DEPARTMENT OF REVENUE V. DAVIS AND DAVIS

In this case, Kentucky taxpayers argue that the state violates the Commerce Clause when it taxes the interest income from bonds issued by states other than Kentucky while not taxing income from bonds issued by Kentucky. The Kentucky Court of Appeals agreed with the taxpayers. The U.S. Supreme Court will now review that ruling, which if upheld, would have significant consequences on the national market for bonds.

UNITED STATES V. WILLIAMS

In 2002, the Supreme Court struck down two provisions of a federal child-pornography law, one of which criminalized the promotion or advertising of such material. Congress responded with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. The anti-pandering provision of this new law prohibit the knowing advertising, promotion, distribution, or solicitation of material in a manner that “reflects the belief, or that is intended to cause another to believe” that the material is actual child pornography. A defendant prosecuted under this provision now claims that it violates the First Amendment as well.

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The 2007–2008 volume is Volume # 35, the 1972–1973 term, the first term that the ABA published PREVIEW, being identified retroactively as Volume #1.

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The American Bar Association is a not-for-profit corporation.
The Federal Torts Claim Act (FTCA) authorizes certain claims to be brought against the United States despite its sovereign immunity. In this case, the Supreme Court will decide whether Congress intended for the United States to be exempt from liability under the FTCA when a correctional officer illegally takes, loses, or damages a prisoner’s property.

Many a forest has been felled to produce the paper through which battles are waged about the meaning of a statute. For those of us who know “plain English” gurus whose life’s purpose is to bring clarity to legal writing, these endless and often avoidable battles can spawn frustration and the question: Why wasn’t this statute vetted thoroughly by such an accomplished wordsmith before its enactment? Perhaps in this case currently before the Supreme Court, and certainly in others in which courts struggle to construe the meaning of a statute, exasperated judges must mull this question to themselves and their colleagues.

ISSUE
Does the exemption from liability under the FTCA for the unlawful detention of property by law-enforcement officers extend to all law-enforcement officers, including correctional officers, or only to law-enforcement officers involved in customs- or tax-related work?

FACTS
The federal prisoner who brought suit in this case, Abdus-Shahid Ali, was transferred on December 3, 2003, from a federal penitentiary in Atlanta to a federal prison in Kentucky. Before the transfer, he placed his personal property in two duffel bags and took them to the Atlanta prison’s Receiving and Discharge Unit. The unit was understaffed at the time, so a correctional officer told Ali just to leave the duffel bags with him. The correctional officer furthermore informed Ali that his property would be processed for shipping in “a day or so.” Ali was not present then when his personal property was inventoried, packaged, and shipped approximately five days later.

When Ali received his duffel bags in Kentucky, he discovered that some of his property was missing, including his Koran, a prayer mat, three books of stamps, and several pairs of socks. The total value of the missing property was $177. Ali alleges that he apprised correctional staff that some of his property was missing, documented in writing what

Lynn S. Branham is a visiting professor of law at the St. Louis University School of Law and co-author of The Law and Policy of Sentencing and Corrections (7th ed. 2005). She can be reached at lbranha1@slu.edu or (314) 977–2766.

PRISONERS’ RIGHTS
As Plain as . . . Day? The Exemption from FTCA Liability for Unlawful Detention of Property
by Lynn S. Branham

A federal civil-forfeiture law, § 1346(b)(1), the United States can be sued for certain injuries, including the loss of property, resulting from the negligence or other wrongdoing of federal employees who were acting within the scope of their employment.

The Federal Tort Claims Act is an example of a statute in which Congress has allowed such suits in certain circumstances. Under one provision of this Act, 28 U.S.C. § 2680(c), the United States cannot be sued without its consent. It is “black-letter law” that the United States is protected by what it says: Lawsuits against the United States asserted, against the United States asserted, against the United States asserted, among other claims, a claim under the Federal Tort Claims Act (FTCA) and sought recompense for his lost property.

The district court dismissed Ali’s FTCA claim, holding that it was barred by the doctrine of sovereign immunity. Sovereign immunity is a legal doctrine under which a government is immune from being sued unless it consents to the suit. The Eleventh Circuit Court of Appeals agreed and affirmed the judgment dismissing the FTCA claim. The Supreme Court then granted certiorari in this case in order to resolve a split in the courts regarding the meaning of the FTCA provision, 28 U.S.C. § 2680(c), which is at issue in this case.

**Case Analysis**

It is “black-letter law” that the United States is protected by what is called “sovereign immunity” and cannot be sued without its consent. The Federal Tort Claims Act is an example of a statute in which Congress has allowed such suits in certain circumstances. Under one provision of this Act, 28 U.S.C. § 1346(b)(1), the United States can be sued for certain injuries, including the loss of property, resulting from the negligence or other wrongdoing of federal employees who were acting within the scope of their employment.

The government rejects what it considers a contorted interpretation of § 2680(c). The government maintains that this exception from the FTCA’s waiver of sovereign immunity says what it means and means what it says: Lawsuits against the United States for the unlawful detention of property by “any,” not just “some,” law-enforcement officers are foreclosed.

As support for its broad construction of the “law enforcement officer” to which § 2680(c) refers, the government cites a caveat following the language insulating certain property claims from the FTCA. If, among other requirements, the property for which compensation is sought was seized under “any” federal law providing for the civil forfeiture of property and was lost or damaged while in the possession of “any officer of customs or excise or any other law enforcement officer,” the injured party can bring a lawsuit against the United States. The government argues that because of the breadth of this limitation in § 2680(c), which extends FTCA liability to certain forfeitures under any federal civil-forfeiture law, Congress clearly intended that the reference to the “law enforcement officer” whose forfeiture-related actions would trigger FTCA liability includes all law-enforcement officers. And it would be nonsensical, the government maintains, to interpret the “law enforcement officer” referred to in § 2680(c) as encompassing all law-enforcement officers in one part of that statutory provision and, in another part, only law-enforcement officers enforcing customs or tax laws.

Ali, on the other hand, underscores that Congress added the forfeiture-related limitation to § 2680(c) in 2000, over 50 years after it first enacted the FTCA. Thus, this limitation has no bearing, he maintains, on the meaning Congress intended in 1946 to ascribe to the “law enforcement officer” alluded to in the exemption from liability described in § 2680(c).

Ali also invokes the “rule against superfluities” in arguing for a nar-
row construction of the “law enforcement officer” whose illegal detention of property cannot give rise to a claim under the FTCA. Under this rule, each word in a statute is presumed to have meaning. Ali notes that customs and tax officers are, without question, law-enforcement officers. Thus, Ali claims that the specific reference to customs and tax officers in § 2680(c) would have been unnecessary and superfluous if Congress intended that the United States could not be sued for the wrongful detention of property by any and all law-enforcement officers, not just those supplementing the efforts of customs and tax officials to enforce the nation’s customs and tax laws.

Ali and the government, not surprisingly, differ as to whether the legislative history confirms or refutes Congress' intent that the United States could not be sued for the wrongful detention of property by any and all law-enforcement officers, not just those supplementing the efforts of customs and tax officials to enforce the nation’s customs and tax laws.

The government urges the Supreme Court to focus on the purposes of the exemptions from liability set forth in the FTCA. It argues that two of those purposes are particularly germane in this case: one, to avoid the disruption that suits for damages can cause to certain governmental activities, and two, to protect the government from fraudulent or excessive claims. The government contends that if the United States can be sued under the FTCA for the mishandling of property by a wide range of law-enforcement officers, including FBI agents, the detention of property for investigative purposes may be hampered in a way that thwarts the enforcement of criminal and other laws. The government also warns that the United States may be inundated by a deluge of lawsuits, including some fraudulent claims, if federal prisoners can file suit under the FTCA to recover damages for their property.

**Significance**

This case, in the end, is about Congress’s intent. When Congress enacted the FTCA, did it intend to exempt the United States from liability when any correctional or other law-enforcement officers illegally detain, damage, or lose people’s property?

If, on the other hand, the Supreme Court concludes that Congress only intended to insulate the United States from liability for illegal property detentions when law-enforcement officers were performing customs- or tax-related work, federal courts, rather than Congress, will be the forums for many property claims against the United States stemming from the actions of law-enforcement officers.

One of the potential upsides of making the United States amenable to suit for these kinds of claims is that it may induce or continue to induce governmental officials to institute or augment procedures to avert and deter illegal detentions of property. But one of the downsides of this reading of § 2680(c) is that the government will spend time and money defending itself against the property claims that it decides not to settle quickly.

The extent of this litigation burden may depend in part on the impact of another federal statute—the Prison Litigation Reform Act (PLRA). Pub. L. No. 104-134, 110 Stat. 1321-66 (1996). The PLRA includes a host of provisions designed to curb the filing of frivolous lawsuits by prisoners and dissuade the burdens of prisoners’ lawsuits on courts. For example, even indigent prisoners now must pay, though perhaps over time, the full fee to file a federal lawsuit—$350. And courts must dismiss certain claims of prisoners, such as those that are frivolous or fail to state a claim for which the court can grant relief, without waiting for correctional officials to file a motion to dismiss.

The PLRA has led to a dramatic decrease in the number of lawsuits filed by prisoners, even as the size of the nation’s prison population has climbed. The exact impact of the PLRA on the filing of prisoners’
property claims under the FTCA would need to be assessed to get a more accurate picture of the effects of a Supreme Court decision holding that the FTCA either does or does not extend to claims seeking damages for the illegal detention of property by all, not just a small subsection, of law-enforcement officials.

However the Supreme Court construes the exemption from liability found in § 2680(c), Congress effectively can override that decision by amending the FTCA. As is true in any case involving the interpretation of a federal statute, the ball ultimately will lie in Congress's court.

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For Respondents Federal Bureau of Prisons et al. (Paul D. Clement, Solicitor General (202) 514–2217)
In order for an employee to bring an age discrimination claim in federal court under the Age Discrimination in Employment Act (ADEA), the employee must first file a “charge of discrimination” 60 days before commencing suit. This case will clarify whether an Equal Employment Opportunity Commission (EEOC) intake questionnaire filled out by an employee-plaintiff constitutes a “charge of discrimination” for purposes of the ADEA.

**ISSUE**

May an “intake questionnaire” submitted to the EEOC suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge?

**FACTS**

On December 3, 2001, Patricia Kennedy, a courier for Federal Express (FedEx), filed an intake questionnaire and four-page affidavit with the EEOC alleging age discrimination in violation of the ADEA.

According to these documents, throughout 1994 and 1995, FedEx implemented the “Best Practice Pays” policy. This policy required a courier and his or her supervisor to agree upon a “reasonable and safe number of stops per hour” that could be achieved on a particular courier’s route. If the courier achieved this number, the result was enhanced pay; however, Kennedy’s questionnaire and affidavit asserted that over time these goals were treated as the minimum acceptable number of stops older couriers were required to make to ensure job retention. She went on to explain that while she knew of several older employees who were either fired or “constructively terminated” as a result of these policies, she did not know of any younger couriers who were terminated on the same grounds.

Subsequently, a class action ADEA complaint was filed by a number of older FedEx employees, including Kennedy, on April 30, 2002. On May 30, 2002, Kennedy filed a formal charge of discrimination with the EEOC.
Institution of an action under the ADEA, as with other federal employment discrimination statues such as Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA), requires individuals to file a charge with the EEOC alleging unlawful discrimination prior to bringing suit in court. Under the ADEA, plaintiffs are required to wait 60 days before bringing a cause of action in court. However, unlike Title VII and the ADA, individuals may bring a suit under the ADEA regardless of whether the EEOC has issued a right-to-sue letter. If the EEOC does issue a right-to-sue letter, the individual has 90 days after receiving the letter to file in federal court.

The district court held that Kennedy's EEOC intake questionnaire did not constitute a charge within the meaning of the ADEA. Specifically, because Kennedy did not file a formal administrative charge until May 30, 2002, one month after the complaint was filed, she failed to meet the ADEA requirement of filing a charge with the EEOC 60 days before commencing suit in federal court and her case was therefore dismissed.

The Second Circuit Court of Appeals reversed the district court and held that Kennedy's intake questionnaire did constitute a charge within the meaning of the ADEA. The court held that Kennedy's questionnaire constituted an EEOC “charge” because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to her employer to activate the EEOC administrative process.

Case Analysis
The ADEA does not define the term “charge.” 29 U.S.C. § 626(d).

However, the EEOC has established regulations that specify what information must appear in order for a document to constitute a charge. 29 C.F.R. §§ 1626.3, 1626.6, 1828.8. According to these regulations, a charge is sufficient when the EEOC receives a “writing” from the person alleging discrimination that names the employer and generally describes the discriminatory acts. Additionally, these regulations suggest that charges should contain full contact information for the employer and the person filing the charge, and a “clear and concise” statement of facts, including pertinent dates.

When a charge is filed, the EEOC is obligated to place the employer on notice and begin investigation and conciliation efforts. The EEOC has created a formal charge form, EEOC Form 5. The EEOC also utilizes an intake questionnaire form, EEOC Form 283. In some situations the EEOC has treated intake questionnaires as charges, utilizing them to provide notice to prospective defendant employers and to begin the investigation and conciliation processes. However, the more common practice seems to be for the EEOC to treat these intake questionnaires like informal documents instead of charges.

The circuits who have decided whether an intake questionnaire form is sufficient to constitute a charge have come to significantly divergent conclusions, falling into four separate camps. The first approach, represented by the Sixth Circuit, requires a formal charge. The second approach, represented by the Fifth and Seventh Circuits, allows that an intake questionnaire may serve as a charge when it contains all the information necessary for a charge and the EEOC treats it like a charge by providing notice to the employer and instigating conciliation efforts. The third approach, taken by the Fourth and Ninth Circuits, holds that an intake questionnaire could be a charge, regardless of how it is treated by the EEOC, if it includes all the requisite information necessary for a charge.

Finally, the fourth approach, represented by the Second Circuit in Holoszczecki and adopted by the Third Circuit, involves the “manifest intent” standard, under which an intake questionnaire can constitute a “charge” if its content satisfies the statutory and regulatory requirements for what content must be included in a charge and the questionnaire communicated the employee's intent to her employer to activate the EEOC administrative process.

