal relations are cordial. Still, Michael wrote the dissent in the Miranda case and in one in which Williams found that people with symptom-free H.I.V. are not protected by the Americans With Disabilities Act.

Michael said that Williams and Niemeyer chose "again and again" to see the evidence in a light favorable to Ocheltree's employer rather than to Ocheltree. They were ignoring the fact that the jury found Ocheltree to be the credible party, and they were ignoring their obligation to respect a jury's finding, he

said. There is, he wrote, "a profound difference in our respective approaches to reviewing a jury verdict."

In a spirited opinion, Williams wrote that there was no reason to believe that the vulgar atmosphere in the workshop had anything to do with Ocheltree's presence or the fact that she was a woman. The incidents were isolated, and the rest was banter, she said. The courts shouldn't treat women preferentially by insulating them from everyday insults. And further, she added, there was some indication that Ocheltree herself was not a "model of femininity."

In his dissent, Michael wrote that a reasonable jury would conclude that the men at Scollon Productions resented Ocheltree's intrusion into their workplace and had set out to make her unwelcome. He said that the "overall tenor of the workplace banter conveyed the message that women exist primarily to gratify male desires for oral sex." In a workplace suffused with representations of women as sexual objects, a female worker "would doubtless wonder," he wrote, whether her male co-workers were looking at her and asking themselves "whether she 'swallows'" or whether she could "'suck a golf ball through a garden hose.'"

Ocheltree was devastated that the Fourth Circuit decision was written by a woman. "Just because she sits up on that bench, she still puts her pantyhose on one leg at a time," she said. "If all the male judges were sitting around talking about oral sex, I wonder how she'd feel then."

Franklin Delano Roosevelt famously set out to overhaul the federal judiciary ideologically. Confronting courts that were thwarting his New Deal projects, he strove to create liberal ones that would grant the government more power to regulate the economy. Decades later, Reagan displayed a similar purposefulness, screening judicial candidates using ideological "litmus tests" in order to choose jurists who were strict constructionists, tough on crime, anti-abortion and pro-family..

Between them, Reagan and the first President Bush named six judges to the Fourth Circuit; those six joined Nixon's appointee, Widener, to form a solid conservative core. On other courts, the transformation to conservative has been more startling. The two Deep South appellate courts, for instance, used to be civil rights crusaders. But until the Carter judges retired, the Fourth Circuit was, if not liberal, at least more balanced.

Clinton put a priority on diversifying the federal bench, picking up where Carter had left off. Despite an uncooperative Senate, he succeeded in getting a record 9 black, 7 Hispanic and 20 female judges confirmed.

Yet the Clinton administration never saw its role as reasserting ideological balance on the courts. When Clinton took office, the appeals courts were solidly Republican, but his administration did not feel compelled to find liberal powerhouses to counter the conservative heavyweights appointed by Reagan and Bush. "Some in the White House argued very forcefully that their job was not to put on the federal bench the liberal equivalents of the Luttigs and the Wilkinsons," said Nan Aron, president of Alliance for Justice, a liberal coalition. Clinton was not a die-hard liberal himself, and he tended to nominate centrist legal professionals in tune with his more centrist politics. Still, he faced intense partisan battles, particularly over his minority appointees, and the acrimony continued through Bush's first two years, affecting not just the political arena but also the courts themselves.

Luttig told me that he thinks the politics surrounding judicial appointments makes judges hyperconscious of their political sponsors. "Judges are told, 'You're appointed by us to do these things.' So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get?" he said. "I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process. And it has to be resisted, by the judiciary and by the politicians."

Clinton named four white judges to the Fourth Circuit without much battle, including one, William B.

Traxler Jr., of Greenville, S.C., who was first elevated to the federal bench, on Thurmond's recommendation, by former President Bush. Traxler votes so often with the conservative majority that court watchers forget he's a Democratic appointee. The other three -- Blane Michael and Robert B. King of West Virginia and Diana Gribbon Motz of Maryland -- are unofficially the dissenters.

In contrast to his smooth experience with getting the white judges confirmed, Clinton tried at least four times to name an African-American to the Fourth Circuit. His nominees were blocked every time. Jesse Helms still bore a grudge from Clinton's failure to renominate his former aide Terrence Boyle, after Boyle's nomination by the first Bush had elapsed. Helms then blocked, as is the home state senator's power, every Clinton nominee from North Carolina, including two African-American judges. As a result, there is no one from North Carolina on the Fourth Circuit now, although proving that even a retired Helms can get his way, President Bush has a pending nominee from North Carolina -- and that is Boyle.

During his period of obstructionism, Helms insisted, and Thurmond publicly concurred, that the matter had nothing to do with race or politics. It would simply be a waste of taxpayer money, Helms said repeatedly, to fill vacancies on the Fourth Circuit when the chief judge, Wilkinson, thought the court would function less efficiently if it were bigger. (And clearly it would have if it became less ideologically homogeneous.)

Clinton finally tried an end run around Helms by nominating a Virginian, a soft-spoken African-American lawyer named Roger L. Gregory. Gregory comes from a small town in rural Virginia where his parents worked in the local tobacco factory. He grew up to found a Richmond law firm with L. Douglas Wilder, the former governor of Virginia. He gives inspirational speeches to black youths. His nomination had bipartisan support. But even Gregory couldn't get a hearing scheduled.

So Clinton resorted to an extraordinary tactic. During his last days in office, after Congress had recessed, Clinton unilaterally appointed Gregory to the bench. President Bush, eager to demonstrate bipartisanship and win support for his own candidates, eventually allowed Gregory's temporary appointment to become permanent. In July 2001, the Senate confirmed him 93 to 1, with Trent Lott casting the dissenting vote. The Fourth Circuit Court of Appeals was officially integrated.

In his "baby judge" speech at the Fourth Circuit judicial convention last summer, Gregory cited Frederick Douglass and Harriet Tubman, setting a new kind of precedent for the court. He also joked that he was welcomed to the Richmond courthouse by someone who pointed out that the Confederate President Jefferson Davis's office used to be right near his new chambers. "That was very reassuring, you can imagine that," Gregory said.

In a study of capital convictions and appeals between 1973 and 1995, Prof. James S. Liebman of Columbia University Law School found that the Fourth Circuit granted relief to death-row inmates less frequently than any other appeals court in the country. Even at that point, and it has gotten more restrictive since, the Fourth Circuit was overturning 12 percent of the death sentences it reviewed: that compared with an average 40 percent reversal rate for federal appeals courts. "There are other conservative courts of appeal but none that are a black hole of capital litigation like the Fourth Circuit," said John H. Blume, director of the Cornell Death Penalty Project, who represe

nts South Carolina prisoners.

When Kevin Wiggins's case came up before the Fourth Circuit in January 2002, he was on death row in Maryland, trying not to get his hopes up. A federal district chief judge had invalidated his death sentence and voided his conviction for murder. Theoretically, he should have gone free. But the state appealed. And Wiggins knew, because death-row prisoners know these things, that the odds of winning in the Fourth Circuit weren't good.

In February, I visited Wiggins in the C-pod of the Maryland Correctional Adjustment Center in downtown

Baltimore. When a guard unlocked the door to a narrow concrete visiting cell, Wiggins was already there, staring blankly through a scratched glass partition. Wearing a white undershirt, his face round with a wisp of a mustache, he was itching to get talking. And talk he did, like a balloon releasing air, his words a jumble as he dizzyingly flicked back and forth in time.

Matter-of-factly, Wiggins described himself as "a nobody with no family and no skills." He had a nightmarish childhood, according to information gathered by a forensic social worker hired by his present lawyer. His mother was alcoholic, neglectful and abusive. When he was 6, Wiggins was removed from his mother's home after she burned him severely with a hot plate in punishment for playing with matches. He then endured a series of foster homes in which he was beaten, locked in closets and repeatedly raped. He emerged into adulthood as a barely educated loner who lived in rented rooms and worked at minimum-wage jobs. He was of "borderline intelligence," according to state social-service records.

