Covering the Court’s Entire March Calendar of Cases, Including …

Citizens United v. Federal Election Commission

An ideological corporation produced an anti-Hillary Clinton documentary. The corporation wanted to air the documentary during the presidential primary season through a cable television “video-on-demand” service and to advertise for it on television. McCain-Feingold bars certain corporate-funded television broadcasts, such as this documentary, in the period before the election and requires disclosure by the funders of election-related broadcast advertising, such as these ads. The question before the Court is whether these limits and disclosure rules are unconstitutional as applied to this case.

Gross v. FBL Financial Services, Inc.

Justice O’Connor’s Price Waterhouse opinion indicated that when a plaintiff presents “direct evidence” that discrimination motivated an employment decision, the defendant employer must prove, as an affirmative defense, that it would have made the same decision in the absence of discrimination. Now the Court is being asked to either abandon or clarify this litigation structure as it applies to cases brought under the Age Discrimination in Employment Act.

Polar Tankers, Inc. v. City of Valdez, Alaska

In this case, owners of oil tankers that come to Valdez, Alaska, the terminus of the Trans Alaska Pipeline System, challenged the constitutionality of Valdez’s targeted property tax, which levies substantial taxes on 24 oil tankers and only four other vessels. The Supreme Court of Alaska held in favor of the City of Valdez. The Supreme Court of the United States has now agreed to review the tankers’ arguments that the tax should be struck down under the Constitution’s Tonnage Clause.

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Yeager v. United States

**Tuesday**

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Citizens United v. Federal Election Commission

**Wednesday**

**March 25**

United States v. Denedo

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**March 30**


**March 31**

Gross v. FBL Financial Services, Inc.

**April 1**

Polar Tankers, Inc. v. City of Valdez, Alaska

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ISSN 0363-0048

A one-year subscription to PREVIEW of United States Supreme Court Cases consists of seven issues, mailed September through April, that concisely and clearly analyze all cases given plenary review by the Court during the present term, as well as briefly summarizing decisions as they are reached. A special eighth issue offers a perspective on the newly complete term.

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ISSUE
When a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, does collateral estoppel bar a retrial on the hung counts?

FACTS
F. Scott Yeager, former vice president of Enron Broadband Services (EBS), was charged with conspiracy to commit securities fraud; committing securities fraud; insider trading; and money laundering. The trial jury found him not guilty of the securities and wire fraud charges, but returned no verdict on the insider trading and money laundering charges. The government sought a second trial on the insider trading and money laundering charges, and Yeager moved to dismiss on the ground of collateral estoppel arising out of the Double Jeopardy Clause of the Fifth Amendment.

Yeager v. United States
DOCKET NO. 08-67
ARGUMENT DATE: MARCH 23, 2009
FROM: THE FIFTH CIRCUIT

PREVIEW of United States Supreme Court Cases, pages 344–348. © 2009 American Bar Association.
meetings, exchanged e-mails, and participated in planning and preparing a presentation on EBS at the aforementioned conference in 2000. The evidence adduced at trial showed that during the presentation, EBS executives made numerous claims about the technological capabilities and performance of a product. Further, the evidence showed that the product did not possess most of the advanced features and capabilities claimed in the presentation.

Yeager testified and denied the allegations in the indictment, asserting a good-faith defense. On cross-examination, he was pressed about his failure to speak out at the conference. Yeager denied having any role in the preparation of press releases and testified that his participation in the planning of the conference was limited to the creation of two videos that were not shown at trial.

The trial court declined Yeager’s request to read the indictment to the jury and his request to provide a copy of the indictment to the jury. The jury was read those parts of the indictment that included the charges, the overt acts of the conspiracy, and paragraph 11. Paragraph 11 set forth the factual bases for the charges and provided that Yeager:

- made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, values, revenue, and business performance of EBS. [Further that Mr. Yeager] executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS’s poor business performance. During the same time period, [Mr. Yeager] sold large quantities of Enron stock, generating millions of dollars for [himself].

After four days of deliberation the jury announced it could not reach agreement, and the trial judge instructed the jury to continue to deliberate until the end of the day. More than one hour later, the jury acquitted Yeager on the conspiracy, securities fraud, and wire fraud counts. The jury deadlocked on the insider trading and money laundering counts. A mistrial was declared as to the insider trading and money laundering counts based on the jury’s failure to reach a verdict.

Yeager moved to dismiss the insider trading and money laundering counts as barred by collateral estoppel. The government obtained an Eighth Superseding Indictment alleging five of the insider trading counts and eight of the money laundering counts contained in the indictment under which Yeager was previously tried. The district court denied Yeager’s motion.