In arguing against treating the intake questionnaire as a charge, the brief for FedEx emphasizes three main points: (1) allowing anything other than a formal charge to suffice as a charge will increase litigation, which in turn will place undue burdens on employees, employers, the courts, and the EEOC alike; (2) allowing an intake questionnaire to suffice as a charge will essentially do away with the statutory time restraints that are contingent upon the filing of a charge and result in indefinite liability without notice for employers; and (3) allowing precharge documents to constitute a charge will significantly increase the EEOC's workload.

More specifically, FedEx contends that allowing precharge documents to fulfill the functions of a charge will increase litigation, because individuals will choose to bypass the EEOC's conciliation process. It reasons employees will suffer because individuals will be forced to wait longer for resolution. Employees will be harmed further by incurring the legal expenses necessary for litiga-
FedEx also argues that the Second Circuit's manifest intent approach will lead to the possibility of stale claims. It urges that under the ADEA's 60-day requirement, an individual may potentially abrogate all time limits altogether. Under this theory, if the EEOC never issues a right-to-sue letter and the 60 day waiting period has already passed, employees could file suit whenever they wanted to since neither time limitation applies to their circumstances any longer. This will result in indefinite employer liability for events that may have occurred many years ago. The effects of the passage of time could result in diminished ability of parties to reconstruct facts, unavailable witnesses or witnesses with diminished recollection, and loss or destruction of pertinent employment records.

Finally, FedEx asserts that if a document other than a formal charge is found to constitute a charge, individuals will bypass EEOC conciliation and thus deny the EEOC the opportunity to fulfill its statutory functions. The importance of conciliation is evidenced by Congress's recognition of the frailties of a private lawsuit. According to this argument, Congress included the charge requirement to facilitate the prompt resolution of employment discrimination through conciliation. Congress intended for the charge requirement to provide notice to potential defendant employers, both to aid in conciliation and as a matter of fairness to the employer.

The FedEx employees, on the other hand, emphasize three main points:

(1) The statute and amendments were meant to help an average employee file a charge and then bring a lawsuit; (2) employees should not be punished for the failings of the EEOC to comprehend that the employee wanted the questionnaire to be treated like a charge; and (3) a rule that finds a charge has been made only when notice has been given to the prospective defendant employers is contrary to Congress's intent and prior Supreme Court holdings.

Beginning with the ADEA's history, the employees assert that Congress's relaxed charge requirements were meant to allow employees to file charges without having to pay for an attorney. According to the employees, this is evidenced by a comparison of the ADEA's charge requirements with Title VII's charge requirements.

Title VII requires verification of a charge and the issuance of a right-to-sue letter before a private action may be filed. In Edelman v. Lynchburg College, 535 U.S. 106, 110 (2002), the Supreme Court stated that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." Additionally, the Court held that Title VII is "a remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process... [and as a result], the lay complainant who may not know enough to verify on filing will not risk forfeiting his rights inadvertently."

On the other hand, the ADEA does not specifically define the term "charge" and does not require a verification or the issuance of a right-to-sue letter before suit is brought. Therefore, respondents assert that since the ADEA's charge requirements are based substantially on Title VII's charge requirements, a comparison between the two demonstrates Congress's intention to place less emphasis on formal requirements.

Additionally, the FedEx employees point out that the 1978 amendments to the ADEA removed a provision that required an individual bringing a charge to file a notice of intent to sue. Congress amended this provision to restrict suits under the ADEA only through time limitations. In making these amendments, Congress observed that "[f]ailure to timely file notice [of intent to sue was] the most common basis for dismissal of ADA lawsuits." S. Rep. No. 493, 95th Cong. 1st Sess. 12 (1977). As a result, one of Congress's stated purposes for amending the charge requirement was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals."

Thus, by refusing to adopt the formal charge requirements of Title VII and later excising the ADEA's stricter notice requirements, Congress made it clear it did not intend to define "charge" based on its success of notifying defendant employers of the complaints brought against them.

The employees also emphasized the penal nature of a rule requiring notice to employers before allowing suit to commence. They assert such a rule would not depend upon the content of the filing, as defined by the EEOC's regulations, but only upon the EEOC's obligation to provide prompt notice. Thus, the rule would punish the employee for the shortcomings of the agency.

This would be especially true where an employer is unable to show that the lack of notice prejudiced its interests. For instance, in Love v.
Pullman Co., 404 U.S. 522, 619 (1972), the Court found that when an employer’s lack of notice does not prejudice its interests, the requirement of “a second filing by the aggrieved party would serve no purpose other than the creation of another procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.”

Additionally, the ADEA’s statutory language only obligates the EEOC to notify the employer’s “promptly.” Thus, the FedEx employees contend that the lack of a specific time evidences Congress’s intent to allow a suit to be filed prior to the distribution of notice and that to hold otherwise would penalize the lay employee for the EEOC’s failure to perform its duty to act “promptly.”

**SIGNIFICANCE**

Although in a recent Title VII case, Edelman v. Lynchburg Coll., 535 U.S. 106, 118 (2002), the Court concluded that a “charge” did not have to be “under oath or affirmation” to be considered timely, the Supreme Court has not yet directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form may be considered a “charge.”

The Supreme Court’s decision in Holowecki will likely resolve the many inconsistencies among federal circuit courts of appeal on the issue of whether an EEOC intake questionnaire may constitute a charge of discrimination under the ADEA. Depending on the breadth of the holding, the case may also answer this same question for related federal employment discrimination laws, such as Title VII and the ADA.

Should the court adopt FedEx’s bright-line, formalistic approach, individuals may lose their day in court on a technicality. This is especially true among individuals who file documents with the EEOC without consulting an attorney. A formalistic approach fails to take into account that laypersons are unlikely to appreciate the legal requirements for initiating a case.

Additionally, this approach could mean an employee will be penalized for the EEOC’s mistakes, even when the mistake is completely and totally out of the employee’s control. This most often occurs when employees are misled by the EEOC to believe a document constitutes a charge. As a result of the EEOC’s mistake, these employees will be denied access to the courts. Practically speaking, an agency that receives roughly 85,000 charges of discrimination under several different statutory schemes is likely to make a mistake every once in a while.

The Court’s adoption of FedEx employees’ intent-based approach could have a far reaching effect on documents other than intake questionnaires, which contain the requisite amount of information. Under this approach just a letter sent to the EEOC might be sufficient to constitute a charge. While ensuring that individuals will not inadvertently forfeit their access to the courts, this approach may create significant confusion as to when a document fulfills the requirements of the EEOC. Ultimately, courts will be forced to undertake a case-by-case analysis. In addition to the possible creation of more inconsistencies among the circuits, an ad hoc analysis may delay an employee’s much needed relief even more and consume precious administrative resources of both the EEOC and the courts.

Additionally, if the use of other types of documents means that employers are not provided sufficient notice of the claims brought against them, employers may be less likely to voluntarily correct discriminatory practices. Furthermore, it may be more difficult for the EEOC to carry out its statutory, gate-keeping function of exposing frivolous claims and helping to conciliate meritorious ones.

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In Support of Respondent Paul Holowecki et al.

AARP et al. (Paul William Mollica (312) 263-0272))

United States (Gregory G. Garre, Assistant to the Solicitor General (202) 514-2217)
Is a State Court Bound by Federal Retroactivity Doctrine in a State Post-Conviction Case?

by Barbara L. Jones

The case presents the classic conflict between federal and state authority, this time in the context of criminal postconviction proceedings. The petitioner seeks to reopen his 1999 state-court conviction based on a 2004 Supreme Court decision, Crawford v. Washington. The state court declined to reopen the case, saying that the Supreme Court already determined that Crawford could not be applied retroactively.

Danforth's challenges to the use of this evidence failed, and his conviction became final in 1999, five years prior to Crawford. He was sentenced to 316 months in prison. After Crawford, Danforth sought postconviction relief, which was denied by the trial court.

Ultimately, the Minnesota Supreme Court held that it was unable to grant relief under Crawford because it was constrained by the U.S. Supreme Court decision in Teague v. Lane, 489 U.S. 288 (1989). Under Teague, the Court's decision in Crawford did not apply to Danforth's case because it announced a new rule of law that was not dictated by precedent at the time Danforth's conviction became final. The Minnesota Court said that it could not apply state retroactivity principles contrary to relevant federal principles. In other words, the Minnesota Supreme Court said that (1) Crawford established a new rule of federal constitutional procedure and therefore was not retroactive under Teague, and that (2) the Minnesota courts could not enunciate a rule of retroactivity that was

**ISSUE**

May state courts apply state law to determine whether U.S. Supreme Court decisions should be applied retroactively when state law would provide more protection to criminal defendants than the federal standard in Teague v. Lane?

**FACTS**

After the U.S. Supreme Court's 2004 decision in Crawford v. Washington, 541 U.S. 36 (2004), limiting the use of out-of-court testimonial statements against a defendant in a criminal trial, many defendants who felt they had been convicted on the strength of just those kinds of statements sought relief from their convictions. The petitioner in this case, Stephen Danforth, is one of them.

Danforth was convicted of first-degree criminal sexual conduct in 1996—about eight years prior to Crawford. The evidence included a videotaped statement of J.S., the 6-year-old boy the jury found Danforth had molested. The statement was taken at a sexual abuse center and not by police.
broader than that declared by the U.S. Supreme Court in Teague.

The issue on appeal is whether the Minnesota courts must apply the Teague standard or whether it may apply a broader standard. The ultimate question of whether Crawford should be applied retroactively to Danforth's case is not before the court.

CASE ANALYSIS

The petitioner starts his argument by characterizing Teague as a procedural defense, not a rule of law that limits the power of the states. Teague is a case involving habeas corpus review of a state conviction, and petitioner argues it should be limited to habeas cases. Teague defined the class of prisoners who could receive federal court review of their state convictions based on a new rule of criminal procedure, the petitioner argues.

“This Court adopted the Teague standard to solve a specific problem: the anomaly created when a federal court upsets a state-court conviction on the basis of constitutional commands not in force when the state-court conviction became final. As such, the Teague rule is a procedural defense that may be invoked by States as parties to federal habeas corpus litigation. It is not a limitation on the power of the courts of the several States,” Danforth argues.

The Teague Court was governed by principles of finality and comity (deference to state proceedings), the petitioner states. Those principles, particularly comity, are not relevant to state court postconviction review of a state criminal conviction.

Subsequent cases interpreting Teague stand for the proposition that it is limited to federal courts. The Teague rationale—that the Supreme Court should be reluctant to allow federal judges to second-guess state courts based on rules that were not in place when the state-court decision was made—applies only to federal courts sitting in judgment of state-court convictions.

The Teague Court’s authority, while not explicitly stated, had to be either the federal habeas corpus statute or the Supreme Court’s supervisory power over federal courts. Neither of those sources of authority binds the state courts. “If Teague were a constitutional command to all courts, as the Minnesota Supreme Court concluded it was, then one would think that this Court would have relied upon some constitutional provision in promulgating the Teague rule. But it did not,” the petitioner argues.

Instead, the Teague Court merely set forth a procedural defense in habeas proceedings that the state may invoke, the petitioner concludes.

Next, Danforth argues that the Supreme Court’s other retroactivity cases set minimum standards (a floor), not the maximum protection (a ceiling) that a court may offer. It has long been the law that states may offer greater constitutional protections than the federal retroactivity cases provide, the petitioner contends.

Specifically, two years prior to Teague, the Supreme Court said in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that all courts (state and federal) had to apply new constitutional rules to cases pending on direct appeal when the rule is announced. “But Griffith set the floor, not the ceiling,” argues the petitioner. It did not say that a state may not apply the new rule to cases on collateral review, such as Danforth’s. Like Griffith, Teague is a floor. This confusion between floors and ceilings was the Minnesota Supreme Court’s basic error.

Since Teague/Griffith set floors, not ceilings, the Minnesota Court is free to perform its own balancing of the interests of finality vs. the interests of full review and is free to accord more weight to full review. Other states have done so, while others have followed Teague or a middle course. “[T]here is nothing unconstitutional or illegal about state courts reviewing their own convictions and choosing, in the interests of justice, to reach a different conclusion,” Danforth argues.

Finally, the petitioner turns to the principle of federalism, often cited in various contexts in recent years. According to Danforth, federalism allows states to adopt any standard that affords greater protection to its citizens than that provided by federal law. Specifically, “and key to this case, is the state courts’ authority to afford greater procedural protections to their respective citizens, even where the state court is applying substantive federal law.”

The petitioner extends his argument even a little further, saying that allowing the states to broaden the class of potential claimants is “necessary in deference to the states.” By adopting the petitioner’s petition, the Supreme Court will vindicate state authority to open access to state courts.

The respondent state of Minnesota also sees important principles at stake—but of course they are different principles. The state cites what it calls the “Griffith/Teague retroactivity doctrine” in support of the government’s interests in the finality of criminal convictions, the uniformity of law across state lines, and the supremacy of federal law and the U.S. Supreme Court. These interests are not limited to habeas review.

(Continued on Page 62)
While the petitioner cites the Bill of Rights, i.e., the Sixth Amendment right to confrontation and the Fourteenth Amendment right to equal protection of the laws, the state turns to Article III of the Constitution, which sets forth the power of the federal courts, and to Article VI, which states that the federal Constitution and laws thereunder are the supreme law of the land.

Interestingly, Minnesota argues that the petitioner is attempting to create a federal constitutional right that would apply only in Minnesota. (Danforth, in his reply brief, rejects the bait and insists that he is actually basing his claim on state law.)

The respondent's argument, however, relies on its characterization of Danforth's appeal as an attempt to create preferred federal constitutional rights rather than as an attempt to seek a postconviction remedy under state law.

Minnesota starts off with its analysis of the "Griffith/Teague doctrine," which is involved in every case — and not just in habeas cases — because it is an exercise of the Court's Article III power to say what the law is. Retroactivity questions and habeas remedies are distinct inquiries, the state argues.

Retroactivity law does not rest on the supervisory powers of the Supreme Court, the state argues. Instead, the Court's retroactivity doctrine can only be understood as an exercise of federal authority over the reach of its federal constitutional rulings.

