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Conservative federal appeals court shifts left

Recent opinions reveal a possible liberal leaning

By **Tricia Bishop**
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The federal appellate court that covers Maryland has for years been considered one of the more right-leaning in the nation, finding that women can be banned from a military institute, that the **FDA** can't regulate tobacco and that confessions count even when suspects haven't been read their rights, among other conservative opinions.

But the 4th Circuit U.S. Court of Appeals now appears to have taken a left turn.

Last week, the court sided with a criminal suspect over police for the fourth time since March on a Fourth Amendment case claiming that improper searches violated the defendant's rights.

In September, the court threw out constitutional challenges to President **Barack Obama**'s health care overhaul efforts, finding that a penalty for not having health insurance amounts to a tax that can't be challenged until it's paid — and that part of the law doesn't take effect for years.

And in July, the court ruled in a case over the separation of church and state that only generic, "nonsectarian" prayers are appropriate for government meetings.

The decisions are the first evidence of an altered philosophy within the 4th Circuit, which oversees federal appeals cases from Maryland, Virginia, West Virginia and the Carolinas, legal analysts said. The shift follows a half-dozen appointments by Obama to a bench that previously had a Republican majority.

"There's been a marked change," said Ilya Shapiro, a senior fellow at the **Cato** Institute, a libertarian think tank in Washington. "Historically, this has been one of the most, if not the most, conservative circuits. Now it's almost one of the most liberal."

When Obama took office, the 4th Circuit, based in Richmond, Va., had 11 sitting judges — six Republican appointees and five Democratic picks — and four vacancies.

The spots were left open because the Democratic-controlled **U.S. Senate** of 2007 and 2008 refused to approve **President George W. Bush**'s 4th Circuit appointments, including Rod J. Rosenstein, who had been named Maryland's U.S. attorney a few years earlier based on a Bush recommendation.

The inaction on judicial nominations paved the way for Obama to make an impact with his choices, which have focused on diversifying federal courts based on race, gender and sexual orientation. Since he took office, two more vacancies opened on the 4th Circuit, allowing him to nominate six people in total. Five have been approved: a woman, two black men, a Latino, and a white man.

That makes the split on the court nine Democratic appointments to five Republican. Another Obama pick, Stephanie Thacker, was nominated this year and is awaiting confirmation by the Senate.

The new makeup could have an effect on national policy, given the kinds of cases handled by this court, legal analysts said.

"It is among the most important federal appeals courts," said Kenneth A. Klukowski, a constitutional lawyer

on the faculty of Virginia's Liberty University. It covers "an area of the country which has some especially important business and economic interests. It's also the circuit that covers the Pentagon, the **CIA**, the **NSA** and a lot of our national security installations."

Cases involving Fourth Amendment protections against unreasonable searches and seizures clearly signal change on the court, analysts said

Last week, in a 2-1 decision, the judges found that police officers from Seat Pleasant in **Prince George's County** overstepped their bounds when they used Obie Lee Powell's prior criminal history, which included armed robbery charges, as justification to search him after a traffic stop. Powell was convicted of **crack cocaine** possession in 2008, based on evidence discovered during the illegal pat-down, and sentenced to 63 months in federal prison.

His federal public defender, Daniel W. Stiller, called the appeals court decision a victory for constitutional rights.

"With changing faces on the court, there seems to be … an increasing sensitivity to law enforcement overreach, as well as citizen rights," Stiller said.

The Powell case was the fourth this year to raise concerns "about the inclination of the government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity," judges said in the majority opinion, written by a Republican appointee.

In March, the 4th Circuit also overturned a North Carolina cocaine conviction after finding that the defendant's odd movements inside a car didn't warrant his detention. In August, they upheld a Maryland federal court's ruling that a state police drug search was illegal, and they reversed a separate ruling from a Virginia federal court allowing evidence from a pat-down done without the suspect's consent.