The Fifth Circuit affirmed the district court’s findings after Yeager’s appeal. The Fifth Circuit found that while collateral estoppel would bar another trial based on the acquittals, the fact that the jury returned no verdict for some counts must be considered. The focus of the inquiry was whether the jury had determined that Yeager possessed insider information. The court reviewed the record and determined that the jury returned a verdict of acquittal on the securities fraud count because it decided either that the government did not prove Yeager participated in making material misrepresentations or omissions or did not prove that Yeager willfully, knowingly, and intentionally made misrepresentation or omissions. The Fifth Circuit concluded that acquittal on the conspiracy, securities, and wire fraud counts and the nonverdict on the insider trading and money laundering counts were inconsistent and the jury was not rational in its findings. It ultimately held that Yeager did not carry his burden to establish what the jury decided. Yeager’s petition for a rehearing was denied. The Supreme Court granted a writ of certiorari. Amicus briefs were filed by the National Association of Criminal Defense Lawyers, the Texas Criminal Defense Lawyers Association, and Criminal Law Professors in support of Yeager.

CASE ANALYSIS

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person will, “for the same offense ... be twice put in jeopardy for life or limb.” The law proscribing double jeopardy predates the U.S. Constitution and can be traced back to ancient Rome. Jay A. Sigler, Double Jeopardy 2-3 (1969). As the amicus point out: Nemo debet bis vexari pro na et eadem causa—no person shall be vexed for one and the same cause is the maxim in which the Double Jeopardy Clause has roots. See H. Broom, A Selection of Legal Maxims Classified and Illustrated 326, 346-350 (8th Am. Ed. 1882). In fourth century B.C., Demosthenes declared the law forbids the same man to be tried twice on the same issue. This doctrine may be traced to St. Jerome in A.D. 392, “there shall not arise a double
affliction,” drawn from the rule that “God does not punish twice for the same act.” Bartkus v. Illinois, 359 U.S. 121, 152 n.4 (1959) (Black, J. dissenting). English common law allowed criminal defendants to invoke autrefois acquit and autrefois convict (autrefois means in the past, before, or formerly); these pleas barred any subsequent accusation, in the case of autrefois acquit, and any subsequent prosecution in the case of autrefois convict for the same crime. It is important to note that only verdicts would trigger the protection of autrefois acquit and autrefois convict. English courts routinely coerced verdicts from juries, and where none was obtained, routinely dismissed juries and the Crown would reindict a defendant, obtain new evidence against him, and obtain a conviction. The framers included the Double Jeopardy Clause in the Bill of Rights in light of this practice.

The United States Supreme Court has interpreted the Double Jeopardy Clause to be a limit on prosecutorial power. Critical to the interest underlying double jeopardy protections are the principles of fairness and finality. See United States v. Wilson, 420 U.S. 332, 340 (1975). The Double Jeopardy Clause guards against the likelihood that the government will use its enormous resources for trial and retrial of the accused in an endless ordeal that imposes financial, emotional, and stigmatizing hardship. Moreover, the Double Jeopardy Clause protects against the risk that the innocent person will eventually be found guilty.

The Double Jeopardy Clause also protects the power of government to ascertain and enforce rights. Without finality, judgments would not establish irrefutable truths but would be advisory; and courts of law would be merely advisory bodies. The Double Jeopardy Clause protects the jury’s solemn verdict. When a jury renders a verdict, it has long been considered an exercise of a sovereign function to decide guilt or innocence. Verdicts are accorded deferential treatment because they are viewed as a statement of the community. Jury verdicts are inextricably intertwined with the right to a trial by jury guaranteed both in the body of the U.S. Constitution and in the Bill of Rights. U.S. Const. Art. III § 2, cl.3; U.S. Const. amend. V. In fact, verdicts are so sacrosanct that not even judges can impeach them. See Fayerweather v. Ritch, 195 U.S. 276, 306-307 (1904), where even a judge’s testimony regarding the meaning of a verdict was not considered.

The Court recognized collateral estoppel as embodied in the Fifth Amendment guarantee against double jeopardy in Ashe v. Swenson, 397 U.S. 436 (1970). The doctrine established that once an issue of ultimate fact has been determined by a valid and final judgment, the issue cannot be litigated again between the same parties. Criminal collateral estoppel developed because of the increasing complexity in the criminal code which contains overlapping and related statutory offenses. With overlapping offenses comes the risk a single crime will be charged under several statutes. In Ashe, the Supreme Court established a test requiring examination of “the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Id at 444.

Yeager argues on appeal that his retrial on the insider trading and money laundering counts is barred by the doctrine of collateral estoppel because the charges in the new indictment, although they have been refined, rely on the same issue decided in Yeager’s favor in the first trial. Specifically, Yeager argues, the jury has already decided in his favor the issue of his possession of insider information. The government’s theory, that Yeager barely said a word when he knew false information was to be presented and profited directly from that choice, presented the charges as seamless and unified. According to Yeager, his acquittal of the securities and wire fraud charges, is evidence that the jury rejected the government’s “failure to disclose” theory and accepted his good-faith defense.

Yeager cites the jury instruction as evidence of the jury’s decision. The jury was instructed in deciding the securities fraud counts to consider whether Yeager failed to disclose material information in his possession. With its acquittal, Yeager argues, the jury found that Yeager did not make either false statements or material omissions. With respect to the wire fraud count, the jury was instructed that failure to disclose was a basis for liability and also that a half-truth, effective omission, or concealing a material fact when coupled with the intent to defraud was a false representation. Again, Yeager argues, his acquittal of wire fraud was a rejection of both the misrepresentation and failure to disclose theories put to the jury by the government.

