

Issue No.

7

April 12, 2004



**COVERING THE COURT'S ENTIRE APRIL
CALENDAR OF CASES, INCLUDING ...**

HAMDI V. RUMSFELD ET AL.

AND

RUMSFELD ET AL. V. PADILLA ET AL.

The war on terror has consistently tested the balance between civil liberty and national security. Nowhere is this more apparent than in the detentions of two U.S. citizens, Yaser Esam Hamdi and Jose Padilla. While Hamdi was captured abroad and Padilla was captured in the United States, both are being held by the military in the United States as enemy combatants.

RASUL ET AL. V. BUSH ET AL.

AND

AL ODAH V. UNITED STATES

These consolidated cases consider the rights of foreign nationals captured abroad in connection with hostilities in Afghanistan and incarcerated at the Guantanamo Bay Naval Base in Cuba. The prisoners in *Rasul* are British and Australian; the prisoners in *Al Odah* are citizens of Kuwait.

**CHENEY ET AL. V. UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Ultimately, this case is about influence and power. The statutory question is whether the National Energy Policy Development Group—appointed by President Bush and chaired by Vice President Cheney—is required to disclose its inner workings at the behest of public watchdog groups and opponents of the Bush Administration.



Division for Public Education



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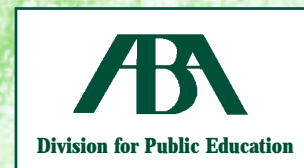
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Case at a Glance

Foreign consumers argue that an extension of antitrust jurisdiction would deter foreign conspiracies from potentially harming U.S. consumers. Multinational vitamin sellers argue that an assertion of extraterritorial jurisdiction conflicts with the plain meaning of the FTAIA, undermines corporate leniency policies, and may be unconstitutional. Resolving the split in the circuits concerning extraterritorial Sherman Act enforcement may also signal the Supreme Court's view as to whether U.S. courts should serve as the fora for claims having attenuated connections to the United States.



May a Foreign Plaintiff Sue a Foreign Defendant for Conduct Outside the U.S. That Caused Antitrust Injury Outside the U.S.?

by Antonio F. Perez

PREVIEW of United States Supreme Court Cases, pages 380-385. © 2004 American Bar Association.

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ISSUES

May the respondents, five foreign companies that purchased goods outside the United States from other foreign companies, pursue Sherman Act claims seeking recovery for overcharges paid in transactions occurring entirely outside U.S. commerce under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a?

Do such foreign plaintiffs lack standing under Section 4 of the Clayton Act, 15 U.S.C. § 15(a)?

FACTS

The respondents are five foreign companies located in Australia, Ecuador, Panama, and Ukraine. On behalf of foreign and domestic purchasers of vitamins, they brought a class action in July 2000 against the petitioners, a number of multinational companies, for allegedly conspiring to fix prices and allocate

markets for vitamins on a global basis between January 1, 1988 and February 1999 in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The respondents sought treble damages and injunctive relief under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, including damages for injuries they allege were suffered by foreign persons because of purchases made outside the United States. The respondents also asserted claims arising under foreign and international law. This matter arose in light of a complex history of federal civil and criminal enforcement proceedings, as well as foreign and domestic private civil claims.

Initially, the vitamin companies moved to dismiss the suit as to the foreign plaintiffs under Fed.R.Civ.P. 12 (b)(1), for lack of subject matter jurisdiction under the FTAIA and for lack of standing under the Clayton Act. Because the district

*F. HOFFMAN-LAROCHE LTD. ET AL.
V. EMPAGRAN, SA ET AL.
DOCKET NO. 03-724*

ARGUMENT DATE:
APRIL 26, 2004
FROM: THE DISTRICT OF
COLUMBIA CIRCUIT

court dismissed the foreign purchasers' claims for lack of subject matter jurisdiction, it did not reach the issue of standing. The district court also declined to exercise supplemental jurisdiction over respondents' foreign law claims, and, finding no international law norm prohibiting private conspiracies to fix prices and allocate markets, it dismissed their claims under customary international law for failure to state a claim. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 2001 WL 761360, at 5-9 (D.C.C. June 7, 2001).

On the subject-matter jurisdiction issue, the court of appeals reviewed the district court's interpretation of the FTAIA provisions that prohibit Sherman Act jurisdiction with respect to "conduct involving foreign trade or commerce" unless two requirements are met. Under FTAIA Section 1, the conduct must have "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and, under Section 2, such effect must "give rise to a claim under" the Sherman Act. The court found that the "a claim" language of the second requirement did not refer exclusively to the claim brought by the plaintiff with respect to the conduct at issue. Rather, the court of appeals read the FTAIA as also applying to extraterritorial conduct that gives rise to separate claims by U.S. purchasers and foreign purchasers. If, then, a U.S. person had "a claim" within the meaning of the Sherman Act, then the FTAIA would not deny a U.S. court jurisdiction to adjudicate the claim by a foreign person arising from the foreign effects of the conduct that gave rise to a separate claim in the United States. The court of appeals held that, because the foreign plaintiffs had, in fact, asserted the existence of such U.S. claims, their claim satisfied the conditions set forth in the FTAIA for the exercise

of extraterritorial jurisdiction by U.S. courts over Sherman Act claims. See *Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd. et al.*, 315 F.3d 338, 357 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3374.

In reaching this conclusion, the court of appeals found the language of the FTAIA insufficiently clear to support a plain-meaning interpretation. Specifically, it rejected the respondents' argument that interpreting the "gives rise to a claim" language as referring only to claims arising from effects in the United States would render superfluous the language in Section 6 of the FTAIA (which provides that, if the Sherman Act applies only because the conduct affects "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States," then it applies "to such conduct only for injury to export business in the United States"). In other words, the respondents argued that interpreting the "gives rise to a claim" language to refer only to claims for injury arising from effects in the United States would make unnecessary the final proviso's limitation of damages for injury to U.S. exports, because claims relating to U.S. exports would already be excluded by Section 2 if petitioners' interpretation were correct. The court of appeals was not persuaded, because it determined that Section 6 might also serve to preclude Sherman Act jurisdiction for damages with respect to operations outside the United States that would not themselves constitute "export" activities. On this basis, it rejected the suggestion that petitioners' narrow interpretation of Section 2 would make Section 6 surplusage. Thus, the court of appeals refused to accept respondents' argument that the plain meaning of Section 2 rules out petitioners' interpretation.

The court of appeals did, however, find other grounds to adopt respondents' proposed interpretation. It relied on legislative history, particularly the underlying policies of deterrence embedded in the FTAIA. The court of appeals cited Supreme Court precedent to describe Congress's purpose in enacting the FTAIA as "to exempt from the Sherman Act export transactions that did not injure the U.S. economy." See *Empagran*, 315 F.3d at 345 (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796-97 (1993)). But it relied on specific passages in the House Report to the FTAIA to find that Congress's intent was to address the question of extraterritorial jurisdiction by prohibiting jurisdiction over "conduct" lacking the requisite U.S. effects rather than by specifying the relationship between the claims that could be adjudicated and that conduct. Congress then denied jurisdiction only over "wholly foreign transactions" not having any "spillover effects" in the United States. *Id.* at 353-54. The court of appeals also relied on the Supreme Court's pre-FTAIA decision in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), cited approvingly in the FTAIA's legislative history, as further evidence for its interpretation. See *Empagran*, at 315 F.3d at 354 (citing H.R. Rep. No. 97-686). In *Pfizer*, the Supreme Court determined that a foreign government had standing under the Clayton Act to assert a Sherman Act claim in order to ensure that foreign antitrust violators would perceive the full costs of their antitrust violations, thereby deterring more effectively global conspiracies that might harm U.S. consumers. The court of appeals concluded that this deterrence rationale would be served by its interpretation of the FTAIA. See *Empagran*, 315 F.3d at 355-57.

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With respect to the standing issue, the court of appeals read the Clayton Act to be coterminous with the FTAIA. It described the foreign purchasers' injury as the type of injury contemplated by the antitrust laws, thereby satisfying the special "antitrust injury" requirement set forth by the Supreme Court. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 489 (1977). The court of appeals rejected respondents' argument that, because the antitrust laws do not forbid the fixing of prices in foreign markets, injury to foreign purchasers was not of "the type" the antitrust laws were designed to prevent. Indeed, the court said: "[T]he arguments that have already persuaded us that, where anticompetitive conduct harms domestic commerce, [the] FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue to enforce the antitrust laws similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here." See *Empagran*, 315 F.3d at 358. In short, the court of appeals grounded its standing analysis on its interpretation of the FTAIA.

In sum, the court of appeals determined that respondents' FTAIA claims should survive a motion to dismiss; it then reversed the district court's decision on subject matter jurisdiction and vacated its judgment against respondents. Because of the new posture of the case, it also required the district court to reconsider whether to invoke its discretion to exercise supplemental jurisdiction to hear the respondents' foreign-law claims. See *Empagran*, 315 F.3d at 359.

On petition for rehearing *en banc*, the court of appeals invited the solicitor general to submit a brief expressing the views of the United States. In its submission on behalf

of the Department of Justice's Antitrust Division and the Federal Trade Commission, the solicitor general urged *en banc* review to reverse the D.C. Circuit panel's reading of the FTAIA. The solicitor general suggested that the court of appeals's interpretation both accorded with the plain meaning of the statute and conflicted with federal antitrust enforcement policy by undermining the government's corporate leniency policy (which facilitates the acquisition of evidence in conspiracy cases in return for the exercise of prosecutorial discretion). The D.C. Circuit denied rehearing, and petitioners sought a writ of certiorari.

In granting certiorari, the Supreme Court now has an opportunity to resolve a recently emerged split in the circuits in the interpretation of the FTAIA. The central question is the meaning of the requirement that conduct having a "direct, substantial, and foreseeable effect" on U.S. commerce also gives rise to "a claim" under the Sherman Act. The Fifth Circuit has held that the "effect" in the U.S. must itself give rise to the very Sherman Act claim brought by the plaintiff. See *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. HeereMac v.o.f.*, 534 U.S. 1127 (2002). The Second Circuit has held that, although the foreign conduct must give rise to an effect in the United States, this effect need not give rise to any Sherman Act claim in the United States in order for a foreign plaintiff to sue a foreign defendant for a Sherman Act claim arising outside the United States. See *Kruman v. Christie's International PLC v.o.f.* 284 F.3d 384 (2nd Cir. 2002). The D.C. Circuit, apparently splitting the difference, has now held that in order for a foreign plaintiff to assert a Sherman Act claim with respect to

extraterritorial conduct's foreign effects, the extraterritorial conduct must have an effect in the United States that gives rise to a separate claim under the Sherman Act claim for antitrust injury in the United States. See *Empagran S.A., et al. v. F. Hoffman-LaRoche, Ltd. et al.*, *Id.* Having denied certiorari to consider the Fifth Circuit's narrow interpretation of the FTAIA in *HeereMac*, the Supreme Court has now granted certiorari to review the D.C. Circuit's broader interpretation in *Empagran* as well as, presumably, the Second Circuit's still broader interpretation in *Kruman*.

CASE ANALYSIS

Petitioners now argue that the D.C. Circuit's interpretation conflicts with the plain language of the FTAIA, undermines federal enforcement policy in international antitrust cases, and arguably takes the statute beyond Congress's authority to regulate foreign commerce. First, they argue that the "most natural" reading of the FTAIA, which they note is endorsed by the Department of Justice, is that the requisite anti-competitive effect described by Section 1 itself gives rise to the claim described by Section 2, which in turn must be the claim brought by the plaintiff before the court. Pet. Br. at 7. Thus, petitioners argue that the court of appeals found statutory ambiguity where there was none. Petitioners note that the enactment of the FTAIA in 1982 reflected a congressional effort to pare back the extraterritorial exercise of jurisdiction by U.S. courts in antitrust cases, after a generation of antitrust jurisdictional conflicts leading to foreign retaliatory measures. They note that, as of the time the FTAIA was enacted, "no case had ever authorized claims arising from foreign transactions occurring wholly outside U.S. commerce, and virtually all academic commentary urged that the focus of U.S. antitrust law

be restricted to claims arising from effect of anticompetitive conduct on U.S. commerce.” Pet. Br. at 9-10.

Second, as to the broad deterrence rationale underlying the court of appeals’s interpretation, petitioners allude to the solicitor general’s argument that the court of appeals’s interpretation of the FTAIA, by undermining the government’s corporate leniency program, would actually reduce deterrence. Pet. Br. at 10. This argument was also made by the solicitor general’s *amicus* brief submitted to the D.C. Circuit in support of a rehearing *en banc* and reiterated in his *amicus* brief submitted to the Supreme Court. Petitioners’ statement of facts observes that “more than seventy-five federal civil antitrust cases, including class actions, were filed beginning in 1998 and consolidated in pretrial proceeding in the district court. Virtually all the claims in those cases have now settled for amounts exceeding \$2 billion.” Pet. Br. at 4. They add: “Beginning in 1999, before any significant proceeding in the civil cases, several petitioners pleaded guilty to federal criminal antitrust violations for fixing prices of vitamins sold in the United States. ... Outside the United States, record civil penalties exceeding \$1 billion were assessed against some petitioners by the European Union, Canada, Australia, and Korea. Private civil suits for damages have also been filed in Canada, the United Kingdom, Germany, Belgium, and the Netherlands, and class actions have been filed in Canada, Australia, and New Zealand.” *Id.* (citations omitted).

Third, petitioners maintain that the court of appeals’s reading of the FTAIA “might well” extend it beyond the scope of Congress’s power to regulate commerce “with foreign Nations, and among the several States.” See U.S. Const., Art. 1, sec.

8, cl. 3. They maintain that under the Foreign Commerce Clause, Congress lacks the constitutional power to create a private claim for purely foreign purchasers against purely foreign sellers for transactions consummated entirely within or between foreign countries when those transactions have no effect on U.S. commerce or U.S. foreign commerce. They also argue that, in view of established Fourteenth Amendment jurisprudence preventing the application of state law to persons and transactions unrelated to that state, the Fifth Amendment’s Due Process Clause should bar a federal court from applying federal law to transactions and persons that are unrelated to the United States. Petitioners therefore urge an interpretation of the FTAIA that avoids these constitutional doubts. Pet. Br. at 29-30.

Respondents ask the Supreme Court to sustain the court of appeals’s interpretation of the FTAIA but also argue in the alternative that their claim should go forward even under the narrower interpretation of the statute advanced by petitioners.

Respondents advance three main arguments in response to petitioners’ contentions. First, they argue that, even if petitioners are correct that Section 2 of the FTAIA requires that an effect in the United States “give rise to a claim” (that is to say, gives rise to “the” claim brought by respondents), that requirement would be satisfied in this case. They assert that it was because petitioners prevented respondents from buying vitamins in the United States directly or through intermediaries that respondents were forced to make those purchases outside the United States and suffered antitrust injuries there from the global vitamin cartel. Moreover, the effectiveness of the cartel in the United States is what made its success

overseas possible; otherwise, “the cartel would have collapsed everywhere as a result of arbitrage.” Pet. Br. at 3. If accepted by the Supreme Court, these characterizations of the underlying economic facts of the case would dispose of petitioners’ Foreign Commerce Clause and Fifth Amendment Due Process arguments, at least as applied to the particular facts of this case. They would, at a minimum, warrant a remand, which might allow respondents another opportunity at the district court to establish the jurisdictional facts necessary to survive a motion to dismiss for lack of subject matter jurisdiction.

Second, respondents also argue that, because the FTAIA applies only to export commerce, it simply does not apply to “cartels, which directly involve U.S. domestic and import commerce.” Third, they argue that this interpretation is plainly supported by legislative history, which they maintain reveals that Congress intended Section 2 “merely to provide that the Sherman Act does not apply to conduct that has a pro-competitive effect” in the United States. Respondents add that the Clayton Act’s standing and injury requirements do not immunize unlawful activity, such as the global cartel that harmed U.S. commerce as well as foreign purchasers in this case. Moreover, they describe the special antitrust standing and injury requirements as merely “prudential doctrines” and characterize respondents themselves as precisely the kind of “direct purchasers” whose claims would deter conduct directly harming U.S. consumers. *Id.* at 4.

In addition, respondents address arguments advanced principally by the *amicus curiae* in this case. The respondents contend that the United States’s argument that the

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U.S. corporate leniency policy would be undermined by granting jurisdiction in this case is unsustainable in the face of pending legislation that would limit the civil liability of leniency program participants. Respondents argue that the fact that the Congress is now considering such legislation suggests that the more appropriate inference is that no limits on civil liability currently flow from the exercise of federal prosecutorial discretion in international cartel cases.

Respondents also dismiss the argument advanced by the governments of the United Kingdom, Ireland, and the Netherlands as *amici curiae* that the court of appeals's interpretation of the FTAIA flies in the face of international law. These governments, as well as petitioners, quote Lord Denning's memorable phrase: "As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune." *Smith Kline & French Labs Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982). *Amici Curiae* Br. at 14, and Pet. Br. at 26. These foreign governments suggest, therefore, that the interpretation of the FTAIA adopted by the court of appeals would encourage forum shopping, undermine their own antitrust enforcement policies (as well as that of the European Union), and undermine respect for national sovereignty in violation of international law. Accordingly, the governments maintain that the court of appeals's interpretation would be inconsistent with the established canon of statutory interpretation that, in the absence of express congressional intent to the contrary, statutes should not be interpreted to violate the law of nations. *Amici Curiae* Br. at 7 (citing John Marshall's famous dictum in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

Respondents reply that this argument is inconsistent with the Supreme Court's view in *Hartford Fire Ins.*, its most recent statement on conflicts of jurisdiction in antitrust, that the "mere overlap" of antitrust enforcement regimes is insufficient to establish that an exercise of jurisdiction is in violation of international law. Respondents add that there could be no conflict in this case since "cartels are universally condemned." That said, respondents nevertheless acknowledge a conflict in the sense that the "application of the Sherman Act remains necessary overseas because current *enforcement* overseas is too lax to protect U.S. interests" (italics in original). But that, they say, is a matter for Congress to resolve. Res. Br. at 5.

SIGNIFICANCE

The Supreme Court's treatment of the narrow question of statutory interpretation raised by this case may well be significant in at least two different ways. First, the renewed attention to the meaning of the FTAIA reflects the increasing internationalization of antitrust enforcement. The FTAIA, enacted in 1982 after several decades of U.S. antitrust extraterritoriality far in excess of what our major trading partners deemed permissible, reflects a more than two-decades-old congressional policy judgment as to the appropriate extent of extraterritoriality in U.S. antitrust enforcement.

Regardless of precisely how the Supreme Court resolves the current circuit split, its decision may well prompt Congress to revisit the issue of the appropriate extent of U.S. extraterritorial exercise of antitrust jurisdiction in an entirely different context. Much has changed in a generation. Major U.S. firms such as Microsoft now face the risk of for-

eign antitrust enforcement policies conflicting with U.S. antitrust law and policy. The executive branch and Congress have expended considerable resources in entering into a series of bilateral cooperation agreements with major U.S. trading partners facilitating international coordination in antitrust enforcement. Looking to the future, substantive antitrust harmonization is an issue on the agenda of the Doha Round at the World Trade Organization, although currently executive branch policy appears to be to block negotiations at that forum.

The role of U.S. courts in this complicated policy area has never been murkier. Some might argue that an aggressive assertion of extraterritorial jurisdiction by U.S. courts would provoke conflicts of jurisdiction, which would lead to international negotiations, which, in turn, would yield political resolution in the form of either agreed allocations of jurisdiction or substantive law harmonization. Others might argue that judicial restraint would better promote conciliation among the major domestic antitrust enforcement regimes that are competing for regulatory authority on the world stage. Still others might argue that an aggressive judicial assertion of jurisdiction would better ensure that U.S., rather than foreign, antitrust values prevail on the world stage as the Sherman Act competes with other nations' approaches to competition policy. The debate on these issues may well be framed by the Supreme Court's decision in this case.

Second, the general question of whether U.S. courts may serve as fora for the vindication of the rights of foreign plaintiffs' rights arises on a number of other fronts as well. A prominent example also before the Supreme Court this term is the



Alien Tort Claims Act (ATCA), a two-century-old statute giving U.S. courts jurisdiction to hear suits by alien plaintiffs against alien defendants for extraterritorial violations of the law of nations. See *Sosa v. Alvarez-Machain*, 331 F.3d 605 (9th Cir. 2003) (*en banc*), *cert. granted*, 72 U.S.L.W. 3192; see also 6 *PREVIEW* 363 (March 15, 2004). The petitioners' Foreign Commerce Clause and Fifth Amendment Due Process Clause arguments are clearly significant in this context, although the ATCA, unlike the Sherman Act, provides a more open-ended grant of jurisdiction to U.S. courts to identify and define international human rights—usually, but not necessarily, of a noneconomic character. Both the FTAIA (as read by the District of Columbia and Second Circuits) and the ATCA open the door for U.S. courts to vindicate the rights of foreign plaintiffs in suits against foreign defendants on claims based on the extraterritorial effects of extraterritorial conduct. In these cases, competing viewpoints on two sets of issues that regularly arise in the work of the Supreme Court are implicated. The first set concerns the relative importance of economic and noneconomic individual rights. The second involves the conflict between judicial activism in the vindication of natural rights and judicial restraint in the assertion of authority to adjudicate arguably political questions that have not clearly been delegated to the courts by Congress. It will be worth watching which combination of viewpoints yields a majority in these two related, albeit distinguishable, cases.