Matthew G. Kaiser, a federal criminal defense attorney in Washington who **blogs** about decisions from the various appeals courts, said the 4th Circuit rulings reveal a court that's now more "hospitable" to arguments from criminal defendants.

"It's hard to say what's causing the shift directly," Kaiser said. "But I think there is a shift, and there's room for hope for people who represent criminal defendants in the 4th Circuit that wasn't there before."

He outlined two recent cases that also appear to fall into that category. In July, the judges ruled that prosecutors can't take away a defendant's right to appeal as a condition for a reduced sentence. And this month, they found that a convicted defendant can't be given a stiffer sentence for claiming innocence while testifying in his own case.

"It's holding the government and the district court to a certain kind of rigorous [examination]," Kaiser said. "That is, I think, a subtle shift. It's a perceptible one, and it's a good one."

Rod Rosenstein, one of a handful of Bush-appointed U.S. attorneys still in office post-Obama, declined to comment. But his team argued in the Powell case that the traffic-stop search was warranted based on the officer's judgment and safety concerns.

Police must "harbor a reasonable suspicion" that the person they're about to frisk or detain is likely "armed and dangerous" or engaged in criminal activity before searching someone. It's a subjective standard that relies on common sense, said Doug Ward, director of the Division of Public Safety Leadership within the Johns Hopkins University School of Education. He calls it a "gray area."

Ward reviewed the Powell case and said he couldn't find anything wrong with the officer's actions. He suggested that the ruling against police may reveal more about the judges than the actions of law enforcement.

The old 4th Circuit did not always appear so defendant-friendly. A 1999 ruling in a Virginia bank robbery case, for example, made it easier for police to submit coerced confessions in court, even if the defendants were not advised of their Miranda rights, which warn against making statements without a lawyer present.

Opinion makers at national media outlets were outraged. **The Washington Post** called the ruling "hair raising," while the **New York Times** said it was "extraordinarily regressive." The **U.S. Supreme Court** soon

overturned the decision, finding that the 1968 law the 4th Circuit relied upon could not nullify the Miranda requirements, which were set in 1968.

Also in 1999, the 4th Circuit outraged women's rights advocates when it declared unconstitutional a legal provision allowing rape and violence victims to sue their attackers.

The conservative reputation grew following decisions that allowed a group to display the Confederate flag on special-order Virginia license plates and blocked **President Bill Clinton**'s initiative to have the U.S. Food and Drug Administration regulate tobacco. (In 2009, with Obama in office, Congress passed a law giving the FDA control over tobacco.)

The 4th Circuit also heard fewer death penalty cases than other circuits, which appeared to signal a rightward bent.

"Even by the mid '80s, I think it was pretty clear the court was relatively conservative," said Carl Tobias, a professor at the **University of Richmond** School of Law, who has studied the 4th Circuit.

He says it's too early to tell how far left the appeals court might eventually lean with its new makeup. And others pointed out that most cases are heard by a three-person, randomly selected panel, which could — depending upon the luck of the draw — be made up of all Republican-appointed judges.

Klukowski, the constitutional lawyer, called the slide to the left "quite unfortunate" and an "excellent illustration of how elections have consequences."

He's concerned that liberal-leaning judges will reinterpret the Constitution as they see fit. He believes conservative judges might be more likely to stick to the original meaning of the text.

None of the sitting 4th Circuit judges agreed to be interviewed for this article, but one took on the issue of ideology in an editorial published in 2009.

"The differences between appointees of Republican and Democratic administrations can be important," wrote 4th Circuit Judge J. Harvie Wilkinson III, who was appointed by **Ronald Reagan** in 1984. But he cautioned that "ideology should not be the foremost criterion for selecting a judge" and urged Obama to make selections that wouldn't polarize the court.

"At the end of the day, it's not lines of battle; it's not us and them," Wilkinson wrote. "Americans are in this together, and that includes the courts."

Klukowski had another take.

"Conservative judges are sometimes called barbarians, and liberal judges are sometimes called judicial activists," he said. "It's just two different philosophies."