The government’s failure to disclose theory reaches all of the insider trading charges in the Eighth Superseding Indictment, according to Yeager. The government charged that Yeager failed to disclose the very same insider information. Since the charges relate to the same period of time, Yeager asserts that he was acquitted of failing to dis-
close insider information during that time.

Yeager goes on to argue that the Fifth Circuit ignored historical deference to jury verdicts. The counts on which the jury made no decision should not be considered because they are not verdicts, Yeager asserts. Since only verdicts are accorded deference, Yeager argues, the Fifth Circuit’s consideration of nonverdicts represents an inquiry into jury deliberations, which is something the Court has long established is an intrusion into the sovereignty of the jury. In considering the nonverdicts, the Fifth Circuit required Yeager to demonstrate why the jury failed to acquit him on some counts, speculation, Yeager says, that has been forbidden by the Supreme Court.

Moreover, Yeager continues, since modern criminal codes have become increasingly complex, collateral estoppel has developed as a prophylactic to prosecutorial overcharging. As complicated criminal codes have developed, so has jurisprudence on criminal collateral estoppel. Criminal collateral estoppel has been shaped by the courts into a critical component of a defendant's rights under the Double Jeopardy Clause. The government cannot continue to refine its case through successive efforts to prove the same facts, treating the first trial as a dry run on the road to conviction.

Conversely, the government asserts its right to one complete opportunity for conviction. The well-established rule that when a jury hangs, the government may retry the case in order to have a complete opportunity for a verdict is dispositive of the issue on appeal, the government argues. The manifest necessity born of a jury’s inability to reach a verdict allows the government to continue prosecution, and such continuation is not viewed as prohibited successive prosecution, according to the government. Retrial is an integral part of the government’s one complete opportunity, the government argues, and continuing prosecution on the remaining charges does not implicate the principles of finality and prevention of prosecutorial overreaching. The government asserts that any cost to a defendant of allowing retrial after a hung jury has long been an unavoidable cost of honoring society’s interest in giving the prosecution its one complete opportunity.

Yeager remains in jeopardy on the hung counts because, the government avers, collateral estoppel, and the rationale for it, do not bar retrial on hung counts when the jury acquits on others. The jury’s failure to reach a verdict does not bar retrial because jeopardy has not been terminated by an acquittal, according to the government. The government argues that like the defendant, it is entitled to a resolution of the case by verdict. Even if collateral estoppel applies, the government argues, acquittal on one count does not bar the government from retrying Yeager on the hung charges. A rational jury would not have returned a mixed verdict if it had decided the issues in Yeager's favor. Conversely, according to the government, if the jury acquitted Yeager on the securities and wire fraud counts because it determined that he did not possess insider information, and that determination required acquittal of the insider trading and money laundering counts, a rational jury would have acquitted on those accounts as well.

The government also argues there is no justification to extend collateral estoppel principles to bar retrial on hung counts. The government challenges Yeager’s assertion that allowing retrial on the hung counts undermines traditional deference accorded to jury acquittals. (This assertion was made by Yeager and his amici, the National Association of Criminal Defense Lawyers and Criminal Law Professors.) Collateral estoppel continues to operate to bar the government from bringing serial prosecutions of the acquitted counts. An acquittal accompanied by hung counts would be stopped if the successive prosecution involved new counts that were not brought in the initial prosecution, says the government. Further, any concern about prosecutorial overreaching is unfounded, according to the government, because the risk of confusing the jury and thereby facilitating acquittal is too great.

The acquittals do not establish that a fact the government must prove in the hung counts have been decided in Yeager's favor, the government argues. With respect to the conspiracy count, the jury was instructed that it had to find that Yeager made an agreement to commit wire or securities fraud, the government avers. As to securities fraud, the government argues that the jury was instructed that it could find Yeager guilty only if he participated in the scheme or fraudulent conduct or personally caused material misstatements to be made or material facts to be omitted from statements that were made.

Lastly, the government asserts that, as to the wire fraud, the jury was instructed that it could find Yeager guilty only if he knowingly devised or intended to devise a scheme to defraud and he either wired or caused a false press release to be wired in an attempt to execute or carry out a scheme. Thus, the government argues, the jury was not required to find Yeager guilty simply because he possessed insider information and failed to disclose it; it had to find there was a scheme. The
acquittals on those counts do not, the government argues, establish that the jury determined that Yeager did not possess insider information.

**SIGNIFICANCE**

This decision will define the parameters of double jeopardy in terms of the ability of the government to bring a series of prosecutions despite jury findings. A jury verdict is considered the final voice of the community. Retrial of issues previously decided by the jury makes the voice of the jury merely advisory. At the very least, a retrial invites an inquiry into jury deliberations, something our system has always held to be sacred. A juror has always been free to voice an opinion without fear that she would have to publicly justify it. In every decision a juror must reject one argument; a juror must be at liberty to do so without worrying about a confrontation about the decision.