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Case at a Glance

The Supreme Court is asked to determine the circumstances in which a U.S. district court is authorized to compel the production of materials at the request of a private party for use in an investigation by the Competition Directorate-General of the European Commission. In this case, the Ninth Circuit ruled that a federal district court was authorized to order discovery under 28 U.S.C. § 1782, even though the information sought would not be discoverable in the foreign proceeding itself.



When Can a U.S. Court Order Production of Materials for Use in a Foreign Authority's Investigation?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 386-389. © 2004 American Bar Association.

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ISSUE

Does 28 U.S.C. § 1782 authorize federal district courts to order discovery for use in an investigation by the Competition Directorate-General of the European Commission of the European Community on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal" even if the information sought would not be discoverable in the foreign proceeding itself?

FACTS

Intel Corporation and Advanced Micro Devices Inc. (AMD) are worldwide competitors in the micro-processor industry. In October 2000, AMD filed a complaint with the Competition Directorate-General of the European Commission, claiming that Intel was abusing its dominant market position in the European Common Market in violation of European Community competition laws. Specifically, the complaint alleged that Intel had violated Article 82 of the treaty establishing the European Commission (EC).

Under the Directorate-General's procedures, it must conduct a preliminary investigation upon receipt of a complaint. The Directorate-General may gather information on its own, and it may provide the complainant with an opportunity to support its allegations. The initial investigation is not considered an adversarial proceeding. The Directorate-General also has authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties.

Completion of the Directorate-General's preliminary investigation results in a decision whether to pursue the complaint. If the decision is not to proceed, the complainant is notified and given an opportunity to submit further information in support of its allegations. The EC then decides, in a final written decision, whether to formally proceed. A decision not to proceed is subject to review by the Court of First Instance and ultimately by the

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Court of Justice for the European Community.

A decision to proceed with the complaint is handled in a slightly different manner. If the EC makes a preliminary determination that infringement may have occurred, it serves a statement of objections on the alleged infringer and appoints an independent hearing officer to conduct a hearing. The hearing officer then presents conclusions to the Directorate-General, which makes a recommendation to the EC on how to proceed. A decision by the EC to dismiss is subject to review by the Court of First Instance. If the EC decides to proceed with the complaint, a preliminary decision is drafted and forwarded to the EC's Advisory Committee, consisting of representatives of the EC's member states. The Advisory Committee drafts an opinion for the EC that, if adopted, becomes a final enforceable decision within the European Community.

As part of its investigation in this case, the Directorate-General submitted written questions to Intel concerning AMD's allegations. The Directorate-General provided AMD a redacted copy of Intel's response and sought AMD's comments. In preparing its response, AMD became aware that Intel had previously produced documents in another lawsuit in federal court in Alabama that could have a bearing on the allegations in AMD's complaint with the Directorate-General. Many of the documents had been submitted to the Alabama federal court in summary judgment proceedings.

AMD asked the U.S. District Court for the Northern District of California to authorize discovery under 28 U.S.C. § 1782 and require Intel to produce documents and transcripts of testimony from the proceeding in Alabama. Intel object-

ed to the discovery of the approximately 600,000 pages of documents, arguing that the matter before the Directorate-General was not a "proceeding in a foreign or international tribunal" within the meaning of § 1782.

The U.S. district court ruled in favor of Intel. The federal court emphasized that AMD's complaint to the EC is "in the initial stage of preliminary inquiry" and that the EC, "in the conduct of the investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." The court also concluded that the EC does not conduct adjudicatory "proceedings" and is not a "tribunal" for purposes of § 1782. AMD appealed to the U.S. Court of Appeals for the Ninth Circuit.

Noting that this was a matter of first impression, the Ninth Circuit reversed the district court. 292 F.3d 664 (9th Cir. 2002). The Ninth Circuit explained that in its view, the Directorate-General qualified as a "foreign or international tribunal" under § 1782. Moreover, according to the Ninth Circuit, the proceeding for which discovery is sought under § 1782 need not be imminent.

The court also ruled that § 1782 does not require that the material being sought under that section be discoverable in a foreign proceeding, regardless of whether the request comes from a private party or a foreign tribunal. The court found nothing in the plain language or legislative history of § 1782 requiring a threshold showing by the party seeking discovery that what it seeks would be discoverable in the foreign proceeding.

The Ninth Circuit remanded the case to the district court to "proceed to consider AMD's request on the merits." Intel asked the

Supreme Court to review the Ninth Circuit Court's decision. While its petition for certiorari was pending, a magistrate judge issued a recommended order of discovery limiting the relief to include only those documents directly relevant to the EC proceedings. The district court has held further consideration of that recommendation in abeyance pending the disposition of the questions presented by Intel's petition for certiorari. The Supreme Court granted Intel's petition for review. 124 S.Ct. 531 (2003).

CASE ANALYSIS

Section 1782 of Title 28 of the United States Code provides that a district court may order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal or upon the application of any interested person." Amendments to § 1782 in 1964 eliminated the requirement that a foreign proceeding be "pending" and eliminated references to "civil action" and "judicial," referring only to discovery of evidence "for use in a proceeding in a foreign or international tribunal." A 1996 amendment to § 1782 permits discovery to aid foreign "criminal investigations conducted before formal accusation."

Intel argues that § 1782 does not authorize a private nonlitigant to come to a U.S. court to obtain, for the ostensible benefit of a foreign law-enforcement authority, massive discovery that it could not otherwise obtain under U.S. law and that the foreign authority itself would not authorize the nonlitigant to receive if the evidence in question were within its jurisdiction. In addition, Intel maintains that such discovery is unavailable in any event when there is no live "proceeding in a foreign ... tribunal" in the first place.

(Continued on Page 388)

Intel contends that § 1782 does not authorize discovery that would otherwise be unavailable to private nonlitigants under both U.S. law and foreign law. It points out that private-party discovery is unavailable in connection with EC antitrust investigations, because the EC has deliberately chosen to keep such investigations from becoming adversarial proceedings. In addition, Intel says that, if AMD had complained about Intel to U.S. antitrust authorities rather than to the EC, it would have no right under any provision of U.S. law to obtain these documents. Because AMD has not filed suit against Intel and thus has not assumed the responsibilities of an actual litigant, Intel says that it is a mere complainant to law enforcement authorities and therefore normally not entitled to obtain prelitigation civil discovery from prospective defendants.

It is Intel's position that § 1782 was enacted to place tribunals and litigants abroad in a position similar to the one they would occupy, for discovery purposes, if the evidence they sought were located in the foreign jurisdiction rather than in the United States. Intel argues that Congress did not intend to magnify the importance of geographic location by granting parties far greater discovery rights when the evidence sought happens to be located outside, rather than inside, the jurisdiction in which the discovery would be used.

AMD asserts that § 1782 does not include any such "discoverability" requirement. It argues that the aim of § 1782 is to provide liberal discovery to those involved in foreign proceedings so as to encourage foreign jurisdictions to provide liberal discovery to those involved in American proceedings. AMD contends that subjecting foreign tribunals and interested persons to a

costly and time-consuming fight over the nuances of foreign law would undermine these aims.

Intel contends that AMD's position in this matter is as inconsistent with the text and legislative record of § 1782 as it is with the basic comity goals of the statute. According to Intel, nowhere in § 1782 did Congress express any intent to create a new species of prelitigation civil discovery available neither in this country nor abroad. As to the 1996 amendment, Intel states that the amendment further demonstrates that Congress wished to limit prelitigation discovery to criminal investigations conducted by foreign sovereigns or their agents.

AMD says that the comity concerns do not justify denying it discovery under the terms of § 1782. According to AMD, there is no risk that parties will amass pretextual filings with the EC simply to obtain discovery under § 1782. AMD also rejects Intel's contention that the EC and other tribunals would be offended by an order granting § 1782 discovery of documents that would not be discoverable in the foreign proceeding. AMD claims that the EC affirmatively welcomes the submission of evidence by a complainant, even when it would not itself afford the complainant compulsory discovery rights.

Intel argues that AMD's application should be denied because no "proceeding" is now underway in a "foreign or international tribunal." Intel claims that AMD's approach would permit anyone to obtain a rival's documents in the United States, even in the absence of a foreign investigation, upon declaring an intent to trigger such an event or file a lawsuit at some indefinite period in the future.

AMD responds that its request unambiguously seeks documents for use in a "proceeding" in a "tribunal." First, it says that the document it seeks will be used in the quasi-judicial and judicial proceedings that necessarily will result from the current stage of the EC's proceedings. Even if the current investigative stage is not yet a pending "proceeding" within the meaning of § 1782, AMD argues that the section does not require that a proceeding be "pending" before discovery may be ordered. AMD points out that Congress deleted the word "pending" from § 1782 in the 1964 revision.

Second, AMD declares that the current EC proceeding is itself a "proceeding" in a "tribunal" within the meaning of § 1782. It is AMD's position that the contemporaneous historical record shows that § 1782's drafters specifically considered EC proceedings to be "within the compass of the statute."

Intel suggests that the Supreme Court adopt rules of practice precluding private nonlitigants from obtaining § 1782 discovery when either (1) such discovery would be unavailable in the foreign jurisdiction if the documents were located there, or (2) there is no live foreign proceeding. According to Intel, the alternative to clear rules of practice is a regime in which district courts are permitted to resolve these internationally significant issues on an unpredictable, case-by-case basis.

AMD disagrees, arguing that the Supreme Court should not impose, as general rules governing the exercise of discretion, the very requirements Congress chose not to include in the statutory text. Furthermore, AMD contends that the presence of the EC as *amicus* supporting denial of discovery in this particular case does not support



the establishment of such rules of practice. Acknowledging that the EC supports “aspects of Intel’s untenable interpretation of the statute itself,” AMD points out that the EC makes no suggestion that, if the statute must be read to allow the district court to order production to AMD, the court nevertheless should deny AMD the documents it seeks. According to AMD, the EC would be obliged to consider such evidence if AMD obtained and submitted it, and such evidence could be of significant value not only to the EC’s investigation but also to any subsequent judicial review of the EC’s decision on whether or not to act against Intel. In order to obtain the benefits of such discovery, AMD urges that an order must be issued promptly so that AMD can vindicate both its procedural right to support its EC complaint and its substantive right to operate in a competitive marketplace.

SIGNIFICANCE

In contrast with the Ninth Circuit’s decision, the First and Eleventh Circuits have construed § 1782 as imposing a requirement that an applicant show that it could obtain the discovery it is seeking in EC proceedings. *In re Application of Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). Like the Ninth Circuit, however, the Second and Third Circuits have refused to impose such a requirement. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). The remaining circuits that have considered the issue have distinguished between a request from a foreign tribunal and one from a private party and have not imposed a discoverability requirement on the former. *In re Letter of Request from*

Amstgericht Ingolstadt, Fed. Republic of Germany, 82 F.3d 590, 592-93 (4th Cir. 1996); *In re Letter Rogatory from First Court of First Instance in Civil Matters* (5th Cir. 1995).

According to the EC, permitting discovery requests on the grounds endorsed by the Ninth Circuit would undermine the EC’s carefully balanced policies regarding the disclosure of confidential information by allowing complainants to obtain through § 1782 documents that they are not permitted to review under European law. The EC asserts that upholding the Ninth Circuit could encourage companies to file pretextual complaints with the EC solely in order to use § 1782, wasting the EC’s scarce resources. In addition, the EC says that characterizing it as a “tribunal” poses serious threats to its anticartel Leniency Program by jeopardizing the EC’s ability to maintain the confidentiality of documents submitted to it.

The Chamber of Commerce of the United States suggests that affirming the Ninth Circuit’s decision would impermissibly broaden the scope of discovery that is allowed private parties who are seeking information from their business rivals under § 1782. The Chamber says that the Ninth Circuit’s decision would govern any time a company from which discovery is sought is subject to the jurisdiction of any foreign sovereign’s courts or regulatory bodies. It claims that important disincentives to harassing and unwarranted discovery requests would be eliminated if the Ninth Circuit’s ruling is permitted to stand.

The United States, on the other hand, says that the Ninth Circuit was correct in ruling that § 1782 does not categorically preclude a district court from providing assis-

tance to a complainant in a EC proceeding that will ultimately result in an adjudication. It contends that district courts should retain discretion to take into consideration foreign discoverability in the course of considering whether to render the requested assistance under § 1782. The United States also questions whether the EC’s views are widely shared in the international community.

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Case at a Glance

Can the National Energy Policy Development Group—appointed by President Bush and chaired by Vice President Cheney—be required to disclose its inner workings at the behest of public watchdog groups and opponents of the Bush administration? At stake is confidential information about the role of the energy industry in formulating governmental policies. But the administration has raised the stakes and invoked constitutional separation of powers to resist any further inquiry or disclosure whatsoever.

Can the President's National Energy Policy Development Group Be Required to Disclose How It Works?

by Thomas E. Baker

PREVIEW of United States Supreme Court Cases, pages 390-396. © 2004 American Bar Association.

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ISSUES

Can the Federal Advisory Committee Act be construed, consistent with the Constitution, to require the vice president and the National Energy Policy Development Group he chaired to disclose the inner workings of how the administration's energy policy was formulated?

Did the court of appeals have interlocutory jurisdiction to review the district court's discovery orders in this case?

FACTS

In January 2001, during his first weeks in office, President Bush established the National Energy Policy Development Group (NEPDG). Vice President Cheney chaired this high-level group, which was comprised of six cabinet secretaries as well as several agency heads and assistants to the president. The vice president was authorized to request other federal execu-

tive officials to participate as he deemed appropriate. The NEPDG's mission was to "develop a national energy policy designed to help the private sector, and as necessary and appropriate Federal, State, and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy." In May 2001, the NEPDG issued its 170-page final report elaborating on its policy recommendations. In June 2001, the president transmitted the report and his recommendations for legislation to Congress; in September 2001, the NEPDG was terminated.

In July 2001, respondent Judicial Watch, a conservative nonprofit organization that designated itself as "an ethical and legal 'watchdog' over our government" filed suit against the NEPDG, the vice president, other named federal officials, and several named private officials alleging that the NEPDG had not followed the Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 1-14. In

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DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA
DOCKET NO. 03-475

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FROM: THE DISTRICT
OF COLUMBIA CIRCUIT



brief, that federal statute requires advisory committees to make public all records and other documents that are not otherwise privileged and exempt from disclosure under the older Freedom of Information Act, 5 U.S.C. § 552, including rosters of attendees and the minutes of meetings; however, the FACA expressly does not apply to advisory committees “composed wholly of full-time officers or employees of the Federal Government,” 5 U.S.C. app. § 2. Judicial Watch alleged that the nonfederal employees it named in its complaint, including political players in the Republican party and operatives and lobbyists from the energy industry, regularly attended meetings and fully participated in developing policy proposals to the point that they, along with unknown and unnamed others, in fact, were fully participating, working members of NEPDG. Thus, issue was joined over whether the FACA applied to the NEPDG. Judicial Watch asked the U.S. District Court for the District of Columbia to order the NEPDG to reveal all its records, including minutes of all its meetings detailing who was present and what was discussed.

At that point, respondent Sierra Club, the oldest and largest environmental organization in the country, filed a second lawsuit in the U.S. District Court for the Southern District of California based on the same legal theory; that lawsuit was transferred to the U.S. District Court for the District of Columbia to be consolidated with the lawsuit brought by Judicial Watch.

All the defendants, led by the vice president, moved to dismiss on a number of complex procedural and substantive grounds, but the district court ruled that the two plaintiff organizations, respondent Judicial Watch and respondent Sierra Club, could go forward with their lawsuits.

Judicial Watch, Inc. v. National Energy Policy Development Group, 219 F.Supp.2d 20 (D. D.C. 2002).

On behalf of all the federal officials who were defendants, except for the vice president, the government produced some 36,000 pages of documents. On behalf of the vice president, however, the government objected that any discovery would be unconstitutional and a violation of the separation of powers. When the district court was not impressed with that legal argument, the government sought a discretionary certificate from the district court to permit an immediate interlocutory appeal, but that request was refused. *Judicial Watch, Inc. v. National Energy Policy Development Group*, 233 F.Supp.2d 16 (D. D.C. 2002).

Still unwilling to go forward with any further discovery or to respond in any other way, and having been refused the district court’s permission to take a discretionary interlocutory appeal, the government nonetheless went to the U.S. Court of Appeals for the District of Columbia and moved for a writ of *mandamus*—an extraordinary writ from the appellate court to the trial court—to prohibit any discovery against the vice president and to order the district court to decide the remaining issues on the extant record, presumably in favor of all the defendants-petitioners. The court of appeals ruled against the government and dismissed that proceeding as premature and improper. *In re Richard B. Cheney*, 334 F.3d 1096 (D.C. Cir. 2003). In an opinion written by Judge Tatel, the majority concluded that all the factual and legal issues, including the vice president’s constitutional objections, should be fully presented and finally decided in the first place in the district court and then, and only then, would an appeal lie to the court of

appeals. Therefore, the vice president would be obliged to assert executive privilege with some particularity in the district court and preserve that issue for the later appeal. Judge Edwards concurred and wrote a separate opinion. Judge Randolph dissented and questioned the soundness of the majority’s reasoning and the reasoning of the cases the majority relied upon.

On December 15, 2003, the Supreme Court granted review. *Cheney v. U.S. District Court for the District of Columbia*, 124 S.Ct. 958 (2003).

CASE ANALYSIS

A federal jurisdiction wonk would be thrilled by all the writs in this case. See generally Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals* (Fed. Jud. Ctr. 1989). First, of course, is the writ of certiorari, the discretionary writ by which the Supreme Court is reviewing the decision of the U.S. Court of Appeals for the District of Columbia Circuit, 28 U.S.C. § 1254, but that is the routine in the High Court. Second, and much more exotic, is the writ of *mandamus* that the court of appeals refused to grant.

When the government went to the court of appeals asking for a writ of *mandamus*, it was attempting a razzle-dazzle kind of procedural maneuver. The routine appellate procedure in the run of cases is for the parties to litigate in the district court to a complete and final judgment and only then to take an appeal from the final judgment to the court of appeals, 28 U.S.C. § 1291. Here the government seemingly wanted to avoid that at all cost. There are some legislative exceptions to the requirement of a final judgment, i.e., designated interlocutory appeals that are

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allowed by statutory category, 28 U.S.C. § 1292(a)(1)-(3), but the government could not possibly fit this case into any of them. When the government tried to get the district court to certify a permissive interlocutory appeal to the District of Columbia Circuit, it was trying to use an alternative procedure that is allowed maybe 100 times out of the 60,000+ appeals each year in the federal courts of appeals, 28 U.S.C. § 1292(b), but that request was denied. Then the government tried an even rarer procedure, to petition the court of appeals for a writ of *mandamus*, what proceduralists call an “extraordinary writ,” 28 U.S.C. § 1651(a). You get a sense of how rare and extraordinary by looking closely at the caption of this case: it takes the form of a proceeding brought by the party seeking the writ—here the vice president—versus the court that is the object of the requested writ—here the U.S. District Court for the District of Columbia; hence, the odd name of this case in the Supreme Court. In the *mandamus* proceeding in the appellate court, therefore, the lower court technically is the respondent, although in the Supreme Court proceeding, the two plaintiffs are called the respondents, and the government is the petitioner on the writ of certiorari.

The executive branch instinct is to withhold and control information. The *raison d'être* of public interest groups, such as the two organizational plaintiffs-respondents, is to hector the government for open meetings and public disclosure. These disputes most often end up in the federal courts in the District of Columbia. See generally Patrice McDermott, “Withhold and Control: Information in the Bush Administration,” 12 *Kan. J.L. & Pub. Pol’y* 671 (2003); Patricia M. Wald & Jonathan R. Siegel, “The D.C. Circuit and the Struggle for Control of Presidential

Information,” 90 *Geo. L.J.* 737 (2002). For legal, strategic, and perhaps political reasons, the government tried everything imaginable to avoid having to go forward in the district court and then tried mightily to get the court of appeals to get rid of this case. And, having failed to convince the court of appeals to get rid of this case, now the government is petitioning the Supreme Court to do so.

If the only goal of the administration was to drag out these proceedings and to delay having to disclose information, it already has won two years; however, if the Supreme Court rules against the administration, sometime near the end of the Term this June, the disclosures will come out in an election year. Editorial writers, environmentalists, columnists, and court-watchers have been suspicious that the administration will be politically exposed by court-ordered revelations of how energy executives (some from the Enron financial fiasco), polluters, and industry lobbyists inveigled themselves and their self-interest into the administration’s energy policy. But these pundits also worry that the Supreme Court will side with the administration. See Charles Lane, “High Court Will Review Ruling on Cheney Task Force Records,” *Washington Post*, Dec. 16, 2003, at A3; Carl Pope & Paul Rauber, “The Bush Administration: Bright Light Must Shine on Energy Policymaking,” *L.A. Times*, Dec. 21, 2003, at M2; William Safire, “Behind Closed Doors,” *N.Y. Times*, Dec. 17, 2003, at A39.

This peculiar procedural posture in the court of appeals is reflected in the organization and tenor of the briefs of the parties. The government, representing petitioner-defendant Vice President Cheney, puts the statutory and constitutional

issues up front to emphasize the serious potential harm to the executive branch from a judicial inquiry and then discusses the appellate jurisdictional issues as if they were a procedural postscript. Both of the organizations that are respondents, plaintiff Judicial Watch and plaintiff Sierra Club, emphasize the threshold procedural issues to argue that the court of appeals was correct to dismiss the *mandamus* proceeding, and they almost matter-of-factly add that the vice president and the other defendants-petitioners should be expected to obey the district court’s discovery order and properly defend the lawsuit. The vice president is cornered in the district court. He knows it and so do the respondents.