Wiggins had no criminal record when he was arrested at age 27 for the murder of an elderly woman. The State of Maryland maintained that Wiggins drowned Florence Lacs, 77, in her bathtub in 1988: he was working as a painter in her building, and he and his girlfriend were found in possession of Lacs's credit cards and car. There was no forensic evidence linking Wiggins to the murder, though there was unidentified forensic evidence -- fingerprints, hair, fibers and a baseball cap left at the scene. Still, in a bench trial, a state judge convicted Wiggins of robbery and murder.

During the subsequent sentencing trial, Wiggins's inexperienced public defenders decided to reargue his innocence instead of presenting a case for why he should get life not death. They did not even bother to investigate his background to discover whether he possessed the kind of "social history" that is routinely used to humanize a defendant and mitigate against the imposition of the death penalty.

Wiggins has now been on death row since 1989. In 1993, a high-powered Washington lawyer, Donald B. Verrilli, Jr., took on Wiggins's case pro bono, and it began wending its way through the postconviction review and then the state appeals process. Verrilli found the case against Wiggins to be weakly circumstantial at best, offering evidence only that Wiggins was a logical suspect. Verrilli said he came to believe that Wiggins did not commit the crime but rather served as the "fall guy for people more clever than him." Specifically, there is a plausible alternative to the course of events involving Wiggins's girlfriend, who was 15 years his elder. All charges against her were dropped, and she testified against Wiggins; her brother, it seemed, lived in an apartment below the victim's.

The case's first stop in federal court was at the bench of Maryland's United States chief district judge, J. Frederick Motz, who happens to be married to Judge Diana Motz, a Clinton appointee on the Fourth Circuit. Judge Frederick Motz is a former federal prosecutor appointed by Reagan; he is not, as he said in court one day, "an anti-capital punishment person." In a 55-page opinion, he concluded, "No rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt." He invalidated the murder conviction and threw out the death sentence too.

I asked Wiggins whether he was happy when Motz took his side. "It's hard for me to be happy about anything," he said. Wiggins told me that he could remember only one joyful time in his life. It was after his mother burned him. Six years old, he awoke in a hospital bed, surrounded by nurses who clucked over him, petting his hair and bringing him cookies.

When Maryland prosecutors decided to appeal to the Fourth Circuit, Motz publicly questioned their desire to continue pursuing what he characterized as a flimsy case. "Why isn't this case of moral concern to the state?" he asked. "Or don't you care?"

At the Fourth Circuit, Wiggins drew a panel of three Republican appointees -- Wilkinson, Widener and Niemeyer. In a hearing last winter, the judges appeared to be wrestling with the case; they doubled the time they usually allot attorneys to present their arguments. Last May, however, in a decision written by the 79-year-old Judge Widener, the panel ended up reinstating Wiggins's conviction and his death

sentence. The panel gave the original trial judge the benefit of the doubt; it deferred to his assertion that he based his decision of Wiggins's guilt on a totality of evidence and that he did not infer Wiggins's guilt from his possession of the victim's property. And it ruled that the public defenders' failure to present Wiggins's background during the sentencing hearing was a trial tactic rather than negligence.

And yet the panel had some hesitations. Judge Wilkinson wrote that he couldn't "say with certainty" that Wiggins committed the murder. And Judge Niemeyer acknowledged that it was something of a close call to find that Wiggins had adequate counsel.

"I think that most circuit courts, if they have real doubts about what has happened in a capital case, they will reverse," Professor Liebman said. "The Fourth Circuit doesn't have the same threshold. In this case, they saw the tripwire and stepped right over it."

Verrilli petitioned the Supreme Court, and in a hearing scheduled for March 24, the court will pick up Wiggins's case, continuing its dialogue with the Fourth Circuit's decision-making. Since 1996, the Supreme Court has reviewed far more death-penalty cases coming from the Fourth Circuit than from any other appeals court -- 9 from the Fourth Circuit alone and 12 from the other 11 appeals courts combined. The 1996 date is significant because in that year Congress passed the Antiterrorism and Effective Death Penalty Act, limiting federal courts' review of capital cases to those in which there's "an unreasonable application of clearly established federal law." That "unreasonableness," however, is open to interpretation, and while the Fourth Circuit has chosen to see its hands tied, other circuits have granted themselves more wiggle room. The Supreme Court is thus mediating the conflict between the circuits, trying to help them figure out when it is appropriate and inappropriate to defer to the state courts

Generally, the Supreme Court upholds the Fourth Circuit's tough stance in death-penalty cases by a 5-to-4 vote, dividing ideologically. Take the Virginia case of Walter Mickens Jr., whose lawyer, it turned out, had at one time defended Mickens's 17-year-old victim. A rare liberal panel of the Fourth Circuit found that Mickens's lawyer had a conflict of interest. But the Fourth Circuit did not want to let that reversal stand; it met en banc and reinstated his conviction. The case then went to the Supreme Court, which agreed, 5 to 4, with the Fourth Circuit's full panel: it held that the lawyer's conflict of interest didn't matter since Mickens couldn't prove that it adversely affected the outcome of his case. Last June, Mickens was executed by lethal injection.

In two important rulings on how to interpret the 1996 law, however, the Supreme Court reversed the Fourth Circuit, finding that the Richmond court had chosen to read the statute too narrowly. In one case, the Supreme Court, unlike the Fourth Circuit, found the state court's judgment "unreasonable" for failing to recognize that the legal representation of Terry Williams, a Virginia inmate, was so ineffective that it didn't meet minimum constitutional standards for competency. Like Wiggins's, Williams's lawyer didn't investigate his horrific childhood; his lawyer was subsequently disbarred for mental disability.

Many, if not most, appeals judges show a pattern to their judging over time.

Wilkinson has granted a new hearing to a death-row prisoner once in 19 years, according to a South Carolina Law Review article. In contrast, Judge Francis D. Murnaghan Jr. of Maryland, who used to be the Fourth Circuit's pre-eminent liberal, granted relief to about one out of three death-row prisoners who came before him.

Yet no judge wants to be seen as tailoring his decisions to his ideology, as bending the law to determine preconceived results. Every judge will tell you that he or she comes to each case with an open mind, seeing a distinct set of facts that raises distinct legal questions.

Wilkinson said he feels strongly that judges should never be rated and ranked as if they were politicians whose votes could be counted. He said that the statistical analyses of judges' decisions, followed by the

affixing of a label of liberal or conservative, is reductive.

"I don't go on the bench as liberal or conservative," Wilkinson said. And yet he does not dispute that he is a conservative jurist. He acknowledges his place among those who came of age concerned about "the excessive activism" of the Warren Court. The Warren Court was seen as having overstepped its bounds with rulings that expanded equal protection, the right to vote, criminal defendants' rights and the right to privacy. Conservatives, in contrast, preached judicial restraint.

Yet with conservatives now controlling most of the nation's federal appeals courts, Wilkinson is one among many who have come to a new appreciation of judicial activism. Like the "new federalists" whose conservative thinking increasingly influences the legal mainstream, Wilkinson said he believes that the Constitution is more than just the Bill of Rights. He doesn't think that the Bill of Rights has been overemphasized, he is quick to say, but that what he calls "the structural Constitution" has been underemphasized.

"That body of the document that spells out the relationship between the federal government and the states was neglected for far too long," he said. "The power of Congress was seen as unlimited and that of the states as a virtual nullity." Wilkinson has found it exciting, he said, to be engaged in redressing this imbalance, which sometimes means striking down Congressional acts that seem to usurp state power unconstitutionally.