The decision in this matter will also determine the weight given to jury verdicts. The weight is significant since modern criminal prosecution is complex and overlapping. Unlike at the time of the framing of the Constitution when crime was more simply defined, modern criminal prosecution often includes several crimes that arise out of a single set of facts.

As an example, a person who receives funds in the mail that do not belong to him but retains the funds and deposits them into a personal account could be charged with mail fraud, bank fraud, wire fraud, using a fictitious name and—if the check is a health care benefit check—health care fraud. At the time of the Constitution's framing the charge would have been fraudulent conversion. Modern crimes also carry significant penalties; often mandatory minimum sentences are required. Consequently, a modern jury decides more issues and the impact of each decision is graver. Giving little or no weight to the decision of the jury would convert the right to a trial by jury into a right to trial by a certain jury; one that renders an acceptable verdict.

A final concern is that, since federal and state government are considered sovereign for the purposes of prosecution, if retrial of issues is allowed by any one of these sovereigns, it may be allowed in both of these, subjecting the defendant to *quadruple* jeopardy.

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CAMPAIGN FINANCE

Can McCain-Feingold Restrict a Corporation’s “Video-on-Demand” Candidate Documentary and Advertising?

by Richard L. Hasen


Richard L. Hasen is the William H. Hannon Distinguished Professor of Law at Loyola Law School, Los Angeles, and author of the Election Law Blog (http://electionlawblog.org). He can be reached at rick.hasen@lls.edu or (213) 736-1466.

ISSUES

Does the McCain-Feingold provision barring corporate-funded broadcasts that mention a federal candidate shortly before an election constitutionally apply to corporate-funded broadcasts offered through a cable television video-on-demand service?

Are the McCain-Feingold provisions requiring disclosure by funders of broadcast advertising that mentions a federal candidate shortly before an election unconstitutional when the advertising reasonably might be interpreted as something other than an unambiguous appeal to vote for or against a candidate?

FACTS

In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (“BCRA,” more commonly referred to as “McCain-Feingold”). This was the most significant federal campaign finance law since the 1974 amendments to the Federal Election Campaign Act (FECA), whose constitutionality the Supreme Court considered in Buckley v. Valeo, 424 U.S. 1 (1976). Although BCRA made many changes in the law, the changes most relevant for purposes of understanding this case concern BCRA’s “electioneering communications” provisions.

FECA required those who spend money on activity related to federal elections to disclose their contributions and spending to the Federal Election Commission (FEC) and (continuing a law predating FECA) it barred corporations and unions from spending general treasury funds on election-related activities. FECA allowed corporations and unions instead to set up separate political committees (commonly referred to as PACs) to spend money on these campaigns, but it limited both the amount that could be contributed and who could be solicited to contribute to these PACs.

By the 1990s, many people viewed the FECA as ineffective, thanks to an interpretation of the statute by the Court in Buckley. The Buckley

(Continued on Page 350)
Court held that, to avoid vagueness and overbreadth problems within FECA, its provisions should be interpreted to reach only election-related activity containing “express advocacy,” such as “Vote for Smith.” Individuals, corporations, and unions began running “issue ads” that appeared aimed at influencing federal elections but that escaped FECA regulation through an avoidance of words of express advocacy. Thus, individuals and entities that spent money on “Vote against Jones” ads had to disclose the sources of payment and those ads could not be paid for with corporate or union treasury funds. In contrast, there were no such limitations on ads that appeared intended to influence federal elections but that avoided the magic words of “express advocacy.” These ads would include ones that said “Call Senator Jones and tell her what you think of her lousy vote on the stimulus bill.” Spending on such ads increased dramatically in the 1990s.

BCRA sought to close this issue advocacy “loophole” by creating new “electioneering communications” provisions. Electioneering communications are television or radio (not print or Internet) advertisements that feature a candidate for federal election and are capable of reaching 50,000 people in the relevant electorate 30 days before a primary or 60 days before a general election. Anyone making electioneering communications over a certain dollar threshold must disclose contributions funding the ads and spending related to the ads to the FEC (BCRA § 201). In addition, corporations and unions cannot spend general treasury funds on such ads (but could pay for the ads through their PACs) (BCRA § 203). In addition, anyone broadcasting an electioneering communication must disclose in the ad the person or committee funding the ad and whether or not it is authorized by any candidate (BCRA § 311).

The § 203 spending limit does not apply to nonprofit corporations that meet certain requirements, including that the nonprofit has a policy not to take for-profit corporate or union funding. These groups are referred to as MCFL groups (named after a 1986 Supreme Court case, FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)), or QNC groups (named after an FEC regulation defining “qualified nonprofit corporation”). MCFL groups still must comply with the disclosure provisions in BCRA § 201 and § 311.