The solicitor general’s brief for the government emphasizes the separation of powers concerns arising from the district court’s discovery order against the vice president and other presidential advisors. The government’s position is that the lower courts’ interpretation of FACA is an incorrect interpretation of the statute and that it is an interpretation that is the “near occasion” for the federal courts to violate the constitutional separation of powers. The court-ordered discovery, which is ostensibly only designed to determine whether FACA applies to the NEPDG, is itself so broad and deep, according to the solicitor general, that it is just as constitutionally problematic and intrusive as the disclosure requirements of the FACA, as misinterpreted by the lower courts, that the vice president is so determinedly seeking to avoid and set aside in the Supreme Court. The solicitor general urges the Supreme Court to reject this bootstrap misinterpretation of the FACA that would automatically authorize such invasive judicial discovery into the affairs of the executive branch at the highest levels. Relatedly, the solicitor general argues that the

court of appeals should not have dismissed the government's petition for a writ of *mandamus*; otherwise, the vice president has the Hobson's choice of complying with the district court's discovery order or refusing to comply and being held in contempt of court.

Respondents characterize the procedural moves of the vice president and the government as nothing more than avoidance behavior. They insist that the government is playing procedural games to attempt a premature, improper interlocutory appeal concerning an otherwise nonappealable, nonfinal discovery order. Respondent Judicial Watch emphasizes that the court of appeals was prudent and correct to dismiss the appeal and send the vice president back to the district court, as a matter of appellate procedure and substantive law. Once there, Judicial Watch argues that the vice president should be expected to comply with the discovery order and should not be allowed to stonewall with exaggerated claims of executive immunity from judicial process. Otherwise, the FACA would not be worth the paper it is written on. Respondent Sierra Club likewise emphasizes that the court of appeals properly concluded that it had no jurisdiction to intervene in the lawsuit unless and until matters have run their course in the district court. Meaningful appellate review can and will take place thereafter. Both respondents defend the scope of the district court's discovery order and the preliminary rulings on how to interpret the FACA to allow for a decision on the merits of their claims. They both want to drag the vice president back into the district court.

Even this brief account of the opposing briefs reveals how the parties are chasing each other around in circles. The two plaintiff-respon-

dent organizations insist that they are entitled to discovery to provide a basis for determining the applicability of the FACA on the merits. The government and the respondent-defendant vice president insist that allowing the pretrial discovery to go forward will harm the executive branch to the same extent as the plaintiffs-respondents' wrong-headed and unconstitutional interpretation of the FACA on the merits. The parties thus present the Supreme Court with a procedural/statutory conundrum.

It is a textbook proposition of constitutional law and federal court jurisdiction, however, that threshold issues of subject matter jurisdiction take precedence and must be decided before a federal court reaches the merits of a case. See Thomas E. Baker & Jerre S. Williams, *Constitutional Analysis in a Nutshell* 74 (2d ed. 2003). All Article III courts—including the court of appeals and the Supreme Court itself—are courts of limited jurisdiction: in order to hear and decide a case on the merits, the court must be satisfied that the case or controversy falls within the judicial power under the Constitution and the relevant jurisdictional statute. Therefore, we ought to expect that the Supreme Court will consider the appellate jurisdiction issues at the outset; only if it is satisfied that the court of appeals had jurisdiction and should not have dismissed the petition for a writ of *mandamus* will the Supreme Court proceed to consider the FACA and constitutional issues on the merits. Of course, one of the justifications for allowing an interlocutory review by extraordinary writ—instead of awaiting a full and final judgment—is that a regular appeal will come too late and that serious and irreparable harm will be caused by allowing things to play out to a conclusion in the trial court, which is

the *leitmotif* in the government's briefing effort to put the separation of powers issues on the merits in front of the jurisdiction issues.

On the statutory and constitutional merits, a few cases will be most relevant. In *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440 (1989), in a majority opinion written by Justice Brennan, the Supreme Court afforded public interest groups standing to sue under FACA but held that the statute's open meeting and records requirements did not apply to the American Bar Association's committee that reviewed nominees for federal judgeships at the behest of the Department of Justice (a practice that the Bush administration has since ended). Part of the basis of that holding was the Supreme Court's recognition that a broader interpretation of the FACA would present formidable constitutional questions, which is the theme of the government's brief in the present case. Suggestively, Justice Kennedy wrote a concurring opinion, joined by Chief Justice Rehnquist and Justice O'Connor, that reasoned the FACA did apply but that the statute was unconstitutional-as-applied because it interfered with the president's power to nominate federal judges. In landmark cases, the Supreme Court has understood that the constitutional principle of separation of powers affords significant protection for executive branch functions and communications but has held that that protection can be outweighed by important competing public interests, if the justices are persuaded by the justification. *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (upholding a screening of presidential papers and materials to preserve the historical record); *United States v. Nixon*, 418 U.S. 683 (1974) (upholding district court *in camera*

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review of presidential tape recordings and documents subpoenaed in a criminal prosecution). Whether the FACA is eventually determined to be constitutional or not will depend on how the Supreme Court ultimately balances the competing interests of the executive branch against the interest of the courts to implement the statute and against the interest of Congress to impose disclosure and reporting requirements in the first place. The justices will apply a balancing analysis to assess whether the discovery ordered here in the name of the statute will impede the executive branch (ultimately the president) in the performance of its constitutional duties and essential functions. See *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the appointment of independent counsel over claims of violation of separation of powers).

SIGNIFICANCE

This publication would not be the first to note the curious juxtaposition of respondents in opposition to the government in this case, i.e., the crossfire aimed at the NEPDG and the vice president from Judicial Watch on the political right and from the Sierra Club on the political left. Previously, the litigation was even “curiouser” when the comptroller general, the head of a congressional agency, the General Accounting Office (GAO), filed a separate but related lawsuit against the vice president to compel the disclosure of documents and information relating to the NEPDG. That federal lawsuit was dismissed for want of standing on the part of the comptroller general. *Walker v. Cheney*, 230 F.Supp.2d 51 (D. D.C. 2002). The GAO decided not to appeal “for a variety of reasons” but issued a lengthy report to the congressional requesters (Representatives Waxman and Dingell and Senators Lieberman, Hollings, Levin, and Dorgan). That

report recounted the GAO’s investigative efforts and the unwillingness of the vice president to provide information and went on to conclude in part: “According to the best information that we could obtain, the *National Energy Policy* report was the product of a centralized, top-down, short term, and labor-intensive process that involved the efforts of several hundred federal employees government wide. NEPDG—comprised mostly of cabinet-level officials (Principals)—and its Support Group—comprised mostly of select DOE [Department of Energy] officials detailed to OVP [Office of Vice President]—controlled most facets of the report’s development. Officials from each participating agency served on a select interagency working group (Working Group), which prepared draft report chapters for the Principals’ review. Agency staff played a tributary role, helping their respective agency complete its NEPDG-related assignments, providing draft outlines and chapters to the Working Group and Principals, and responding to the Support Group’s subsequent requests for information, review, or comment. In developing the *National Energy Policy* report, the Principals, Support Group, and participating agency staff also met with, solicited input from, or received information and advice from nonfederal energy stakeholders, principally petroleum, coal, nuclear, natural gas, and electricity industry representatives and lobbyists. To a more limited degree, they also obtained information from academic experts, policy organizations, environmental advocacy groups, and private citizens. The extent to which submissions from any of these stakeholders were solicited, influenced policy deliberations, or were incorporated into the final report is not something that we can determine based on the limited information at our disposal. Nor can

we, because of OVP’s unwillingness to provide us with information, provide a comprehensive listing of the dates or purposes of these meetings, their attendees, or how the attendees, when solicited, were selected.” *U.S. General Accounting Office Report, Energy Task Force—Process Used to Develop the National Energy Policy* (August 2003). See also Jeffrey P. Carlin, Note, “*Walker v. Cheney*: Politics, Posturing, and Executive Privilege,” 76 *S. Cal. L. Rev.* 235 (2002); Carolyn Bigham Kello, Note, “Drawing the Curtain on Open Government? In Defense of the Federal Advisory Committee Act,” 69 *Brook. L. Rev.* 345 (2003).

One of the more interesting press angles of this case is the background relevance of the controversy over President Clinton’s Task Force on National Health Care Reform that was chaired by then-first lady, now Senator, Hillary Rodham Clinton. In the court case brought under the FACA, the U.S. Court of Appeals for the District of Columbia held on appeal that the first lady was an officer of the executive branch for purposes of the FACA reporting exemption for committees composed entirely of executive officials but also went on to hold that nonfederal employees’ participation as consultants and advisors can be significant enough to strip a committee of that exemption from the statute’s disclosure requirements. *Association of American Physicians and Surgeons, Inc., v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993). In the case *sub judice*, the U.S. Court of Appeals for the District of Columbia majority relied on that D.C. Circuit precedent, much to the chagrin of the dissenting judge. Compare 334 F.3d 1103-1104 (Tatel, J., for the court) with *id.* at 1114-16 (Randolph, J., dissenting). The government calls on the Supreme Court to reject that interpretation of

the FACA, while, at the same time, the two organizational respondents maintain that the majority got it right.

Finally, there is the sidebar issue of recusal. A lot of ink already has been spilled on this matter by the Fourth Estate, but a brief mention is in order here. On March 18, 2004, Justice Scalia, sitting as a single justice, published a memorandum denying the motion of the plaintiff-respondent Sierra Club to recuse himself from this case (plaintiff-respondent Judicial Watch did not join the motion). 124 S.Ct. 1391 (2004).

Justice Scalia's memorandum recounts how it came to pass that he went duck hunting in Louisiana with a group that included Vice President Cheney—who the justice acknowledged is his long-time personal friend—in January 2004, about a month after the Supreme Court had granted certiorari in this case in which the vice president is a named party. When the story broke, even before the motion was filed, some members of Congress wrote the chief justice to object, and the chief justice wrote back to explain to them that a matter of recusal was left up to the individual justice under historical Supreme Court practices. Dozens of prominent newspapers around the country, including the *N.Y. Times*, the *L.A. Times*, the *Washington Post*, and *USA Today* published editorials calling for Justice Scalia to step aside in this case. The *Wall Street Journal* editorialized back at them for conducting a “partisan ethics war.” Review & Outlook (Editorial), “Recuse or Lose,” *Wall St. J.*, Mar. 9, 2004, at A16. And Dahlia Lithwick, who covers the Supreme Court for Slate.com, accused the *L.A. Times*, which broke the story and kept it alive, of playing its new “favorite parlor game ... [p]in the

alleged bias on the Supreme Court Justice.” Dahlia Lithwick, “Fighting Words—Leave Scalia Alone,” Slate.MSN.com, Mar. 9, 2004, fray.slate.msn.com/id/2096883/. When Justice Ginsburg was criticized for giving a lecture and for the lecture being named after her by the liberal National Organization of Women Legal Defense and Education Fund, which regularly appears before the Supreme Court, she was quoted in the *L.A. Times* itself as suggesting that the newspapers were only using her as political cover in their campaign against Justice Scalia in the current case. David G. Savage & Richard A. Serrano, “Ginsburg Stands by Involvement With Group,” *L.A. Times*, Mar. 13, 2004, at A14. Picking up on the extensive press coverage, late-night television talk show hosts poked fun at the situation in their monologues. There also was an awful lot of Internet fulminating and lampooning on blogs, and so on.

To be sure, all of this embarrassed Justice Scalia, he said, but he stuck to his guns. He concluded that established principles and practices of the justices did not require him—indeed did not permit him—to recuse under these circumstances. 124 S.Ct. 1391 (2004). He took pains to correct some of the misstatements of fact in the press coverage of the hunting trip. In his opinion, his personal friendship with the vice president was not enough justification to overcome the rule of necessity or the presumption that a justice sit in a case, because the vice president was sued only in his official capacity and not in his personal capacity. He noted other examples from history of friendships and contacts between members of the Supreme Court and official Washington. Nor was the plane ride aboard Air Force 2 from Washington, D.C., to Louisiana any-

thing but a personal favor and a convenience to the justice who had to purchase a round-trip commercial airline ticket to get back. He expressly stated that he and the vice president were never alone for any significant time, and he specifically asserted that they did not discuss this case at all. The statutory recusal standard that his “impartiality might be reasonably questioned,” 28 U.S.C. § 455(a), simply was not satisfied in Justice Scalia's mind; by comparison, he deemed the standard was satisfied when he made up his mind to recuse himself earlier this Term, after he had made public comments criticizing the lower court's decision in the case challenging the phrase “under God” in the Pledge of Allegiance. *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 384 (2003) (No. 03-7 argued Mar. 23, 2004); Brett G. Scharffs, “Is the Pledge of Allegiance an Unconstitutional Establishment of Religion?,” *PREVIEW*, Mar. 15, 2004, at 304-11.

Copies of the relevant documents, including Justice Scalia's memorandum denying the motion, correspondence between members of Congress and the Chief Justice, the motion to recuse with exhibits of newspaper editorials and cartoons, and links to other press coverage of the story can be found at the Findlaw.com site: news.findlaw.com/legalnews/lit/energytaskforce/index.html. Slate.MSN.com has compiled a collection of political cartoons at cagle.slate.msn.com/news/Scalia/main.asp. Satirist Art Buchwald has composed a heartfelt song in response to the memorandum opinion, titled “Scalia” and sung to the tune of the song “Maria” from *West Side Story*, Art Buchwald, “Justice's Duck Blind,” *Wash. Post*, Mar. 25, 2004, at C2. This certainly is one story that has legs.

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What Rights Are Owed “Enemy Combatants” in America’s War on Terror?

by Douglas W. Kmiec

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Editor’s Note: The respondents’ briefs in these cases were not available by *PREVIEW*’s deadline.

ISSUE

Did the president act within his authority as commander in chief, and within that given to him by the Congressional Authorization for the Use of Military Force, in determining that two U.S. citizens are “enemy combatants” who may be detained and interrogated regarding participation in terrorist activities?

FACTS

The events of September 11, 2001, are well known and, even in their factual recital, sear the mind with the loss of innocent life, haunting pictures of the massive devastation of the nation’s financial and defense centers, and continuing disbelief that is transcended only by the reality that it could occur again at any

time and any place. Four commercial airliners were hijacked within one hour—two striking and destroying the towers of the World Trade Center, a third ravishing the Pentagon, and a fourth—thought to be intended for either the Capitol or the White House—brought to earth in Pennsylvania short of its target by the heroic actions of that fateful day’s travelers. Nearly 3,000 persons were killed and the national economy seriously weakened.

Acting as commander in chief, President George W. Bush took steps to safeguard the nation from further attack. Shortly thereafter, Congress overwhelmingly authorized the president to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, autho-

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HAMDI V. RUMSFELD ET AL.
DOCKET NO. 03-6696

ARGUMENT DATE:
APRIL 28, 2004
FROM: THE FOURTH CIRCUIT

AND

RUMSFELD ET AL. V. PADILLA ET AL.
DOCKET NO. 03-1027

ARGUMENT DATE:
APRIL 28, 2004
FROM: THE SECOND CIRCUIT

Case at a Glance

The war on terror has consistently tested the balance between civil liberty and national security. Nowhere is this more apparent than in the detentions of two U.S. citizens, Yaser Esam Hamdi and Jose Padilla, who are being held and questioned by the military as enemy combatants. These habeas cases question whether the president and Congress are constitutionally empowered to continue the detentions.





rized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons.”

Military intelligence revealed that the al Qaeda terrorist network, a radical Muslim sect, was responsible for the attack and that it had most immediately been assisted and harbored by the Taliban regime in control of Afghanistan. In the course of military operations, the Taliban was subdued and al Qaeda’s training capacity diminished. Unfortunately, Osama bin Laden, the leader of al Qaeda, remains at large, coordinating continued attacks aimed at the United States and its allies, most recently killing hundreds of innocent civilians in a Madrid train station. As recently as last month, an al Qaeda tape warns: “Bush fortify your targets, tighten your defense, intensify your security measures, because the fighting Islamic community—which sent you New York and Washington battalions—has decided to send you one battalion after another, carrying death and seeking heaven.”

As in past times of war, the United States and its allies have captured and detained a large number of persons fighting for and associated with the enemy. Yaser Esam Hamdi and Jose Padilla (a/k/a Abdullah Al Muhajir) are two of them. It is alleged that Hamdi was seized with an AK-47 assault rifle after his military unit surrendered to the Northern Alliance on the battlefield. According to American defense forces, Hamdi had initially trained with the Taliban in the months immediately preceding 9-11. Initially held in Afghanistan and Guantanamo Bay, Cuba, Hamdi was transferred to the naval brig in

Norfolk when it was learned that he was born in Louisiana and had never renounced in word his U.S. citizenship. He was subsequently moved to the military brig in Charleston, South Carolina.

Padilla’s path to the brig in South Carolina was different. He was arrested in Chicago after allegedly meeting with high-ranking al Qaeda members most immediately in Pakistan, but over a number of years in Saudi Arabia and Afghanistan as well, for the purpose of identifying potential U.S. targets for the detonation of a radiological dispersal device (or “dirty bomb”) with the capacity to kill and injure civilian populations over a large area. Initially held as a material witness before the 9-11 grand jury in New York, Padilla was transferred into military custody after the president determined him to be an “enemy combatant,” based on the detail of Padilla’s al Qaeda relationship, as summarized in an open declaration filed by the Department of Defense and in additional classified documents filed under seal with the district court and now the U.S. Supreme Court.

While Hamdi’s combat status is largely premised upon his battlefield capture, Padilla’s is the result of a formal finding by the president following review and recommendations by the CIA, the secretary of defense, the attorney general, and a formal legal opinion from the Office of Legal Counsel in the Department of Justice. In his June 9, 2002, order, the president found that Padilla “is, and at the time he entered the United States was an enemy combatant ... represent[ing] a continuing, present and grave danger to the national security of the United States.”

The detentions of Hamdi and Padilla were both challenged in the lower

courts by appointed counsel. While the public defender’s habeas action for Hamdi was initially dismissed, a similar action brought by Hamdi’s father as “next friend” resulted in a district court order that Hamdi be given unmonitored access to counsel. 243 F.Supp.2d 527 (E.D.Va 2002). The Fourth Circuit, however, reversed, asking the trial judge to reconsider in light of the national interests at stake and the authority given to the political branches in times of war. The trial judge remained dissatisfied, but on another trip to the Fourth Circuit, the appellate panel ruled that the information submitted by the Department of Defense in affidavit “is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution.” 316 F.3d 450, 459 (4th Cir 2003). *En banc* review was denied, 337 F.3d 335 (4th Cir. 2003), and certiorari was granted.

Padilla’s appointed counsel’s habeas action resulted in a determination that he had been validly detained as an enemy combatant, but also that he should be permitted consultation with counsel. 233 F.Supp.2d 564, 569-70 (S.D.N.Y. 2002). The United States challenged the particular district court’s jurisdiction (arguing that the appropriate district was where Padilla was actually being detained) and also urged that the ordered access to counsel would undermine the ability to interrogate a combatant during wartime. A divided Second Circuit panel upheld the lower court’s jurisdiction and admitted the president’s military authority but found it to be constrained by a criminal statute, 18 U.S.C. § 4001(a), which prohibits the detention of citizens without express constitutional authorization. 352 F.3d 695 (2nd Cir. 2003). The dissenting judge thought § 4001(a)

inapplicable, unconstitutional if so applied to interfere with military decision making, and in any event, complied with by the congressional authorization of the use of military force. The Supreme Court granted certiorari to hear both the Padilla and Hamdi matters on the same day.

CASE ANALYSIS

Before considering the opposing views of the merits, the Supreme Court will need to satisfy itself that the southern district of New York had proper jurisdiction in the Padilla case. Padilla's counsel (Donna Newman) will surely defend the reasoning below that it is not necessary to name the actual custodian of her client since that requirement arguably should not apply when the individual is detained for reasons other than a criminal proceeding. The lower court also found it appropriate to name the secretary of defense since he has ultimate legal control of the detainee. Nonsense, replies the United States, there is only one habeas statute applicable to criminal and noncriminal context alike, and the fact that every warden has a supervisor somewhere does not excuse the statutory obligation to name the person having actual custody. Indeed, the Seventh Circuit, in another terrorism-related case, *Al-Marri v. Rumsfeld*, 2004 WL 415279 (7th Cir. March 8, 2004) held just that.

To onlookers anxious to have the Court resolve the merits, this jurisdictional squabble may seem oddly formal. Yet the habeas statutes have strictly imposed jurisdictional limits since the nineteenth century to prevent one court from issuing a writ for a person confined in a remote location. The solicitor general points out that the Supreme Court itself has previously explained the limitation as necessary since

Congress thought it "inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo v. United States*, 364 U.S. 611, 617 (1961). If, after argument, the Court determines that it would be more prudent not to opine upon the president's military authority to detain Padilla because of his unique capture on American soil, this jurisdictional defect may supply the vehicle for simply vacating the lower court for lack of jurisdiction.

In Hamdi's case, and Padilla's as well if it survives jurisdictional analysis, the appointed counsel will argue that these citizens have been detained without a meaningful and timely hearing and that this in effect suspends the protections of habeas corpus. Hamdi's public defender, Frank Dunham, writes: "Hamdi has never been allowed to present a claim of innocence, respond to the allegations against him, or attend a hearing of any kind." While the Fourth Circuit placed heavy reliance upon the allegation that Hamdi was captured on the battlefield, Dunham argues that Hamdi himself has never conceded this point. To Hamdi, the president lacks executive power to detain, except when it is "required by military necessity" or when it results from "areas of actual fighting."