But he notes, because he is of judicious temperament, that judicial activism is "heady wine" and that restraint is still the greater virtue. Everything in moderation. Luttig takes exception to the view that striking down Congressional laws necessarily constitutes judicial activism. "Remember, it's sophomoric to think that invalidation of a statute equals judicial activism," he said. "Judicial activism means deciding a case based on one's own personal predilections, regardless. It might well take the form of sustaining a law that should be stricken." Several years ago, in an opinion written by Luttig, the Fourth Circuit struck down a key provision of the Violence Against Women Act. As Luttig saw it, Congress had established a federal civil right that didn't exist in the Constitution ? the right to be free of crimes of violence motivated by gender ? and then established the additional right for victims of such violence to sue their aggressors for damages in federal court. Congress had justified the law based

Luttig ruled that Congress had overstepped its authority. A three-judge panel of the Fourth Circuit originally heard the appeal, upholding the constitutionality of the Violence Against Women Act, as had 17 of 18 federal district judges who had reviewed it. But the full Fourth Circuit vacated the liberal decision, taking the case en banc. Motz, the Clinton appointee, hinted in her dissent that her colleagues were motivated by their distaste for the act itself. "Judges' policy choices provide no basis for finding a statute unconstitutional," she wrote.

The case went up to the Supreme Court, and the Supreme Court agreed with the Fourth Circuit, 5 to 4, striking down the right of rape victims and abused women to sue in federal court under this statute. The Supreme Court version of the Fourth Circuit's ruling became the law of the land, and the Fourth Circuit and the Supreme Court jointly reinforced the principle that Congress's powers are limited.

Luttig's opinion, though, went beyond the Supreme Court's rhetorically. He began, "We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves."

Cass Sunstein, a University of Chicago law professor, said that no court had issued such a battle cry for states' rights since before the New Deal.

During the nearly two hours that the Fourth Circuit debated her case, Ocheltree, dressed in a pin-striped pants suit with a white handkerchief sewed into the breast pocket, sat anonymously on a pewlike bench,

holding her husband's hand in a tight grip. The judges didn't even know she was there. Her feathered dirty blond hair fell over her eyes a few times, and she tossed it back. Other than that, she was frozen, riveted by the theater of the bench, which veered occasionally into Grand Guignol.

Chuck Thompson, the lawyer for Scollon Productions, who used to clerk for Senior Judge Clyde H. Hamilton, a Republican appointee to the Fourth Circuit, wore a red bow tie. "May it please the court," he said. He didn't get a chance to say very much more. This was the judges' show. Karen Williams, author of the pro-employer decision, spent more time arguing Scollon's case than Thompson did. Michael, the dissenter, rolled his eyes and defended Ocheltree; Motz fired a few one-line zingers. Luttig, wagging his finger, told his fellow judges where their legal reasoning proved inadequate and instructed the lawyers for both sides what their arguments should be. "I'd have to disagree with you," Thompson ventured at one point.

"You can't!" Luttig retorted. "You can't disagree!" Wilkinson, perennially concerned with civility, exuded disgust at the locker-room atmosphere being described and exasperation with his colleagues for rehashing the ugly details of the case. "Who enjoys what and who enjoys whom," he said, his voice booming, "that's not for an appellate court to decide." For Wilkinson, the bottom line seemed to be that there was a jury verdict, and his remarks hinted that he was disinclined to overturn it.

Luttig, however, didn't seem certain that the jury verdict was defensible, and he scolded Ocheltree's lawyer, William Elvin Hopkins Jr., 36, for failing to make his best case. As Luttig saw it, the crux of Hopkins's challenge was to explain why Ocheltree was discriminated against if the locker-room atmosphere predated her arrival at Scollon. "You'll lose if you don't better answer that before this panel," he said. Luttig suggested this theory: Most men would stop such salacious talk once a woman was in their midst and if they didn't, it was precisely because she was there. Their behavior may not have changed, but their motivation did, he said.

When the conversation became graphic, Widener, whose eyes had been closed, seemed to startle into participation. "You're asking us to hold that when there's an all-male shop, a woman can walk in and say, 'Give me the money!'"

Williams agreed: there was no reason for Ocheltree to have been any more offended than her male colleagues by sexually explicit conversation, not in an age when magazines feature articles about how much women enjoy oral sex.

As in most oral arguments I observed, Gregory, the African-American judge who joined the court in 2001, didn't grandstand. When he speaks, though, he doesn't mince words, slices to the core and if the subject is discrimination, he gets it. Title VII is not about sex or race, he said; it's about power. And the incidents with the mannequin speak volumes, he said: "The problem with the mannequin is that it became almost an effigy, if you will, of the plaintiff."

As Ocheltree left the courthouse, still holding her husband's hand, she said that she felt the court would do the right thing when it issued its decision later this year. There was no real basis for her optimism, though, not in the court's track record or in the questions the judges asked at her hearing. It could go either way, but the odds are not with the Lisa Ocheltrees or the Kevin Wigginses, not in the Fourth Circuit or, for that matter, in an ever increasing number of appellate courts in this country.

Legal scholars talk about the pendulum swinging from liberal to conservative, from a preoccupation with individuals' rights to a preoccupation with states' rights, and suggest that, in time, it will swing back once more. It would certainly help many Americans sustain their faith in the system if the courts could find their equilibrium, if they could become less ideological, less predictable and less political. That doesn't appear to be on the horizon, though, not in the foreseeable future. In the historic site in Richmond where the Confederacy once thrived, the United States Court of Appeals for the Fourth Circuit is ushering in the 21st century.

Deborah Sontag is a staff writer for The New York Times Magazine.

<H5>March 9, 2003</H5><NYT_HEADLINE type=" " version="1.0">
<H2>The Power of the Fourth</H2></NYT_HEADLINE><NYT_BYLINE type=" " version="1.0"><FONT size=-1><STRONG>By DEBORAH SONTAG</STRONG></FONT>

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<P><IMG alt=T src="http://graphics7.nytimes.com/images/dropcap/t.gif" align=left border=0>he 19th-century courthouse that houses the United States Court of Appeals for the Fourth Circuit sits across from a <ORG value="CVS" idsrc="NYSE">CVS</ORG> and a <ORG value="DBRN" idsrc="NASDAQ">Dress Barn</ORG> on a desultory stretch of Main Street in Richmond, Va. The entrance -- peeling "Pull" sign, metal detector, dim lobby -- is not awe-inspiring. But upstairs in the courtrooms, beneath the pendulous chandeliers and the oil portraits of former jurists, a hush prevails. Whether or not the judges are on the bench, people whisper. It is as if they tacitly accept that the atmosphere should continue to be rarefied even as the judicial process becomes increasingly polluted by politics. </P>
<P>This 148-year-old building, once the site of the Confederate Treasury, is where you go if you are appealing the decisions of federal judges or juries in Virginia, West Virginia, Maryland, North Carolina or South Carolina. It's the last stop before the Supreme Court, which, given how few cases the highest court actually hears, essentially makes it the court of last resort for those seeking justice in this region. Let the plaintiff beware, though; the Fourth Circuit is considered the shrewdest, most aggressively conservative federal appeals court in the nation. </P>
<P>On the last Tuesday in February, Lisa Ocheltree of Lexington, S.C., settled warily onto a hardwood bench in a courtroom carpeted in billiard-table green. Several years ago, Ocheltree won a substantial jury verdict in a sexual-harassment suit against her former employer. The jury found that vulgar language, crude sexual commentary and sexual acting-out created an extremely hostile working environment for Ocheltree as the sole woman in a costume-production workshop. But a three-judge panel of the Fourth Circuit overturned that verdict late last year. "Were they telling me that I should have just sucked it up?" Ocheltree asked. She petitioned the full court to reconsider the panel's 2-to-1 decision, and the judges agreed to take her case en banc, which they hardly ever do. </P>
<P>And so all 12 judges were about to file in and take the bench, affording a rare glimpse at the dynamic of the entire court. Ocheltree's lawyer was nervous: a three-judge panel of the Fourth Circuit provides a grilling, but this would be a full-court press. Ocheltree, however, was determined not to be intimidated. "Just because I'm a blue-collar worker doesn't mean I'm gonna let the black robes scare me," she said. "It may be the South, but it's the 21st century." </P>
<P>Geographically, the Fourth Circuit, one of 13 federal courts of appeals, is not the most southern. But it is singularly genteel: its judges descend from the bench to shake lawyers' hands after oral arguments. And as recently as 1999, Chief Justice William H. Rehnquist led the Fourth Circuit's annual judicial conference in a traditional rousing sing-along that included "Dixie." This always offended civil rights lawyers and the few African-American lawyers in attendance. But it never surprised them. </P>
<P>It was not until the year 2001 that the Fourth Circuit, which has the largest African-American population of any appellate jurisdiction, became the final federal appeals court to be racially or ethnically integrated. Many consider the court to be a legacy of Strom Thurmond and Jesse Helms because the former senators from the Carolinas played a key role in shaping it through patronage appointments and obstructionism. Indeed, President Bush's most recent appointment to the Fourth Circuit, Dennis W. Shedd, is a former chief of staff to Thurmond; his pending nominee, Terrence Boyle, is a former Helms aide unsuccessfully nominated by Bush's father more than 10 years ago. </P>
<P>Although President Bush may or may not get the chance to name a new Supreme Court justice this year, he is busy trying to fill 25 federal appeals court vacancies, including 3 on the Fourth Circuit, with the backing of a newly Republican Senate. He already has 16 nominees waiting for confirmation. And despite the occasional Democratic filibuster, he appears poised to transform the federal judiciary -- which includes 179 appeals judges at full strength -- back into an overwhelmingly conservative bench. In 12 years between them, Ronald Reagan and George H.W. Bush established a Republican majority on every appeals court. Clinton, facing stiff resistance from an opposition Senate for six of his eight years, pushed that back somewhat so that Bush inherited a Republican majority on 8 of the 13 appellate courts, with 3 more poised to swing Republican through his appointments. And those appointments, because they are for life, could reverberate for generations. Judge H. Emory Widener Jr. of the Fourth Circuit, wh