This authority is in service of the aforementioned principles: finality, uniformity, and federal supremacy. "Allowing states to selectively create certain preferred rights in the name of the federal constitution will mean similarly situated citizens of different states will be treated differently with regard to the same textual provisions of the federal constitution," the state argues. That would violate both uniformity and supremacy.

It also would extend state court authority to interpret the federal Constitution in a way that would be shielded from federal review, two bad ideas that together are intolerable, the state argues. "With millions of state criminal cases and the limited ability of this Court to review those cases, the task of achieving clarity and uniformity in federal constitutional decisions will be extremely difficult if states are free to disregard federal retroactivity standards and to selectively create certain preferred federal constitutional rights good only in a single state," respondent argues.

Griffith/Teague also respects the finality principle because it distinguishes between final and nonfinal cases. Under Griffith, new rules are applied to pending cases, state or federal, because respect for final judicial decisions is not implicated. Teague also recognizes the importance of leaving final convictions "in a state of repose." This respect for the state court's final decisions promotes federalism, Minnesota argues.

"Importantly, both finality and comity interests are involved whether a federal or state court undertakes the task of applying federal constitutional rules to collateral review of final state judgments. In both instances, the question is not what state law requires, it is what the federal constitution requires. Missing this point, Petitioner argues that a state court's decision regarding retroactivity of federal constitutional rules reflects some unique and unidentified state interest and is entitled to respect, indeed complete deference, by this court. Yet, a state court determines federal interests, not unique state interests, by applying a federal constitutional rule," argues the respondent.

Even if the state wants to disregard the Griffith/Teague principles, it may not do so, the respondent continues. “[A] state court applying a federal law is not acting as an agent loyal only to a state.”

"Unlike a state court applying state law and vindicating a state interest, a state court applying a federal constitutional rule is vindicating federal interests. In the case of Teague, supremacy, uniformity, judicial integrity, finality, and federalism require keeping new federal constitutional rules from upsetting final state court interests.”

If a state wants to provide greater rights for its citizens, it should do so through the state political and legislative process, Minnesota argues. “[A] state court should be fully politically and legally accountable for its decisions when those decisions do not rest upon the federal constitutional views of this Court,” the respondent states.

In other words, states that want to prefer select individual rights must do so under state law.

But that's exactly what he is asking the state to do, Danforth argues in his reply brief.

"As long as the state court afforded the prisoner as much protection as federal law requires ... then the state court would not run afoul of federal law.”

"[A]ny state court or legislature that chooses not to provide [the Teague defense] to the State (as a party to the litigation) simply makes a policy decision to provide extra protections to its state prisoners. That is the state court's or state legislature's right, and it is how our federalism works.”
Danforth’s reply brief also waves off the respondent’s concerns about uniformity, pointing out that the federal system is inherently non-uniform. The reply brief instead emphasizes the state’s interest in controlling access to its own courts and vindicating its own citizens’ rights.

**SIGNIFICANCE**

Pundits have been pretty quiet about *Danforth* thus far, although there are four amicus curiae briefs filed. One blogger does observe that the case—to be argued on Halloween—should be “spooky cool for law geeks.”

Speaking generally, the petitioner and those who support him see the case as critical to keeping the doors to state courthouses open to criminal defendants and to allowing states to open those doors at will. The American Civil Liberties Union and the National Association of Criminal Defense Lawyers (NACDL) have weighed in on the petitioner’s side.

The ACLU describes the Minnesota Supreme Court’s decision as “startling” and its conclusion that it was proscribed by federal law to be “astonishing.” No feature of federal law or federalism prohibits a state court from vindicating federal constitutional rights, the ACLU points out. The ACLU’s death penalty project is particularly interested in *Danforth*, probably because prisoners in capital cases frequently avail themselves of collateral review.

The NACDL brief closely tracks the petitioner’s arguments and also makes an interesting point about the Court: “[R]espondent’s position appears to rely on a view—that this Court’s decisions make law rather than discern it—that has been rejected by many of the Court’s members. Given that, it is unlikely that *Teague* was or should be understood as articulating a rule about what the substance of federal law is or was at any point in time.”

Ten states and Puerto Rico have joined the state of Alaska in support of Minnesota. In addition to supporting Minnesota’s arguments, the amici also argue that affirming the Supreme Court of Minnesota would be consistent with the existing case law while reversing it would upset extensive precedent.

Kansas and seven other amici states have filed “in support of neither party,” declaring that:

> The State amici support neither party in this case because both parties’ filings to date fail to respect fully the overriding federalism principle at stake here. The petitioner argues that States can give only *broader* but not *narrower* retroactive effect to Supreme Court decisions than would be the case applying *Teague*. And the respondent has argued that state courts must strictly follow *Teague*, with no departures. Both positions are wrong in part.

However, Kansas does recommend that the Minnesota decision be vacated:

> The Constitution does not compel nor require the States to provide post-conviction processes or remedies at all. Once a State provides a constitutionally sufficient trial and direct appeal, its federal constitutional obligations are satisfied. State post-conviction proceedings, from a federal constitutional standpoint, are a matter of state grace not of federal right. Necessarily, it follows that the Constitution generally does not dictate the procedures, substance or remedies of such proceedings when a State chooses to provide them.

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May a Railroad Alleging Property Tax Discrimination Challenge the State’s Valuation Method?

by Ferdinand P. Schoettle

Contending that the state had overvalued its property for tax purposes, a Georgia railroad sued the state of Georgia under the federal Railroad Revitalization and Regulatory Reform Act of 1976. The Eleventh Circuit held that although this federal law is designed to ensure that railroads pay no more than their fair share of property taxes, it does not allow railroads to challenge the methodology by which a state determines the fair market value of their property.

ISSUE

In an action in federal court under 49 U.S.C. § 11501(b)(1), which prohibits property tax discrimination against railroads, may a railroad challenge the valuation method chosen by the state?

FACTS

In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, the so-called 4-R Act. The Act itself had its genesis in a series of congressional hearings extending over a decade that established discriminatory property taxation of the railroads. The railroads were overassessed and paying more than their fair share of property taxes. The 4-R Act provided that the federal courts could hear challenges to discriminatory taxes on railroads and grant relief. To make this possible, the Act provided that 28 U.S.C. § 1341, the Tax Injunction Act, did not apply to a federal court that was acting to prevent a violation of subsection (b) of the 4-R Act.

The federal courts appear to have had difficulty reconciling the policies underlying the Tax Injunction Act and the 4-R Act, difficulties that are clearly reflected in this case.

CSX Transportation, Inc., a freight rail carrier with multiple routes through Georgia, brought an action under the 4-R Act in the U.S. District Court for the Northern District of Georgia. CSXT alleged that Georgia’s State Board of Equalization had valued CSXT’s transportation property at $7.8 billion when its true market value did not exceed $6 billion. Because of the overvaluation, CSXT’s assessment ratio exceeded that of non-railroad commercial and industrial property and thus violated 49 U.S.C. § 11501(b)(1), which provides:

CSX TRANSPORTATION, INC. V. GEORGIA STATE BOARD OF EQUALIZATION
DOCKET NO. 06-1287

ARGUMENT DATE:
NOVEMBER 5, 2007
FROM: THE ELEVENTH CIRCUIT
The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the railroad property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

Proving a property tax overvaluation involves two elements of proof. First, the property owner must prove the fair market value of the property. Second, the property owner must prove or accept the taxing authority’s estimate of an assessment ratio. In general, real property is not assessed for taxation at its full fair market value but is assessed at a percentage of its full fair market value, a percentage called the assessment ratio. For this litigation, CSXT accepted the assessment ratio put forward by Georgia’s State Board of Equalization. The only fact in dispute is the value of CSXT’s property in Georgia.

The valuation methods used by Georgia took a unit-valuation approach. Under this approach, Georgia first values the entire railroad nationwide. Then it assigns some of that value to Georgia for taxation according to the percentage of track miles in the state, 7.194059 percent in this case. Such a “unit valuation” approach may or may not be appropriate in all states.

The valuation approaches used by Georgia in the present case depend on observed income. The State Board of Equalization used three basic approaches for determining the fair market value of CSXT’s railroad property. The state employed the stock and debt approach, a discounted cash-flow approach, and a market multiple approach. The critical assumption underlying these valuation approaches is that the observed income and stock values come from the railroad property Georgia wishes to value, not from some other source. Should CSXT have had income and value from nonrailroad sources, the assumption might be challenged. For instance, if CSXT owned a gambling casino in Las Vegas, the stock market might be more enthusiastic about the casino than the railroad, and the above approaches to value might not be appropriate.

At trial, the State Board of Equalization basically used three methods to estimate the value of CSXT’s property. CSXT’s expert used a slightly different method of valuation. As the district court put it, “[T]he Court cannot consider [the expert’s] valuation because it was prepared using different valuation methods than the Department.” Further, the district court held that “the 4-R Act does not generally allow a railroad to challenge the state’s chosen methodology.”

The district court found in favor of the state, and CSXT appealed to the U.S. Court of Appeals for the Eleventh Circuit.

The circuit court affirmed the district court’s decision. The Eleventh Circuit’s opinion artfully sets the stage for the Supreme Court to interpret the meaning of the 4-R Act. Four pages of the court’s opinion support citations and analysis the proposition stated in a headnote that “The 4-R Act Does Not Allow a Railroad to Challenge the Methodology By Which a State Determines Fair Market Value.” The circuit court talks not of valuation methodology but of “sovereignty.”

Another two pages of the court’s opinion support another headnote’s proposition that “The District Court Did Not Clearly Err in Finding That the Railroad Used a Valuation Methodology Different From the Methodology of the State.”

Case Analysis

Seldom does one see a case that has been so carefully crafted to present a clear question of law to the U.S. Supreme Court. Does or does not the Railroad Revitalization and Regulatory Reform Act of 1976, the so-called 4-R Act, permit courts to make findings of fact concerning a preferred valuation approach for a particular valuation? From the point of view of a valuation expert, choosing the most appropriate valuation for a particular subject property is critical to getting a good result.

Doubts about the answer to the above question have a legal, not valuation, genesis. In Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454 (1987), Justice Marshall wrote for a unanimous Court that the federal courts need not find discrimination in order to review instances of alleged overvaluation of a railroad. In a footnote that was unnecessary to that ruling, Marshall added that:

This case therefore does not present the question whether a railroad may, in an action under § 11503, challenge in the district court the appropriateness of the accounting methods by which the State determined the railroad’s value, or is instead restricted to challenging the factual determinations to which the State’s preferred accounting methods were applied. Accordingly we express no view on that issue.

That footnote gives the impression that the Supreme Court believes

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that the right of a railroad to challenge the valuation methodology may be limited by the 4-R Act.

In subsequent cases, the circuit courts have split on the question whether a railroad may challenge a state’s valuation methodology. In addition to the Eleventh Circuit’s decision in the present case, the Fourth Circuit held that the 4-R Act does not permit such a challenge to the state’s valuation methodology. *Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991); accord *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993). The Ninth and Second Circuits disagree. In *Burlington Northern Railroad v. Department of Revenue*, 23 F.3d 239, 241 (9th Cir. 1994), the circuit court held that state valuation methodologies could be defeated by convincing evidence. In another case the Second Circuit allowed the railroad to challenge the state’s valuation methodology. *Consolidated Rail Corp. v. Town of High Park*, 47 F.3d 473 (2d Cir. 1995).

Not allowing a railroad to challenge the methodology by which it has been valued approximates denying it relief from overvaluation. Challenges to property taxes very often, indeed maybe most often, focus on the issue of whether the assessing authorities followed the appropriate approach to estimate value. (For more discussion of this point, see Chapter 3 of *State and Local Taxation: The Law and Policy of Multi-Jurisdictional Taxation* (LexisNexis, Matthew Bender 2003)).

The briefs in favor of CSXT point to language of 49 U.S.C. § 11501(b)(1) quoted above. The act clearly envisions litigation about the “true market value” of a railroad’s property, not just about the accurate application of the methodology used to arrive at that value. The legislative history is detailed in the briefs asking the Supreme Court to reverse the Eleventh Circuit. There seems to be no doubt that Congress wished to give the railroads relief from over-taxation and an opportunity to prove in federal court the “true market value” of their properties.

**SIGNIFICANCE**

As to the protections provided by the Railroad Revitalization and Regulatory Reform Act of 1976, this is a significant case. The annual property taxes paid by the railroad industry nationally are major operating costs. Without full federal protections, the railroads are still today an easy target for overvaluation, a cash cow waiting to be milked by the property tax. The freedom to choose an appropriate approach to valuation with which to prove fair market value is critical to a railroad’s challenge to a state’s valuation.

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Kentucky taxpayers argued that the state violates the Commerce Clause when it taxes the interest income from bonds issued by states other than Kentucky while not taxing income from bonds issued by Kentucky. The Kentucky Court of Appeals agreed, but the U.S. Supreme Court has now agreed to review that ruling, which if upheld, would have significant consequences on the national market for bonds.

Can a State Exempt In-State Municipal Bonds from the Tax It Applies to Out-of-State Bonds?

by Ferdinand P. Schoettle

This is an important case. The focus in this case is on the national market for bonds. Kentucky’s brief points out that on January 1, 2007, state and local governments had more than $2.4 trillion in outstanding bonds. Of the 50 states, only 43 have income taxes. Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming impose no taxes on personal income. Thirty-eight states have tax schemes on municipal bond interest substantially identical to Kentucky’s. Indiana exempts all state-bond interest income from its income tax. Illinois and Iowa tax all income from municipal bonds except for a small number of in-state municipal bonds.

As of June 30, 2006, Kentucky and its political subdivisions had outstanding approximately $33.8 billion in bonds. Municipal bonds are not a homogeneous product, but must be preceded by an adjective if one is to have a rough idea of for what the bond was actually issued. General obligation bonds are backed by the full faith and credit of the state which promises to use its taxes to pay the bonds. The Kentucky Constitution requires voter approval for general obligation bond issues exceeding $500,000. Because of this provision, Kentucky has no general obligation bonds outstanding. About 23 percent of Kentucky’s outstanding bonds are industrial revenue bonds. Such bonds are issued for the benefit of private, not public, enterprises and are funded from revenues received from private sector companies. Kentucky has been spectacularly successful in wooing automotive manufacturers to locate plants in Kentucky. Industrial revenue bonds would normally play a part in the benefit package that Kentucky offers to prospective new businesses.