This denial of executive military authority is incredible to the solicitor general. He argues: "This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over ... enemy belligerents [and] prisoners of war.'" *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946))." The United States adds

that the military "has seized and detained enemy combatants in virtually every significant armed conflict in the Nation's history." The Supreme Court in *Ex parte Quirin* confirmed this "universal agreement and practice" under the "law of war" in holding that enemy combatants are "subject to capture and detention ... by opposing military forces."

Quirin involved the capture of eight Nazi saboteurs, one of whom is reported to have been an American citizen, who came ashore plotting to blow up critical infrastructure and industrial plants in the United States. *Quirin* nicely illustrates the difference between lawful and unlawful enemy combatants—the former applying to those in uniform who aim at military targets and openly display their weaponry. Lawful combatants are immune from prosecution for war-related hostile acts and, if captured, are entitled under the Geneva Convention to be treated as POWs. "Unlawful combatants," by contrast, do not fight in accordance with international legal principle and custom and at common law were often subject to capture and summary execution. Modernly, unlawful combatants have been held to be subject to capture and detention as well as trial and punishment by military tribunals. *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

Hamdi and Padilla deny that the Court's precedent in *Ex parte Quirin*, 317 U.S. 1 (1942), supports the executive's detention of citizens. *Quirin*, they insist, was premised upon express congressional authority. Hamdi and Padilla admit that the Court in *Quirin* remarked that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful

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because in violation of the law of war,” 317 U.S. at 37, but they seek to limit *Quirin* to its facts. In particular, these detained enemy combatants highlight that Congress explicitly authorized military tribunals in *Quirin* and did not directly address the president’s power in the absence of such tribunal authorization. Moreover, Hamdi and Padilla argue that citizenship alone entitles them to better treatment. Hamdi writes: “A unilateral authority of the Executive branch to indefinitely detain American citizens has far greater implications for the character of our government than does the detention of enemy aliens.” In this, the citizen enemy combatants seek to strengthen their argument by the numbers—small ones, that is—noting that only two U.S. citizens, Hamdi and John Walker Lindh, were seized in relation to the conflict in Afghanistan. Ergo, the captured enemy combatants reason, the practical problem of extending rights to counsel and the guarantee against unreasonable search and seizure and other due process protections is “extremely small.”

The United States finds such special pleading to contradict the settled reality of the law as well as the facts of war. Enemy combatants are not detained—at least during the conduct of the war itself—for purposes of prosecution, the Solicitor General reasons. Rather, detention prevents those captured from rejoining the enemy and enables the U.S. military to gather intelligence. Such interrogation, observes the United States, is especially critical in a war on terror, where “the enemy is composed of combatants who operate in secret and aim to launch surprise, sporadic, and large-scale attacks against civilian population.” Citing military estimates that intelligence gathered from combatants has thwarted potential attacks, the solicitor general highlights that the president

explicitly found that Padilla “possesses intelligence, including intelligence about personnel and activities of al Qaeda that ... would aid the United States or its armed forces.”

As for *Quirin*, the solicitor general finds a close parallel between that case and the present matter. There, the enemy combatants sought habeas relief. It was denied. In *Quirin*, at least one of the saboteurs sought to hide behind the protection of citizenship. The Court said a citizen could be held responsible for his “belligerency.” The solicitor general also observes that the *Quirin* Court made short work of the claim that the belligerents were not in a “theatre or zone of active military operations.” That, said the *Quirin* justices, did not matter any more than that the Nazi saboteurs had been stopped by civilian authority (the FBI). And as for the notion that *Quirin* rested on some special authorization for military tribunals, the United States responds that the cited-to authorization is general in nature, has never been repealed, and is today part of the Uniform Code of Military Justice, 10 U.S.C. § 821. Most importantly, the United States argues, the Court in *Quirin* affirmed that the power to try enemy combatants includes the lesser authority to detain them. 317 U.S. at 31.

Even were all that true, assert Hamdi and Padilla, *Quirin* has been superseded by Congress’s enactment of 18 U.S.C. § 4001(a), which prevents the detention of citizens absent specific law to the contrary. The United States argues that this statute is related to the management of federal prisons and thus wholly inapposite. It would be unconstitutionally applied, the solicitor general says, were it used to undermine the president’s Article II powers to conduct military operations. But responding to the argu-

ment by Hamdi and Padilla on its terms, the United States notes that the detention has been congressionally authorized by the authorization for the use of force and also by a separate provision in Title 10 affirming military detentions.

Hamdi and Padilla contend that congressional approval to use “all necessary and appropriate force against” terrorist organizations or the nations or persons associated with them does not include the power to detain prisoners of war. Section 4001(a) was enacted, say Hamdi and Padilla, partly in response to the detention of Japanese Americans in the United States during the Second World War, and so construing a mere declaration of war or force authorization to be sufficient to capture enemy combatants would be contrary to Congress’s larger purpose. Because the force authorization “does not specifically authorize the detention of citizens, it cannot represent a congressional sanction for Hamdi [or Padilla’s] detention,” contend their appointed counsel. Similarly, they argue that the appropriation of funds for “expenses incident to the maintenance ... of prisoners of war, other persons ... whose status is determined ... to be similar to prisoners of war, and persons detained ... pursuant to Presidential proclamation,” 10 U.S.C. § 956(5), is “far from the specific authorization required.”

As mentioned, the solicitor general doubts the very applicability of 18 U.S.C. § 4001(a). In his judgment, it “pertains solely to the detention of American citizens by *civilian* authorities. It has no bearing on the settled authority of the *military* to detain enemy combatants in time of war.” Section 4001(a) repealed the Emergency Detention Act of 1971 which, while never invoked, gave authority to the attorney general to

detain citizens suspected of espionage or sabotage. The focus of § 4001(a) was the proper scope of law enforcement authority, a fact made patent, argues the United States, by its placement in Title 18, which concerns “crimes and criminal procedure.” Indeed, § 4001(a) was added to an existing provision that still provides that the “control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General.” 18 U.S.C. § 4001(b).

The United States does not dispute that the Japanese internment was a partial motivation for the enactment of § 4001(a), but it reminds the Court that these highly criticized internments were by order of civilian, not military, authority. Indeed, observes the solicitor general, when the Court ordered the release of a concededly loyal citizen in *Ex Parte Endo*, 323 U.S. 283 (1944), the Court explicitly distinguished the authority of the president under *Quirin*, commenting that “no questions of military law are involved.” 323 U.S. at 298. But even if § 4001(a) should have some applicability, Congress virtually unanimously gave its approval under law. The solicitor general reasons that because “‘the President act[ed] pursuant to an express ... authorization from Congress,’ his power is at its maximum, and its exercise is ‘supported by the strongest of presumptions.’” *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) at 635 (Jackson, J. concurring)). Because the seizing and detaining of enemy combatants has long been recognized as an essential part of warfare, the authority to use “all necessary and appropriate force” necessarily embraces the capture and detention of enemy combatants, writes the solicitor general. Moreover, the

United States highlights Judge Wesley’s dissent in the Second Circuit that “the power to detain enemy combatants, while part and parcel of the use of force ... expressly authorized by Congress is a far lesser ‘restraint’ than the authority to shoot them, which the Authorization also grants.”

While admitting that the president has been given some authority to make military judgments under the Constitution and particularly here by a congressional authorization, Hamdi and Padilla nevertheless insist upon a more active supervisory role for Article III courts. “Judicial review of executive detention is demanded by, not contrary to, the separation of powers,” they insist. Neither side categorically disputes a judicial role. The United States has laid before every court to consider the status of Hamdi and Padilla the evidence that informed the characterization of these individuals as enemy combatants. The real question is not whether judicial supervision, but how much supervision. Hamdi’s counsel dubs the Fourth Circuit’s review “rubber-stamp” and a refusal to permit “any inquiry” into the “factual circumstances.”

The solicitor general has chosen not to respond in kind, but an *amicus* brief filed on behalf of Senators Cornyn and Craig lends support to the Fourth Circuit’s “some evidence” standard, borrowed in part from the Supreme Court’s explanation in the deportation context that historically habeas courts accept “factual determinations made by the Executive” so long as there is “some evidence to support the deportation order.” *INS v. St. Cyr*, 533 U.S. 289, 306 (2001).

The members of Congress believe this evidentiary standard to mirror the constitutional role that has been

assigned to them and the president in wartime. The president is not left unchecked, these legislators reason, since “if Congress believes that the President has overstepped his authority, it has numerous tools available to it to respond, including statutory amendment or withholding appropriations. It is difficult to imagine a greater judicial intrusion into the separation of powers than one that would dictate to the President and Congress how to conduct a war.”

Hamdi and Padilla disagree. Making reference to commentary, they contend that “under ... common law, the review of executive detentions was far greater.” What is needed, they insist, is “muscular judicial review” that rejects the Fourth Circuit’s concern with the “logistical effort to acquire evidence from far-away battle zones,” since they contend “the location of the seizure has absolutely nothing to do with a court’s ability to exercise judicial review.” In this respect, Hamdi and Padilla note that after the Civil War, “courts regularly reviewed the entitlement of claimants under the Captured and Abandoned Property Act to recover compensation for property seized by the military in ‘zones of armed combat,’” citing *Briggs v. United States*, 143 U.S. 346 (1892) (holding that the proceeds of cotton belonging to a plantation owner who remained loyal to the Union should not have been confiscated and compensation was due). In the end, Hamdi and Padilla urge a rule of thumb distinguishing between “areas of actual fighting,” where the president and other military commanders would have authority, and detention outside such areas, where they would not. Hamdi’s counsel elaborates: the habeas petition challenges the detention as an enemy combatant “outside of areas of actual fighting,

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not the Executive's authority to initially apprehend him overseas."

The solicitor general doubts the proffered distinction is a constitutionally required one and specifically argues that "the broad language of Congress' Authorization [suggests no unstated exception] for enemy combatants captured within the United States. Indeed, Congress was acting in direct response to attacks that took place on United States soil and were initiated by combatants located within the borders of the United States."

SIGNIFICANCE

The question presented is both a foundational one of constitutional assignment and a singularly unique one dealing with an unprecedented war on terror. For a Rehnquist Court that prides itself on adherence to original understanding and observance of the separation of powers, deference to the president and Congress might be expected. Yet the present Court has also not been reticent to check what it perceives to be overreaching by a co-equal branch. With that in mind, the enemy combatants insist that Article III courts must closely superintend the factual circumstances of those captured in the context of military action outside areas of active fighting. The United States accepts this responsibility to explain the detention of citizen enemy combatants generally, but not at the level of detail associated with the due process protections afforded individuals charged with garden-variety criminal offenses.

The divide between the Second and Fourth Circuits turns precisely upon this proposition. Both Circuits sought to vindicate the principles of the Great Writ; that is, to determine if a citizen was being unconstitutionally deprived of liberty. In both cases, the United States responded with factual averments, both classified and not, regarding the capture and military detention of Hamdi and Padilla. Unlike the Fourth Circuit, which accepted these factual recitals of the executive and the Department of Defense in Hamdi's case, the Second Circuit said it needed more or else Padilla must be released.

The value of civil liberty inclines every American, especially now in this Janus time of both war and peace, to err upon the side of more evidence and more process, not less; not surprisingly, the detained enemy combatants in these actions seek to draw heavily upon this American ethic of fairness. Yet such claims cannot be accepted indiscriminately without jeopardizing the lives and safety of our soldiers on the battlefield, and even more, the fathers and mothers and children who were, and can still be, the target of an organization such as al Qaeda that kills irrationally for blood sport and a twisted conception of eternity.

It can be reasonably speculated that the justices will struggle to know where the judicial hand must intervene. Some members of the Court may be inclined to find the Fourth Circuit to have been overly deferential in the Hamdi matter, though his

battlefield context certainly makes him less than a poster child for habeas relief. Others may accept the argument put forward by the members of Congress that the Constitution simply does not contemplate the type of review argued for by the appointed counsel of either of the detainees. Nominally, even Padilla's arrest within the United States—thought by many to be a distinguishing factor—may not be capable of supplying the sought-after bright line. After all, the Second Circuit held that the president lacked authority to detain *even assuming* that Padilla is closely associated with al Qaeda forces and that he came to the United States intending to advance the conduct of further hostile actions by al Qaeda.

In the war to end all wars, the justices resolved that "it would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive. ..." *Johnson v. Eisentrager*, 339 U.S. at 779. Having accepted these difficult cases for review, the justices must now decide what this principle means for a war on terror of possibly infinite scope—unbounded as it seems tragically destined to be by the laws of war, place, or the sanctity of the human person.



ATTORNEYS FOR THE PARTIES

In *Yaser Esam Hamdi; Esam Fouad Hamdi, as next friend of Yaser Esam Hamdi v. Donald H. Rumsfeld, Secretary of Defense, et al.*, Docket No. 03-6696

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Case at a Glance

Under the National Environmental Policy Act and the Clean Air Act, federal agencies are required to analyze the environmental and air-quality effects of their actions. Presidential actions are exempt from these requirements.

In this case, the Supreme Court addresses the question of whether a federal agency must analyze the environmental impacts from regulating Mexican trucks operating in the United States when the agency's action implements a foreign-affairs decision by the president.

When Are Presidential Foreign-Affairs Actions Exempt From Environmental-Review Requirements?

by Marisa Martin

PREVIEW of United States Supreme Court Cases, pages 404–407. © 2004 American Bar Association.

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ISSUE

Must a federal agency analyze air pollution and other environmental impacts from Mexican trucks operating in the United States under the Clean Air Act and the National Environmental Policy Act when the agency action implements a decision by the president, whose actions are exempt from such laws?

FACTS

Every year there are approximately 4.5 million truck crossings from Mexico into the United States. However, Mexican trucks can only transport cargo and provide bus services to terminals within the commercial zone along the United States-Mexico border. From there, U.S. carriers transport the cargo or passengers to the final destinations within the United States.

This border situation arose in 1982 when Congress enacted a two-year moratorium on the permitting of new trucks from Mexico and Canada in response to concerns that U.S. trucks were being denied equal

access to markets in those countries. Congress granted the president the authority to continue the moratorium if Mexico or Canada “substantially prohibit[ed]” operations by United States carriers. 49 U.S.C. § 10922(l)(1). President Reagan lifted the moratorium with respect to Canadian carriers after the two countries entered into a bilateral understanding. However, the prohibition on Mexican trucks continued until 1996, with Presidents Reagan, Bush, and Clinton each extending the moratorium during their time in office.

Before the moratorium expired in 1996, Congress enacted the Interstate Commerce Commission Termination Act of 1995. This statute provided that the moratorium on Mexican trucks would continue and the president could impose restrictions if “unreasonable or discriminatory” burdens were placed on United States carriers operating in Mexico. 49 U.S.C. §

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13902(c)(1). Congress also authorized the president to lift the moratorium if he determined it would be “consistent with the obligations of the United States under a trade agreement. ...” 49 U.S.C. § 13902(c)(3).

In December 1992, the North American Free Trade Agreement (NAFTA) was signed by Canada, the United States, and Mexico. Under NAFTA, the United States and Mexico agreed to phase out the moratorium, and President Clinton allowed for limited licensing of new Mexican bus services in the United States. However, due to lingering concerns about Mexican motor carrier safety, no further steps were taken to lift the moratorium, and the phaseout was stalled.

The Mexican government challenged the United States’s failure to end the moratorium under NAFTA. In February 2001, an international arbitration panel under NAFTA determined that the blanket refusal of the United States to consider the operation of Mexican carriers beyond the border zone due to safety concerns violated NAFTA. Almost immediately after the arbiter’s decision, President Bush made clear his intention to lift the moratorium. In the meantime, the Federal Motor Carrier Safety Administration (FMCSA), a federal agency charged with motor carrier safety and registration, published for comment proposed rules for new Mexican trucks that seek cross-border operating authority.

In December 2001, Congress intervened before FMCSA’s rules became final. Congress passed legislation prohibiting the use of any funds “for the review or processing of an application by a Mexican motor carrier for authority to operate” outside of the border zones until FMCSA implemented specific application

and safety-monitoring regulations that were lacking in FMCSA’s proposed rules. Dept. of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 864. Congress later extended the legislation for fiscal years 2003 and 2004. Therefore, as of December 2001, two barriers prevented new Mexican trucks from operating in the United States: (1) conditions placed by Congress on FMCSA’s rulemaking; and (2) the moratorium the president was authorized (and expressed intention) to lift.

In March 2002, FMCSA issued new proposed rules on Mexican motor-carrier safety designed to fulfill the necessary congressional requirements. For these new rules, FMCSA performed an environmental assessment (EA) as required under the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(C). FMCSA determined, in the EA, that the marginal increase in the number of roadside inspections of Mexican trucks and buses resulting from its rulemaking was not a “significant” environmental effect. Therefore, FMCSA determined that the EA was sufficient, and it did not prepare a more comprehensive environmental impact statement (EIS). Under the Clean Air Act (CAA), FMCSA determined that its action was categorically exempted from the “conformity requirement” of the act because emissions resulting from its rulemaking fell below the level necessary to trigger a conformity analysis. Essential to its analysis under the Clean Air Act and National Environmental Policy Act, FMCSA concluded that any significant increase in emissions from Mexican trucks operating in the United States would result from the president’s decision to lift the moratorium and not from the agency’s rulemaking.

In May 2002, Public Citizen, the International Brotherhood of Teamsters, AFL-CIO, Natural Resources Defense Council, and other groups brought a lawsuit alleging that FMCSA violated the National Environmental Policy Act and the Clean Air Act by failing to prepare an environmental impact statement or a conformity analysis. Six months later, in November 2002, President Bush lifted the moratorium on Mexican cross-border truck and bus services. In January 2003, the Ninth Circuit set aside FMCSA’s rules and directed the agency to complete an EIS to analyze the increased emissions due to Mexican trucks operating in the United States. The court also ordered FMCSA to conduct a conformity analysis under the Clean Air Act to determine if emissions from increased cross-border trucking would impede states’ ability to comply with federal air-quality standards. The court stated it was “illogical” for FMCSA to distinguish between the environmental effects of the president’s border opening and the environmental effects of its safety rules. Because Congress coupled the president’s lifting of the moratorium with FMCSA’s regulations, the court ruling prevented the implementation of President Bush’s border-opening decision. The Bush administration sought certiorari on this issue.

CASE ANALYSIS

All parties agree that the president’s decision to lift the moratorium is not subject to NEPA review. However, deciding which action—the president’s decision or FMCSA’s rulemaking—is responsible for the increased emissions from Mexican trucks in the United States is the determinative issue. If the president’s action in lifting the moratorium is the cause of potential increased emissions, as the Bush

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administration contends, then NEPA and CAA compliance is not required. However, if FMCSA's rule-making is responsible for the increased emissions, then an environmental impact statement and conformity analysis likely would be required.

Petitioners argue that the presidential lifting of the moratorium was taken pursuant to express congressional authorization, in the furtherance of foreign policy and trade objectives and to comply with the ruling of the NAFTA arbitration panel. Petitioners characterize respondents' argument attributing the potential adverse air-quality effects from Mexican trucks to FMCSA's rulemaking as an end-run around the exemption of presidential actions from NEPA and CAA requirements.

Respondents argue that this case is entirely separate from the president's action of lifting the moratorium. Instead, respondents point out that Congress directed FMCSA to promulgate rulemaking regarding the Mexican trucks. Respondents argue that FMCSA's action is responsible for increased emissions from Mexican trucks because regardless of what action the president decides to take, Mexican trucks cannot operate unless FMCSA promulgates rules according to the congressional guidelines. Respondents state that Congress gave the president and FMCSA separate spheres of responsibility and that FMCSA's safety inspections are clearly independent from the president's authority to lift the moratorium.

According to petitioners, FMCSA lacks the authority to comment on relations with other nations and environmental issues involved in implementing trade agreements such as NAFTA, and therefore FMCSA has no duty to analyze the envi-

ronmental effects of the president's border opening. Respondents emphasize that all federal agencies are required to abide by national environmental laws notwithstanding a nonenvironmental statutory mandate such as FMCSA's of motor carrier safety. Respondents contend that the Ninth Circuit should be upheld because Congress ratified the court's decision by twice passing legislation requiring FMCSA's rule-making and by expressly referencing the court decision in relevant House and Senate Reports.

Respondents argue that under the Clean Air Act and National Environmental Policy Act, FMCSA must evaluate not just the marginal air-quality effects of increased inspections of Mexican trucks but the significant effects of more Mexican trucks operating in the United States as a result of the border opening. Respondents point out that while the border opening may not increase total vehicles operating in the United States because Mexican trucks will reduce U.S. trucks, more pollution will be emitted overall because Mexican trucks are significantly more polluting than U.S. trucks. Respondents rely on regulations from the Council on Environmental Quality that require the evaluation of all environmental effects that are "reasonably foreseeable" even if they are indirect. 40 C.F.R. § 1508.8(b). Respondents contend that because the president made clear his intention to lift the moratorium once FMCSA's rules were in place, the border-opening decision was a reasonably foreseeable consequence of FMCSA's rule-making. Therefore, respondents argue, FMCSA erred in confining its analysis to just the increase in emissions from more inspections at the border and instead should evaluate the overall increase of emissions from Mexican trucks operating throughout the United States.