A broad coalition of plaintiffs challenged each of these BCRA provisions (along with a number of others) in McConnell v. FEC, 540 U.S. 93 (2003). By a 5-4 vote, the Supreme Court upheld BCRA § 203 against facial challenge. It reaffirmed the Court’s controversial holding in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Austin held that corporate spending on elections could be limited because of what the Court termed the “distorting and corrosive effects” of immense aggregations of wealth accomplished with the corporate form, which could be spent on elections despite the corporation’s ideas having little or no public support. Relying on Austin’s upholding of corporate limits on “express advocacy,” the McConnell Court held that the “issue ads” regulated by the electioneering communications provisions of BCRA could constitutionally be limited because most of them were the “functional equivalent of express advocacy.” By an 8-1 vote, the Court also upheld BCRA § 201 and § 311 against facial challenge. Five justices took the position the disclosure provisions were necessary to prevent Austin-style corruption, to enforce other campaign finance laws, and to provide information relevant to voters as they decide how to vote. Three other justices held the disclosure provisions were justified on information grounds only. Only Justice Thomas dissented, viewing the disclosure provisions as a violation of a First Amendment right to anonymous speech.

In Wisconsin Right to Life v. Federal Election Commission, 546 U.S. 410 (2006) (WRTL I), the Court held that McConnell did not preclude an “as applied” challenge to BCRA § 203 for a corporation or union whose ads were not the “functional equivalent of express advocacy.” WRTL I involved a corporate-funded broadcast advertising that mentioned Senator Feingold’s and Senator Kohl’s position on judicial filibusters, and was to be broadcast in Wisconsin during the period of Senator Feingold’s reelection campaign. After remand, in which the lower court found the ads were not entitled to an exemption because they were the functional equivalent of express advocacy, the case returned to the Supreme Court.

In Wisconsin Right to Life v. Federal Election Commission, 127 S.Ct. 2652 (2007), (WRTL II), the Court held, on a 5-4 vote, that BCRA § 203 could not be constitutionally applied to such ads. Three justices in the majority (Justices Kennedy, Scalia, and Thomas) held, consistent with their dissenting opinions in McConnell, that BCRA § 203 was unconstitutional as applied to any corporate advertising, stating that McConnell and Austin should be overruled. Chief Justice Roberts and Justice Alito, in a narrower controlling opinion, did not reach the question whether McConnell and Austin should be overruled. They held instead that the only corporate-funded advertise-
ments that BCRA could bar constitutionally were those that were the “functional equivalent of express advocacy.” The controlling opinion held that in making the “functional equivalent” determination, the question the FEC or a court must consider is whether, without regard to context (such as the fact that the filibuster issue was one that conservatives were using to attack liberal Democrats) and without detailed discovery of the intentions of the advertisers, the advertisement was susceptible of no reasonable interpretation other than as an advertisement supporting or opposing a candidate for office. Unless the ad was susceptible to “no reasonable interpretation” other than as an advertisement supporting or opposing the candidate, it would be unconstitutional to apply BCRA § 203 to bar corporate funding for it. The controlling opinion then held that the ad at issue in WRTL II was susceptible to an interpretation as something other than an ad against Senator Feingold: it did not mention Senator Feingold’s character or fitness for office, and had no other clear indicia of the functional equivalent of express advocacy. Accordingly, WRTL was entitled to an as-applied exemption and could pay for the ads with corporate funds.

The case at bar is a follow-on case to WRTL II. Citizens United, a non-profit ideological corporation (but one that took some for-profit corporate funding) produced a feature-length documentary entitled Hillary: The Movie. The documentary appeared in theaters and was available to order via DVD during the 2008 primary season. Citizens United wished to distribute the movie as well through a cable television “video-on-demand” service. In exchange for a $1.2 million fee, a cable television operator consortium would have made the documentary available to be downloaded by cable subscribers for free “on demand” as part of an “Election 08” series. The documentary contained no express advocacy, but it did contain a great deal of negative statements about Hillary Clinton, including statements that she was a “European socialist” and not fit to be commander-in-chief. The FEC took the position that the documentary was the functional equivalent of express advocacy and therefore subject to BCRA § 201, meaning it was an electioneering communication that could not be paid for with corporate funds.

Citizens United also wished to broadcast some 10-second and 30-second advertisements promoting the documentary. The corporation wished to do so without complying with BCRA § 201 (requiring disclosure of funders) or § 311 (requiring the “disclaimer” stating who paid for the advertisement and that it was not approved by any candidate or committee). The FEC conceded that the advertisements (as opposed to the documentary itself) were not the “functional equivalent of express advocacy,” but it took the position that the rules of BCRA § 201 and § 311 still applied. According to the FEC, the disclosure rules were not eligible for the “as applied” exemption that the Court created for corporate spending in WRTL II.

Pursuant to a special jurisdictional provision of BCRA, Citizens United filed suit against the FEC before a three-judge court in the United States District Court for the District of Columbia (with direct appeal to the Supreme Court). Citizens United, at that point represented by James Bopp (who had successfully argued WRTL II), moved for a preliminary injunction barring enforcement of BCRA § 203 for its broadcast of the documentary through “video-on-demand” and barring enforcement of BCRA § 201 and § 311 disclosure requirements as to the advertisements.

