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Foreword

The Honorable James C. Hill

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FOREWORD

Honorable James C. Hill

United States Court of Appeals for the Eleventh Circuit

This is the third in the *University of Miami Law Review*'s annual issues devoted to a recap of some of the more interesting cases dealt with by the United States Court of Appeals for the Eleventh Circuit. As my foreword predecessors, Judges Marcus and Fay, have pointed out, we are and continue to be one of the busiest circuits in the country. In 2009, we handled over 7000 cases for the third straight year. These cases, involving both state and federal law, including civil, criminal, and regulatory matters, by and large receive their final disposition in our court, since the United States Supreme Court takes less than one percent of our cases for review.

At the end of the year, we welcomed our newest judge, The Hon. Beverly Martin, to our court, filling out our allotted twelve active judges, and we continue to enjoy the active participation of our four senior judges, of which I am one. I am honored to have been asked to introduce this recap of 2009 in the Eleventh Circuit.

The articles included in this issue discuss some of our cases involving both constitutional and significant statutory issues. Two of the articles analyze cases in which we were asked to evaluate the constitutionality of congressional regulation under the authority of the commerce clause.[1] Another of the articles examines current habeas corpus law as it relates to a claim of actual innocence in one of our

1. *See* Jonathan D. Colan, *The New Federalism Meets the Eleventh Circuit's Old Criminal Law*, 64 U. MIAMI L. REV. 1205 (2010); Sanford L. Bohrer and Matthew S. Bohrer, *Congressional Power to Criminalize "Local" Conduct: No Limit in Sight*, 64 U. MIAMI L. REV. 1221 (2010).

capital cases.[2] Finally, a fourth article examines a case in which we examined federal arbitration law in the context of an international arbitration agreement.[3]

All of these articles examine important and contemporary issues raised in cases before our court last year that will significantly impact the development of the law in these areas in years to come. For example, the two articles on congressional authority to regulate under the commerce clause examine recent challenges to the use of that authority by Congress to federalize what were heretofore strictly state crimes. Congress's increasing tendency to view the commerce power as an independent source of a federal police power is examined in the context of the historical use of the commerce clause as a source of regulatory power. The impact, or lack thereof, of the Supreme Court's decisions in *Lopez* and *Morrison* on the emerging federal police power is explored. Several of our decisions in cases challenging this use of the commerce power to police private conduct are examined.

Of equal, or even perhaps greater, significance in constitutional law are the recent developments in habeas corpus jurisprudence. Serving the important interests in finality and comity, the Anti-Effective Death Penalty Act of 1996 erected a series of substantial obstacles to the filing of successive (and, prior to the statute, seemingly endless) habeas petitions by state prisoners. Whether claims of actual innocence in a successive petition are federally cognizable in the absence of an accompanying assertion of an independent constitutional or federal statutory error is examined in the context of *In re Davis*, a habeas petition filed originally in the Supreme Court, and which the Court has transferred to the Southern District of Georgia with instructions to conduct an evidentiary hearing on whether newly discovered evidence clearly establishes Davis' actual innocence, and, if so, to determine what remedy might be available.

Finally, the fourth article undertakes to examine our "novel" interpretation in *Thomas v. Carnival Corp.* of the "prospective waiver" doctrine, under which a federal court may refuse to enforce contractual provisions that work as waivers of federal statutory rights in violation of federal public policy.

All these articles focus on cases we have decided of great public interest and jurisprudential significance. The explorations of these cases

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2. *See* Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279 (2010).

3. *See* Joseph R. Brubaker and Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution:* Mitsubishi*'s Footnote 19 Comes to Life in the Eleventh Circuit*, 64 U. MIAMI L. REV. 1233 (2010).

in the articles that follow are well-done, and worth your careful consideration.

Not all of the work of the Eleventh Circuit invites such scrutiny, analysis, and comment. The ordinary working day of the court—its judges, administrators, legal assistants, and others—has a "grist for the mill" component. We are called upon to visit and revisit oft-considered and clearly established rules and apply them to ordinary cases brought by ordinary people seeking our application of these established rules to their claim. These cases too demand our attention, must be reviewed and decided. The cases, however, provoke little scholarly excitement.

There were over 7000 cases decided by us in 2009. The following articles discuss the merest fraction of those. What of the others? Do they have any significance? What of the widow and children, holders of a substantial judgment for the wrongful death of their husband and father, for which execution is stayed pending appeal. Or the once-thriving business with well-paid employees, now with a large judgment against it, unable to obtain credit while awaiting our court's action.

A quarter of a century ago, when the division of the Fifth Circuit was being heatedly debated, one opponent of division, responding to the two-year delay in resolving appeals from Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, and the then-U.S. Panama Canal Zone remarked, "We are wasting too much time on unimportant cases!" A colleague responded, "I agree. Whenever the parties stipulate that their case is unimportant, we should not waste our time on it."

Of those 7000-plus cases we decided last year, the Supreme Court accepted twenty-one for review. Were the others "unimportant?" Have we erred by spending much time and thought in their resolution? I do not think so. Over 7000 disputes of sufficient concern to have brought people, government, and other institutions to court have been resolved peacefully—under law and pursuant to our constitutional guarantee of due process. Each case represents a human drama of great import to sincere litigants.

So, we from time to time produce opinions, orders, and judgments that attract the attention of law-review editors, students, and scholars. You will find them discussed here. But the remaining 6999 represent an equally important, though largely anonymous, part of the work of the Court of Appeals for the Eleventh Circuit. Their place in our system of justice may ultimately be of greater significance than their more exciting and high-profile cousins.