Petitioners maintain that the president's decision to lift the moratorium is the cause of any potential increases in emissions and because it is exempt from the National Environmental Policy Act and the Clean Air Act, FMCSA properly limited its environmental review to the increase in emissions from its inspection and safety requirements. Petitioners characterize the president's border-opening decision as an "intervening event" and not an "effect" of FMCSA's regulations and therefore no NEPA or CAA review is necessary. Petitioners disagree with the Ninth Circuit's decision that the "but for" relationship between FMCSA's rulemaking and possible environmental effects of allowing cross-border operations by Mexican trucks triggers the need for NEPA review.

SIGNIFICANCE

This case blends trade agreements, congressional legislation, presidential powers, agency rulemaking, and environmental laws into one complicated legal situation. Some worry that if stringent environmental reviews are required in this case, agency actions could have the unintended effect of undoing or altering the president's foreign affairs and treaty powers and decrease the flexibility in exercising those powers. Others worry that not requiring a comprehensive environmental review in this situation would erode the nation's environmental laws by exempting agency action that could have significant environmental effects from NEPA and CAA review as long as it is connected to a president's decision related to foreign nations.

If petitioners prevail, FMCSA would likely not finish the EIS it began under the Ninth Circuit's court order, and the border would likely be quickly opened to new Mexican carriers that satisfy FMCSA's safety



conditions. Thousands of Mexican trucks will be on the nation's roads, and cross-border transport will be much smoother without the handoff between Mexican carriers and U.S. transporters in the border zone.

However, because Mexican carriers will be able to pass through the border zone and operate throughout the nation, American cargo transport and bus services industries are concerned about American job losses.

If respondents prevail under the National Environmental Policy Act, once FMCSA finishes its EIS, new Mexican trucks will likely still be allowed to operate in the United States beyond the border zone. NEPA cannot stop agency actions; it merely requires agencies to evaluate and disclose the environmental effects of its actions. However, if respondents prevail under the Clean Air Act, the border opening could be indefinitely delayed. FMCSA would be required to examine the impact of Mexican trucks in scores of air quality control regions throughout the United States. If FMCSA concluded that Mexican carriers would cause an increase in air emissions above the regulatory threshold, FMCSA's rules—and therefore the border opening—could not be implemented until “conformity” was somehow achieved. Even if regions are within air quality thresholds and a conformity analysis is not triggered, states, especially those along the U.S.-Mexico border, may still face increased air pollution. Some studies have shown that Mexican trucks on average generate more nitrogen oxide and particulate matter than U.S. trucks, which can contribute to regional haze and other public health concerns related to diesel emissions.

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Case at a Glance

In 2002, the Supreme Court held that the Sixth Amendment requires that juries—not judges—must determine capital sentences. In 1984, Summerlin was convicted of murder in Arizona, and a drug-abusing judge determined his sentence. Now the Court must consider whether its 2002 case applies retroactively to Summerlin's case.

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ISSUES

Did the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), announce a retroactive, substantive new rule of criminal procedure or merely a nonretroactive procedural rule, following the retroactivity principles of *Teague v. Lane*, 489 U.S. 288 (1989)?

Did the Supreme Court's decision in *Ring v. Arizona* announce a "watershed rule" of criminal procedure "implicating the fundamental fairness of the criminal proceeding," so as to render the rule retroactive under *Teague v. Lane*?

FACTS

The opinion on review here—issued by an *en banc* Ninth Circuit—begins with a paragraph that beautifully frames the drama of this case:

It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly

incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, "truth is often stranger than fiction because fiction has to make sense."

Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003) (*en banc*).

Despite the fact that none of the dramatic elements mentioned above are actually before the Supreme Court, these background facts are certainly worth note.

Brenna Bailey was a delinquent account manager for Finance America, and on the morning of April 29, 1981, she had plans to call on Wesley Warren Summerlin's wife as well as other people. When Bailey did not return to work from her morning calls, her boyfriend informally investigated and discovered that Bailey had visited Summerlin's home but had not made any of her

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subsequent scheduled visits. Bailey's boyfriend reported her missing that day. That same evening, the police received an anonymous tip that Summerlin had murdered Bailey; the caller was later "identified as Summerlin's mother-in-law[,] who testified that the basis of her information was her daughter's extra-sensory perception." *Summerlin*, 341 F.3d at 1085. Summerlin was later arrested and charged with Bailey's murder.

The public defender's office was appointed to represent Summerlin, and his case was eventually assigned to an attorney who is referred to throughout the lower courts' opinions as "Jane Roe." Because Summerlin had pending burglary and aggravated assault charges, Roe arranged for Summerlin to enter an "Alford plea" to second-degree murder and a regular guilty plea to the aggravated assault charge. In return, the prosecutor agreed that he would recommend certain non-capital sentences on the three charges, to be served concurrently. (An Alford plea is one in which the defendant pleads guilty yet still maintains his factual innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970). The assistant prosecutor—who is referred to throughout the lower courts' opinions as "John Doe"—agreed to this deal because he did not think that the murder met Arizona's legal standard for capital offenses, and because Summerlin's conviction record did not meet the required minimum for the associated aggravating circumstance. *Summerlin*, 341 F.3d at 1086.

Early on, Summerlin was evaluated by two court-appointed psychiatrists, Drs. Tuchler and Benheim. Although both found Summerlin competent to stand trial and that he did not meet the standard for insanity under Arizona law, Dr. Tuchler

"observed that dyslexia and illiteracy made Summerlin 'functionally mentally retarded'" and that he suffered from personality disorders. *Summerlin*, 341 F.3d at 1085. Suspecting that Summerlin might suffer from epilepsy as well as mental illness, Roe also arranged for Summerlin to be evaluated by defense neurological and mental health experts. After the neurological evaluation, it was determined that Summerlin did not have epilepsy, but a psychologist, Dr. Tatro, opined that he did suffer from "organic brain impairment, borderline personality disorder, and paranoid personality disorder." *Summerlin*, 341 F.3d at 1086. As Ninth Circuit Judge Thomas explained:

There is no doubt that Warren Summerlin is an extremely troubled man. He has organic brain dysfunction, was described by a psychiatrist as "functionally retarded," and has explosive personality disorder with impaired impulse control. His father was a convicted armed robber who was killed in a shootout. As a youth, his alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. At his mother's behest, he received electroshock treatments to control his explosive temper. He dropped out of school in the seventh grade due to dyslexia and committed numerous petty juvenile offenses. In 1975, he was diagnosed as a paranoid schizophrenic and treated with the antipsychotic medication Thorazine.

Summerlin, 341 F.3d at 1084.

Summerlin entered his Alford plea but, a few days later, changed his mind and asked to vacate the plea. In a subsequent court appearance,

Summerlin "openly registered dissatisfaction with the plea, the stipulated sentence, and Roe's handling of his case." *Summerlin*, 341 F.3d at 1086. In response, Judge Derickson—who presided over the preliminary matters in Summerlin's case—explained to Summerlin that he did not intend to accept the stipulated sentence, and that he would give Summerlin the option of vacating the plea or moving ahead with sentencing. Roe then sought to have Judge Derickson disqualified but was unsuccessful.

The same night that Roe moved for Judge Derickson's disqualification, she attended a Christmas party where she met Doe. Roe and Doe left the party together and engaged in "a personal involvement . . . of a romantic nature." *Summerlin*, 341 F.3d at 1086-7. Concerned about the conflict of interest, Roe reported her "personal involvement" to her supervisor, and the two agreed that the entire office was likely conflicted and should withdraw. Nonetheless, Roe represented Summerlin at his next court appearance several days later, in which Judge Derickson again told Summerlin that he did not intend to honor the stipulated sentence, and that he would likely sentence Summerlin to 38 1/2 years in prison. Summerlin decided to withdraw his plea and requested a new attorney. Roe remained silent about her "personal involvement" with Doe, and the court denied Summerlin's request for new counsel due to his failure to set forth any grounds for the appointment of new counsel. *Id.* at 1087. The case was then transferred to another judge.

Six days after Summerlin withdrew his plea, Roe spoke to Doe about her conflict of interest. At that meeting, Roe expressed her desire that Doe continue with the case,

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because of his belief that Summerlin was not eligible for the death penalty. At a second hearing on Summerlin's request for new counsel shortly afterwards before another judge—Judge Riddel—no mention was made of Roe and Doe's "personal involvement" or the resulting conflict of interest. And Roe failed to tell Summerlin about the issue, explaining that she saw "no reason to beat a dead horse." *Summerlin*, 341 F.3d at 1088. Nonetheless, new counsel was appointed: George Klink, a private practitioner. Klink moved for Judge Riddel's disqualification on the murder case but somehow failed to move for his disqualification on the aggravated assault charge.

Before the assault case came to trial before Judge Riddel, Klink requested a continuance due to lack of preparation, which was denied. After Klink called only a single witness, Summerlin was convicted. *Summerlin*, 341 F.3d at 1088.

In the meantime, the attorney general—who did not share Doe's opinion regarding Summerlin's lack of eligibility for the death penalty, especially in light of his recent conviction for aggravated assault—assumed prosecution of Summerlin's case. Summerlin's murder case was also assigned to Judge Philip Marquardt, "a heavy user of marijuana," *Summerlin*, 341 F.3d at 1089, who was subsequently convicted of two marijuana-related offenses and disbarred. *Id.* at n.1.

At trial, Klink defended Summerlin by arguing a lack of premeditation, "present[ing] no evidence in support of his theory." *Summerlin*, 341 F.3d at 1088. Despite Summerlin's mental health history, Klink made no mental health presentation regarding Summerlin's state of mind, instead calling Roe to

impeach a statement by the coroner regarding seminal fluid. After less than three hours of deliberation, the jury convicted Summerlin of first-degree murder and sexual assault. Judge Marquardt scheduled a sentencing hearing—which, according to Arizona law at the time, occurred before the judge alone—for the following month. *Id.*

In the time between the jury's verdict and the sentencing hearing, Klink did not meet with Summerlin or otherwise perform any independent investigation on his case. At the sentencing hearing, Klink failed to present most of the mitigating information known to him at the time, e.g., that Summerlin's aggravated-assault conviction evolved from a situation in which he was trying to protect his wife, and that court-appointed psychiatrist Dr. Tuchler had found Summerlin to be mentally ill, although not legally insane. Instead, Klink called Dr. Tatro, who had evaluated Summerlin pretrial at Roe's behest; when Summerlin objected, Klink rested after introducing Dr. Tatro's report. In support of aggravation, the state presented information regarding Summerlin's aggravated-assault conviction, as well as two psychiatric witnesses in rebuttal. *Summerlin*, 341 F.3d at 1089.

The following Monday, Judge Marquardt sentenced Summerlin to death, finding the existence of two aggravating circumstances—that Summerlin had a history of convictions involving violence to another person, and that he had committed the murder in an especially heinous, cruel, or depraved manner." *Summerlin*, 341 F.3d at 1090 (citations omitted). Notably, Judge Marquardt had sentenced another defendant to death that day—who had been convicted of killing a woman with the same last name as

Summerlin's victim—and had found the same two aggravating circumstances. *Id.*

On direct appeal, the Arizona Supreme Court affirmed Summerlin's convictions and sentence. *State v. Summerlin*, 138 Ariz. 426, 675 P.2d 686 (1983). Summerlin then filed a number of state postconviction petitions and a habeas petition, all of which were unsuccessful. Summerlin's second amended habeas corpus petition was filed in November 1995, before the enactment of the Antiterrorism and Effective Death Penalty Act. The district court denied the writ in an unpublished opinion but issued a certificate of probable cause to appeal. On appeal, Summerlin presented five basic issues: that Roe's "personal involvement" with Doe conflicted her representation; that Klink was ineffective in his representation; that his due process rights were violated by Judge Marquardt's admitted drug use during his trial; and that the retroactive application of *Ring v. Arizona*, 536 U.S. 584 (2002) required resentencing.

A divided panel of the Ninth Circuit affirmed in part and reversed in part, remanding the case to the district court for a hearing on the issue of Judge Marquardt's "mental condition" while presiding over Summerlin's case. *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001). In all other respects—including the *Ring* issue currently before the Court—the panel affirmed the decision of the district court.

In "sober dissent," Judge Kosinski explained that Summerlin had failed to demonstrate that Judge Marquardt's admitted marijuana use had any effect on his case, and that the majority opinion would result in a "fishing expedition" for

Summerlin's attorneys, as well as a "disaster for the administration of justice in nine western states." *Summerlin v. Stewart*, 267 F.3d at 964 (Kosinski, J., dissenting). Judge Thomas likewise dissented in part, finding that Klink had rendered ineffective assistance of counsel during the penalty phase of Summerlin's trial. *Id.* at 964-966 (Thomas, J., dissenting in part and concurring in part).

Subsequent to the issuance of the Ninth Circuit's panel decision, the Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), holding that the Arizona sentencing statute—which permits a judge, and not a jury, to determine a capital sentence—violates the Sixth Amendment right to a jury trial. Summerlin moved for rehearing *en banc*, arguing, *inter alia*, that the decision in *Ring* should be applied retroactively to his case.

The Ninth Circuit granted rehearing *en banc* and, in a divided opinion, held that *Ring* should be applied retroactively, both because the decision in *Ring* announced a new substantive rule of criminal procedure and was therefore presumptively retroactive, and, in the alternative, because the *Ring* rule fell within one of the two exceptions to the general rule barring retroactive application of new rules of criminal procedure.

The Supreme Court granted certiorari on December 1, 2003.

CASE ANALYSIS

Despite the theatrical history of this case, the issues before the Court in this case are anything but; they involve the retroactivity of the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Regardless, the Court's decision has the potential to change much of the landscape of capital litigation in this country.

Ring arose from complex historical origins. In a 1988 decision foreshadowing *Ring*, the Ninth Circuit ruled that Arizona's sentencing statute violated the Sixth Amendment because the aggravating circumstances to be considered and potentially found by the judge at sentencing mandated a finding that the crime of murder was a separate offense with separate elements from the crime of capital murder. *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*). Two years later, the Court essentially reconsidered *Adamson* by granting certiorari in a nearly identical Arizona case and ruled that the Arizona aggravating factors did not function as separate elements of an offense but instead were factors offered to guide the judge's discretion in sentencing. *Walton v. Arizona*, 497 U.S. 639, 648 (1990) (citations omitted).

A decade later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court struck a New Jersey noncapital sentencing scheme, whereby a defendant convicted of a hate crime could have his sentence enhanced if a judge made certain findings regarding the crime after the jury had convicted him. Because *Apprendi* necessarily revisited issues litigated in *Walton*, the majority in *Apprendi* sought to distinguish *Walton*, while four of the dissenters observed, "If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy, and Breyer, JJ.). Finally, in 2002, the Court issued its opinion in *Ring*, overruling *Walton* and recognizing that a capital sentencing scheme that permits a judge to find the existence of aggravating factors violates the defendant's rights under the Sixth Amendment. Two years later,

in Summerlin's case, the Court is asked to consider the next question in line: whether *Ring* applies prospectively only or retroactively.

As a general matter, when the Court announces a new substantive rule of criminal procedure, it is fully retroactive to all cases, even if a case is on collateral review. E.g., *Bousley v. United States*, 523 U.S. 614, 620 (1998). In contrast, new procedural rules are prospective only and may only be applied retroactively to cases that were not "final" at the time the rule was announced. *Teague v. Lane*, 489 U.S. 288 (1989). However, if the "new" constitutional rule is not new at all—if it was dictated by existing precedent—then it may be applied retroactively without violating *Teague*.

Thus, if a court determines that the constitutional rule at issue is a "new" procedural rule, it must then determine when the defendant's conviction became "final." If, as in this case, the defendant's conviction became final before the announcement of the new rule, the court will assess the rule to determine if one of *Teague's* two narrow exceptions to nonretroactivity apply.

First, if the new constitutional rule "places a class of conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarantee accorded by the Constitution," it may be retroactively applied. Second, if the new constitutional rule is a "watershed rule" of criminal procedure "implicating the fundamental fairness of the criminal proceeding[.]" it may be retroactively applied. *Teague*, 489 U.S. at 311 (citations omitted). In order to meet *Teague's* second exception, it is "not enough . . . to say that a new rule is aimed at improving the accuracy of trial. . . ."

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A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding . . .” *Sawyer v. Smith*, 497 U.S. 227, 242 (1990) (citations and emphasis omitted). *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the Court held that indigent criminal defendants have a right to counsel in state court, is the “most commonly cited example of a rule so fundamental that it would fit this category. . . .” *O’Dell v. Netherland*, 521 U.S. 151, 170 n.4 (1997) (Stevens, J., dissenting).

In determining that *Ring* announced a substantive and not a procedural rule, the Ninth Circuit relied on its decision in *Adamson*, explaining that in Arizona, “all murder is not capital murder,” *id.* at 1004 (citations omitted), because the aggravating circumstances considered in sentencing by the judge—the aggravating circumstances that distinguish murder in Arizona from capital murder—function as elements of a new offense. See also *Summerlin*, 341 F.3d at 1102 (“*Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment”).

Petitioner Schriro presents two main arguments. First, she claims that *Ring* did not announce a substantive rule but instead announced a procedural rule. In support, Schriro explains that *Ring* “did not change *what* is found, but only *who* finds it.” Pet. Br. at 7 (emphasis in original). The petitioner continues, explaining that the federal courts have consistently held that *Apprendi* is a procedural rule, and since *Ring* simply applied the logic

of *Apprendi* to capital cases, *Ring* must be a procedural rule as well. Pet. Br. at 15-16 (citing cases).

Second, the petitioner goes on to argue that, since *Ring* announced a new procedural rule, it must fit into one of the two *Teague* exceptions in order to be considered retroactive. The petitioner then explains why *Teague*’s second exception—the only one at issue in this case—does not apply, arguing (1) that nothing in Arizona’s former capital sentencing scheme affected the accuracy of the proceedings—presumably, in spite of Judge Marquardt’s marijuana use—and (2) that *Ring* did not affect “bedrock procedural elements essential to the fairness of a proceeding. . . .” *Sawyer*, 497 U.S. at 242. See Pet. Br. at 22-26 (addressing *Ring*’s effect on the accuracy of the proceedings) and 26-34 (addressing *Ring*’s effect on “bedrock principles of procedure”).

Summerlin responds by contending that the Court’s decision in *Ring* was no more than a statement by the Court that it had misunderstood Arizona law in *Walton*, because in *Walton*, the Court mistakenly believed that Arizona judges simply found the existence of aggravating circumstances after a jury had already found the defendant guilty of capital murder. Res. Br. at 11; see also *id.* at 16 (“What changed from *Walton* to *Ring* was not federal constitutional law, but this Court’s understanding of Arizona law. . . .”). Thus, Summerlin argues that this change in the law does not implicate *Teague*. Res. Br. at 11-13.

Second, Summerlin argues that, since *Ring* represents a “belated discovery” that an earlier decision (*Walton*) was incorrect, *Teague* is not implicated because *Teague* requires imposition of a “new rule.” Res. Br. at 16. Summerlin also takes issue with the petitioner’s character-

ization of *Ring* as a “new rule,” explaining that simply because *Apprendi* may be considered a new rule, “it does not necessarily follow that *Ring* did so as well.” *Id.* at 19. Distinguishing Arizona’s capital sentencing from the hate crime legislation at issue in *Apprendi*, Summerlin argues that when the Bill of Rights was ratified in 1791, it was “unquestioned” that the jury was responsible for the factual determinations required to subject a defendant to capital punishment. Res. Br. at 21.

Third, Summerlin argues that if *Ring* did announce a new rule, it is a substantive one and therefore is retroactive. Res. Br. at 22-32. Fourth, Summerlin claims that *Ring* meets *Teague*’s second exception, because the presence of juries in capital sentencing both improves fact-finding and implicates the “bedrock procedural elements essential to the fairness of the proceeding,” because it implicates the Sixth Amendment right to a jury trial. Res. Br. at 32-41. Finally, Summerlin argues that if the petitioner is correct—if *Ring* announced a new procedural rule—then that new rule “merits inclusion” with *Gideon* “in the exclusive group of decisions that alter our understanding of the bedrock procedural elements essential to a fair trial.” Res. Br. at 41.

SIGNIFICANCE

The tremendous significance of this case is best demonstrated by the presence of the *amici*: Nebraska, Alabama, Colorado, Delaware, Florida, Illinois, Indiana, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia have together filed an *amicus* brief, each claiming that the Ninth Circuit’s *en banc* decision is in “direct conflict” with state court decisions from each respective state. See generally Brief



of *Amici* State of Nebraska et al. at 1. While together these states are responsible for a little less than half of the death-sentenced prisoners in the country, it is fair to say that the *amici* states have two basic sets of interests.

First, those states that formerly used judges to decide some aspect of capital sentencing—Idaho, Montana, Colorado, Nebraska, Alabama, Delaware, Florida, and Indiana, in addition to Arizona (represented by the petitioner here)—are directly concerned with the retroactivity of *Ring*. Second, all of the *amici* states are concerned by the Ninth Circuit’s pronouncement in *Summerlin* that “*Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment.” *Summerlin*, 341 F.3d at 1102. Because this view differs from the perspective of the Arizona state courts, the *amici* states have joined to express their “strong interest in having their highest courts be the final arbiters of the meaning of their state statutes.” Brief of *Amici* State of Nebraska et al. at 2-3.

In addition, the solicitor general has submitted an *amicus* brief on behalf of the United States and has been granted time for oral argument. While the solicitor general concedes that the retroactive application of *Ring* will not affect federal capital sentencing, he claims that the United States has a “substantial interest” in the standards governing the retroactivity of new rules in postconviction cases. See generally Brief of *Amicus* United States at 1.