The three-judge court unanimously rejected Citizens United’s arguments. As to the documentary itself, the court held that under WRTL II the documentary was the functional equivalent of express advocacy and was therefore not entitled to an as-applied exemption: the movie could not be paid for with for-profit corporate funds. As to the advertisements, the district court held that the WRTL II exemption did not apply to the disclosure rules, relying on language in McConnell broadly upholding these requirements. Citizens United appealed from the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal. 128 S.Ct. 1732 (2008). The case returned to the trial court. The district court then granted summary judgment, relying on its earlier opinion on the preliminary judgment.

The Supreme Court noted probable jurisdiction and set the case for argument. Ted Olson, who had argued on the government’s side for the constitutionality of BCRA in the McConnell case, replaced Jim Bopp as counsel for Citizens United on the merits stage of the appeal. Bopp filed an amicus brief supporting Citizens United on behalf of a group that had wished to broadcast a documentary against Barack Obama under similar circumstances.

**Case Analysis**

*The Documentary Broadcast over “Video-on-Demand”*

Citizens United raises a number of arguments against the government’s position that this documentary could not be broadcast over cable television’s “video-on-demand” service because it constituted a corpo-
rate-funded “electioneering communication.” Some of these arguments appear to have been raised for the first time in the Supreme Court’s merits brief (perhaps as a consequence of the change of lead lawyers), and for this reason the Court may reject them as not properly before it.

First, Citizens United argues that, under a strict scrutiny standard, the government cannot demonstrate a compelling interest in regulating a feature-length documentary broadcast through a cable television “video-on-demand” service. There are two aspects to this argument. (A) Citizens United argues that the feature-length nature of the documentary is different from the short “issue ads” considered in *McConnell*. While the record demonstrated a potential corruption problem with these short ads, there is no evidence a feature-length documentary would raise the same sorts of problems. (B) The fact that this is a “video-on-demand” service makes it more akin to the distribution of a DVD to interested viewers than to a normal television broadcast. Because viewers must effectively “opt-in” to view the documentary, and viewers who opt in are likely to already be opponents of the candidate, the documentary does not have the same corruptive potential.

The FEC takes issue with both of these points. As to Point (A), if the concern is about disproportionate corporate influence on the political process, the government says corporations can have just as disproportionate influence through a long message as through a short one. As to Point (B), the government disputes the notion that only Clinton opponents would tune into such a documentary, and in any case the advertisement could still be useful in energizing the base of Clinton opponents and getting out the vote. The interests supporting the corporate limit on regular broadcasts apply equally to video-on-demand.

Citizens United also raises a second argument related to Point (B), that the FEC regulations should not be construed to apply to “video-on-demand” cable broadcasts. Citizens United concedes that it did not raise the issue below (see Brief of Appellants, footnote 2), but notes that the district court passed on it and that the canon of constitutional avoidance (construe a statute to reach the statutory question. The government disagrees that the Court should reach the question. However, the BCRA legislative sponsors (Sens. McCain and Feingold, and former Representatives Shays and Meehan) filed an amicus brief suggesting that if the Court is otherwise inclined to avoid constitutional issues when possible) gave the Court a reason to reach the statutory question. The FEC argues that Citizens United’s second set of arguments take on existing Supreme Court precedent. First, Citizens United argues that *Austin* was wrongly decided and should be overruled, with the result being that even express advocacy by corporations in federal elections could be paid for with corporate treasury funds. Second, Citizens United argues that *MCFL* should be expanded to include nonprofit corporations that take some corporate money, so long as funds from individuals are the predominant form of funding.

The FEC’s main argument against these points is that they were not properly presented below. As to the *Austin* argument, the FEC notes that Citizens United did not raise this point below, and that it expressly withdrew any facial challenges before the district court issued its summary judgment. On the merits, the FEC argues that Citizens United presented no special reasons to overcome stare decisis in this case. As to the *MCFL* argument, the FEC notes that Citizens United specifically pleaded the case as one that did not involve an MCFL corporation (Jim Bopp’s strategy at the time appeared to be to expand *WRTL II* for all corporations, not to expand the scope of the MCFL exemption). Moreover, the FEC argues that there is not enough evidence developed in the record as to the extent of corporate contributions either supporting the documentary in particular or supporting Citizens United more generally.

Finally, Citizens United argues that its documentary, considered as a whole, is not the “functional equivalent of express advocacy” under *WRTL II*. Citizens United concedes that its documentary includes portions questioning Clinton’s character and fitness for office, but contends that considered as a whole, the documentary could be seen as about issues, not about Clinton’s candidacy. The FEC disputes this characterization, pointing to numerous statements in the documentary questioning Clinton’s character and fitness for office.

The FEC raises issues related to the BCRA legislative sponsors (Sens. McCain and Feingold, and former Representatives Shays and Meehan) filed an amicus brief suggesting that if the Court is otherwise inclined to avoid constitutional issues when possible, the FEC argues that there is not enough evidence developed in the record as to the extent of corporate contributions either supporting the documentary in particular or supporting Citizens United more generally.