<P>As Bush makes his selections, his staunch conservative supporters tout the Fourth Circuit as a model to emulate, and liberals view it anxiously as a harbinger of doom. That's because the Fourth Circuit, which has eight Republican and four Democratic appointees, is not only conservative but also bold and muscular in its conservatism. It is confident enough to strike down acts of Congress when it finds them stretching the limits of the federal government's power and hardheaded enough to rule against nearly every death-row defendant who comes before it. </P>
<P>To critics, the Fourth Circuit lacks compassion for the individual.. To admirers, the Fourth Circuit is a welcome corrective after years of soft, liberally activist benches, a brilliant court with a healthy respect for the concerns of prosecutors, of business owners, of state officials -- and of the Bush administration, which received deference from the court to treat a United States citizen captured in Afghanistan as an "enemy combatant" who could be detained without charges even on American soil. </P>
<P>Helms once told a North Carolina newspaper that the furor in Washington over judicial nominations was out of whack with the sentiments of the public: "You go out on the street of Raleigh, N.C., and ask 100 people, 'Do you give a damn who is on the Fourth Circuit Court of Appeals?' They'll say, 'What's that?'" </P>
<P>He had a point. Few pay much attention to federal courts below the Supreme Court level. But they should. The appellate courts, created in the late 19th century to relieve overcrowding of the Supreme Court's docket, decide about 28,000 cases a year compared with the highest court's 75 or so. Practically speaking, they have the final say in most matters of law; their reach is broader, if not deeper, than the Supreme Court's itself. </P>
<P>Judges on the Fourth Circuit say that they just follow the Supreme Court's lead. And it is true that the Fourth Circuit is the appellate court closest in thinking to the Rehnquist Court. But the relationship is symbiotic: the Fourth Circuit does not just imitate; it also initiates. It pushes the envelope, testing the boundaries of conservative doctrine in the area of, say, reasserting states rights over big government. Sometimes, the Supreme Court reins in the Fourth Circuit, reversing its more experimental decisions, but it also upholds them or leaves them alone to become the law of the land. There is a cross-fertilization, which could see its apotheosis this spring: the Fourth Circuit is dominated intellectually by two very different conservative judges, J. Harvie Wilkinson 3rd and J. Michael Luttig, both of whom are leading candidates for the next Supreme Court vacancy. </P>
<P>
Judge Karen J. Williams, 52, a tall, slender woman with delicate features and a regal carriage, wrote the decision overturning the jury verdict in Lisa Ocheltree v. Scollon Productions. The federal law that prohibits sexual harassment in the workplace, as she phrased it ever so piquantly, is not a "neo-Victorian chivalry code designed to protect" the "tender sensitivities of contemporary women." </P>
<P>Williams eloped at 17 with her teenage sweetheart, gave birth to four children, taught school, commuted to law school and eventually became a lawyer in her husband's private practice in Orangeburg, S.C. She was appointed by former President Bush in 1992 on the recommendation of Strom Thurmond, a friend of her father-in-law's, then the president of the South Carolina State Senate. At Williams's investiture, Thurmond and her father-in-law reminisced about how they used to double-date. </P>
<P>Williams, in the self-mocking "baby judge" speech that newly appointed jurists make at the annual judicial conference, said that Thurmond "maneuvered my hearings so that I would be the first woman on the circuit and his nominee." Thurmond, she said, liked to be on the cutting edge, and he just plain liked women too. In the course of the confirmation process, Williams added, a Justice Department official pointed out to her that her race was listed incorrectly on her driver's license. "We finally knew then how I got it," she said jokingly, referring to the judgeship. "Not only was I a female, but they had me as a black female." Some laughed; others cringed. </P>
<P>Once a month, the judges, whose annual salary of $164,000 is higher
than that of senators, travel from their home states to Richmond to hear a week of oral arguments. They sit in three-judge panels randomly selected by a computer program and invariably encounter a rich menu of human dramas and hot-button issues. They hear everything from bankruptcy cases to international child-custody disputes, from race discrimination claims to environmental battles over wetlands. In the January hearings, they debated whether Norfolk, Va., could use an anti-loitering statute to keep an elderly couple from protesting abortion on a bridge over a highway and whether animal-control officers in High Point, N.C., were stripping pit bull owners of their Fourth Amendment rights by killing their dogs. They examined three cadets' contention that the mealtime prayer at the Virginia Military Institute was unconstitutional and an Israeli immigrant's appeal of his conviction for interfering with a flight crew when,