While some media reports following the issuance of *Ring* and *Apprendi*

made dire predictions of their effects on capital sentencing, the significance of *Summerlin* is difficult if not impossible to predict, in large part because of the richness of *Teague*’s bar against retroactivity. *Summerlin*’s case presents difficult and disturbing facts, but the procedural aspects of his case extend well beyond them.

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May the Federal Judiciary Review the Legality of the Guantanamo Bay Detentions?

by Vikram David Amar

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Case at a Glance

In these two highly publicized cases consolidated for oral argument, the Supreme Court will begin to resolve the important legal questions that are distinctively raised by the United States's prosecution of the so-called War on Terror.

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ISSUE

Do the United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities in Afghanistan and incarcerated at the Guantanamo Bay Naval Base in Cuba?

FACTS

The following facts are drawn from the briefs, the lower court opinions, and the allegations—which were taken as true by the lower courts for purposes of ruling on the government's motion to dismiss for lack of jurisdiction—contained in the plaintiffs' complaints. On September 11, 2001, the United States suffered the most devastating domestic attack since the 1941 bombing of Pearl Harbor. Acting in his capacity as commander-in-chief, and supported by Congress's authorization to use "all necessary and appropriate force against those nations, organizations,

or persons he determines planned, authorized, committed or aided the terrorist attacks ... or harbored such organizations or persons," President George Bush took military action. The president sent the U.S. armed forces to Afghanistan to find and subdue the so-called al Qaeda international terrorist network and the Afghani Taliban regime that had supported it. As a result of this military action, the Taliban was removed from power and the al Qaeda fighting forces were significantly reduced. American-led and NATO-led forces continue to this day to be engaged in active combat operations in Afghanistan, pursuing the Taliban and al Qaeda forces that remain in the area.

During the course of their military operations in Afghanistan, the U.S. and coalition forces have captured thousands of individuals. Persons captured in connection with the Afghanistan hostilities undergo a multistep screening process within

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DOCKET NO. 03-334
AND
AL ODAH ET AL. V. UNITED STATES
DOCKET NO. 03-343

ARGUMENT DATE:
APRIL 20, 2004
FROM: THE DISTRICT OF
COLUMBIA CIRCUIT



the military to determine if their detention is necessary. Initially, field commanders make a decision whether a captured individual should be treated as an “enemy combatant,” i.e., whether the individual is “part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.” Persons determined on the field to be enemy combatants are then sent to a centralized holding area in Afghanistan where a military team reviews information about the detainees, including information derived from interviews of each captured individual. Those who the military concludes, after this screening process, have a high potential intelligence value or who pose a distinct threat to U.S. interests may be transferred to the U.S. Naval Base at Guantanamo Bay, Cuba, where approximately 650 detainees currently are being housed. The federal government has not issued any public written explanation as to why detention of any of the individual detainees involved in this litigation is necessary or appropriate. The Department of Defense has recently announced that it will conduct a review process no more infrequently than once a year to reexamine the need to detain each person held at Guantanamo. Under this process, detainees will be allowed to appear before an administrative review panel, and each detainee’s foreign government will also be permitted to submit information.

The Guantanamo Naval Base is on the southeast coast of the Republic of Cuba. The U.S. base is operated under the terms of a 1903 Lease Agreement with Cuba, which was extended by the terms of a 1934 Treaty between the two nations. The Treaty recognizes the “continuance of the ultimate sovereignty of the Republic of Cuba” over the leased area but gives the United

States “complete jurisdiction and control” of the region during the lease period. The president has declared that the military authorities are “treating and will continue to treat all of the individuals detained at Guantanamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949.” Over the past two years, more than 60 Guantanamo detainees whose detention the military has determined is no longer necessary have been released or remanded to the custody of other countries.

In one of the two consolidated cases, *Rasul v. Bush*, the parents of four British and Australian citizens who were captured in connection with the military campaign in Afghanistan and who are being detained in Guantanamo filed in February 2002 a habeas corpus petition in federal district court in Washington, D.C., as “next friends” of their detained children. The habeas petition alleged that the four petitioners “had no involvement, direct or indirect, in any terrorist act, including the attacks of September 11, 2001.” Two of the four petitioners in this case have been designated for release to the custody of Great Britain (but they remain detained in Guantanamo for the time being.) A third petitioner in *Rasul* has been designated under President Bush’s November 13, 2001, military order as eligible to be tried as a war criminal by a military tribunal. The Department of Defense may charge him with violation of the laws of war, but it has not yet done so. The habeas petition in *Rasul* challenges the legality of the current detention of all four petitioners under the Due Process Clause and other constitutional provisions and seeks their release.

A second action, *Al Odah v. United States*, was filed in the district court in May 2002 against the president, the secretary of defense, and military commanders who operate the Guantanamo facility, on behalf of another group of Guantanamo detainees. The plaintiffs in *Al Odah* are relatives of 12 citizens of Kuwait who allegedly were in Pakistan and Afghanistan serving as charitable volunteers to provide humanitarian aid when they were captured by coalition forces. As in the *Rasul* action, the complaint in *Al Odah* alleges that none of these 12 detainees has ever been a member or supporter of al Qaeda, the Taliban, or any terrorist organization. Plaintiffs in *Al Odah* invoked the district court’s jurisdiction under the habeas statute but did not formally style their action as a habeas petition; instead they sought to challenge the legality of the Guantanamo detention under the Alien Tort Statute, the Administrative Procedure Act, and directly under the Fifth Amendment.

The government defendants in both actions moved to dismiss the cases for lack of jurisdiction, and the district court held a consolidated hearing in both cases on the jurisdictional issue. After the hearing, the district granted the government’s motion to dismiss each case, holding that the Supreme Court’s decision in “[*Johnson*] v. *Eisenstrager*, and its progeny, are controlling and bars the court’s consideration of the merits of these two cases.” In *Eisenstrager*, 339 U.S. 763 (1950), a group of Germans had been convicted by a U.S. military tribunal convened in China toward the end of World War II. They challenged their military convictions (for violating the laws of war by aiding the Japanese against the United States after the German government had already surrendered) in a habeas

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corpus action in federal district court. The district court denied relief, and that ruling was upheld by the United States Supreme Court.

The district court in the *Rasul* and *Al Odah* cases read *Eisentrager* to stand for the idea that “[i]f an alien is outside the country’s sovereign territory, then ... the alien is not permitted access to the courts of the United States to enforce the Constitution.” The district court rejected the notion that *Eisentrager* applies only when the detainees are considered “enemy aliens.” The court reasoned that *Eisentrager* “did not hinge on the fact that [the *Eisentrager*] petitioners were enemy aliens” but rather “broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.” The district court found that detention of foreign nationals in Guantanamo, like detention of foreign nationals in China, did not afford a basis for federal court review.

The U.S. Court of Appeals for the D.C. Circuit affirmed, concluding that the “detainees [in both the present cases] are in all relevant respects in the same position as the prisoners in *Eisentrager*” and thus that federal courts are not “open to them.” With respect to whether the Guantanamo detainees are “enemy aliens,” the D.C. Circuit said that the Guantanamo plaintiffs did not fall into that category as described in *Eisentrager*. But like the district court, the court of appeals did not think that *Eisentrager*’s ruling turned on the fact that petitioners there were “enemy aliens.” The court of appeals reached this conclusion because of its view that *Eisentrager*’s holding as to federal court jurisdiction was tied to the question of whether the Constitution’s protections themselves applied to particular persons.

According to the D.C. Circuit, it was the Supreme Court’s holding in *Eisentrager* that the Fifth Amendment’s protections themselves have no application to noncitizens who are outside the territorial jurisdiction of the United States that accounted for the Court’s additional holding that federal court jurisdiction to adjudicate due process claims raised by noncitizens outside the U.S. is similarly limited. Quoting from *Eisentrager*, the D.C. Circuit observed that “the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection.”

The D.C. Circuit ruled that plaintiffs could not avoid the bar represented by *Eisentrager* by pleading, as the plaintiffs in *Al Odah* did, for relief under the Administrative Procedure Act or the Alien Torts Statute rather than under the habeas statutes. The court said: “The holding of *Eisentrager*—that the privilege of litigation does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign—dooms these additional causes of action, even if they deal only with the conditions of confinement and do not sound in habeas.”

Like the district court, the court of appeals rejected the idea that the present cases differ from *Eisentrager* insofar as the United States exercises *de facto* control and territorial jurisdiction over Guantanamo Bay. Relying largely on the terms of the Lease Agreement and Treaty between the two nations, the court found that Cuba, not the United States, has sovereignty over Guantanamo for purposes of this analysis.

Judge Randolph, one of the three D.C. Circuit judges on the panel, concurred separately to address

additional grounds for rejecting the non-habeas claims by the *Al Odah* plaintiffs, although he stated his agreement with the panel opinion that *Eisentrager* fully disposes of these claims as well. The petitioners sought rehearing *en banc*, which was denied. The Supreme Court then granted certiorari on November 10, 2003.

CASE ANALYSIS

Petitioners in each case argue that the district court does in fact have jurisdiction over claims of illegal detention in Guantanamo. The petitioners in *Rasul* emphasize the breadth of the habeas statute, which grants federal courts power to review executive detentions “in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241. They argue that nothing in the statute purports to limit jurisdiction based on the nationality or territory in which the detention takes place. They further point out that construing the habeas statute not to apply to the present circumstances would raise a serious constitutional due process question because it would mean that the executive branch could perpetuate “an indefinite, perhaps permanent, deprivation of human liberty without any judicial protection.” The *Rasul* petitioners also argue that denying jurisdiction in the present case would raise serious questions under the so-called Suspension Clause of the Constitution by “denying an entire class of persons access to the writ through Executive fiat.” Invoking the settled interpretive canon that statutes should be read so as to avoid constitutional questions if reasonably possible, and the canon that limitations on habeas review should not be imposed absent a clear intent of Congress to do so, the *Rasul* petitioners advocate a broad reading of § 2241.

Nor, the *Rasul* petitioners argue, should *Johnson v. Eisentrager* be understood as a bar to a broad reading in favor of jurisdiction. In *Eisentrager*, the habeas petitioners had already been convicted by a military tribunal—at which they raised (and had resolved) the same constitutional issues they later urged before the Court. According to the *Rasul* petitioners, the Court in *Eisentrager* did in fact exercise federal court jurisdiction to examine the Germans’ claims—the Court simply denied habeas relief as to those claims. *Eisentrager*, they argue, is “therefore best understood as a restraint on the exercise of habeas, rather than a limitation on the power of federal courts” to entertain habeas claims. That restraint on ultimate habeas relief there has no bearing on the present case, the *Rasul* brief suggests, because petitioners in the present case, unlike those in *Eisentrager*, have not had any judicial process of any kind.

The *Al Odah* petitioners add their own arguments concerning the breadth of other jurisdictional statutes, including the general federal question statute, 28 U.S.C. § 1331. They argue that any decision by the Supreme Court limiting the reach of federal judicial authority more narrowly than the reach of plenary federal executive power “would encourage manipulation by executive officials anxious to avoid having to defend their conduct against charges that it is unwarranted in law or baseless in fact. To erect a categorical geographic boundary beyond which the executive has total power to act but [where] the courts have no jurisdiction to examine that action is to allow the executive itself to decide whether its actions can or cannot be called to account under law.” To permit the highest levels of the executive branch to detain people

without allowing access to “any impartial tribunal to review whether a basis exists” for the detentions would “violate the very essence of the separation of powers that the Constitution’s framers implemented to guard against tyranny.”

The *Al Odah* petitioners also make additional arguments concerning the (non)applicability of *Eisentrager*. Even if the Court in *Eisentrager* is read to have held that the petitioners in that case could not obtain federal court review, that holding should be limited to instances in which petitioners have already been tried and convicted by a duly constituted tribunal established under law. Nothing in *Eisentrager* suggests that aliens who have never been tried or convicted (or even charged for that matter) can be detained indefinitely without a hearing—“just because they are kept outside our borders.” The *Al Odah* petitioners also question *Eisentrager*’s applicability to citizens of countries allied with—as opposed to recently at war with—the United States. Finally, the *Al Odah* brief argues that Guantanamo is not like China; for all practical purposes, Guantanamo is American territory.

The United States in its brief is, quite understandably, relatively content to defend the reasoning of the D.C. Circuit. The solicitor general argues that the “fundamental jurisdictional question presented in this case is governed by this Court’s decision in *Johnson v. Eisentrager*,” a case the government reads to stand both for the idea that federal court jurisdiction is lacking to review claims by noncitizens held outside the United States, and for the idea that the Fifth Amendment does not confer rights on aliens held outside U.S. sovereign territory. Because Cuba, like China and Germany, is outside the sovereign

territory of the United States, the solicitor general argues that *Eisentrager* is squarely on point. Nor, according to the government, does it matter whether the detained prisoners are “enemy aliens.” *Eisentrager*’s reasoning turns on the fact that the habeas petitioners there were aliens, “whether friendly or enemy.” In any event, says the solicitor general, the petitioners in the present case qualify as enemy aliens for any relevant purpose.

If there were any doubt that *Eisentrager* remains good law, the government points out that Congress did not amend the habeas statutes in response to *Eisentrager* and indeed chose not to enact a proposed amendment in the wake of that ruling that would have explicitly conferred federal jurisdiction. Moreover, the government observes that the Supreme Court itself has repeatedly reaffirmed *Eisentrager*’s holding that the Fifth Amendment does not apply to aliens abroad, perhaps most importantly in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). The solicitor general relies on nonjudicial (or rather the lack of judicial) precedent as well, observing that since the 1950s, the United States has detained thousands of aliens abroad in connection with military campaigns, and federal courts have never entertained habeas petitions challenging the detention.

In short, says the solicitor general, “the Constitution commits to the political branches and, in particular, the President, the responsibility for conducting the Nation’s foreign affairs and military operations. Exercising jurisdiction over [petitioners’] claims would place the federal courts in the unprecedented position of micro-managing the Executive’s handling of captured enemy combatants from a distant combat zone where American

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troops are still fighting. ... At the same time, recognizing jurisdiction over petitioners' claims would intrude on Congress' ability to delineate the subject-matter jurisdiction of the federal courts."

SIGNIFICANCE

It seems that there are at least three important and related questions that the Supreme Court may end up touching on in resolving these disputes. First, of course, is whether the federal statutes, particularly the federal habeas statutes, do authorize federal courts to entertain petitioners' claims that they are being denied due process (as well as other rights). Second is the question of whether the Fifth Amendment—or any other part of the Constitution or other law—actually applies to restrict what the federal government can do to persons in this kind of setting. That is, there is the question of whether petitioners have any Fifth Amendment or other rights to assert, in habeas or otherwise. Third, there is the question—assuming the Due Process Clause applies and can be raised in federal court—of what process is "due."

How (and perhaps whether) the Court answers each of these questions depends largely on how it reads the *Eisentrager* case. The opinion for the Court in that case is susceptible of different interpretations. Petitioners in the present cases rely heavily on the fact that the Germans in *Eisentrager* had already been given a military trial provided for under congressional statutes. The *Eisentrager* Court openly deferred to the results of that military trial, perhaps to the point of seeming to rule on the merits of the case. The present petitioners also rely on the fact that the German citizens in *Eisentrager* came from a country with which the United States had very recently been at war—perhaps aliens from those

countries with which we have recently had wars are entitled to lesser constitutional protections. And finally, there is the question whether Guantanamo is, for the relevant purposes, part of United States territory. It is true, of course, that the Treaty between Cuba and the United States vests "ultimate sovereignty" with Cuba. But theoretical sovereignty without any practical means of maintaining order and control may not carry the day. And Cuba seems to have no real control over Guantanamo—Cuba's laws, and its law enforcement mechanisms, have no presence within the American military facilities. By contrast, in *Eisentrager*, the detention and trial took place in China under the explicit approval of the Chinese sovereign.

On the other hand, *Eisentrager* is an opinion whose language is broad, and it is for the most part styled in terms of "jurisdiction." There are passages that seem to make whether the detainee was a citizen from an enemy nation irrelevant in deciding whether someone has the privilege of litigation. And there are also passages that suggest that the Fifth Amendment does not even apply to noncitizens outside the territory of the United States; if that is the case, then having "jurisdiction" to hear the Fifth Amendment claims would result in a prompt dismissal of those claims without any real inquiry into the fairness of the detention in any event. This broad language of *Eisentrager* about the substantive inapplicability of the Constitution abroad has been invoked by the Court before, most famously in *Verdugo-Urquidez*. But that case, too, has facts that might lead the Court to find it distinguishable. The *Verdugo-Urquidez* Court held that U.S. agents operating abroad did not have to respect Fourth Amendment limitations when searching and seiz-

ing noncitizens, but it did not hold that such noncitizens could also be denied due process rights when ultimately detained and tried as defendants.

The government also has going for it the fact that some process *is* being provided the petitioners. The petitioners' briefs point out that no "impartial" body has determined that continued detention is appropriate (for intelligence gathering or other reasons), but the military does have in place a screening and information-gathering mechanism to determine on an individualized basis who should be detained and who should be released. Indeed, dozens of persons have been released, and the government (perhaps moved in part by the grant of certiorari in these litigations) has announced a new review process for each detainee at least once a year. Perhaps such a process is not "impartial" enough to satisfy petitioners—but neither is it no process at all. The Supreme Court *could* rule that it does not need even to resolve the jurisdictional question or the applicability of the Fifth Amendment at all, because in any event the process that the military is providing—albeit entirely within the Department of Defense—is more than that which is "due." Compare *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

Among the most watched cases of the term, these consolidated litigations have evident doctrinal and symbolic importance. How broad the federal jurisdictional statutes are, how completely constitutional limitations follow federal power, and what process is due to individuals detained in a newfangled war against an enemy distinct from any the United States has ever before confronted are obviously momentous legal questions. In addition, the broader institutional messages sent



by the results and the reasoning in these cases—both to the executive branch and to the rest of the world—will no doubt cause the Court’s opinion to be publicized and analyzed for years to come.

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Case at a Glance

Under federal law, state prisoners seeking a writ of federal habeas corpus must show that they “exhausted” all of the remedies available in state court before they turned to the federal courts. In this case, Richard Ford, convicted of first-degree murder and conspiracy, filed two sets of “mixed” federal habeas petitions containing both exhausted and unexhausted claims.



When Must a District Court Dismiss Petitions Containing Both Exhausted and Unexhausted Claims?

by Robert Yates

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Editor’s Note: The respondent’s brief in this case was not available by *PREVIEW*’s deadline.

ISSUES

Is the dismissal of a “mixed” habeas petition improper unless the district court informs the petitioner about the possibility of a stay pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling?

May a second, untimely habeas petition relate back to a first habeas petition if the first habeas petition was dismissed and the first proceeding is no longer pending?

FACTS

Richard Ford, a former Los Angeles police officer, was convicted, with a codefendant, of first-degree murder for financial gain and conspiracy (the *Weed* case); when the jury deadlocked in the penalty phase, the court sentenced Ford to life without the possibility of parole. In a separate trial, the two were also

convicted of conspiracy to commit another murder and related charges (the *Loguercio* case); Ford received a sentence of 36 years to life.

Five days before the expiration of the one-year limitation on filing habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act (AEDPA), Ford filed a petition challenging his conviction in the *Weed* case. At the same time, he filed a motion to stay the petition while he exhausted his state-court remedies on three claims that were not alleged in the habeas petition.

Under federal law, state prisoners seeking a writ of federal habeas corpus must show that they “exhausted” all of the remedies that were available to them in state court before they turned to the federal courts. The magistrate judge in this case ruled that seven of Ford’s 12 claims were unexhausted. The judge denied Ford’s motion to stay the mixed petition but gave him the option of dismissing his unexhausted claims and proceeding on the

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exhausted claims. When Ford failed to respond to the court's inquiry, the court dismissed the petition without prejudice.

On the same day that Ford filed his habeas petition in the *Weed* case, he also filed for habeas relief in the *Loguercio* case. Similarly, he filed a motion to stay, pending the exhaustion of state-court remedies on three unexhausted claims. Again, the magistrate judge found that two of his 11 claims were unexhausted and gave Ford the option of dismissing the unexhausted claims, proceeding on the exhausted claims, or suffering dismissal of the petition. In this case, Ford notified the court that he wished to dismiss the petition without prejudice so that he could proceed in state court.

After the state court denied his petitions on the unexhausted claims, Ford filed second petitions in federal court challenging his convictions in both cases. The district court dismissed the petitions with prejudice as untimely under AEDPA.

The Ninth Circuit vacated the dismissals of the second petitions on three grounds. First, the district court did not "inform Ford that it would not have the power to consider his motions to stay the [first] petitions unless he opted to amend them and dismiss the then-unexhausted claims." Thus, the court held, his decision "to have his timely-filed federal habeas petitions dismissed without prejudice was an uninformed one." Second, the appellate court held that the district court erred by failing to advise Ford "that his federal claims would be time-barred ... upon his return to federal court if he opted to dismiss the petitions 'without prejudice.'" Third, because the dismissals of the first petitions were improper, "the claims that were included in the first petitions and reasserted in the

second petitions were not time-barred under AEDPA, but related back to the initial, timely, filing of the first petitions."

The Supreme Court granted the state's petition for certiorari on January 9, 2004.