Interest income from most municipal bonds enjoys a favored status in the income tax world. Most important from an investor’s point of view, the federal income tax exempts from taxation interest income from most municipal bonds. 26 U.S.C. § 103. Of secondary importance is the tax exemption provided by the states on interest income from their own municipal bonds.

Relief from taxation of interest income unambiguously lowers the interest rate at which bonds can be sold. In an efficient market, bonds with similar risks and maturity dates will provide the same post-tax return. Suppose, for example, that the income tax rate is 10 percent and that a $1,000 nonmunicipal bond pays $850 per year in interest income. If the nonmunicipal interest income were taxed at 10 percent, the investor would have a net post-tax return of $45 after paying a $5 tax. In our example, the bond with taxed interest income might be marketed with an interest rate of 5 percent in order to provide a post-tax return of $45. A municipal bond with untaxed interest income could be marketed with an interest rate of 4.5 percent in order to provide the same $45 post-tax (that is, no-tax) return. An efficient market would regard these two investments—the taxable 5 percent bond and the untaxed 4.5 percent municipal bond—as similar because both of them provided a 4.5 percent post-tax return.

Currently, the market for municipal bonds is not efficient. In general, the rich states benefit somewhat by granting tax-free treatment only to income from their own bond. The benefits of receiving tax-free income flow most generously to the very rich who have the highest federal and state income-tax rates. Big bucks, high-income, rich taxpayers with lots of money to invest are not evenly distributed across the states. To give a concrete example, if Kentucky could market its bonds with tax-free municipal bond interest in New York as well as in Kentucky, Kentucky could market at a slightly lower interest rate. The markets of New York, which contain more very high-income taxpayers than do the markets of Kentucky, will welcome tax-free income with more enthusiasm than will the markets of Kentucky. New Yorkers face higher federal and state income-tax rates than do Kentuckians. Thus, the tax advantages of tax-free income are greater in New York than they are in Kentucky. In general, if a “rich” state can restrict tax-free status to its own municipal bonds and thus lower the supply of tax-free bonds, the rich state will get a higher price for its own municipal bonds. On the other hand, the “poorer” states, if restricted to offering tax-free income only at home, will not do as well as they would have done in an open and free market.

A brief filed with the Supreme Court by seven economists asks that the Court hold unconstitutional the discriminatory tax treatment of municipal bonds. That brief gives voice to the inefficiency of the current system. This brief analogizes the current bond market to a product market in which each state required its residents to “obtain agricultural and manufactured products from its own farmers and firms.” The economists detail the extra costs imposed on the market by more than 600 single-state municipal bond funds. Furthermore, the economists agree with the observations in the brief of the National Federation of Municipal Analysts that balkanization of the market diminishes liquidity and increases costs.

Although many states have signed on to a brief filed on behalf of the states, one does not know whether these briefs were filed on behalf of revenue departments or whether the governor’s office and state policy officials had carefully thought
through the current situation concerning state taxation of municipal bond interest. As far as the federal structure is concerned, tax policy rests with the Treasury Department. Collection of revenue rests with the Internal Revenue Service. A good guess would be that the governors’ offices and state policy economists have not signed off on the briefs that bear the states’ support in this case. The briefs filed on the authority of the states’ attorney generals most likely give voice to the revenue departments’ desire not to grant refunds for state taxes paid on interest income from out-of-state municipal bonds.

**Case Analysis**


This “negative” or dormant aspect of the Commerce Clause "prohibits economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” Thus, the “fundamental command” of the Commerce Clause is that “a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.” As a result, “state laws discriminating against interstate commerce on their face are ‘virtually per se invalid.’”

One case, *Shaper v. Tracy*, 647 N.E.2d 550 (Ohio App. 1994), upheld a challenge to Ohio’s taxation on out-of-state interest income from municipal bonds. The Ohio appellate court said:

We agree with the trial court’s rationale that “neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between governmental entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds. Those purchasers then become the major beneficiaries of the issuance of the bonds for state issues, capital improvements, and similar benefits.” Given the lack of any precedent to apply the Commerce Clause to this type of taxation scheme, we are unable to find [Ohio’s tax statute] R.C. 5747.01 unconstitutional as violative of the Commerce Clause.

*Shaper v. Tracy* has no detailed discussion of Supreme Court precedents and accordingly has not been given much weight.

A very recent case—decided on April 30, 2007—deservedly occupies center stage in all of the briefs. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), the Supreme Court upheld the authority of Oneida and Herkimer, two New York counties, to require private waste collectors to take their waste to a public authority selected by the counties, the Oneida-Herkimer Solid Waste Management Authority. The counties established the authority to dispose of waste. According to the facts, the counties had experienced substantial problems with private-sector waste disposal for at least a couple of decades. Among other things there was price-fixing, pervasive overcharging, and influence of organized crime. The Court summarized environmental problems that the counties had experienced in using private-sector waste disposal:

By the 1980’s, the Counties confronted what they could credibly call a solid waste “crisis.” … Many local landfills were operating without permits and in violation of state regulations. Sixteen were ordered to close and remediate the surrounding environment, costing the public tens of millions of dollars. These environmental problems culminated in a federal clean-up action against a landfill in Oneida County; the defendants in that case named over 600 local businesses and several municipalities and school districts as third-party defendants.

The waste management authority provided services that had not previously been available such as recycling 33 kinds of material, composting, and dealing with household hazardous waste disposal among other things. Not only were the authority’s services greater than had previously been the case, so also were the authority’s costs and charges.

The Supreme Court upheld by a 6-3 vote the actions of Oneida and Herkimer Counties on the ground that the Commerce Clause allowed for a distinction between laws that provided a benefit to the public as opposed to laws that discriminated in favor of private facilities. The Court spent no time on standard public finance analysis. According to standard public finance economic thinking, activities such as recycling (which allegedly benefit all creatures on earth, not just those whose trash has been picked up) cannot be adequately paid for by private markets, which will, unless closely regulated, simply get rid of waste at the lowest cost to the waste producer.

(Continued on Page 70)
Three recent law review articles have analyzed the constitutionality under the Commerce Clause of the typical state's income-tax scheme that taxes interest on out-of-state municipal bonds but exempts from taxation interest on the state's own municipal bonds. All of these sources have reached the same conclusion: the tax discrimination against interest on out-of-state bonds violates the Commerce Clause. The three articles are Ethan Yale and Brian Galle, “Muni Bonds and the Commerce Clause After United Haulers,” 115 Tax Notes 1037 (June 11, 2007) and 44 State Tax Notes 877 (June 18, 2007); Julie Muething, “Comment and Casenote: An Analysis of the Disparate Tax Treatment of Municipal Bonds: Department of Revenue of Kentucky v. Davis,” 75 U. Cin. L. Rev. 1711 (Summer, 2007); and Joel Michael, “Kentucky v. Davis: Implications for State Tax Policy and the Dormant Commerce Clause,” 45 State Tax Notes 753 (Sept. 17, 2007).

On balance, an abundant number of Supreme Court precedents support the proposition that the current discriminatory scheme for taxing interest income from municipal bonds violates the Commerce Clause.

SIGNIFICANCE
There is a very slight possibility that the Court's majority in this case could invoke the Constitution's Import-Export Clause. Article I, Section 10 of the Constitution states that “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws. ...” In his dissent to Camps Newfound/ Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997), Justice Thomas suggested that the Court should use the Import-Export Clause rather than the Commerce Clause. In 1869, the Supreme Court held that the Import-Export Clause applies only to imports from a foreign country. Woodruff v. Parham, 75 U.S. 123 (1868). Earlier cases, that is, cases prior to 1868, did not draw this distinction between interstate and international commerce. The distinction makes even less sense today than it did in 1868. Almost all goods today are a combination of U.S.- and foreign-made products. An amicus brief filed on behalf of Tax Foundation urges the Court to apply Justice Thomas's 1997 reasoning to this case. The chances of this application seem slim. Those Supreme Court justices (especially Justice Scalia), who oppose application of the Commerce Clause, have displayed a firm interest in not thinking positively about the role of the judiciary in resolving disputes in a free-market economy.

An application of the Import-Export Clause would be very significant, however.

A major problem that the Court will have with this case is the magnitude of the numbers involved. Also, the Court most likely will have difficulty perceiving the exact operation of the discrimination. In the case now before the Court, other states are not much disadvantaged because Kentucky taxes interest income from their municipal bonds. Kentucky is not a sought-after national financial market. It is somewhat disadvantaged because the states that do have important national financial markets do not grant Kentucky equal access to their municipal bond markets. The current market in municipal bonds is certainly economically inefficient.

As to the magnitude of the numbers involved in this case, suppose the Court were to hold that it was unconstitutional discrimination under the Commerce Clause for a state to exempt from tax the interest income from in-state municipal bonds but to tax the interest income from out-of-state municipal bonds. Claims for refunds would be filed by those who had paid income tax on the interest income from their out-of-state municipal bonds. Because of statutes of limitation, claims could be filed only for “open” years, perhaps three years.

Determining the magnitude of refund claims is not an easy task. First, because of the “discrimination,” taxpayers tend not to invest in out-of-state municipal bonds. Joel Michael in the article cited above analyzed Minnesota's tax returns. Minnesota's possible refunds were well within acceptable limits. Second, some of the municipal bonds not purchased by in-state taxpayers may be held under circumstances in which no state may tax them. For instance, many taxpayers with very high federal income-tax marginal tax rates have legal domiciles in an income-tax-free state such as Wyoming or Florida. Delaware is a much-used tax haven for investment income. In Delaware, the state will not tax the income of trusts containing investments. Some taxpayers may use Delaware trusts to avoid state taxation. All of these considerations diminish the magnitude of the possible refund obligations facing the states.

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In Support of Petitioner
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Churchill Tax-free Fund of
Kentucky, Hawaiian Tax-free Trust,
Narragansett Insured Tax-free
Income Fund, Tax-free Fund for
Utah, Tax-free Fund of Colorado,
Tax-free Trust of Arizona, Tax-free
Trust of Oregon, Hawaii Municipal
Fund, Hawaii Intermediate Fund,
the Idaho Tax-exempt Fund, Ocean
State Tax-exempt Fund, Bishop
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North Carolina, Alabama, Alaska,
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Colorado, Connecticut, Delaware,
Florida, Georgia, Hawaii, Idaho,
Illinois, Indiana, Iowa, Kansas,
Louisiana, Maine, Maryland,
Massachusetts, Michigan, Minnesota,
Mississippi, Missouri, Montana,
Nebraska, Nevada, New Hampshire,
New Jersey, New Mexico, New York,
North Dakota, Ohio, Oklahoma,
Oregon, Pennsylvania, Rhode
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Association, National League of
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Legislatures, National Association of

In Support of Respondents George
W. Davis and Catherine V. Davis
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Christopher Demuth, Jason
Furman, Kevin A. Hassett, R. Glenn
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In Support of None of the Parties
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First Amendment

Free Speech and the Marketing of Child Pornography: Is the PROTECT Act’s Anti-Pandering Provision Constitutional?

by David L. Hudson Jr.

In 2002, the Supreme Court struck down two provisions of a federal child-pornography law, one of which criminalized the promotion or advertising of such material. Congress responded with a new law known as the PROTECT Act. The anti-pandering provision of the act prohibits the knowing advertising, promotion, distribution, or solicitation of material in a manner that “reflects the belief, or that is intended to cause another to believe” that the material is actual child pornography. The defendant claims that this anti-pandering measure violates the First Amendment as well.

Williams. A resulting search of Williams’s computer yielded 22 images of minors in sexually explicit poses or activity.

Federal officials charged Williams with two counts of child pornography. The first count related to actual possession of child pornography. The other charge was based on 18 U.S.C. § 2252(a)(3)(B), the so-called pandering provision. This provision targets any person who knowingly advertises, promotes, presents, distributes, or solicits … any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains:
An obscene visual depiction of a minor engaging in sexually explicit conduct; or a visual depiction of an actual minor engaging in sexually explicit conduct.

Williams pled guilty to both counts, but reserved the right to challenge the constitutionality of the pandering provision. The judge sentenced

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ISSUE
Does a federal law violate the First Amendment when it prohibits the promotion or advertising of material that purports to be child pornography even if the material is not child pornography?

FACTS
In April 2004, a U.S. Secret Service agent in an undercover operation entered an Internet chat room under the name “Lisa_n_Miami.” The agent posed as a person interested in obtaining child pornography. The agent communicated via e-mail with someone who had adopted a sexually explicit user name. The two traded communication about swapping child pornography pictures. The person with the sexually explicit user name posted various sexually explicit pictures of minors in sexually explicit poses. The agent determined that this poster was respondent Michael

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Argument Date: October 30, 2007
From: The Eleventh Circuit
Williams to 60 months’ imprisonment for each count with the terms to run concurrently.

The district court rejected the respondent’s challenge, finding that the pandering provision “only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography.” The district court reasoned that the pandering of such material is not protected by the First Amendment.

On appeal, a three-judge panel of the U.S. Court of Appeals for the 11th Circuit reversed, finding the provision unconstitutionally overbroad and vague. The Eleventh Circuit cited the concern Senator Patrick Leahy voiced during the legislative process: that the provision “federally criminalizes talking dirty over the Internet or the telephone when the person never possessed any material at all.”

The Eleventh Circuit wrote that “the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment.” The appeals court found “particularly objectionable” the fact that “liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted in legal child erotica, or on promotional or solicitious speech reflecting that an individual finds certain depictions of children lascivious.”

The Eleventh Circuit also determined the statute was too vague, writing that it “is unnecessarily muddled by the nebulous ‘purported material’ and ‘reflects the belief, or is intended to cause another to believe’ language.”

The government petitioned for en banc review, which was denied on July 17, 2006. The government then petitioned for a writ of certiorari (after Justice Clarence Thomas twice extended the filing deadline) on November 17, 2006. The Supreme Court granted review on March 27, 2007.

**CASE ANALYSIS**

Child pornography is a form of expression that receives no First Amendment protection. The Court clarified in *New York v. Ferber*, 458 U.S. 747 (1982), that this material had no protection because of its link to the sexual abuse of children. In *Osborne v. Ohio*, 495 U.S. 103 (1990), the Court ruled that the private possession of child pornography—even without active distribution—could be criminalized.