on the three-month
<P>The full Fourth Circuit rarely sits to review the decision of one of its three-judge panels. When it does, though, critics say that it uses this en banc procedure to overturn liberal decisions that slip through, and there are plenty of supporting examples. But with Ocheltree, the judges were sitting in reconsideration of a quite conservative decision, one that would greatly limit the ability of employees in the region to make successful claims of sexual harassment. They were also addressing the sensitive issue of the sanctity of jury decisions.. </P>
<P>Williams was the author of an infamous decision several years ago. The Fourth Circuit ruled that the liberal Warren Court's landmark 1966 ruling in Miranda v. Arizona was not constitutionally based, and as such that an obsolete Congressional statute trumped it. More than 30 years ago, the statute was a stillborn attempt to overrule the court's holding that criminal suspects must be apprised of their rights through what have become known as Miranda warnings. It was never enforced and largely forgotten until the Fourth Circuit resurrected it. And Williams's decision helped cement the Fourth Circuit's reputation as a judicially active conservative court. But the Supreme Court reversed it, 7 to 2, with Antonin Scalia and Clarence Thomas, the two most conservative justices and President Bush's self-proclaimed favorites, dissenting. In that instance and several others, the Fourth Circuit's effort to nudge the Supreme Court toward greater conservatism backfired. Still, the Supreme Court has upheld 36.5 percent
<P>The Fourth Circuit does not march in conservative lock step, however, and its intellectually vibrant judges do not constitute an ideological cabal. The court often reaches consensus across the ideological divide; some of its work is nonideological in nature. Sometimes the majority lets liberal decisions stand; other times even the most conservative judges issue opinions that seem to betray their ideological stripes. And often the fiercest legal arguments are not between the liberals and the conservatives but between conservatives themselves. </P>
<P>Yet when it comes to high-profile decisions, the Fourth Circuit tends to divide neatly along party lines. And taken together, those decisions not only bespeak a conservative philosophy of law but also serve a conservative political agenda. Among its many decisions, the Fourth Circuit has upheld the minute of silence in Virginia schools; ended court-ordered busing in Charlotte; upheld state laws that stringently regulate abortion clinics or require parental notification or ban so-called partial-birth abortions; ruled that the Virginia Military Institute could remain all male as long as there was a separate but comparable education for women; upheld a Charleston, S.C., program that tested maternity patients for illegal drug use without their consent and turned the results over to the police; overturned a Virginia prohibition against license plates bearing the Confederate flag; ruled that the F.D.A. didn't have the authority to regulate nicotine as a drug; and, most recently, overruled a West Virginia feder
<P>
As the Ocheltree hearing opened in a packed courtroom, the bailiff intoned the traditional blessing: "God save the United States and this honorable court." The judges took their seats in leather swivel chairs, with the brand-new chief judge, William W. Wilkins Jr. of South Carolina, in the center. Wilkins started his career as a clerk to Judge Clement Haynsworth of the Fourth Circuit (whose Supreme Court nomination by Nixon was rejected by Congress) and then went on to become an aide and campaign director for Thurmond. He was the first federal judge appointed by Reagan. </P>
<P>J. Harvie Wilkinson 3rd had technically stepped down as chief judge after seven years, as required by law. But he was sitting just off-center, and he still dominated, he and Luttig, each in his own way. </P>
<P>A warm, gracious and patrician Virginian, Wilkinson, 58, appears slight and owlish in his civilian clothes -- blue blazer, gold buttons -- yet commanding in his robes. The son of a banker, the future judge attended boarding school at Lawrenceville and college at Yale before returning to Virginia to study law. While a law student, he ran as a Republican candidate for Congress; when he got 30 percent of the vote, he jokes, he took it as a mandate to finish law school. He eventually taught law and served as editorial-page editor of The Norfolk Virginian-Pilot. (This didn't keep The Pilot from editorializing against his appointment to the bench in 1983, saying that he lacked courtroom experience.) </P>
<P>Wilkinson was confirmed at the age of 39, and he and Luttig share the experience of having been judicial <EM>Wunderkinds</EM>. Luttig points out that at the time of his appointment in 1991, he held the distinction of being the youngest judge on a federal appeals court. He was 37. </P>
<P>The two judges share other distinctions as well. They both clerked for Supreme Court justices they still revere -- Wilkinson for Lewis F. Powell Jr. and Luttig for Chief Justice Warren Burger as well as for Antonin Scalia when Scalia was an appeals court judge. Both worked for Republican Justice Departments and participated in judicial selections, Wilkinson under Reagan and Luttig under the first Bush. Luttig shepherded Clarence Thomas through his contentious confirmation, and pictures of Thomas hang on his

chambers' walls, including one inscribed "This would not have been possible without you! Thanks so much, buddy!" (Luttig's three clean-cut male clerks will head to the Supreme Court next year to clerk for Thomas, Scalia and Anthony M. Kennedy.) </P>
<P>These similarities between Wilkinson and Luttig, and their keen legal minds, initially created a natural alliance between them. Luttig, a native of Tyler, Tex., said that he used to spend more time talking with Wilkinson than with any other judge on the court. They are still friends, he said. But the years have clarified the differences in the two judges' styles and their jurisprudence, and they often parry and thrust in their decisions, with Luttig going for the direct and Wilkinson the indirect jabs. Often Wilkinson and Luttig end up voting the same way, but "there's this very antagonistic sideshow," said Rodney Smolla, a University of Richmond law professor. </P>
<P>Wilkinson writes essayish opinions filled with the kind of rhetorical flourishes that I imagine him composing with a quill pen. He often goes beyond facts and analysis to hold forth. He ponders, he digresses, he philosophizes. Wilkinson is the rare judge who speaks publicly and writes books; in his recent "One Nation Indivisible," he assailed affirmative action and ethnic separatism. Occasionally he injects his personal views on, say, racial quotas into his legal opinions. When he takes issue with "my fine colleagues," he does so in the most courtly manner possible, always striving to emulate Justice Powell as "a healer and bridge builder," he said. In fact, taking me by surprise, he grew quite emotional when telling me how rancorously divided the legal community, the political community, even the country has become. His voice grew insistent, then caught, and his eyes moistened. </P>
<P>"I don't believe in throwing salt in people's eyes," he said. "It's very important to me that the country come together. There are so many wounds, and we ought not pick at scabs. The legal culture especially is too polarized. There's too much throwing of pitch and tar and mud." </P>
<P>Luttig, in contrast, is not given to bursts of inspirational speaking and does no public speaking. Down-to-earth and likable in private, he comes across publicly as intense, austere and unsentimental. "He goes out there with piercing ideas and steel-trap analysis," Smolla said. Luttig sees himself as a legal "nerd," worships analytical rigor and composes a hard-boiled, sometimes mathematically logical opinion. He does not hesitate to gore his colleagues if he finds their thinking subpar. "If any opinion is without reasoning or poorly reasoned, I want them to be embarrassed by their analysis so as to continually improve on the process," he told me. He can be particularly scathing toward Wilkinson -- "Judge Wilkinson misunderstands this issue altogether" -- and he'll criticize him for contradicting himself or for making pronouncements that go beyond a specific case. </P>
<P>Attorneys who go before Luttig know about one central event in his life: that his father was brutally murdered nine years ago, that he moved his chambers to Texas during his father's killer's trial and that the killer became a <EM>cause célèbre</EM> for death-penalty opponents before he was executed. Some wonder if it makes him less objective; Luttig has never granted a new hearing to a death-row defendant. He brushes their concerns aside; the experience affected him -- how could it not have? -- but it didn't warp him. </P>
<P>Many lawyers also assume that Luttig is more conservative than Wilkinson. But the law journal Judicature recently evaluated the decisions of six possible Bush nominees for the Supreme Court and found Wilkinson to be furthest to the right -- exceptionally conservative. It found Luttig the second least conservative of the six. "Did you see the Judicature article?" Luttig asked me, and he also made sure that I had read some cases in which he took unexpectedly liberal positions.. He is loath to be predictable and eager to be perceived as more moderate in anticipation of a Supreme Court opening. </P>
<P>In one case, Luttig took issue with Wilkinson's finding that police officers in Prince George's County, Md., couldn't be held liable for violating the constitutional rights of Nelson O. Robles. The officers had tied Robles to a pole in a parking lot in the middle of the night with a note at his feet stating that he was wanted on an outstanding traffic warrant by a neighboring county. Wilkinson, while condemning the officers for behaving like Keystone Kops, said that they could not have known that they were violating Robles's constitutional rights because it had never been specifically enunciated that what they did was such a violation. </P>
<P>Luttig argued pungently, but unsuccessfully, that Wilkinson's decision should be reviewed by the full court: "I would like to have thought that at this point in our history no court would hold, as did this panel, that law enforcement officers need an opinion from this court in order for them to be on notice that handcuffing a pretrial detainee to a metal pole in a deserted shopping center at 3:00 a.m. in the morning, and abandoning him there, <EM>for no law enforcement purpose at all</EM>, is unconstitutional." </P>
<P>Wilkinson and Luttig do not like to talk about the possibility that they will be competing for a