The Disclosure and Disclaimer Provisions in the Advertisements

The issue in the second part of this case differs significantly from the first. The question here concerns advertisements that the FEC concedes are not the “functional equivalent of express advocacy” under the controlling *WRTL II* test.

Recall that BCRA § 201 requires anyone (not just corporations or unions) spending money on “electioneering communications” to disclose contributors and expenditures. Citizens United argues that the dis-
closure rules are subject to strict scrutiny. According to Citizens United, under this standard it is unconstitutional to apply the disclosure rules to it. Citizens United further argues that because the advertisements are not the “functional equivalent of express advocacy,” information about contributors and expenditures would not be relevant to voters deciding how to vote, nor would disclosure serve an anti-corruption function. It says the disclosure rules chill political speech.

The FEC disagrees, stating that intermediate (or “exact[ing]”) scrutiny applies, and that under this standard the disclosure rules are constitutional. The FEC notes that the Supreme Court in McConnell upheld the disclosure rules with very broad language, and that eight of the nine justices supported disclosure in McConnell to prevent corruption, enforce other campaign laws, and provide valuable information to voters. The FEC also argues that the First Amendment costs of the corporate ban in the WRTL II—which led to the as-applied exemption for corporate spending—are much higher than the costs of disclosure at issue here. It concludes that as-applied exemptions from disclosure rules are unwarranted. The FEC notes that if Citizens United faces real threats of harassment, the organization can seek an exemption from disclosure rules under Broan v. Socialist Workers. Finally, the FEC points to a number of earlier Supreme Court cases (including MCFL, First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)) containing holdings or dicta supporting disclosure requirements in cases in which the Court held spending limits unconstitutional.

Citizens United also takes issue with BCRA § 311’s requirement that include a disclaimer in its advertising, arguing that the disclaimer is compelled speech and that it is burdensome (using up 4 seconds in a 10-second advertisement). The FEC argues that the Court upheld § 311 in the McConnell case against a similar challenge, and that there is no reason to treat this case differently. It also argues that the disclaimer provides important information to voters.

**SIGNIFICANCE**

This case has the potential to be a blockbuster if the Court overrules Austin and McConnell and holds that the Constitution bars limits on corporate spending in federal elections. The limit on corporate and union spending in federal elections has existed in some form since the early 20th century, and has been enforced strictly since at least the 1970s. Many states also limit corporate and union spending in candidate elections, and these limits too would be unconstitutional if the Court accepted Citizens United’s invitation to overrule these cases.

That said, it seems unlikely that a Court majority will be prepared to go this far in this case. Three justices (Justice Kennedy, Scalia, and Thomas) have voted repeatedly for Austin to be overruled, but Chief Justice Roberts and Justice Alito thus far have moved more cautiously in the campaign finance cases. In each of the campaign finance cases decided by the Roberts Court, the Court has sided with those challenging the law, but has done so in an incremental way. There are many ways for these two justices to side with Citizens United on the question of airing the documentary without overruling Austin, an issue which was not presented until the merits stage. Perhaps the easiest way to support Citizens United would be for the Court to construe the FEC regulations so as not to apply to “video-on-demand” broadcasts. Of course, these justices could also vote with the other justices generally supporting the constitutionality of campaign finance regulation (Justices Breyer, Ginsburg, Souter, and Stevens) to uphold application of BCRA § 203 to Citizens United’s documentary. Such an outcome would be notable as the first time the Roberts Court upholds a campaign finance regulation.

On the challenge to BCRA’s electioneering communications disclosure rules, a holding that WRTL II’s “no reasonable interpretation” test applies to the disclosure rules would also be significant, because it would seriously undermine the effectiveness of disclosure. Citizens United’s disclosure argument seems somewhat of a long shot, however. In McConnell, eight justices voted to uphold those disclosure laws broadly. Two of those justices (Chief Justice Rehnquist, and Justice O’Connor) are no longer on the Court, but six of them still are, including Justices Kennedy and Scalia, who view disclosure rules as a more narrowly tailored way than contribution and spending limits to accommodate the state’s interests in campaign finance regulation. So regardless of how Chief Justice Roberts and Justice Alito view this question, Citizens United will need to move at least two justices from their positions on disclosure in McConnell in order to prevail on this issue. A decision to uphold the disclosure rules would reaffirm the status quo and therefore be somewhat less significant.