With the advent of computer technology, the child pornography market expanded. Many child pornographers morphed pictures of adults and created “virtual” child pornography—images of child porn that contain no actual children.

Congress addressed this problem in the 1996 Child Pornography Protection Act (CPPA).

However, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the U.S. Supreme Court struck down two provisions of CPPA that dealt with virtual child pornography. One of the invalidated provisions, 18 U.S.C. § 2256(8)(D), defined child pornography to include visual depictions “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.”

The Court determined that the provisions prohibited material that didn’t fall into the traditional definitions of the unprotected categories of obscenity and child pornography. Writing for the Court, Justice Anthony Kennedy determined that “where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.” The Court also felt the provisions came dangerously close to thought control—punishing people for their dirty thoughts. Kennedy explained that the government cannot “suppress lawful speech as the means to suppress unlawful speech.”

With respect to the pandering provision in CPPA, the Court noted that it punished individuals farther down the distribution chain for possessing images that were marketed—perhaps mistakenly—as child pornography.

After the Court’s decision in *Free Speech Coalition*, Congress responded with the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003—known as “the PROTECT Act.” The PROTECT Act expands the definition of child pornography to include synthetic or virtual child pornography. Those provisions are not at issue in the Williams case, which does not involve virtual child pornography. It is undisputed that respondent Michael Williams possessed and advertised “real” child pornography. The question in this case concerns whether the federal law that prohibits the pandering of material as illegal child pornography violates the First Amendment.

The PROTECT Act changed the anti-pandering provision. In the words of the Eleventh Circuit, these changes “allay certain concerns voiced by the Court in *Free Speech Coalition.*” The new provision focuses only on the pandering speech, not on the underlying material. However, the statute fails to

(Continued on Page 74)
provide for an affirmative defense that the material promoted does not involve an actual minor.

The government argues that “offers and solicitations of illegal products are not protected by the First Amendment.” Such speech can be prohibited, the government insists, whether the speech is commercial or noncommercial. The petitioner-government points out that “speech proposing illegal activity can be just as injurious if offered for free as if offered for profit.”

The government asserts that such speech can be prohibited because it contributes to the market for child pornography and fuels the creation of more such material. “Congress can ban such speech as a permissible means of drying up the market for child pornography and thus eliminating a major incentive for its creation,” the government asserts. The government concludes that “there is no First Amendment value in speech that peddles innocent or nonexistent material as illegal child pornography.”

As a fallback position, the government also contends that even if the statute technically applies to some protected speech, that fact should not result in the law being struck down on its face. Instead, the government asserts that such situations should be addressed in future “as-applied” challenges to the law. The government asserts that the statute is not substantially overbroad. According to the government, “even if narrow circumstances could be imagined in which the statute would reach protected speech, the remedy would be an as-applied challenge rather than the radical step of facially invalidating the law.”

The respondent and supporting amici counter that the new statute suffers from the same fundamental flaws as the provisions struck down by the Free Speech Coalition decision. They argue that the government certainly can prohibit and punish those who distribute and possess child pornography. However, they assert that the anti-pandering provision goes too far by criminalizing speech about child pornography—even speech about material that itself wouldn’t even qualify as actual child pornography. Williams contends that the provision goes too far by criminalizing the “non-commercial, non-inciteful promotion of illegal child pornography.” He says the law is substantially overbroad because it captures “any non-commercial parable between citizens who are simply exchanging their thoughts and ideas about child pornography.”

The amicus National Coalition Against Censorship, writing in support of Williams, argues that the Court rejected the “dry-up-the-market” rationale in Ashcroft v. Free Speech Coalition and says “the Government presses the same arguments already raised and rejected in Free Speech Coalition.” In its amicus brief, the National Coalition Against Censorship writes that the law “threatens to criminalize a substantial range of speech that is neither commercial nor false—including sexually explicit materials involving simulations or virtual images of minors, sarcasm, hyperbole, jokes told in poor taste, mistaken beliefs, and advocacy speech.”

**SIGNIFICANCE**

Respondent remains incarcerated in a federal prison not only for his violation of the pandering provision, but also for his conviction for possession of child pornography. He was sentenced to 60 months concurrently for each violation. Thus, a favorable decision for Michael Williams will not result in his release because the Court’s decision will have nothing to do with the underlying child pornography possession conviction.

However, the parties and amici on both sides contend the decision is very significant. Petitioner and its amici argue the pandering provision is necessary to prosecute and curtail insidious child pornography networks. However, the Free Speech Coalition argues that this claim may not be justified. In its amicus brief, the Free Speech Coalition questions whether the government has had difficulty obtaining convictions in child pornography cases, writing: “[t]he fact of the matter is that federal authorities have had remarkable success in prosecuting child pornography cases before, during and after [the Court’s decision in] Free Speech Coalition.”

Respondent and amici claim that the law criminalizing the *marketing* of material that may or may not actually violate child pornography laws endangers a range of expressive materials that do not constitute obscenity or child pornography.

The Court could also speak to the continued viability of *Ginsburg v. United States* (1966). In *Ginsburg*, the Court ruled that the pandering nature of speech could be used as evidence that it constituted obscenity. The Eleventh Circuit noted that *Ginsburg* was decided before the Court started to protect commercial speech in the mid-1970s. “Since *Ginsburg*, the Court has extended First Amendment protection to commercial speech and has made it clear that truthful, non-obscene material cannot be deemed obscene simply based on the manner in which it is advertised or marketed.”

Twenty-eight states in their amicus brief in support of petitioner contend that the anti-pandering measure is a “critical prosecutorial tool”
needed to close the burgeoning networks of illegal child pornography. Because the Supreme Court in *Free Speech Coalition* prohibited the criminalization of virtual child porn, the states contend the anti-pandering measure is even more crucial. They point out that an adverse decision could endanger similar state laws around the country.

However, those supporting Williams contend that dangers will arise if the Court upholds the law’s pandering provision. According to the amicus brief of the American Booksellers Foundation for Free Expression, a favorable decision for the government and what it terms “the marketing provision” will mean that the government can create “similar marketing crimes to laws restricting obscenity and harmful to minors.” These groups contend that the federal law at issue in this case “indirectly restricts the protected books, periodicals and DVDs whose marketing is chilled by the possibility of a lengthy jail term.”

The decision could be significant as well because it affords the Court the opportunity to clarify when facial challenges are appropriate or whether—as Justice Antonin Scalia has advocated in several other First Amendment cases—as-applied challenges provide the more appropriate basis for challenging such laws on free speech grounds.

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### Amicus Briefs

**In Support of Petitioner United States**

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- American Center for Law and Justice and Eighteen Members of Congress (Jay Alan Sekulow (202) 546–8890)
- Lighted Candle Society and Family Leader Foundation (Gene C. Schaerr (202) 282–5000)
- Morality in Media (Robin S. Whitehead (212) 870–3222)
- National Center of Law for Children and Families, Stop Child Predators, the KlaasKids Foundation, the Jessica Marie Lunsford Foundation, and the Joyful Child Foundation (Daniel P. Collins (213) 683–9100)
- National Legal Foundation (Steven W. Fitschen (757) 463–6133)
- The Rutherford Institute (John W. Whitehead (434) 978–3888)

**In Support of Michael Williams**

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- National Coalition Against Censorship and the First Amendment Project (Katherine A. Fallow (202) 639–6000)
Is the Tucker Act’s Six-Year Limitation Period Jurisdictional?

by Mary Phelan D’Isa

The Tucker Act gives the Court of Federal Claims power to decide certain claims against the federal government that would otherwise be barred by sovereign immunity. Such claims must be filed within six years after they accrue. The Court will decide if this limit is jurisdictional (meaning the court lacks the power to hear any claims filed after six years) or whether it is merely a claim-processing rule (meaning failure to file on time is simply an affirmative defense).

Claim-processing rules tell a claimant how and when to file a claim. Jurisdiction-granting rules tell a court if it has authority—subject matter jurisdiction and personal jurisdiction—over a claim and the parties so it can render and enforce judgment. Some rules have characteristics of both claim-processing and jurisdiction-granting. Still others are easily mischaracterized and misapplied.

In a string of recent decisions, the Court recognized this confusion and misuse and suggested a need to demarcate these rules: “[c]larity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.” Kontrick v. Ryan, 540 U.S. 443, 456 (2004) (emphasis added). These cases hold that failure to follow a claim-processing rule merely provides a waivable defense to a claim. If a claim-processing rule is not met and neither party objects, there is no impact on the court’s authority to hear the case. However, failure to follow a jurisdiction-granting rule is fatal to the court’s authority to hear a claim—and the parties or the court (sua sponte on its own imitative) may raise a subject matter jurisdiction failure at any stage of litigation—including, for the first time, on appeal. Thus, how a particular rule is characterized can be deal-breaking.

The Tucker Act was passed in 1887. It was named after John Randolph Tucker of Virginia, who introduced it as an alternative to other measures the House Judiciary Committee considered for claims against the federal government. The act waives the federal government’s sovereign immunity in cases involving contracts and certain constitutional claims, including unjust takings claims under the Fifth Amendment (which provides that property shall not “be taken for public use without just compensation”) 28 U.S.C. § 1491. Sovereign immunity is the legal doctrine that says a government is immune from being sued in its own courts unless that government consents to the
suit. The limitations section of the act provides that: “[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition ... is filed six years after such claim first accrues.” 28 U.S.C. § 2501.

The Supreme Court now will decide whether the limitations period in § 2501 is a claim-processing or jurisdiction-granting rule. If the Court follows several of its recent statements that characterize statutes of limitations and other time prescriptions as claim-processing, then the failure to object to a Tucker Act claim filed outside the six-year limitations period will not affect a federal court’s ability to hear the claim. Conversely, if the Court treats it as a jurisdiction-granting rule, then federal district courts will lack subject matter jurisdiction authority to hear any Tucker Act claim that is filed untimely—no matter when and by whom that defect is raised.

ISSUE
Does the six-year statute of limitations in the Tucker Act (28 U.S.C. § 2501) limit the Court of Claims’ subject matter jurisdiction?

FACTS
It is first important to note that the Court did not grant certiorari on the petitioner’s second question that asked when a claim for unlawful taking accrues under § 2501 of the Jones Act. Further, the lack of subject matter jurisdiction issue did not get raised for the first time until the case was on appeal at the U.S. Court of Appeals for the Federal Circuit. Therefore, most of the facts reported in the decisions below, which are not in dispute, are irrelevant to the issue currently before the Court.

Petitioner, John R. Sand & Gravel (JRS&G), is a Michigan company that leased 158 acres in Metamora Township, Lapeer County, Michigan, in 1969 for a term of 50 years from Russell and Mildred Parrish. (Lapeer County is located in the southeastern part of the state, just north of Detroit.) The lease entitled JRS&G the exclusive right to mine and remove sand and gravel from the property. Before that, starting in 1955, the Parrishes operated an unregulated open dump in Lapeer County, which was known as the “Metamora Village Dump.”

In 1966, the dump was converted into a landfill and began accepting illegal solid and liquid industrial waste in 55-gallon drums. Tens of thousands of these drums are buried on this site. The Parrish family continued to operate the landfill, which was located near JRS&G’s leased property, until the landfill closed in 1980. (Russell Parrish’s son, Eugene Russell Parrish, took over the landfill in 1974. According to his deposition, that is when he stopped accepting drums at the landfill. The landfill lost its license in 1979.) In 1984, the Environmental Protection Agency (EPA) placed the landfill on its National Priorities (Superfund) List of contaminated sites that needed remedial action. The EPA required several companies, including Ford Motor Company and General Motors—but not JRS&G—to cleanup the landfill. For several years thereafter, the EPA required a number of cleanup actions, including excavating the buried drums of hazardous materials, taking soil samples, installing monitoring wells, and constructing a landfill cap and a pad to store the drums near the JRS&G leasehold. The cleanup was to take place in two phases: (1) drum excavation and removal, and (2) the remediation of the site.

One of the actions required the government to construct a security fence around some of the cleanup operations. The initial fence cut off JRS&G’s access to parts of its plant and temporarily prevented it from operating its machinery and selling finished products to its customers. JRS&G protested and the fence was relocated outside the primary plant. JRS&G continued its mining and gravel operation until another fence was installed. Once again the fence temporarily deprived JRS&G of access to some of its operations, specifically the water supply. And once again, the fence was removed months later. Eventually, the dispute was resolved in the U.S. District Court for the Eastern District of Michigan, when the court ordered that the government and its representatives have access to the landfill site and that another fence be constructed—this time enclosing about 42 acres of JRS&G’s leasehold and excluding JRS&G only from the cleanup’s institutional controls.

In 2002, JRS&G filed a Tucker Act claim against the United States, alleging that the cleanup operations constituted a permanent physical taking and violated the Fifth Amendment. JRS&G argued that its claim accrued in 1998 when the EPA moved the fence and the court ordered that the EPA have unrestrained access to the leased property. The government countered that the claim accrued four years earlier—in 1994—when the fence first went up, and thus the claim was untimely.

The United States Court of Claims, in two decisions, held that the claim did not constitute a takings claim because JRS&G lacked a compensable property injury. The Court initially found that since the claim accrued in 1992, the suit was untimely under the Tucker Act’s limitations period. However, the court revisited the accrual question and decided that the claim was timely under § 2501 since it had actually accrued in May 1998.
Nevertheless, the Court denied the claim on its merits. The Court never addressed the jurisdictional impact of untimely filed claims, and neither party objected to the Court’s jurisdiction. JRS&G appealed to the U.S. Court of Appeals for the Federal Circuit. 57 Fed. Cl. 182 (Fed. Cir. 2003) (rulings on summary judgment motions); 52 Fed. Cl. 556 (Fed. Cir. 2004) (decision after bench trial).