CASE ANALYSIS

The petitioner's argument borrows a line from the dissent to the Ninth Circuit's holding, which itself borrowed the line. According to the petitioner, the Ninth Circuit, "boldly going where no court has gone before," ignored the dictates of a 1981 Supreme Court opinion, *Rose v. Lundy*, 455 U.S. 509, that district courts "must dismiss habeas petitions containing both exhausted and unexhausted claims." Instead, the Ninth Circuit now requires courts to give warnings about AEDPA's limitation period before dismissing a mixed petition.

The Ninth Circuit requirements, the petitioner argues, promotes "stay and abeyance," a procedure that allows a mixed petition to be filed, unexhausted claims dismissed, and a stay obtained to exhaust the claims in state court. The now-exhausted claims are then added to the original petition because they are deemed to relate back to the initial filing. Stay and abeyance undermines AEDPA by actually encouraging the filing of mixed petitions and thereby increasing "the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce."

The Ninth Circuit's second major error, Piler says, was to conclude that the relation-back doctrine applies to habeas proceedings. The circuit court relied on Federal Rule 15(c), which, according to the petitioner, did not apply to habeas proceedings at the time of its enactment, because it was very specific-

ly tied to statutes of limitations. The state points out that until the enactment of AEDPA, there were no statutory limitations on habeas proceedings:

No court (other than *Ford*) has ever concluded that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding that was dismissed and is no longer pending. ... The Ninth Circuit's interpretation of the relation-back doctrine is inconsistent with habeas corpus practice and amounts to a subversion of AEDPA's limitation period.

The petitioner cites several cases in support of *Rose v. Lundy's* mandate for dismissal of a mixed petition, all of which lead to *Duncan v. Walker*, 533 U.S. 167 (2001), in which the Supreme Court "reaffirmed those well-settled principles in a post-AEDPA habeas proceeding."

The state quotes from *Duncan*:

The exhaustion requirement [set forth in AEDPA] ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment. ... Tolling the limitation period for a federal habeas petition that is dismissed without prejudice would ... create more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves. We do not believe that Congress designed the statute in this manner.

The state argues that the Ninth Circuit went off on its own, holding "for the first time anywhere" that a dismissal of a mixed petition is improper unless the district court

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informs the habeas petitioner that it does not have the power to consider a stay request unless he amends the petition to dismiss the unexhausted claims. “The advisements required by the Ninth Circuit,” the petitioner says, “are designed to encourage the stay and abeyance of mixed petitions, a procedure that contravenes *Duncan v. Walker* by permitting AEDPA’s limitation period to be tolled during the pendency of a federal habeas proceeding. . . . [S]tay and abeyance runs afoul of this Court’s pronouncements that AEDPA’s limitation period is tolled only during ‘the pursuit of state remedies and not during the pendency of applications for federal review. . . .’ *Duncan v. Walker*, 533 U.S. at 180 (emphasis added).”

In its interpretation of AEDPA’s predecessor statute, 28 U.S.C. § 2254, the Court in *Rose v. Lundy* stated that its interpretation of §§ 2254(b), (c) “provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court.” AEDPA, the petitioner argues, retains the exhaustion requirement of § 2254, specifically prohibiting habeas relief unless the habeas applicant has exhausted all remedies available in state court but departs from its predecessor in establishing a one-year limitation period. In *Duncan v. Walker*, the Court held that AEDPA’s one-year limitation period “quite plainly serves the well-recognized interest in the finality of state court judgments. . . . The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period.”

According to *Duncan v. Walker*, the petitioner says, the design of AEDPA “is consistent with *Rose v. Lundy*’s total exhaustion rule.” Stay and abeyance, on the other hand, is a

means of holding a federal proceeding hostage in favor of unexhausted claims that, under *Rose v. Lundy*, should play no role in federal review.

Stay and abeyance also frustrates the intent of AEDPA’s limitation period, which “contemplates the expeditious resolution of habeas claims.” The petitioner argues that the AEDPA, under *Duncan v. Walker*, does not allow the tolling of the limitation period during the pendency of a federal petition. “Stay and abeyance,” the petitioner argues, “illegitimately affords such tolling by other means.” Citing six Ninth Circuit cases that support its holding in the instant case, the petitioner argues that the circuit’s “practice is designed to bypass the limitation period of AEDPA.” If the Court allows the Ninth Circuit holding to stand, AEDPA’s limitation period would be rendered “virtually irrelevant, and reduce district courts to what one appellate court has aptly described as a ‘jurisdictional parking lot.’”

The second point of the Ninth Circuit ruling was that, because the district court’s dismissals of Ford’s first petitions were improper, the claims that were included in the second set of petitions were not time-barred, but related back to the initial filing date. This, Pliler says, is a misapplication of the relation-back doctrine of Federal Rule 15(c). “The Federal Rules of Civil Procedure (FRCP) do not uniformly apply to habeas cases. Even though habeas corpus proceedings are characterized as ‘civil’ (as opposed to criminal) in nature . . . this Court has observed that such a ‘label is gross and inexact.’ *Harris v. Nelson*, 394 U.S. at 293-94 [1969].”

The *Harris* opinion is closest to the present case, according to the petitioner. In *Harris*, the question was

whether FRCP Rule 33, which relates to the use of interrogatories in civil cases, also applies to habeas proceedings. The *Harris* Court held that habeas proceedings are “unique” and that the “fundamental differences between ordinary civil actions and habeas corpus proceedings dictated that certain discovery tools provided for in the FRCP should not apply in habeas proceedings. . . . Similarly,” Pliler says, “there is nothing in AEDPA, congressional intent, congressional understanding of federal habeas practice, or even Rule 15(c) itself, to suggest that the relation-back doctrine should apply to habeas proceedings.”

Once again, the petitioner turns to the design and intent of AEDPA to demonstrate that the Ninth Circuit’s application of the relation-back doctrine is intended to frustrate AEDPA. Rule 15(c), the petitioner says, applies only to proceedings governed by a statute of limitations; prior to the adoption of AEDPA, there was no statute of limitation for habeas proceedings:

AEDPA’s limitation period serves an entirely different purpose from that of statutes of limitation governing ordinary civil causes of action. The limitation period, and the remainder of the provisions of AEDPA, were designed to prevent federal habeas petitioners from unduly delaying the finality of their state court judgments. . . . [T]he one-year limitation period was enacted for the simple purpose of ensuring that federal habeas corpus cases proceed in a timely fashion.

Coming full circle, the petitioner concludes by arguing that the Ninth Circuit stands alone in its interpretation. “No other court has ever held that an otherwise untimely habeas petition relates back to a prior habeas petition in a proceeding



that was dismissed and is no longer pending. Indeed, at least six other circuit courts of appeals have expressly declined to apply the relation-back doctrine in that manner.”

SIGNIFICANCE

An affirmation of the Ninth Circuit’s opinion would be enormous if it turned out that the state of California is justified in fearing that the Ninth Circuit’s expansion of the relation-back doctrine in effect “nullifies” AEDPA’s limitation period.

ATTORNEYS FOR THE PARTIES

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AMICUS BRIEFS (AS OF MARCH 29, 2004)

In Support of Richard Ford

Federal Defenders in the Ninth Circuit (Mark R. Drozdowski (213) 894-2854)

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Case at a Glance

Carlos Dominguez Benitez bargained for a reduced sentence on a drug conspiracy charge. But the judge did not follow the sentence recommendation and gave Benitez 10 years. Now Benitez claims that because the judge made a mistake by initially failing to tell him he could not later withdraw his guilty plea, the plea and conviction must be vacated even though his lawyer did not object. The Ninth Circuit agreed.



When Is a Violation of Rule 11(e) of the Federal Rules of Criminal Procedure Reversible Error?

by Michael Kaye

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ISSUE

In order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, must a defendant demonstrate that he would not have pleaded guilty if the violation had not occurred?

FACTS

Rule 11 of the Federal Rules of Criminal Procedure, which governs the taking of guilty pleas, was enacted in 1944. At first it was neither lengthy nor detailed and imposed few responsibilities on courts other than the obligation to ensure that the plea was voluntary and that the defendant understood the charge against him. After 1975 and the landmark decision in *Boykin v. Alabama*, 395 U.S. 238, Rule 11 was transformed into a detailed procedure designed to guide judges in taking guilty pleas and to ensure that the pleas were indeed knowing and voluntary and met due process standards. Rule 11(c) now requires the judge to address the defendant personally in open court to deter-

mine that he understands a number of rights and potential penalties.

Rule 11(e) provides rules to prevent abuse of plea bargaining. It has three subsections. Subsection A says the attorney for the government may agree to dismiss other charges. Subsection C says the attorney for the government may agree that a specific sentence or sentencing range is appropriate in the case. Subsection B is more limited. The attorney for the government may only agree to recommend or agree not to oppose the defendant's request for a particular sentence or sentencing range. This recommendation does not bind the sentencing judge.

Rule 11(e)(2) states: "If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea." This subsection recognizes that in those cases (under subsection B) in which the govern-

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ment only agrees to make a non-binding recommendation, the defendant faces a greater risk when pleading guilty.

Later, when a defendant challenged or sought to withdraw his guilty plea because the court failed to comply with Rule 11 procedures, courts differed on the availability of relief. Some courts took the view that automatic reversal of the judgment was required and other courts took a “harmless error” approach when it appeared that the deviation from the rules had no impact on the defendant’s decision to plead or the fairness of holding him to the plea.

Rule 11(h) now incorporates the harmless error standard into Rule 11. Recently, in *United States v. Vonn*, 535 U.S. 55 (2002), the Court held that *unobjected-to error* in a trial court’s guilty plea colloquy was reversible only upon a showing that the error affected the defendant’s substantial rights. In making that determination, the reviewing court could look beyond the guilty plea colloquy and canvass the whole record.

In this case, the district court did not advise the defendant when he entered his “section B” plea that he could not withdraw the plea if the sentencing judge decided not to follow the terms of his plea bargain with the government. The judge sentenced him to a lengthier sentence than he had bargained for, and his court-appointed lawyer, whom the defendant had repeatedly sought to discharge over a disagreement on the disposition of the case, did not object.

On appeal, the Ninth Circuit Court of Appeals held that failure to advise the petitioner before his guilty plea that he could not later withdraw that plea affected his substantial

rights and amounted to plain error. The Ninth Circuit reversed the conviction and sentence of 120 months in prison.

The events leading up to that point began in 1999, when Carlos Dominguez Benitez agreed to sell several pounds of methamphetamine to a confidential informant working with the police. Benitez met with the informant and provided him a sample of the drug. The informant then agreed to buy a larger quantity. This meeting was overheard by the police. Later, Benitez and two codefendants went to a restaurant where the drugs were to be delivered and met the informant. Benitez and one of his codefendants entered the informant’s car. The codefendant was carrying the methamphetamine in a shopping bag. On a signal from the informant, surveillance officers arrested both suspects and found more than a kilogram of methamphetamine inside the bag.

Following his arrest, Benitez admitted to the police that he had sold methamphetamine to the informant on two occasions, and he told them where he had obtained the drugs. He also told them about his role and the role of the codefendants in the illegal transactions.

Benitez and his codefendants were indicted for conspiracy to possess with intent to distribute more than 500 grams of methamphetamine, a violation of 21 U.S.C. §§ 846 and 841(a), and also for possession with intent to distribute a substance containing methamphetamine, a violation of 21 U.S.C. § 841(a). Benitez faced a possible sentence of a mandatory minimum of 10 years and a maximum sentence of life in prison. A deputy federal defender was appointed to represent him.

Approximately six weeks before the trial was to begin, Benitez requested that the court assign him new counsel. In his letter to the court, he disclosed that his lawyer was encouraging him to accept a plea bargain that he did not want. Later, at a status conference, through a Spanish language interpreter, Benitez told the district judge that he was seeking a “better deal” and further that he wished to settle the case without trial. His lawyer confirmed that Benitez did not wish to go to trial. The request for new counsel was denied.

Less than a week later, Benitez appeared again in district court before the same district judge and requested permission to change his plea to guilty. He was represented by the same deputy federal defender and had the assistance of a Spanish interpreter. The district judge then questioned Benitez before accepting his plea to determine whether it was knowing and voluntary. Benitez told her that he could neither read nor write English and that he did not speak English. In Mexico, he had received an eighth-grade education and he read and wrote Spanish. He was seeking a GED degree while in government custody.

The judge went over the plea agreement concluded between the government and Benitez. She asked him whether he understood the terms of the agreement and whether he had signed it. She questioned him about the penalties, particularly the so-called “safety valve exception.” The safety valve exception requires a sentencing court to impose a reduced sentence, in accord with the applicable sentencing guidelines and without regard to any statutory minimum sentence, if certain criteria are met, including a limited criminal history (one “history point” is allowed). In this case,

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that exception would make a significant difference because otherwise the statutory minimum sentence is 10 years.

The judge discussed Benitez's understanding of the penalties he faced, their mandatory nature, and the possibility of a safety valve exception:

THE COURT: In the next section of the plea agreement, there is a discussion about the penalties that you face. You are reminded that absent a determination by the Court that your case satisfies the criteria, which apparently would be a safety valve exception, there is a mandatory minimum sentence that the Court must give you, which is ten years of imprisonment, followed by a five-year period of supervised release. Do you understand the mandatory nature of the sentence the Court must impose as stated in paragraph 4?

THE DEFENDANT: Yes.

THE COURT: And at this point, has anyone promised you that you will in fact qualify for the so-called safety valve exception?

THE DEFENDANT: No.

THE COURT: So you realize the Court may give you a ten-year sentence or more, as provided for by law?

THE DEFENDANT: Yes.

THE COURT: Knowing that, do you still want to go forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: You must realize that the statutory maximum sentence provided for by law is actually as much as life imprisonment, a fine of up to \$4 million, and a mandatory special assessment, which is required and that is in the sum of \$100. Do you understand the maximum penalties provided for by law?

THE DEFENDANT: Yes.

THE COURT: And knowing those

consequences, do you still wish to go forward with your guilty plea?

THE DEFENDANT: Yes.

THE COURT: Mr. Wilke, is there some reason to believe that this defendant will in fact qualify for the safety valve calculation?

MR. WILKE: Yes, your Honor, there is.

THE COURT: But you've told him that is still subject to the Court's determination?

MR. WILKE: Yes, your Honor.

Later during the plea colloquy, the judge again referred to the plea agreement. She asked Benitez if he understood that any discussions between defense counsel and the prosecution about sentencing factors, including the safety valve provision, were not binding on the probation officer or the court when the time came to fix a proper sentence. Benitez said yes. The judge also reviewed the safety valve factors, noting that there was no agreement about Benitez's criminal history or criminal history category. She again reminded him that stipulations by counsel regarding these matters were not binding on the court. Finally, at the end of the hearing, the judge asked the government whether it was fairly likely that the defendant would qualify for the safety valve exception. The prosecutor replied, "I think it's possible that he may qualify."

The district judge also told Benitez that paragraph 19 of the plea agreement outlined the circumstances under which he would or would not be able to withdraw his guilty plea. However, she did not comply with the requirements of Rule 11(e)(2) of the Federal Rules of Criminal Procedure by explicitly telling him that he could not withdraw his plea if the court did not accept the parties' sentencing recommendations. Benitez's lawyer did not object to

the omission. The district judge then concluded that Benitez understood the rights he was giving up and that his guilty plea was free and voluntary.

Benitez appeared for sentencing on January 31, 2000, represented by counsel and with a Spanish interpreter. The court asked Benitez if he wished a continuance to review the presentence investigation report since he had not had the required 35 days to review it. Benitez said he wanted more time and again stated that he was not satisfied with the help that he had received from his lawyer. He also submitted a letter to the court complaining about the lack of assistance he had received from his lawyer. In the letter he asked for a postponement of sentencing and a new lawyer. The matter was continued until March 13, 2000.

Benitez's counsel told the court that a sentence of 120 months, which was the mandatory minimum sentence and the middle of the applicable guideline range, was the appropriate sentence. He also told the court that Benitez was not satisfied with his legal representation. Benitez had entered into a plea agreement with an expectation that he would at least be eligible for a sentence below the mandatory minimum. When he found out, upon receipt of the presentence report, that the safety valve sentence was not available, there was a further breakdown in the attorney-client relationship.

Counsel informed the court that the parties thought that Benitez would qualify for the safety valve exception and that this sentence was more than he had expected. He said that the parties had stipulated as part of the plea agreement the safety valve application or "at least a safety valve factor." However, appli-



cation of the safety valve “factor” turned out not to be appropriate in light of Benitez’s criminal history.

When asked if he wished to address the court, Benitez told her that he never had any knowledge about the “points of responsibility” or the safety valve and that he felt he had never received proper representation. He said he had accepted responsibility, and he also claimed that he had not hidden his criminal history from his lawyer. He had wanted to meet with a government agent, but his lawyer had not permitted it. He acknowledged that he had been in a state diversion program (interrupted by the arrest in this case) and that he might have been solicited to commit the crime for which he had pled guilty.

The court asked Benitez whether he was saying that the court, his counsel, and the prosecutor should have known that Benitez would not qualify for the safety valve exception. He responded that it was never explained to him. The court said she had explained that he might qualify for the safety valve exception and that Benitez’s complaint was apparently about his displeasure with his attorney and the way the case had come out. Benitez agreed. He again stated that he did not have enough communication with his counsel even though he accepted responsibility for the commission of the crime.

In further discussions on the record, the prosecutor explained that the parties had been aware of the diversion shortly before the guilty plea was entered and were concerned about the effect that would have on the safety valve. That was discussed with counsel. However, the probation report disclosed other offenses unrelated to the diversion. Criminal history points based on these offenses eliminated the safety valve

exception option. These convictions were in other names than Benitez. The court then sentenced Benitez to 120 months in accord with the plea bargain and dismissed the second count.

A divided Ninth Circuit held that the district court’s failure to advise Benitez before he entered his guilty plea that he could not withdraw his plea at a later time affected Benitez’s substantial rights and was plain error. The case was reversed and remanded.

The court of appeals found that Benitez did not understand his rights before he entered his guilty plea even though he had signed a written plea agreement expressly warning him that he would be unable to withdraw the plea if the court did not sentence him according to its terms. Benitez was unable to read the agreement, although it was read to him in Spanish, and he was never informed in open court that he could not withdraw his plea if he failed to receive the benefit of the plea bargain.

The court noted that because plea agreements such as Benitez’s embody a high degree of risk to the defendant, the court must advise the defendant that if the court does not accept the recommendation or request, the defendant has no right to withdraw the plea.

The Ninth Circuit construed Fed.R. Crim.P. 11(e)(2) as permitting reversal for plain error when the error is not “merely technical” or if the defendant did not understand his rights when he entered his plea.

The government then sought certiorari from the Supreme Court.

CASE ANALYSIS

In this case, neither side disputes that there was error during the plea

colloquy and that it was “plain error.” But was it reversible plain error?

Benitez says it was. He claims his guilty plea was neither intelligent nor voluntary because he was not advised in open court, as required, that he could not withdraw his plea if he did not receive the sentence he bargained for. But the government contends that a defendant cannot demonstrate reversible plain error, if, upon raising his Rule 11 error claim on appeal for the first time, he fails to show that he would have persisted in a plea of not guilty if he had received the advice omitted by the district court.

The parties differ sharply on the correct legal standard for overturning a guilty plea based on a Rule 11 violation. They agree that the error must have had a prejudicial effect on the defendant’s substantial rights. But according to the government, an error affects substantial rights and is prejudicial under Rule 11 only if it affects the defendant’s decision to plead guilty. The error does not affect the defendant’s substantial rights unless it affects the outcome of the case, even if the defendant was unaware of the omitted advice. Thus, defendants who disclose that they are determined to plead guilty, or who have received a significantly reduced sentence in exchange for their plea, or who were confronting such a strong prosecution case that there was little chance they could have pursued a successful trial, cannot prove prejudice to their substantial rights.

In contrast, the Ninth Circuit’s test for reversible plain error under Rule 11 requires the defendant to prove that the court’s error was not minor or technical, or that he did not understand the rights at issue when he entered his guilty plea. Thus, in this case, the appeals court concluded

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ed that the failure to advise Benitez that his guilty plea could not be withdrawn was neither minor nor technical since the sentence he received was substantially higher than the sentence he thought he would get under the plea bargain. Moreover, reading him the plea agreement in Spanish shortly before the entry of plea did not cure the district court's failure to observe Rule 11's requirements or assure that, in the hurried atmosphere of the courtroom, he understood his rights.

But this standard, the government says, is wrong and in conflict with the Court's previous decisions. The government relies on *United States v. Olano*, 507 U.S. 725 (1993). In *Olano*, the Court held that the required prejudice that must be shown under the plain-error rule of Fed.R. Crim.P. 52(b) is prejudice that must have affected the outcome of district court proceedings. Examples of nonprejudicial errors include grand jury proceedings in which the error had no effect on the decision to indict, trial errors that did not influence the verdict, or sentencing errors that did not influence the sentencing court's selection of the proper sentence.

In the Benitez case, the Court will have its first opportunity to apply the *Olano* standard to guilty pleas. However, the Court's decision might be foreshadowed by *Hill v. Lockhart*, 474 U.S. 52 (1985), where, in assessing defense counsel's performance in representing a client who pled guilty, the Court held that the question was whether, but for counsel's errors, the defendant would have pled not guilty and gone to trial.

A number of cases, the government observes, have recognized that even when defendants are unaware of information omitted from a Rule 11

colloquy, there are circumstances in which no substantial rights are violated. Examples include cases in which after becoming aware of Rule 11 information, the defendant did not seek to withdraw his guilty plea, and cases in which the defendant was intent on pleading guilty, or received a significant reduction in sentence in exchange for his guilty plea, or faced a great risk of a lengthier sentence at trial.