nomination as soon as this spring if, say, Chief Justice Rehnquist, 78, or Justice Sandra Day O'Connor, 72, steps down. But during Ocheltree's hearing at the Richmond courthouse, the subject was in the air. </P>
<P>
Since 1995, for so long that she is beginning to feel and sound like a crusader, Lisa Ocheltree, 41, has been pursuing her claim against Scollon Productions, a manufacturer of life-size costumes for mascots like the South Carolina Gamecock and characters like Tommy Pickles. </P>
<P>She filed suit under a civil rights law, Title VII, that sees sexual harassment as a violation of the prohibition against workplace discrimination because of sex. Some sexual-harassment claims involve a quid pro quo; others, like Ocheltree's, assert a hostile work environment. Unfortunately for Ocheltree, she has ended up before the appeals court least likely to be sympathetic to any such claims. </P>
<P>Plaintiffs in sexual-harassment suits prevail in only 21 percent of their appeals before the Fourth Circuit, according to a recent Cornell Law Review article. They win, in contrast, 80 percent of the time in the New York-based Second Circuit, which is dominated by Democratic appointees, and 39 percent of the time nationwide. </P>
<P>When Ocheltree, now a U.P.S. employee, worked at Scollon Productions, she was the only woman in an otherwise all-male production shop. Over time, the atmosphere grew more coarse, she said, until it was dominated by sexually explicit conversation and behavior. </P>
<P>A co-worker pinched the nipples of a mannequin while another fell to his knees and simulated oral sex on it. A co-worker teased her with a dirty song while others, including her supervisor, laughed at the show. A colleague tried to get her to react to a photograph of a man with his genitalia pierced. During Ocheltree's trial, a male co-worker said that the other men would routinely fondle the mannequins because they knew it bothered Ocheltree. </P>
<P>Ocheltree complained about the environment during an employee meeting, and she was rebuffed repeatedly when she tried to get an audience with the company's senior executives. After about 18 months at Scollon, she was fired. A federal judge summarily dismissed her complaint, but, representing herself, she appealed that judgment to the Fourth Circuit, which determined that she had grounds for trial. A jury awarded Ocheltree $7,280 in compensatory damages and $400,000 in punitive damages. The judge reduced the damages to $50,000 because Scollon is a small business. Nonetheless, Ocheltree said that her victory restored her "sense of honor and dignity," even though the men at the plant "are laughing to this day." </P>
<P>Scollon Productions appealed the jury's verdict to the Fourth Circuit, contending that Ocheltree's description of the workplace environment was exaggerated and that the crude behavior wasn't directed at Ocheltree anyway. The three-judge panel assigned the case included Williams, Paul V. Niemeyer, appointed by Bush in 1990, and M. Blane Michael, a bow-tie-wearing Clinton appointee from West Virginia. Williams and Niemeyer voted to reverse the jury's decision, and Michael was the dissenter. </P>
<P>It is a role that Michael, who keeps a large photograph of Clinton's inauguration on his chambers' walls, often exercises. There have been other instances in which it has pitted him against Williams too, although he told me that their personal relations are cordial. Still, Michael wrote the dissent in the Miranda case and in one in which Williams found that people with symptom-free H.I.V. are not protected by the Americans With Disabilities Act. </P>
<P>Michael said that Williams and Niemeyer chose "again and again" to see the evidence in a light favorable to Ocheltree's employer rather than to Ocheltree. They were ignoring the fact that the jury found Ocheltree to be the credible party, and they were ignoring their obligation to respect a jury's finding, he said. There is, he wrote, "a profound difference in our respective approaches to reviewing a jury verdict." </P>
<P>In a spirited opinion, Williams wrote that there was no reason to believe that the vulgar atmosphere in the workshop had anything to do with Ocheltree's presence or the fact that she was a woman. The incidents were isolated, and the rest was banter, she said. The courts shouldn't treat women preferentially by insulating them from everyday insults. And further, she added, there was some indication that Ocheltree herself was not a "model of femininity." </P>
<P>In his dissent, Michael wrote that a reasonable jury would conclude that the men at Scollon Productions resented Ocheltree's intrusion into their workplace and had set out to make her unwelcome. He said that the "overall tenor of the workplace banter conveyed the message that women exist primarily to gratify male desires for oral sex." In a workplace suffused with representations of women as sexual objects, a female worker "would doubtless wonder," he wrote, whether her male co-workers were looking at her and asking themselves "whether she 'swallows'" or whether she could "'suck a golf ball through a

garden hose."' </P>
<P>Ocheltree was devastated that the Fourth Circuit decision was written by a woman. "Just because she sits up on that bench, she still puts her pantyhose on one leg at a time," she said. "If all the male judges were sitting around talking about oral sex, I wonder how she'd feel then." </P>
<P>
Franklin Delano Roosevelt famously set out to overhaul the federal judiciary ideologically. Confronting courts that were thwarting his New Deal projects, he strove to create liberal ones that would grant the government more power to regulate the economy. Decades later, Reagan displayed a similar purposefulness, screening judicial candidates using ideological "litmus tests" in order to choose jurists who were strict constructionists, tough on crime, anti-abortion and pro-family. </P>
<P>Between them, Reagan and the first President Bush named six judges to the Fourth Circuit; those six joined Nixon's appointee, Widener, to form a solid conservative core. On other courts, the transformation to conservative has been more startling. The two Deep South appellate courts, for instance, used to be civil rights crusaders. But until the Carter judges retired, the Fourth Circuit was, if not liberal, at least more balanced. </P>
<P>Clinton put a priority on diversifying the federal bench, picking up where Carter had left off. Despite an uncooperative Senate, he succeeded in getting a record 9 black, 7 Hispanic and 20 female judges confirmed. </P>
<P>Yet the Clinton administration never saw its role as reasserting ideological balance on the courts. When Clinton took office, the appeals courts were solidly Republican, but his administration did not feel compelled to find liberal powerhouses to counter the conservative heavyweights appointed by Reagan and Bush. "Some in the White House argued very forcefully that their job was not to put on the federal bench the liberal equivalents of the Luttigs and the Wilkinsons," said Nan Aron, president of Alliance for Justice, a liberal coalition. Clinton was not a die-hard liberal himself, and he tended to nominate centrist legal professionals in tune with his more centrist politics. Still, he faced intense partisan battles, particularly over his minority appointees, and the acrimony continued through Bush's first two years, affecting not just the political arena but also the courts themselves. </P>
<P>Luttig told me that he thinks the politics surrounding judicial appointments makes judges hyperconscious of their political sponsors. "Judges are told, 'You're appointed by us to do these things.' So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get?" he said. "I believe that there's a natural temptation to line up as political partisans that is reinforced by the political process. And it has to be resisted, by the judiciary and by the politicians." </P>
<P>Clinton named four white judges to the Fourth Circuit without much battle, including one, William B. Traxler Jr., of Greenville, S.C., who was first elevated to the federal bench, on Thurmond's recommendation, by former President Bush. Traxler votes so often with the conservative majority that court watchers forget he's a Democratic appointee. The other three -- Blane Michael and Robert B. King of West Virginia and Diana Gribbon Motz of Maryland -- are unofficially the dissenters. </P>
<P>In contrast to his smooth experience with getting the white judges confirmed, Clinton tried at least four times to name an African-American to the Fourth Circuit. His nominees were blocked every time. Jesse Helms still bore a grudge from Clinton's failure to renominate his former aide Terrence Boyle, after Boyle's nomination by the first Bush had elapsed. Helms then blocked, as is the home state senator's power, every Clinton nominee from North Carolina, including two African-American judges. As a result, there is no one from North Carolina on the Fourth Circuit now, although proving that even a retired Helms can get his way, President Bush has a pending nominee from North Carolina -- and that is Boyle. </P>
<P>During his period of obstructionism, Helms insisted, and Thurmond publicly concurred, that the matter had nothing to do with race or politics. It would simply be a waste of taxpayer money, Helms said repeatedly, to fill vacancies on the Fourth Circuit when the chief judge, Wilkinson, thought the court would function less efficiently if it were bigger. (And clearly it would have if it became less ideologically homogeneous.) </P>
<P>Clinton finally tried an end run around Helms by nominating a Virginian, a soft-spoken African-American lawyer named Roger L. Gregory. Gregory comes from a small town in rural Virginia where his parents worked in the local tobacco factory. He grew up to found a Richmond law firm with L. Douglas Wilder, the former governor of Virginia. He gives inspirational speeches to black youths. His nomination had bipartisan support. But even Gregory couldn't get a hearing scheduled. </P>
<P>So Clinton resorted to an extraordinary tactic. During his last days in office, after Congress had recessed, Clinton unilaterally appointed Gregory to the bench. President Bush, eager to demonstrate