On appeal, the parties focused solely on the Fifth Amendment takings issue. However, a consortium of 12 corporations who had agreed under a consent decree with the government to fund the landfill cleanup, filed an amicus brief and arguing that the claim was untimely under the Tucker Act’s six-year limitations period. They argued that the claim accrued when the first fence went up in 1994—more than six years before the case was filed. Therefore, according to the amicus, the claim was time-barred. JRS&G continued to argue that its claim did not accrue until the fence was relocated in 1998. In a 2-1 ruling, however, the Federal Circuit held that the claim accrued in 1994; therefore, the suit was untimely. Citing its own precedent, the appeals court ruled that § 2501 was jurisdictional, and thus the Court of Federal Claims lacked the subject matter jurisdiction to decide the suit. As a result, the appeals court never considered the merits of JRS&G’s takings claim.

The dissent found that “section 2501 is an unexceptional statute of limitations that is interpreted like any other statute of limitations.” 457 F.3d at 1362 (Newman, J., dissenting). Citing the language in the Tucker Act, the dissent noted that the “text of the statute confirms that the limitations period is applied to claims of which the Court of Federal Claims has jurisdiction.” (28 U.S.C. § 2501 provides: “Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.”)

The dissent was also not persuaded by the majority’s rationale that because Tucker Act claims for monetary damages against the government require the government’s waiver of its sovereign immunity before a court may exercise subject matter jurisdiction, such claims must be strictly scrutinized. Nor did it agree that such claims should be distinguished from limitation provisions applicable to claims for money damages between private parties that simply require “minor procedural requirements ... that Congress characterize[s] as ‘claim-processing.’” Citing the Court’s decision in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), the dissent charged that the precedent to support the majority’s rationale had been overruled. “The Court in Irwin ... clarified that limitations principles apply to the government ‘in the same way’ as they are applied to private parties, e.g., they may be tolled or waived in appropriate circumstances.” 457 F.3d at 1363 (Newman, J., dissenting).

Nevertheless, the dissent found that based on the merits, JRS&G was not entitled to compensation.

JRS&G appealed, and the Court granted certiorari on May 29, 2007, limiting its review to the jurisdictional significance of the Tucker Act’s six-year limitations period. It did not grant certiorari on the question of when a takings claim accrues under the Tucker Act.

**CASE ANALYSIS**

This case pits the Court’s recent jurisprudence treating many statutes of limitations and other time prescriptions as claim-processing rules against section 2501’s “longstanding pedigree as a jurisdictional requirement” in the context of an underlying Fifth Amendment takings claim. John R. Sand & Gravel Co. v. U.S., 457 F.3d 1345, 1355 (Fed. Cir. 2006). Indeed, since 1883, “the Court has consistently held that the time limit [in the Tucker Act] is jurisdictional and ... cannot be waived.” 457 F.3d at 1355 (citing Kendall v. United States, 107 U.S. 123 (1883)). But review is necessary to resolve confusion and inconsistency in the Court of Federal Claims and the Federal Circuit. As JRS&G contends in its petition for certiorari: “For 20 years, the Federal Circuit has steered an unsteady course over the jurisdictional nature of Section 2501 ... and this conflict now manifests itself in contradictory decisions in the Court of Federal Claims that thwart uniform treatment of Tucker Act claimants.”

At the heart of JRS&G’s arguments is the premise that § 2501 is an unexceptional limitations provision. To support this notion, JRS&G points to the 1948 codification of the Tucker Act that placed its limitations provision in a procedure chapter in the judicial code, “separate and distinct” in both language and placement from its sovereign-immunity-waiving provision that was placed in a jurisdiction chapter. JRS&G contends in its brief that the immunity-waiving provision speaks in “forthright and distinctive language of ‘jurisdiction,’” but § 2501, “by contrast ... address[es] jurisdiction, if at all, only to confirm the prior attachment or exercise of jurisdiction by the Court of Federal Claims.” It adds that at the time Congress revised and codified Title 28, “the prevailing rule in American law was that a statute of limitations is a procedural device and an affirmative defense that may be waived or otherwise forfeited.”
JRS&G’s better argument here, and one advanced by the Federal Circuit dissent in this case, endorses a “plain English” reading of the statute. At least one panel of the Court of Claims agrees and charges that “this plain English interpretation is supported by the Federal Circuit cases that have closely examined this issue.” Grass Valley Terrace v. United States, Fed. Cl. 341, 347 (2005). According to the dissent, any other interpretation reads the phrase “has jurisdiction” out of the statute “and thereby violate[s] the ‘cardinal principle of statutory construction that a statute ought upon the whole be so constructed that, if it can be prevented no clause, sentence, or word shall be superfluous, void or insignificant.’” 457 F.3d at 1362, Newman, J., dissenting, citing and quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001).

The way JRS&G and the Court of Claims panel read it, the text of section 2501 (“Every claim of which the United States Court of Federal Claims has jurisdiction ...”) confirms that “the limitations period is applied to claims of which the Court of Federal Claims already ‘has jurisdiction.’” 457 F.3d at 1362, Newman, J., dissenting. In other words, Tucker Act claimants must perform a two-step dance: establish jurisdiction under § 1491(a)(1); then timely process the claim under § 2501—and the former is not defeated by failure to satisfy the latter.

The government counters that petitioner’s statutory location argument is misplaced for two reasons. First, “the 1948 Act that revised the Judicial Code expressly stated that no inference regarding the meaning of various provisions should be drawn from their placement within Title 28.” And second, the Court recently held that the time limit for filing a notice of appeal in a federal civil case is jurisdictional—despite it being codified in a chapter different from the one that defines jurisdiction.

The government further argues that JRS&G’s textual argument is misplaced because the Court has consistently distinguished statutory limits for filing suits against the federal government for money damages from those applicable in different contexts. And because “the language of the current provision is not meaningfully different from prior versions of the six-year filing requirement, which the Court has consistently construed as non-waivable and jurisdictional,” JRS&G’s textual argument provides no sound basis for departing from this Court’s prior decisions.” The government adds that “against the backdrop of those decisions, Congress has periodically refined, reenacted, and recodified the six-year filing requirement without evincing any intent to permit waiver of that requirement or otherwise to alter its jurisdictional character.”

JRS&G’s final argument dovetails the logic of its plain English argument and draws upon selected slices of the Court’s recent limitations decisions for support. JRS&G starts this argument with Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). In Irwin the Court held that statutes of limitations on suits against the government should be treated “in the same way” as those in private suits. JRS&G contends that Irwin “superseded earlier decisions that had strictly applied statutes of limitations against the United States as jurisdictional conditions on the waiver of sovereign immunity.” The petitioner next pulls from the Court’s more recent statement in Bowers v. Liberty Mut. Ins. Co., 554 U.S. 187 (2008), that because “this Court has no authority to create equitable tolling exceptions to jurisdictional requirements,” [the] presumptive allowance of equitable tolling of statutes of limitations on claims against the government removes such statutes of limitations from the category of jurisdictional commands.”

However, other slices of Irwin are equally persuasive for the government. The Irwin Court said that jurisdictional treatment of statutory time limits “makes good sense,” 498 U.S. at 2365. The Court reasoned that, within constitutional bounds, because Congress sets the limits for the lower federal courts’ subject matter jurisdiction, “it can also determine when, and under what conditions, federal courts can hear them,” and when it does so, such limitations are no less “jurisdictional.” 498 U.S. at 2365. “[T]he notion of ‘subject matter’ jurisdiction obviously extends to ‘classes of cases ... falling within a court’s adjudicatory authority,’ ... but it is no less ‘jurisdictional’ when Congress forbids federal courts from adjudicating an otherwise legitimate ‘class of cases’ after a certain period of time has elapsed. ...” 498 U.S. at 2365-66.

Notwithstanding, treating § 2501 as a jurisdictional rule would be consistent with tradition and the Roberts Court’s trend toward strictly enforcing jurisdictional requirements.

In its amicus brief in support of Petitioner, the National Association of Home Builders urges the Court to heed the Fifth Amendment takings claim context of this suit and remand for ripeness considerations. Specifically, the association argues that the Court’s decision in Williamson County Reg’l Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985), creates an anomaly in this case; namely, that JRS&G’s takings claim against the EPA was not ripe (that is, not ready for litigation) until the company sought

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compensation under the Tucker Act by filing its claim in the claims court. Accordingly, the association argues, the statute of limitations could not have run before the takings claim became ripe. And because “ripeness is unquestionably jurisdictional, this point can be considered sua sponte” on the Court’s own initiative.

Whether the Court will consider this ripeness issue is questionable. Even “amicus recognizes the tautology to maintain that [JRS&G’s] takings claim did not ripen until [it] filed suit to compensate for EPA’s taking.” Nevertheless, the association contends “that odd result is required under the current state of the case law.”

More likely, however, the Court will focus on the confusion surrounding the jurisdictional significance of § 2501—and leave takings claimants to argue for their access to federal courts in another case.

**SIGNIFICANCE**

Since all Tucker Act lawsuits must be filed in the federal claims court and since all claims court appeals must go to the Federal Circuit (making it the only circuit to consider these issues), the Supreme Court’s decision in this case will provide for uniform treatment of Tucker Act claimants on the jurisdictional nature of the six-year limitations period.

In this case, the Supreme Court’s decision will either end JRS&G’s litigation, leaving the company without appellate review of the merits of its takings claim; or it will remand the case back to the Federal Circuit to decide whether the claims court erred in denying the company’s claim on its merits. This latter scenario will only occur if the Supreme Court finds that § 2501 is not jurisdictional—and it could require further litigation on the issue of when a takings claim accrues under the Tucker Act. The former will occur if the Court finds that § 2501 is jurisdictional in nature, in which case, the failure to file the claim within six years of its accrual will deny the federal courts jurisdiction authority to decide the claim on its merits—and it will not matter that this failure was raised for the first time on appeal.

In a broader context, the decision in this case may provide more insight into the Roberts Court, which appears to be “stemming the tide of federal litigation” by strictly enforcing jurisdictional requirements. It is unlikely it will produce any additional ripeness and takings precedent—but that itself may provide additional ammo for takings claimants who argue that their access to federal courts is being restricted.

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May the Parties to an Arbitration Agreement Agree that a Court May Modify the Award because of Legal or Factual Error?

by Jay E. Grenig

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ISSUE
May the parties to an arbitration agreement provide that a court may review an arbitration award for legal or factual error despite the Federal Arbitration Act’s provision that a court “must grant an order confirming an award except on specified grounds that do not include legal or factual error?”

FACTS
Hall Street Associates is the owner of property in Beaverton, Oregon. Mattel, Inc., and its predecessors have leased the property for over 20 years. As a result of a series of mergers and assignments, Mattel became the tenant in 1997. The lease between Mattel and Hall Street did not contain an agreement to arbitrate disputes; it preserved both parties’ right to have all claims arising under the lease resolved by court adjudication.

The parties’ lease required Mattel to comply with all federal, state, and local environmental laws and regulations in its use of the leased property. The lease required Mattel to assume liability “for the use of presence in the Building materials on or about the Premises of any hazardous waste” and responsibility for investigation and cleanup of “any such release or presence or use.” The lease provided that Mattel would “indemnify and defend Landlord” for “all losses, costs, damages, expenses (including environmental abatement costs[)] or liability directly or indirectly resulting or arising from any such release or presence or use of hazardous building materials.” The lease included an exception to the tenant’s obligation to indemnify the landlord, “[t]o the extent Tenant has been in compliance with applicable environmental laws, … Tenant shall not be held liable following the expiration of this Lease term for the following …. the removal and disposal of any hazardous waste on the Premises, the presence of use of which hazardous waste has not been caused directly or indirectly by the acts of the tenant.”

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The Oregon Drinking Water Quality Act required regular testing of the well water on the leased property for environmental contaminates. Mattel and its predecessors did not test the well water for trichloroethylene (TCE), a chemical used by a predecessor of Mattel to degrease metal parts.

After Hall Street tested the well water on the property in 1998, Hall Street discovered the well water contained levels of TCE significantly above federal limits. A subsequent investigation showed that other types of contaminants were present. In early 2000, Mattel notified Hall Street that it intended to terminate the lease. After spending more than $1 million on repairs and inspections, Mattel surrendered the property to Hall Street in May 2001. During this time, Hall Street filed a complaint in Oregon state court for a declaratory judgment that Mattel's termination of the lease was not permissible and that the lease obligated Mattel to indemnify Hall Street for costs related to environmental cleanup and third-party lawsuits. Mattel removed the case to the United States District Court for the District of Oregon based on the diversity of the parties.

In the district court, the parties conducted a court on one issue in the case involving Mattel's termination of the lease. 145 F.Supp.2d 1211 (D.Or. 2001). After the district court decided that issue and after an unsuccessful attempt to settle the entire case through mediation, the parties proposed to the district court that they arbitrate the remaining issues in the case. The proposed arbitration agreement allowed either party to seek district court review of the arbitral decision for substantial evidence and errors of law.

The parties' arbitration agreement contained several provisions relating to the district court's review of the arbitration award. First, to facilitate that review, Paragraph 1 of the arbitration agreement specified the “arbitrator shall prepare written findings of fact and conclusions of law that may be reviewed” by the district court at the request of either party. The arbitration agreement also specified the standard of review of the arbitration award:

The arbitrator shall decide the matters submitted based upon the evidence presented and the applicable law. The arbitrator shall issue a written decision which shall state the basis of the decision and include specific findings of fact and conclusions of law. The United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award, or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

A provision in the arbitration agreement entitled “Confirmation of Award by Judgment” conditioned confirmation of the arbitration award on the district court's first reviewing the arbitration award for substantial evidence of legal error at the request of either party. Following the district court's approval of the agreement, the parties proceeded to arbitration to resolve the remaining issues in the case.

In January 2002, the arbitrator issued an award determining that the lease contained a broad indemnification clause requiring Mattel to “indemnify Hall Street for all activities with respect to the premises whether or not they occurred before the date of the original lease.” The arbitrator determined the only exception to Mattel's obligation to indemnify Hall Street for all activities with respect to the premises was if Mattel (1) complied with all applicable federal, state, and local environmental laws; and (2) did not directly or indirectly contribute to the presence or use of hazardous waste on the property.

The arbitrator found that Mattel and its predecessor had failed to comply with the Oregon Drinking Water Quality Act during the approximately 18 years they occupied the property. However, the arbitrator concluded that Mattel's failure to comply with the Act was not a violation of any “applicable environmental law” because the statute sought to protect human health and was “not designed to protect landowners from having their property protected from environmental contamination.” Based on that conclusion, the arbitrator ruled Mattel was entitled to the contractual exception to the broad indemnification requirements of the lease.