Finally, the government argues that it would be an abuse of discretion for the court to reverse in this case because the error would not seriously affect the fairness, integrity, or public reputation of judicial proceedings or result in a miscarriage of justice. The defendant is not claiming actual innocence of the charge. There can be no miscarriage of justice when, as in this case, the defendant does not contend that if he had been properly advised by the trial judge, he would not have pled guilty. To hold otherwise would "elevate minor flaws over substantial justice."

On the facts of this case, the government insists that, even if the written plea agreement is not considered, there is proof that Benitez would have abandoned his "not guilty" plea even if he had received the omitted Rule 11 advice. Benitez did not attempt to withdraw his guilty plea and he did not state that he wanted a trial. He actually said that he did not want a trial. And, even without application of the safety valve exception, Benitez had a substantial incentive to plead guilty and avoid a lengthier sentence. Had he gone to trial, the case against him appeared strong. Moreover, the district judge had told him, before he pled guilty, that she was not bound by the sentencing agreement and that he could be facing a minimum mandatory 10-year sentence.

According to respondent Benitez, however, the Ninth Circuit did not adopt a new standard for "reversible plain error" but merely applied the standard of *United States v. Olano*: plain error that affected substantial rights. He claims there is no bright line "but for" test for reversible plain error requiring that the defendant would not have pled guilty but for the error. When the court of appeals characterized the outcome-affecting error in this case—an increase of 12 to 33 months—as neither minor nor technical, it accurately described the impact of the error. The appeals court was also correct in concluding that the error was substantial when it found that the defendant did not understand the rights at issue when he entered his guilty plea. The appeals court ruling not only followed the *Olano* test but also ensured that guilty pleas must be made knowingly and voluntarily and with full knowledge of the consequences. This reflects fundamental constitutional principles as well as the intent of the drafters of Rule 11.

According to Benitez, the government's definition of reversible error is too narrow to satisfy constitutional requirements. The government ignores dictum in *Olano* that there may be a special category of errors that can be corrected regardless of their effect on the outcome of the case. An example of such an error, says Benitez, is the case in which the defendant is actually unaware of the right accorded him under Rule 11 to be informed, in open court, that he has entered into a plea agreement from which he cannot withdraw even if the court decides not to follow the recommendations in the agreement. That is the very case we have here, even though the written plea agreement contained the information omitted by the judge in her colloquy with him.



SIGNIFICANCE

Following soon after *United States v. Vonn*, which recognized the application of plain error analysis to Rule 11 errors and expanded review to the entire court record, this case is important because it will more precisely define the elements of plain error review. It will tell us, among other things, whether a defendant whose lawyer sits silent when a judge omits required advice during the plea colloquy must establish that he would have maintained his plea of not guilty if he had been advised that he could not later withdraw his guilty plea.

The Court will also address what appears to be a conflict among the circuits applying plain error review, for example, between the “non-minor and technical” test and the “unaware of the omitted information” test of the Ninth Circuit or the Eleventh Circuit’s *per se* reversal rule when the district court does not address a “core concern,” such as awareness of direct consequences, freedom from coercion, or understanding of the charges. And the Supreme Court in this case will, for the first time, apply *Olano* and *Vonn* to guilty pleas.

No matter what its outcome, the case will focus attention on the guilty-plea process in the era since *Boykin* and on whether that hallowed case has been followed or eroded as sentencing and plea bargaining have become more complicated and arcane. In *Boykin*, Justice Douglas wrote:

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a

record adequate for any review that may be later sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Reading the record in this case, the justices will see that the district court was patient and attentive whenever the defendant was before her. While she clearly erred in failing to tell him that because of the type of plea agreement he had made, he would lose the option to move to withdraw his guilty plea, she also reminded him of the statutory minimum, discussed the safety valve exception with him, and reminded him that she was not bound by the terms of the plea agreement that contained a sentence that his lawyer openly supported at sentencing.

Benitez neither speaks nor writes English and had to depend on interpreters and his court-appointed public defender. Should the defendant’s ethnicity be considered in assessing the risks he faced during the plea colloquy? The Ninth Circuit held that including the important, but omitted information in a plea agreement that his lawyer would explain to him through an interpreter was no substitute for a judge’s oral explanation in open court. Would reversal in these circumstances increase the incentive of judges to rigidly follow the requirements of Rule 11?

This is an especially important question given Benitez’s complaints to the court about his dissatisfaction with his public defender. Even though he did not establish grounds for appointment of new counsel, Benitez made it clear to the trial court that throughout the process he was in conflict with his counsel. Given this, the court had to be particularly clear in explaining to this defendant the terms and conse-

quences of the plea agreement. Proper explanation of these matters could not be left to counsel.

It may be significant that the government sought certiorari review on the question whether a court of appeals may consider the terms of a written plea agreement in determining whether a Rule 11 violation constitutes reversible error. However, also significantly, the grant of certiorari was limited to whether the defendant must demonstrate that he would not have pled guilty if the violation had not occurred.

McCarthy v. United States, 394 U.S.459 (1969), a case discussed by both sides in this appeal, has been broadly read by some courts to require automatic reversal whenever a defendant’s conviction was not obtained by full adherence to Rule 11 procedures. Now, as the Court ponders the extent of prejudice to Benitez in this case, the justices may also wonder to what extent *Boykin* still matters, and whether the current system under Rule 11 better protects defendants’ rights and conserves judicial resources than does the automatic reversal rule of *McCarthy*.

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Case at a Glance

In this case, the Supreme Court will resolve a circuit split regarding whether pension plans can expand the circumstances in which pension payments may be suspended following reemployment.

Disagreeing with the Fifth and Sixth Circuits, the Seventh Circuit held that such an expanded definition violates ERISA's "anti-cutback" rule.

Can Pension Plan Amendments Expand the Circumstances in Which Pension Benefits Are "Suspended"?

by Michael J. Collins

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The "anti-cutback" rule under the Employee Retirement Income Security Act (ERISA) prohibits any amendment to a pension plan that would reduce a plan participant's accrued benefit or would eliminate or reduce an early retirement subsidy or an early retirement benefit. However, ERISA permits plans to "suspend" pension payments to plan participants who are reemployed in specified circumstances. In *Heinz et al. v. Central Laborers' Pension Fund*, the Seventh Circuit held that a plan amendment that retroactively expands the circumstances in which benefits are suspended violates the anti-cutback rule. The Supreme Court agreed to hear the case to resolve a circuit split.

ISSUE

Does ERISA's anti-cutback rule prohibit a pension plan amendment that expands the circumstances in which pensioners' benefit payments are suspended?

FACTS

The Central Laborers' Pension Fund (Fund) is a collectively bargained "multiemployer" plan that primarily covers construction workers in central Illinois. Unlike pension plans maintained by single employers, multiemployer plans permit employees who perform covered services in a specified industry to continue accruing benefits under the plan while employed by any employer that contributes to the plan. Multiemployer plans are especially common in industries such as the construction industry in which union members tend to work for many employers over the course of their careers. Employers contribute to multiemployer plans at rates specified in collective bargaining agreements, and the plans are administered by boards that consist of equal numbers of trustees appointed by the employers and the union.

*CENTRAL LABORERS' PENSION
FUND V. HEINZ ET AL.*
DOCKET NO. 02-891

ARGUMENT DATE:
APRIL 19, 2004
FROM: THE SEVENTH CIRCUIT





Thomas E. Heinz and Richard J. Schmitt, Jr. are participants in the Fund. Both Heinz and Schmitt “retired” at age 39 and began collecting benefits from the Fund at that time. At the time they retired, the Fund provided that benefit payments would be suspended if they worked “in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classifications where contributions are to be made to the Fund.” Heinz and Schmitt both obtained jobs as supervisors in the construction industry. Because that employment did not fall under the definition under which benefits were suspended, they continued to receive uninterrupted pension benefits from the Fund.

However, in 1998, the trustees amended the Fund to expand the situations in which pension benefits would be suspended. The new definition included working “in any capacity in the construction industry (either as a union or a non-union construction worker).” The supervisory work performed by Heinz and Schmitt was covered by this expanded definition, and their pension benefits were therefore suspended.

The two plaintiffs then sued the Fund, alleging that the amendment violated ERISA’s anti-cutback rule. The district court relied on *Spacek v. Maritime Ass’n*, 134 F.3d 283 (5th Cir. 1998), which upheld a basically identical amendment from an ERISA challenge, and granted summary judgment to the Fund. On appeal, the Seventh Circuit reversed, holding that the Fund’s expansion of the situations in which benefits are suspended did violate the anti-cutback rule. The Supreme Court then granted certiorari to resolve this circuit split.

CASE ANALYSIS

When Congress enacted ERISA in 1974, it wanted to ensure that once pension benefits are promised, they cannot be taken away. The anti-cutback rule in section 204(g) of ERISA therefore provides that a participant’s accrued benefit (i.e., the monthly retirement benefit promised under the plan) may not be retroactively reduced by a plan amendment. For example, if a pension plan promised a monthly benefit commencing at age 60 equal to the product of \$20 and a participant’s years of service with the employer, an amendment that attempted to retroactively reduce this formula to \$15 times a participant’s years of service would violate the anti-cutback rule.

Congress expanded the anti-cutback rule in 1984 in response to several court decisions. Specifically, the anti-cutback rule was expanded to cover reductions or eliminations of early retirement benefits or retirement-type subsidies. Using the example in the paragraph above, a pension plan could provide that a participant could commence benefits earlier than age 60, but that such benefits would be actuarially adjusted to reflect the earlier pension commencement date. The reason that the plan might impose an actuarial reduction is that a monthly benefit of a set amount commencing at an earlier age has a higher “present value” than a monthly benefit of the same amount commencing at a later age. For example, a participant who is entitled to a benefit of \$250 a month beginning at age 60 might only be entitled to a benefit of \$220 a month if the benefit were to start at age 58. From an actuarial point of view, these benefits would be approximately the same.

The suspension of benefits rules in § 203(a) of ERISA provides one of the few situations in which ERISA permits benefits to be reduced or suspended once payment of the benefits commences. Under those rules, a plan may (but is not required to) suspend (i.e., stop) a participant’s benefits if the participant is reemployed in “disqualifying employment.” With respect to multiemployer plans such as the Fund, such a suspension is permitted if the participant resumes work in a job “in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced,” and only until the participant stops engaging in the disqualifying employment.

This case involves the interaction of the anti-cutback rule and the suspension of benefits rule. In effect, at the time Heinz and Schmitt accrued their benefits under the Fund (and when they retired), the Fund employed a less restrictive definition of disqualifying employment than it could have. After they began receiving benefits, the Fund’s trustees amended the definition (still including only situations permitted by the suspension of benefits rule) in a way that had the effect of suspending their benefits. If the rule adopted by the trustees in 1998 had always been in place, there would not be any dispute here. The issue then is whether the anti-cutback rule effectively “locks in” a plan’s criteria for suspending benefits or, alternatively, whether plans can be amended at any time to change the definition (subject, of course, to the requirement that the new definition remain consistent with the statutory limitations on when benefits can be suspended).

The Fund makes several arguments in favor of its interpretation that the

(Continued on Page 432)



anti-cutback rule does not affect its ability to retroactively change the situations in which it suspends benefits. First, the Department of Labor and the Internal Revenue Service (the two agencies responsible for interpreting the anti-cutback and suspension of benefits rules) have consistently allowed such amendments to pension plans, and such interpretations should be given deference. In this regard, the United States filed a brief supporting the Fund's petition for certiorari and its legal position. Second, § 203(a) of ERISA, which permits suspension of benefits, does not by its terms limit retroactive amendments. Third, Congress's purpose in allowing suspensions of benefits was to allow pension plans the discretion to suspend benefits for employees who receive income from specified sources, and disallowing plans from retroactively changing the situations when benefits may be suspended would defeat congressional intent. Fourth, the plain language of the anti-cutback rules addresses "reductions" and "eliminations" of benefits; if Congress wanted to include suspensions of benefits, it would have explicitly so stated. Finally, the legislative history of the statute supports the Fund's position.

Heinz and Schmitt make a number of counterarguments. First, they allege that the suspension of benefits exception is not even applicable in this case under a technical reading of that rule, so the application of the anti-cutback rule is not defeated by this provision of ERISA.

However, given that the Seventh Circuit noted that both parties conceded the applicability of the suspension of benefits rule, it is not clear whether the Court will find this argument persuasive. Second, the intent behind the anti-cutback rule set forth in § 204(g) of ERISA mandates the result reached by the

Seventh Circuit. Allowing retroactive changes would defeat congressional intent, which was to allow employees to know with certainty what their pension benefits will be at the time they retire. Third, the anti-cutback rule by its terms protects all of the "terms and conditions" that determine the value of pension benefits, and the situations in which benefits may be suspended are such a "term or condition" of those benefits. Fourth, although the suspension of benefits rule allows a plan to suspend benefits in specified circumstances, it does not purport to authorize a plan to retroactively expand those circumstances.

SIGNIFICANCE

A decision upholding the Seventh Circuit would substantially impact many multiemployer plans as well as some plans maintained by single employers. Relying on the Internal Revenue Service's and Department of Labor's interpretation of this issue, as well as on previous cases, plans have long assumed that the circumstances in which benefits are suspended may be modified at any time with retroactive effect.

For example, when plans can easily afford paying larger benefits—after, say, significant stock market gains—a narrow definition of the circumstances in which benefits are suspended may be imposed. In those circumstances, continuing to pay benefits to reemployed plan participants does not place a strain on the plan.

On the other hand, plans are often amended to expand the circumstances when benefits are suspended if plan funding is below expectations. For example, plans may be amended in this regard after a stock market decline or after a number of important employers "withdraw" from the plan and no longer are

required to contribute. In fact, concern about the financial status of the Fund is what caused its trustees in this case to expand the situations in which benefits are suspended.

Another possible result of a decision in favor of the plaintiffs would be that plans would simply always apply the most restrictive possible definition of disqualifying employment. That way, the plan would always be protected to the maximum extent possible from having to pay benefits to reemployed individuals at times when the plan can least afford to do so. Such a result may be an unintended consequence of the plaintiffs' desired rule.

A decision in favor of the Fund would simply confirm what has long been assumed by most plans, employers, and practitioners. Thus, a reversal of the Seventh Circuit's holding would put things back where they were before that decision was issued.

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Burdens/Standards of Proof —

As a general matter, the party in a lawsuit asserting a claim or defense has the burden of presenting evidence that establishes the claim or defense. This is known as the burden of proof.

There are three burdens of proof. From the least to the most demanding, they are the preponderance-of-the-evidence burden of proof; the clear-and-convincing burden of proof; and the beyond-a-reasonable-doubt burden of proof. The first two burdens can apply in either criminal or civil cases, while the third applies only in criminal cases and then only to the prosecution.

There are no ready definitions for these burdens. There are, however, working definitions. Under the preponderance standard, the party with the burden of proof is required to come forward with credible evidence establishing that a claim or defense is more likely true than not. Under the clear-and-convincing standard, the party with the burden of proof is expected to present evidence establishing that the claim or defense is quite likely true. Under the beyond-a-reasonable doubt standard, the prosecution must present such evidence of the defendant's guilt that a reasonable person would not hesitate to find the defendant guilty. See *Victor v. Nebraska*, 114 S. Ct. 1239 (1994).

Class Action Lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff's lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the

plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff's and the defendant's side of the case constitute a class.)

Collateral review (see also habeas corpus) — Collateral review is the criminal law's fail-safe mechanism. It is intended to ensure that a conviction and sentence satisfy the requirements imposed by law, constitutional and statutory. As its name suggests, collateral review looks at a convicted defendant's trial and in some cases the sentencing proceeding; it is not, however, a second trial. As a general rule, collateral review is limited to issues of law.

To be eligible for collateral review, the petitioning party must be in custody at the time the process begins. Typically but not necessarily, custody means imprisonment. For those convicted of state-law crimes, collateral review is available under state law and federal law, the latter in the form of a petition for a writ of habeas corpus. As a general rule, state-law petitioners must exhaust all avenues of collateral review under state law before filing a federal habeas corpus petition. For federal-law petitioners, federal habeas corpus review is available after certain post-conviction avenues such as a motion to vacate a conviction or sentence have been exhausted.

For both state-law and federal-law petitioners, federal habeas corpus review begins in a trial-level court but in the collateral-review context, the trial court functions as a reviewing court. However, if the federal habeas corpus petitioner is unsuccessful in habeas court, he or she is permitted, within limiting procedural rules, to seek further review of the habeas court's

decision in the appropriate intermediate federal appeals court and if unsuccessful there, in the Supreme Court.

Damages — In law, damages means money given to a party whose legal interests have been injured. While there are several types of damages that can be given to an injured party, two of the most prominent types are compensatory damages and punitive damages.

An award of *compensatory damages* is a sum of money intended to make the injured party whole, insofar as this is possible. An award of *punitive damages* is intended to punish the wrongdoer in order to deter future wrongdoing. Usually, punitive damages go to the injured party and are over and above any award of compensatory damages. However, in some states, a portion of any punitive damages award goes to the state treasury.

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court's disposition of his or her case — including issues of law, issues of fact, issues concerning the trial judge's use of discretion.

If the first appeal is resolved against the convicted defendant, appellate rules permit the defendant to seek discretionary review by still higher courts, generally by the highest court of the convicting state and then by the United States Supreme Court. (In federal criminal cases, the convicted defendant's initial appeal as a matter of right is to a circuit court of appeals and then as a matter of discretion to the Supreme Court.) If these courts decline to hear the defendant's case, hear the case but decide against the defendant, or if the

defendant defaults on his or her right to seek discretionary review, the direct review process ends and it is said that the defendant's conviction and sentence are final. At this point, the only avenue of relief from a conviction or sentence — retrial, resentencing, or outright release — is collateral review defined above.

Discovery — Discovery is a pretrial device in which each party to a lawsuit seeks information from the other party as well as from non-parties believed to have knowledge relevant to the issues in the case. The plaintiff seeks information through discovery to make his or her case; the defendant seeks information to support any defenses that may be available.

Diversity — This term is used whenever a federal court has jurisdiction over a case that does not involve a question of federal law. While there are several types of diversity jurisdiction, the most common type has two requirements: (1) the plaintiff and the defendant are residents of different states; (2) the dollar amount of the dispute between the parties is at least \$75,000, exclusive of interest and costs.

Habeas corpus — Under the federal habeas corpus statute, 28 U.S.C. §2254 (1994), a person held in state/local custody who believes that his or her custody violates federal law — typically, the Constitution — may challenge that custody by filing a petition for a writ (i.e., an order) of habeas corpus in federal district court. If the petitioner wins, he or she must be released or retried, at the option of the prosecuting authority.

In banc — *In banc* (sometimes spelled *en banc*) literally means “full bench.” The term applies to those courts — typically, intermediate appellate courts — in which more than one judge, but less than all judges of the court, hears a case. As a general rule, when an appellate court sits *in banc*, all

active judges sit. However, in the federal system, some circuit courts of appeals have so many active judges, e.g., the Ninth Circuit with 28 judges, that sitting literally *in banc* is not feasible. Thus, for those circuits with 15 or more active judges, the size of an *in banc* court is set by circuit rule. Currently, *in banc* courts in the Fourth, Fifth, Sixth, and Ninth Circuits are composed of fewer than the entire court, with the exact number varying by circuit according to circuit rule.

Per curiam opinion — This term literally means “the opinion of the court,” the Supreme Court or any appellate court. Because the opinion is the court's opinion, there is no indication of which justice/judge wrote it.

Plurality opinion — This term denotes an opinion of the United States Supreme Court in which there is no majority opinion; that is, fewer than a bare majority of five justices were able to agree on the legal basis for the Court's action in affirming, reversing, or vacating a lower court decision.

In some cases, the Court's opinion can be a *partial plurality opinion*. A partial plurality opinion is one in which at least one part of the opinion represents the views of four or fewer Justices. For an example of a partial plurality opinion, see *Hubbard v. United States*, 115 S. Ct. 1754 (1995) (Parts IV and V, a plurality of three Justices; Parts I, II, III, and VI, a majority of six Justices).

Preemption — Under the Supremacy Clause, U.S. CONST. art. VI, § 2, federal law — whether based on the Constitution, a statute, or a treaty — takes precedence over state or local law on the same matter. In other words, if federal law addresses a matter, either expressly or by implication, it trumps and renders unenforceable any state or local law on the matter.

Qualified Immunity — Qualified immunity is a defense that can be raised by a government employee whenever there is uncertainty about the lawfulness or unlawfulness of certain actions taken by the employee, actions claimed by the plaintiff to be unlawful. A government employee can avoid a trial under this defense if the employee can show that, at the time of the complained-of action, he or she could not have known that it violated the law.

Strict scrutiny — Strict scrutiny is a searching level of judicial review applied to governmental actions — federal, state, and local — challenged as unconstitutional. Strict scrutiny requires the governmental actor to show that it had a compelling reason to take the challenged action and that the action taken goes no further than necessary — is narrowly tailored — to advance the cited compelling reason.

Summary judgment — This is the name of a procedural device available to either party to a civil lawsuit that enables one or the other party to win without a trial. A party seeking summary judgment is entitled to a judgment in its favor if there is no genuine dispute about the pertinent facts, and, based on those undisputed facts, the law compels a judgment for the party who has asked for a favorable ruling.

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