bipartisanship and win support for his own candidates, eventually allowed Gregory's temporary appointment to become permanent. In July 2001, the Senate confirmed him 93 to 1, with Trent Lott casting the dissenting vote. The Fourth Circuit Court of Appeals was officially integrated.. </P>
<P>In his "baby judge" speech at the Fourth Circuit judicial convention last summer, Gregory cited Frederick Douglass and Harriet Tubman, setting a new kind of precedent for the court. He also joked that he was welcomed to the Richmond courthouse by someone who pointed out that the Confederate President Jefferson Davis's office used to be right near his new chambers. "That was very reassuring, you can imagine that," Gregory said. </P>
<P>
In a study of capital convictions and appeals between 1973 and 1995, Prof. James S. Liebman of Columbia University Law School found that the Fourth Circuit granted relief to death-row inmates less frequently than any other appeals court in the country. Even at that point, and it has gotten more restrictive since, the Fourth Circuit was overturning 12 percent of the death sentences it reviewed: that compared with an average 40 percent reversal rate for federal appeals courts. "There are other conservative courts of appeal but none that are a black hole of capital litigation like the Fourth Circuit," said John H. Blume, director of the Cornell Death Penalty Project, who represents South Carolina prisoners. </P>
<P>When Kevin Wiggins's case came up before the Fourth Circuit in January 2002, he was on death row in Maryland, trying not to get his hopes up. A federal district chief judge had invalidated his death sentence and voided his conviction for murder. Theoretically, he should have gone free. But the state appealed. And Wiggins knew, because death-row prisoners know these things, that the odds of winning in the Fourth Circuit weren't good. </P>
<P>In February, I visited Wiggins in the C-pod of the Maryland Correctional Adjustment Center in downtown Baltimore. When a guard unlocked the door to a narrow concrete visiting cell, Wiggins was already there, staring blankly through a scratched glass partition. Wearing a white undershirt, his face round with a wisp of a mustache, he was itching to get talking. And talk he did, like a balloon releasing air, his words a jumble as he dizzyingly flicked back and forth in time. </P>
<P>Matter-of-factly, Wiggins described himself as "a nobody with no family and no skills." He had a nightmarish childhood, according to information gathered by a forensic social worker hired by his present lawyer. His mother was alcoholic, neglectful and abusive. When he was 6, Wiggins was removed from his mother's home after she burned him severely with a hot plate in punishment for playing with matches. He then endured a series of foster homes in which he was beaten, locked in closets and repeatedly raped. He emerged into adulthood as a barely educated loner who lived in rented rooms and worked at minimum-wage jobs. He was of "borderline intelligence," according to state social-service records. </P>
<P>Wiggins had no criminal record when he was arrested at age 27 for the murder of an elderly woman. The State of Maryland maintained that Wiggins drowned Florence Lacs, 77, in her bathtub in 1988: he was working as a painter in her building, and he and his girlfriend were found in possession of Lacs's credit cards and car. There was no forensic evidence linking Wiggins to the murder, though there was unidentified forensic evidence -- fingerprints, hair, fibers and a baseball cap left at the scene. Still, in a bench trial, a state judge convicted Wiggins of robbery and murder. </P>
<P>During the subsequent sentencing trial, Wiggins's inexperienced public defenders decided to reargue his innocence instead of presenting a case for why he should get life not death. They did not even bother to investigate his background to discover whether he possessed the kind of "social history" that is routinely used to humanize a defendant and mitigate against the imposition of the death penalty. </P>
<P>Wiggins has now been on death row since 1989. In 1993, a high-powered Washington lawyer, Donald B. Verrilli, Jr., took on Wiggins's case pro bono, and it began wending its way through the postconviction review and then the state appeals process. Verrilli found the case against Wiggins to be weakly circumstantial at best, offering evidence only that Wiggins was a logical suspect. Verrilli said he came to believe that Wiggins did not commit the crime but rather served as the "fall guy for people more clever than him." Specifically, there is a plausible alternative to the course of events involving Wiggins's girlfriend, who was 15 years his elder. All charges against her were dropped, and she testified against Wiggins; her brother, it seemed, lived in an apartment below the victim's. </P>
<P>The case's first stop in federal court was at the bench of Maryland's United States chief district judge, J. Frederick Motz, who happens to be married to Judge Diana Motz, a Clinton appointee on the Fourth Circuit. Judge Frederick Motz is a former federal prosecutor appointed by Reagan; he is not, as he said in court one day, "an anti-capital punishment person." In a 55-page opinion, he concluded, "No rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt." He invalidated the

murder conviction and threw out the death sentence too. </P>
<P>I asked Wiggins whether he was happy when Motz took his side. "It's hard for me to be happy about anything," he said. Wiggins told me that he could remember only one joyful time in his life. It was after his mother burned him. Six years old, he awoke in a hospital bed, surrounded by nurses who clucked over him, petting his hair and bringing him cookies. </P>
<P>When Maryland prosecutors decided to appeal to the Fourth Circuit, Motz publicly questioned their desire to continue pursuing what he characterized as a flimsy case. "Why isn't this case of moral concern to the state?" he asked. "Or don't you care?" </P>
<P>At the Fourth Circuit, Wiggins drew a panel of three Republican appointees -- Wilkinson, Widener and Niemeyer. In a hearing last winter, the judges appeared to be wrestling with the case; they doubled the time they usually allot attorneys to present their arguments. Last May, however, in a decision written by the 79-year-old Judge Widener, the panel ended up reinstating Wiggins's conviction and his death sentence. The panel gave the original trial judge the benefit of the doubt; it deferred to his assertion that he based his decision of Wiggins's guilt on a totality of evidence and that he did not infer Wiggins's guilt from his possession of the victim's property. And it ruled that the public defenders' failure to present Wiggins's background during the sentencing hearing was a trial tactic rather than negligence. </P>
<P>And yet the panel had some hesitations. Judge Wilkinson wrote that he couldn't "say with certainty" that Wiggins committed the murder.. And Judge Niemeyer acknowledged that it was something of a close call to find that Wiggins had adequate counsel. </P>
<P>"I think that most circuit courts, if they have real doubts about what has happened in a capital case, they will reverse," Professor Liebman said. "The Fourth Circuit doesn't have the same threshold. In this case, they saw the tripwire and stepped right over it." </P>
<P>Verrilli petitioned the Supreme Court, and in a hearing scheduled for March 24, the court will pick up Wiggins's case, continuing its dialogue with the Fourth Circuit's decision-making. Since 1996, the Supreme Court has reviewed far more death-penalty cases coming from the Fourth Circuit than from any other appeals court -- 9 from the Fourth Circuit alone and 12 from the other 11 appeals courts combined. The 1996 date is significant because in that year Congress passed the Antiterrorism and Effective Death Penalty Act, limiting federal courts' review of capital cases to those in which there's "an unreasonable application of clearly established federal law." That "unreasonableness," however, is open to interpretation, and while the Fourth Circuit has chosen to see its hands tied, other circuits have granted themselves more wiggle room. The Supreme Court is thus mediating the conflict between the circuits, trying to help them figure out when it is appropriate and inappropriate to defer to the state cou
<P>Generally, the Supreme Court upholds the Fourth Circuit's tough stance in death-penalty cases by a 5-to-4 vote, dividing ideologically. Take the Virginia case of Walter Mickens Jr., whose lawyer, it turned out, had at one time defended Mickens's 17-year-old victim. A rare liberal panel of the Fourth Circuit found that Mickens's lawyer had a conflict of interest. But the Fourth Circuit did not want to let that reversal stand; it met en banc and reinstated his conviction. The case then went to the Supreme Court, which agreed, 5 to 4, with the Fourth Circuit's full panel: it held that the lawyer's conflict of interest didn't matter since Mickens couldn't prove that it adversely affected the outcome of his case. Last June, Mickens was executed by lethal injection. </P>
<P>In two important rulings on how to interpret the 1996 law, however, the Supreme Court reversed the Fourth Circuit, finding that the Richmond court had chosen to read the statute too narrowly. In one case, the Supreme Court, unlike the Fourth Circuit, found the state court's judgment "unreasonable" for failing to recognize that the legal representation of Terry Williams, a Virginia inmate, was so ineffective that it didn't meet minimum constitutional standards for competency.. Like Wiggins's, Williams's lawyer didn't investigate his horrific childhood; his lawyer was subsequently disbarred for mental disability.. </P>
<P>
Many, if not most, appeals judges show a pattern to their judging over time. </P>
<P>Wilkinson has granted a new hearing to a death-row prisoner once in 19 years, according to a South Carolina Law Review article. In contrast, Judge Francis D. Murnaghan Jr. of Maryland, who used to be the Fourth Circuit's pre-eminent liberal, granted relief to about one out of three death-row prisoners who came before him. </P>
<P>Yet no judge wants to be seen as tailoring his decisions to his ideology, as bending the law to determine preconceived results. Every judge will tell you that he or she comes to each case with an open mind, seeing a distinct set of facts that raises distinct legal questions. </P>
<P>Wilkinson said he feels strongly that judges should never be rated and ranked as if they were politicians whose votes could be counted. He said that the statistical analyses of judges' decisions,