Hall Street then filed a motion with the district court seeking review of the arbitrator's decisions. Hall Street argued that the arbitrator had committed legal error in concluding that Mattel's violation of the Oregon Drinking Water Quality Act was not a violation of an “applicable environmental law.” Granting Hall Street's motion to vacate the award, the district court held that the arbitrator had erred in concluding the Oregon Drinking Water Quality Act was not an “applicable environmental law.” The district court said the arbitrator's conclusion that the Act was not an applicable environmental statute “defies logic” and remanded the matter to the arbitrator.

On remand, the arbitrator entered an amended decision based on the
district court’s ruling that the Oregon Drinking Water Quality Act qualified as an applicable environmental law. Ruling that no exceptions to Mattel’s indemnification agreement applied, the arbitrator awarded Hall Street $8583,971.60 and also awarded declaratory relief against Mattel for all future costs that Hall Street might be required to pay relating to the environmental cleanup of the property.

Both parties then sought review of the arbitrator’s amended decision. The district court upheld the arbitrator’s amended award, except for a correction of the arbitrator’s computation of prejudgment interest. The judgment against Mattel totaled $810,107.49 with 6 percent post-judgment interest. Both sides then appealed to the U.S. Court of Appeals for the Ninth Circuit.

Reversing the district court, a three-judge panel of the Ninth Circuit declared that, under Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003) (en banc), the Federal Arbitration Act precludes parties from modifying the statutory grounds for vacatur of arbitral awards to authorize judicial review of an arbitration award for legal error. Also relying on Kyocera, the court held that evidence the parties intended that the entire arbitration agreement should fail in the event that the expanded standard of review provision failed was not strong enough to distinguish the case from Kyocera. 113 Fed.Appx. 272 (9th Cir. 2004).

According to the Ninth Circuit, Kyocera compelled it to vacate the district court’s judgment based on the arbitration agreement and returned the case to the district court. On remand, the district court was directed to return to the original arbitration award (not the subsequent award revised after reversal), and confirm that award unless the district court determines the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.

On remand, the district court again failed to enforce the arbitration award—this time finding the award was “implausible.” On appeal from that decision, a divided three-judge panel of the Ninth Circuit once again reversed the district court’s decision holding that implausibility is not a valid ground for avoiding an arbitration award under either 9 U.S.C. § 10 or 11. 196 Fed.Appx. 476 (9th Cir. 2006). Acknowledging that the arbitrator’s assessment of the merits in the case contained possible errors of law, the court held those errors were not a sufficient basis for a federal court to overrule an arbitration award. In addition, the majority found it cannot be said that the arbitrator’s decision was completely irrational.

The court remanded the case to the district court with instructions to enforce the original arbitration award and declare Mattel the prevailing party. Hall Street sought review of this decision by the U.S. Supreme Court, and the Supreme Court granted certiorari. 127 S.Ct. 2875 (2007).

**CASE ANALYSIS**

The right or duty to arbitrate normally arises from an agreement to arbitrate a future or existing dispute. The arbitration agreement determines and limits the issues to be decided. In Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 479 (1989), the Supreme Court held that “[j]ust as [private parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.” An arbitration agreement may include such matters as the governing substantive law, the procedure for initiating arbitration, the procedure for selecting the arbitrator or arbitrators, the place of the arbitration hearing, and whether the decision should include the arbitrator’s reasons for the award.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify, or correct an arbitral award. In addition to these statutory grounds for vacating an award, courts have applied the non-statutory grounds of manifest disregard of the law, conflict with public policy, complete irrationality, and failure of the award to draw its essence from the parties’ underlying contract.

It is Hall Street’s position that, at the time the parties made their proposal to arbitrate, the parties and the district court were bound by the decision of the Ninth Circuit in LaPine Tech. Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997), vacated sub nom. Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987 (9th Cir. 2003) (en banc), petition for cert. dismissed, 540 U.S. 1098 (2004). In LaPine, the Ninth Circuit held that nothing in the Federal Arbitration Act precludes parties from agreeing to deviate from the statutory grounds for vacatur and agreeing to allow federal courts to review an arbitration award for legal error. Based on LaPine, the district court approved the parties’ agreement to arbitrate the remaining issues and agreed to confirm the arbitration award only if it was free from legal error.

Quoting Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. (Continued on Page 84)
Hall Street argues that the primary purpose of the Federal Arbitration Act is to ensure that “private agreements to arbitrate are enforced according to their terms.” Hall Street asserts that the Supreme Court has held repeatedly that private agreements to arbitrate must be rigorously enforced according to their terms, even if those terms deviate from the Federal Arbitration Act’s statutory provisions.

Mattel responds that the Federal Arbitration Act’s limited grounds for vacatur, modification, or correction of an award reflect a deliberate choice made by Congress in 1925 to reject an alternative approach of certain contemporaneous arbitration laws in some states, in particular Illinois, that permitted vacatur of arbitration awards for legal error. Mattel says Congress followed the New York Arbitration Act of 1920, which had been uniformly interpreted not to permit review of an arbitrator’s conclusions of law or findings of fact.

Hall Street points out that that Section 9 of the Federal Arbitration Act authorizes “parties in their agreement” to determine whether “a judgment of the court shall be entered upon the award made pursuant to the arbitration.....” It explains that, by deferring to the parties’ agreement on whether a judgment shall be entered, Section 9 necessarily allows parties to specify in their agreement the circumstances under which a judgment shall not be entered on an arbitration award. Hall Street notes that the Supreme Court has recognized judicially created exceptions to the statutory grounds for vacating arbitration awards, including manifest disregard of the law.

With respect to manifest disregard of the law as a ground for vacating an arbitration award, Mattel contends that Court’s reference to that in Wilko v. Swenson, 346 U.S. 427 (1953) was dicta going to the scope of the statutory grounds in Section 10. Mattel claims that such dicta did not establish a nonstatutory ground for vacatur. Mattel also asserts that Volt Information Systems is inapplicable here because it relied on principles of preemption and looked to the test of Section 4 of the Federal Arbitration Act, neither of which is relevant here according to Mattel.

Hall Street reasons that an arbitration agreement entered into in the middle of an ongoing federal litigation, which clearly and unmistakably preserves the court’s ability to correct an arbitrator’s erroneous legal conclusion, does not offend the goals and policies of the Federal Arbitration Act or unduly burden the federal judiciary. Hall Street says the parties’ arbitration agreement does not usurp any congressional power or dictate to the court how to conduct its judicial proceedings. It points out the district court fully endorsed the parties’ agreement and entered it as an order of the court.

Mattel disagrees, asserting that Section 2 of the Federal Arbitration Act makes the Act applicable to agreements to “settle” a controversy “by arbitration.” If the parties to an arbitration agreement can agree a court will refuse to confirm an award if the award contains an error of law or lacks substantial evidence supporting facts, Mattel argues that arbitration becomes only a prelude to judicial review and there is no agreement that arbitration will “settle” the controversy.

Mattel notes the parties can protect themselves against the risk of an anomalous decision by an arbitrator through the use of appellate arbitration. Appellate arbitration allows parties to provide for a second review by arbitrators of an award under whatever standards the parties wish. According to Mattel, what parties cannot do is require a court to apply standards of review and grounds for judicial vacatur, modification, or correction of an arbitration award that the parties customize for their particular cause of action in court, but which Congress did not authorize in the Federal Arbitration Act.

Hall Street stresses that the parties’ agreement did not purport to confer federal jurisdiction. It points out that the Federal Arbitration Act is not a jurisdictional statute and that any case before a federal district court under the Federal Arbitration Act must have an independent jurisdictional basis.

Mattel responds that, under Hall Street’s view, a court would be bound by the grounds drafted by the parties for confirmation, vacatur, modification, or correction, rather than by the grounds stated by Congress. Mattel asserts that Section 9 of the Federal Arbitration Act unequivocally directs that a court “must grant” an application for an order forming an arbitration award unless “the award is vacated, modified or corrected as prescribed in sections 10 and 11” of the Act. Mattel claims that Sections 10 and 11 do not authorize in the Federal Arbitration Act.

Given the rapid growth of the use of arbitration to resolve commercial and consumer disputes, this case will have a significant impact on how arbitration agreements are drafted and applied. There is a defi-
nite split among the circuits with respect to whether the parties may contract for more expansive judicial review of arbitration awards. The Tenth Circuit has agreed with the Ninth Circuit that the parties do not have such power. *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001). Cf. *UHC Mgt. Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998) (stating it is not clear that parties have any say in how a federal court will review an arbitration award, when Congress has ordained a specific, self-limiting procedure for how such review is to occur).

The Third and Fifth Circuits disagree with the Ninth and Tenth Circuits, holding that parties who voluntarily agree to arbitration may provide for more expansive judicial review of an arbitration award than that provided in the Federal Arbitration Act. They emphasize the purpose of the Federal Arbitration Act is to enforce the terms of private arbitration agreements including terms specifying the scope of review of arbitration decisions. See *Roadway Package Systems, Inc. v. Kayser*, 257 F.3d 287 (3d Cir.), cert. denied, 534 U.S. 1020 (2001); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).

The Supreme Court has the opportunity to decide whether parties may include standard-of-review clauses in arbitration agreements or if substantive review of arbitration awards may only be had under the narrow standards of the Federal Arbitration Act.

It is suggested that a decision permitting parties to include a standard-of-review clause in arbitration agreements promotes arbitration by appealing to parties who otherwise would be reluctant to arbitrate for fear of a legally erroneous award without a chance for meaningful review. Others disagree, suggesting that permitting parties to agree on nonstatutory grounds for judicial vacatur, modification, or correction of arbitration awards based on errors of law would create havoc for arbitrators and courts, resulting in arbitration becoming like court proceedings. Such a decision may force arbitrators to adopt explicit limits on the scope of the record, rulings on evidentiary objections, and formal findings. Some argue that this would seriously undermine the time and cost savings arbitration is supposed to yield.

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How Should the Armed Career Criminal Act Treat Convictions That Allow Persons to Retain Their Civil Rights?

by Kathy Swedlow

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James D. Logan received a 15-year mandatory minimum sentence in federal court as an “Armed Career Criminal”; the sentencing enhancement was based on three prior state misdemeanor convictions for battery. Logan argues that these state convictions were improperly used to enhance his sentence as they are the sort of convictions that Congress sought to exclude under the Firearm Owners’ Protection Act.

ISSUE

Does the “civil rights restored” provision of 18 U.S.C. § 921(a)(20) apply to a conviction for which a defendant was not deprived of his civil rights and thereby preclude such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)?

FACTS

James D. Logan was arrested on May 31, 2005, following a consensual search of his car. During the search, police officers found a 9mm pistol in the glove box. At the time of his arrest, Logan had four convictions: a 1991 felony conviction for unlawful possession of a controlled substance, two 1988 state of Wisconsin misdemeanor convictions for battery; and one 2001 state of Wisconsin misdemeanor conviction for battery. Because Logan was considered a repeat offender under state law, the maximum penalty for each of the battery convictions was increased from nine months to three years.

Logan later pleaded guilty in federal court to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). In turn, the Probation Office prepared and submitted a presentencing report, recommending a 15-year enhancement to Logan’s sentence under the provisions of the Armed Criminal Career Act (ACCA). According to the presentence report, Logan’s three state misdemeanor battery convictions counted as felonies for ACCA enhancement because they were punishable by more than two years’ imprisonment.

At Logan’s sentencing, the district court adopted the recommendation in the presentence report and rejected Logan’s arguments that his state misdemeanor battery convictions should be excluded under the Firearm Owners’ Protection Act (FOPA). That statute expressly exempts state criminal convictions from being considered under ACCA when the defendant has had his civil rights “restored” after serving his sentence for the relevant state court conviction. (Such civil rights include the right to vote, sit on a jury, and hold public office.) According to the district court, since Logan had never
lost his civil rights as part of his sentencing for the battery convictions, they could not have been “restored” within the meaning of FOPA. Logan was thereafter sentenced to 15 years imprisonment. Had the district court accepted Logan’s argument and found his battery convictions exempt under FOPA, his maximum sentence would have been 120 months, and his guideline range would have been between 37–46 months.

Logan appealed, but the Seventh Circuit affirmed the district court. United States v. Logan, 453 F.3d 804 (7th Cir. 2006). In its decision, the appellate court rejected Logan’s argument that the government’s application of FOPA defied logic, insofar as it allowed a person whose civil rights had never been taken away (a person such as Logan) to be treated differently from one whose civil rights had been removed and then later restored. The court also rejected Logan’s argument that nothing in the legislative history of FOPA suggested that Congress wanted these two categories of individuals to be treated differently.

The Supreme Court granted certiorari on February 20, 2007.

**Case Analysis**


In interpreting these provisions, the Supreme Court held in 1983 that an expunged state conviction could serve as a predicate offense for enhancement of a federal sentence under ACCA. Dickerson v. New Banner Institute, 460 U.S. 103 (1983). In response to Dickerson, Congress enacted the Firearm Owners’ Protection Act (FOPA) in 1986, in order to ensure that federal courts—when enhancing federal sentences based on state convictions—give appropriate deference to state court decisions regarding who may and may not be trusted to legally carry a weapon. According to the relevant provision of FOPA:

>What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, or receive firearms. 18 U.S.C. § 921(a)(20)(B).

Two federal courts of appeals have considered claims from defendants in similar circumstances to Logan, and they have reached opposite conclusions as to whether a conviction of a defendant who retained his civil rights is exempt from FOPA. In 1995, the Second Circuit held that such a defendant who is not exempt (McGrath v. United States, 60 F.3d 1005 (1995)), and in 1996, the First Circuit reached the opposite conclusion (United States v. Indelicato, 97 F.3d 627 (1996)). In ruling on Logan’s case, the Seventh Circuit explained that it was following McGrath for one “simple” reason: “the ‘restoration’ of a thing never lost or diminished is a definitional impossibility.” Logan, 453 F.3d at 805 (quoting McGrath, 60 F.3d at 1007).

Before the Supreme Court, Logan presents many of the same basic arguments as he did in the courts below. First, he argues that the purpose of § 921(a)(20) would be frustrated if defendants whose rights were retained were treated differently from those whose rights were lost and then later restored. In support, Logan discusses the history of FOPA, emphasizing the specific reason for its enactment: to “give full effect to a state’s determination that a particular conviction is not serious enough to warrant subjecting the person to prosecution and increased penalties under the federal statute.” In Logan’s view, because FOPA was expressly enacted to oblige the federal courts to defer to certain state court determinations, his convictions should be exempted.

Logan also notes that the Court has, in the past, found the “process by which a person’s status is achieved” to be “irrelevant.” Specifically, Logan points to Caron v. United States, 524 U.S. 308 (1998), a case in which the defendant had the requisite number and type of convictions to support a 15-year enhancement under ACCA. However, while the defendant in Caron had had his civil rights restored at the completion of his state sentences, he did face some limitations on his ability to possess a handgun. The Caron Court held that the handgun limitation triggered the final clause of § 921(a)(20), and that the defendant’s sentence was appropriately enhanced. The Caron Court also explained that § 921(a)(20) did not require a “case-by-case decision to restore civil rights to [a] particular offender.” Instead, the Court reasoned that § 921(a)(20) applied equally to situations in which there had been an individual determination regarding the defendant’s status (e.g., in the case of an executive (Continued on Page 88)
Second, Logan argues that a reading of the statutory provisions surrounding § 920(a)(20) suggests that the statute should be interpreted to exclude convictions for which civil rights are retained as well as those for which civil rights are only restored after the completion of the resulting sentence. In particular, Logan refers the Court to § 922(9)(g), which restricts possession of a firearm by a person who has been convicted of any misdemeanor crime of domestic violence. Section 921(a)(33)(B)(ii) of that same statute—similar to the provision at issue in the present case—exempts from consideration those convictions for which the defendant's civil rights have been restored; however, § 921(a)(33)(B)(ii) also states that the restoration of civil rights provision applies only “if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense.” Logan contends that these two statutory provisions must be read side-by-side to reach two different results: as he argues, “[p]lainly, where Congress wanted to narrow the exemption provision to encompass only offenders whose civil rights were restored, it knew how to do so.”

Finally, Logan argues that to exclude convictions for which civil rights are retained would produce an “irrational and unjust” result, which requires that the statute be read in such a way as to exempt his convictions from being used to enhance his sentence under § 924(e). See e.g., Public Citizen v. United States Dep’t. of Justice, 491 U.S. 440, 470-471 (Kennedy, J., concurring) (explaining that “[w]here the plain language of the statute would lead to ‘patently absurd consequences,’ that ‘Congress could not possibly have intended,’ we need not apply the language in such a fashion ...”) (internal citations omitted).

In many ways, this aspect of Logan’s argument has the strongest appeal: It is difficult to understand why, although Logan was not deemed dangerous enough to lose his civil rights when convicted of battery in Wisconsin, he now faces a greatly enhanced sentence under federal law because he has been deemed a “career criminal” because of his state convictions. Notably, Wisconsin misdemeanants, even repeat offenders such as Logan, do not lose their civil rights upon conviction, but felony defendants do. This—combined with the fact that pardons are unavailable to misdemeanants—means that Wisconsin misdemeanants “have no way to satisfy § 921(a)(20)’s exemption clause under the Seventh Circuit’s interpretation.” This is the result that Logan labels absurd because it equates to a lifetime ban against possessing firearms for certain defendants, even when the state has never determined that such a ban should exist. Logan notes that Justice Clarence Thomas, dissenting in Caron, observed that “it is bizarre to hold that the legal possession of firearms under state law subjects a person to a sentence enhancement under federal law.” Id., 524 U.S. at 318 (Thomas, J., dissenting).

For its part, the government spends the greater part of its brief arguing that the “plain language” of 18 U.S.C. § 921(a)(20)(B) mandates that Logan’s convictions be allowed to enhance his sentence, essentially defending the logic used by the Seventh Circuit below. This “plain meaning” argument is really the government’s strongest claim: it is supported by the basic rules of statutory construction, and Logan tacitly concedes that “restore” and “retain” generally have very different meanings.

Next, the government takes issue with Logan’s understanding of the role FOPA plays in federal sentencing and how much deference federal judges are required to give to state court criminal sentences. Quoting Caron, the government observes that “the very point of ACCA is to ‘keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by States.’ ” Id., 524 U.S. at 315. In other words, the government claims that while ACCA and FOPA mandate some deference to state court decisions, those decisions do not fully control all federal sentencing decisions.

The government also contends that Logan has misread the import of the distinctions between §§ 921(a)(20) and 921(a)(33). As the government explains in its brief, § 921(a)(20) was enacted in 1986, in response to the opinion in Dickerson. Section 921(a)(33)—which has language differentiating those convictions for which civil rights have been lost and restored from those for which the loss of civil rights is not an available punishment—was enacted 10 years later, after some courts of appeal had questioned, in dicta, whether Congress had intended to exclude from § 921(a)(20)’s exemption persons who had never lost their civil rights. Thus, the government argues that the language in § 921(a)(33)
seeks to “clarify the meaning of ‘restored’ in the new statute, not to change the meaning of that term in the earlier statute.”

**SIGNIFICANCE**

While the factual circumstances in this case may not be common, the Court’s decision may have some far-reaching impact. Aside from the very real impact on James Logan, the Court’s decision will also signal how the relatively new Roberts Court wishes to treat mandatory sentencing laws. The divided Rehnquist Court, of course, issued the opinion in *Booker v. United States*, 543 U.S. 220 (2005), holding that the formerly mandatory Federal Sentencing Guidelines must be considered advisory only. See also United States Sentencing Commission, *Final Report of the Impact of Booker v. United States on Federal Sentencing* (March 2006). Although Logan’s case does not present the same Sixth Amendment issues presented in *Booker*, the issues presented in each are intertwined.

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May a Futures Commission Merchant Sue a Board of Trade for Failure to Keep a Commodities Exchange Honest?

by Barry Barnett

In this case, the Court is being asked to decide to either broaden or restrict the class of persons who may sue commodity boards of trade under the Commodity Exchange Act. If the class is broadened, not only people who bought or sold commodity contracts could recover losses, but also those who process such trades under the arrangements peculiar to commodity exchanges.

The Commodity Exchange Act provides an express private right of action to recover actual losses to a person who “engaged in any transaction” that was on or “subject to the rules of” a commodity board of trade if the board, in bad faith, engaged in illegal conduct that caused the person to suffer the actual losses. 7 U.S.C. § 25(b)(1).

ISSUE

Did the court of appeals in this case err in concluding that futures commission merchants lack statutory standing to invoke the right of action contained in 7 U.S.C. § 25(b)(1)?

FACTS

Norman Eisler used Klein & Co. Futures, Inc., a futures commission merchant (FCM), to buy futures contracts, in a Pacific Stock Exchange Technology Index (P-Tech), for his firm, First West Trading, Inc. First West purchased the contracts “on margin”—with a loan from Klein & Co. At the same time, Eisler exploited his positions as chairman of the New York Futures Exchange and as a member of the P-Tech Futures and Options Settlement Committee to manipulate the end-of-day value (or “settlement price”) of all P-Tech futures and options contracts. He did this to hide big losses on the First West positions during 1999 and 2000.

Or so Klein & Co. alleged after Eisler’s scheme collapsed, killing the firm.

The derailment went like this: In May 2000, people started complaining about settlement prices for P-Tech contracts. The gripes led to Eisler’s ouster from the NYFE and the P-Tech committee and a fresh look at the values of P-Tech contracts. Recomputation produced far lower assessments and a $4.5 million deficit in First West’s trading account at Klein & Co. A now-frantic Klein & Co. called on First West for more collateral, but First West of course defaulted—and took Klein & Co. down with it.

KLEIN & CO. FUTURES, INC. V. BOARD OF TRADE OF THE CITY OF NEW YORK, ET AL.

DOCKET NO. 06-1265

ARGUMENT DATE: OCTOBER 29, 2007
FROM: THE SECOND CIRCUIT

PREVIEW of United States Supreme Court Cases, pages 90–92. © 2007 American Bar Association.
But why did First West’s demise likewise kill Klein & Co.? The answer may hold the key to the Supreme Court’s decision in this case.

Let us start our journey by defining some terms. You already know about commodities—just about anything that the imagination of mankind can conceive of standardizing, packaging, and trading in, such as pork bellies, barrels of sweet crude oil, and (yes) even futures and options contracts.

A futures contract obligates the buyer to purchase or sell the relevant commodity on a date certain—the “strike date.” An options contract, on the other hand, entitles the buyer to do the same thing but doesn’t require him to do so.

Commerce in options and futures amounts to risky-but-legal gambling. The buyer of a contract—for, say, 100 pounds of choice white grease—bets that the market grease price will go up between the purchase date and the strike date. If the price of grease does rise, he pockets the difference between what he agreed to pay on the strike date and the market price at which he may now sell the oleaginous substance, but vice versa if the price tumbles. Eisler and First West gambled on the value of P-Tech futures and options, but they lost. And their crapshoot brought down Klein & Co. because the resulting charge pushed its net capital below the minimum necessary for it to maintain trading privileges with the New York Clearing Corporation (NYCC) and the New York Mercantile Exchange (NYMEX). Suspensions by NYCC and NYMEX put the nails in Klein & Co.’s coffin.

Klein & Co. sued the Board of Trade of the City of New York (NYBOT), NYCC, Eisler, and others under sections 25(a) and (b) of the Commodity Exchange Act (CEA), 7 U.S.C. § 25. After dismissing Klein & Co.’s CEA claims, the district court declined to exercise supplemental jurisdiction over state law claims and tossed them without prejudice. Klein & Co. Futures, Inc. v. Board of Trade of the City of New York, 2005 WL 427713 (S.D.N.Y. Feb. 18, 2005).

The Second Circuit affirmed. Klein & Co. Futures, Inc. v. Board of Trade of the City of New York, 464 F.3d 255 (2d Cir. 2006). The two-judge panel—a third judge recused himself—first concluded that Klein & Co. lacked standing to sue under the CEA. The court opined that all four subdivisions in section 25(b) “limit claims to those of a plaintiff who actually traded in the commodities market” and therefore do not cover nontraders. Id. at 260. Because Klein & Co. acted solely as an FCM of the NYCC, it did not “actually trade” in the P-Tech contracts and thus could not bring a claim under the CEA. The court also upheld the district court’s discretionary dismissal of Klein & Co.’s state law claims in light of the absence of federal question jurisdiction.

The Supreme Court granted Klein & Co.’s petition for a writ of certiorari and granted leave for the Solicitor General to participate. The United States and the Futures Industry Association, Inc., have both filed amicus briefs in support of the Klein & Co. position.

§ 25. Private rights of action

(b) Liabilities of organizations and individuals; bad faith requirement; exclusive remedy

(1)(A) A contract market or clearing organization of a contract market that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by section 7a(8) and section 7a(9) of this title,

(B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or

(C) any contract market, clearing organization of a contract market, or licensed board of trade that in enforcing any such bylaw, rule, regulation, or resolution violates this chapter or any Commission rule, regulation, or order,

shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such contract market or licensed board of trade to the extent of such person’s actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

Section 25(b)(4) adds a bad faith element. See 7 U.S.C. § 25(b)(4) (requiring that defendant “acted in bad faith in failing to take action or in taking such action as was taken.”).

The statutory question resolves into what the phrase “a person who engaged in any transaction” means. Klein & Co. takes it to signify “an indispensable party to” a commodities transaction in the sense either

(Continued on Page 92)
of the actual trader or of a “clearing member” (such as Klein & Co.) who processes the trade. Brief of Petitioner at 8. The petitioner emphasizes that commodity exchange rules make it far more than a mere participant in trades. The rules also mandate “that any contract made on the exchange ‘shall be made on behalf of a clearing member,’ such as petitioner, ‘who shall be the buyer or seller of said contract on the terms set forth therein’ and that the clearing member shall assume as its own the futures contracts on the exchange.” Id. (quoting New York Futures Exchange Rule 306(i)(2)) (emphasis added). The Solicitor General makes much the same point. See Brief of the United States as Amicus Curiae Supporting Petitioner at 20-24.

The respondents see things quite differently. They urge that the plain language of section 25(b)(1)—plus several other factors—limits the class of people with standing to actual traders on a commodity market. They portray Klein & Co. and amici as arguing that “any transaction” in section 25(b)(1) covers “any activity governed in any way by the rules of a contract market.” Brief of Respondents at 21. They then cite three statutory snippets that, they contend, use the term “transaction” to refer only to something that traders do.

SIGNIFICANCE
The outcome of the case will, in the narrow sense, either broaden or restrict the class of persons who may sue under the CEA. If the class is broadened, not only people who bought or sold commodity contracts could recover losses but also those who process the trades under the arrangements peculiar to commodity exchanges. The latter of course include clearing member FCMs such as Klein & Co.

A broadening of potential liability through a reversal in Klein & Co. seems modest. How often, really, will a clearing member choose to sue a commodity exchange, on whose goodwill its business depends? Plus, the requirement of proving bad faith looks tough. The case of Klein & Co. thus appears to be an outlier.

Let us note here that Klein & Co. doesn’t involve a circuit split. It doesn’t embody a fact pattern that one expects to see on a reality television show. So why did the Court reach out for it?

The true significance of Klein & Co. may consist in its pairing this Term with Stoneridge Inc. v. Scientific-Atlanta, Inc., 06-43, probably the most important securities case before the Court so far this decade. Stoneridge offers the justices a chance to limit liability under federal securities law to companies and individuals who actually make misrepresentations on which investors rely in buying securities. Allowing clearing members to sue quasi-regulators under the CEA for what amounts to bad faith failure to prevent commodities fraud might seem like an elegant way to contrast the two statutory schemes. We shall see.

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Burden/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 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 awarded 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, and 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 or 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.

**En banc** — The term literally means “full bench.” Cases in the federal circuit courts of appeals are typically heard and decided by panels of three judges who are drawn from all the judges in that circuit. In rare instances, the court may subsequently agree to have the case reargued, this time in front of more or all of the judges from that circuit.

**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.

**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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