followed by the affixing of a label of liberal or conservative, is reductive. </P>
<P>"I don't go on the bench as liberal or conservative," Wilkinson said. And yet he does not dispute that he is a conservative jurist. He acknowledges his place among those who came of age concerned about "the excessive activism" of the Warren Court. The Warren Court was seen as having overstepped its bounds with rulings that expanded equal protection, the right to vote, criminal defendants' rights and the right to privacy. Conservatives, in contrast, preached judicial restraint.</P>
<P>Yet with conservatives now controlling most of the nation's federal appeals courts, Wilkinson is one among many who have come to a new appreciation of judicial activism. Like the "new federalists" whose conservative thinking increasingly influences the legal mainstream, Wilkinson said he believes that the Constitution is more than just the Bill of Rights. He doesn't think that the Bill of Rights has been overemphasized, he is quick to say, but that what he calls "the structural Constitution" has been underemphasized. </P>
<P>"That body of the document that spells out the relationship between
the federal government and the states was neglected for far too long," he said. "The power of Congress was seen as unlimited and that of the states as a virtual nullity." Wilkinson has found it exciting, he said, to be engaged in redressing this imbalance, which sometimes means striking down Congressional acts that seem to usurp state power unconstitutionally. </P>
<P>But he notes, because he is of judicious temperament, that judicial activism is "heady wine" and that restraint is still the greater virtue. Everything in moderation. Luttig takes exception to the view that striking down Congressional laws necessarily constitutes judicial activism. "Remember, it's sophomoric to think that invalidation of a statute equals judicial activism," he said. "Judicial activism means deciding a case based on one's own personal predilections, regardless.. It might well take the form of sustaining a law that should be stricken." Several years ago, in an opinion written by Luttig, the Fourth Circuit struck down a key provision of the Violence Against Women Act. As Luttig saw it, Congress had established a federal civil right that didn't exist in the Constitution — the right to be free of crimes of violence motivated by gender — and then established the additional right for victims of such violence to sue their aggressors for damages in federal court. Congress had justified the law bas
<P>Luttig ruled that Congress had overstepped its authority. A three-judge panel of the Fourth Circuit originally heard the appeal, upholding the constitutionality of the Violence Against Women Act, as had 17 of 18 federal district judges who had reviewed it. But the full Fourth Circuit vacated the liberal decision, taking the case en banc. Motz, the Clinton appointee, hinted in her dissent that her colleagues were motivated by their distaste for the act itself. "Judges' policy choices provide no basis for finding a statute unconstitutional," she wrote.</P>
<P>The case went up to the Supreme Court, and the Supreme Court agreed with the Fourth Circuit, 5 to 4, striking down the right of rape victims and abused women to sue in federal court under this statute. The Supreme Court version of the Fourth Circuit's ruling became the law of the land, and the Fourth Circuit and the Supreme Court jointly reinforced the principle that Congress's powers are limited. </P>
<P>Luttig's opinion, though, went beyond the Supreme Court's rhetorically. He began, "We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves." </P>
<P>Cass Sunstein, a University of Chicago law professor, said that no court had issued such a battle cry for states' rights since before the New Deal. </P>
<P>During the nearly two hours that the Fourth Circuit debated her case, Ocheltree, dressed in a pin-striped pants suit with a white handkerchief sewed into the breast pocket, sat anonymously on a pewlike bench, holding her husband's hand in a tight grip. The judges didn't even know she was there. Her feathered dirty blond hair fell over her eyes a few times, and she tossed it back. Other than that, she was frozen, riveted by the theater of the bench, which veered occasionally into <EM>Grand Guignol</EM>.</P>
<P>Chuck Thompson, the lawyer for Scollon Productions, who used to clerk for Senior Judge Clyde H. Hamilton, a Republican appointee to the Fourth Circuit, wore a red bow tie. "May it please the court," he said. He didn't get a chance to say very much more. This was the judges' show. Karen Williams, author of the pro-employer decision, spent more time arguing Scollon's case than Thompson did. Michael, the dissenter, rolled his eyes and defended Ocheltree; Motz fired a few one-line zingers. Luttig, wagging his finger, told his fellow judges where their legal reasoning proved inadequate and instructed the lawyers for both sides what their arguments should be. "I'd have to disagree with you," Thompson ventured at one

point.</P>
<P>"You can't!" Luttig retorted. "You can't disagree!" Wilkinson, perennially concerned with civility, exuded disgust at the locker-room atmosphere being described and exasperation with his colleagues for rehashing the ugly details of the case. "Who enjoys what and who enjoys whom," he said, his voice booming, "that's not for an appellate court to decide." For Wilkinson, the bottom line seemed to be that there was a jury verdict, and his remarks hinted that he was disinclined to overturn it.</P>
<P>Luttig, however, didn't seem certain that the jury verdict was defensible, and he scolded Ocheltree's lawyer, William Elvin Hopkins Jr., 36, for failing to make his best case. As Luttig saw it, the crux of Hopkins's challenge was to explain why Ocheltree was discriminated against if the locker-room atmosphere predated her arrival at Scollon.. "You'll lose if you don't better answer that before this panel," he said. Luttig suggested this theory: Most men would stop such salacious talk once a woman was in their midst and if they didn't, it was precisely <EM>because</EM> she was there. Their behavior may not have changed, but their motivation did, he said.</P>
<P>When the conversation became graphic, Widener, whose eyes had been closed, seemed to startle into participation. "You're asking us to hold that when there's an all-male shop, a woman can walk in and say, 'Give me the money!'"</P>
<P>Williams agreed: there was no reason for Ocheltree to have been any more offended than her male colleagues by sexually explicit conversation, not in an age when magazines feature articles about how much women enjoy oral sex. </P>
<P>As in most oral arguments I observed, Gregory, the African-American judge who joined the court in 2001, didn't grandstand. When he speaks, though, he doesn't mince words, slices to the core and if the subject is discrimination, he gets it. Title VII is not about sex or race, he said; it's about power. And the incidents with the mannequin speak volumes, he said: "The problem with the mannequin is that it became almost an effigy, if you will, of the plaintiff."</P>
<P>As Ocheltree left the courthouse, still holding her husband's hand, she said that she felt the court would do the right thing when it issued its decision later this year. There was no real basis for her optimism, though, not in the court's track record or in the questions the judges asked at her hearing. It could go either way, but the odds are not with the Lisa Ocheltrees or the Kevin Wigginses, not in the Fourth Circuit or, for that matter, in an ever increasing number of appellate courts in this country. </P>
<P>Legal scholars talk about the pendulum swinging from liberal to conservative, from a preoccupation with individuals' rights to a preoccupation with states' rights, and suggest that, in time, it will swing back once more. It would certainly help many Americans sustain their faith in the system if the courts could find their equilibrium, if they could become less ideological, less predictable and less political. That doesn't appear to be on the horizon, though, not in the foreseeable future. In the historic site in Richmond where the Confederacy once thrived, the United States Court of Appeals for the Fourth Circuit is ushering in the 21st century. </P>
<P><EM></P>
<P>Deborah Sontag is a staff writer for The New York Times Magazine.</P></EM><p>
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