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(Continued on Page 354)
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- Cato Institute (Benjamin D. Wood (202)-457-6000)
- Center for Competitive Politics (Stephen M. Hoersting (703) 894-6800)
- Chamber of Commerce of the United States of America (Jan Witold Baran (202) 719-7000)
- Committee for Truth in Politics, Inc. (James Bopp Jr. (812) 232-2434)
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- Institute for Justice (William R. Maurer (206) 341-9300)
- Reporters Committee for Freedom of the Press (Lucy A. Dalglish (703) 807-2100)
- Wyoming Liberty Group and the Goldwater Institute (Benjamin Barr (240) 863-8280)

\textbf{In Support of Appellee Federal Election Commission}
- Center for Political Accountability and the Carol and Lawrence Zicklin Center for Business Ethics Research (Karl J. Sandstrom (202) 628-6600)
- Senator John McCain, Senator Russell Feingold, Former Representative Christopher Shays, and Former Representative Martin Meehan (Scott L. Nelson (202) 588-1000)
In this case the United States has petitioned the Supreme Court to decide what limits, if any, exist on the authority of military courts to issue writs of error coram nobis, which is a remedy for setting aside an erroneous conviction to achieve justice where no other remedy exists. The United States argues that military courts cannot consider a coram nobis petition in a court-martial case that is final. Respondent Joseph Denedo argues that military appellate courts are federal courts properly exercising an All Writs Act authority to issue extraordinary writs such as habeas corpus or coram nobis.

**FACTS**


Denedo retained a civilian attorney to represent him along with his assigned military attorney. He plead guilty in accordance with a pretrial agreement. In exchange for his guilty plea, the charges were reduced and were tried at a special court-martial instead of a general court-martial. Because of his plea, the value of the larceny exceeded $10,000.00.

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Denedo faced a maximum potential confinement of six months. See Article 19, UCMJ, 10 U.S.C. § 819 (1994). At a general court-martial, Denedo’s potential confinement exposure would have been in excess of 15 years.

Denedo claims that he specifically told his defense counsel during plea negotiations that “his primary concern and objective” was “to avoid the risk of deportation,” and that he was “far more concerned about deportation and being separated from his family, than the risk of going to jail.” Denedo claims his counsel assured him that he would avoid any risk of deportation by pleading guilty. The defense counsel advice was wrong. Unbeknownst to Denedo at the time, his civilian defense counsel was suffering a substantial disability due to alcohol dependence.

Denedo plead guilty before a military judge sitting alone and that judge found that Denedo knowingly and voluntarily waived his rights to a trial, that he knowingly and voluntarily admitted guilt, and that he was guilty. The military judge then proceeded to sentence Denedo to three months confinement, a reduction to the lowest enlisted pay-grade, and a bad-conduct discharge.

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) conducted its mandatory review in accordance with Article 66(c), UCMJ, and a bad-conduct discharge. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) conducted its mandatory review in accordance with Article 66(c), UCMJ, § 866(c). The NMCCA found the record inadequate to decide the merits of the underlying ineffective assistance of counsel claim. The NMCCA returned the case to the NMCCA for further fact-finding. Thus the case is not itself final.

Denedo is still in jeopardy of deportation. If the Supreme Court agrees that military appellate courts have jurisdiction to hear his petition, and if he is successful on the merits of his petition, a retrial could ensue. Denedo would then have the option to withdraw his guilty plea. If he withdraws his guilty plea, the prosecution could reinstitute a general court-martial prosecution. However, there may be significant logistical barriers for the government in a retrial years after the case was supposedly final. If Denedo cannot be prosecuted or is found not guilty at a retrial, then he might escape deportation.

In 2002, President Bush signed an executive order making lawful immigrants to the United States immediately eligible for U.S. citizenship when they serve on active duty in the armed forces. In 2008, approximately 37,000 foreign citizens were serving on active duty in the armed forces. Secretary of Defense Gates noted in 2008 that nearly 43,000 men and women in uniform have become U.S. citizens since September 11, 2001. An unknown number of these service-members face disciplinary proceedings, including courts-martial.

**CASE ANALYSIS**

A writ of error coram nobis is a very rare remedy among a list of extraordinary remedies, known more for being denied than granted. Writs of error coram nobis are granted only under the most compelling circumstances to ensure justice and to correct fundamental errors. The All Writs Act, 28 U.S.C. § 1651(a), allows courts established by Act of Congress to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,” including writs of error coram nobis. The Act applies to the Article I military courts.
If Denedo’s claim were a proper subject of a writ of error coram nobis in federal district court, then it would be a proper subject for the military courts. A writ of error coram nobis is available to a person convicted in federal district court. *United States v. Morgan*, 346 U.S. 502, 512 (1954). The petitioner in *Morgan* was given an enhanced state court sentence as a recidivist based on a prior federal court conviction. *Morgan*’s coram nobis claim was for a denial of counsel. *Morgan* had served his entire federal court sentence at the time he filed his petition for a writ of error coram nobis. The Supreme Court surveyed the history of the writ of error coram nobis and concluded that a writ of error coram nobis could be issued in a post-criminal trial proceeding under the All Writs Act.


Since *United States v. Frischholz*, 16 U.S.C.M.A. 150, 151-53, 36 C.M.R. 306, 307-09 (1966), it is generally accepted that military courts have All Writs Act powers, including the power to issue writs of error coram nobis. See *Noyd v. Bond*, 395 U.S. 683, 695 n.7 (1969). The petitioner challenges the jurisdiction of the CAAF because Denedo’s conviction is final under Article 76, UCMJ. Petitioner argues that the finality of court-martial cases is vital to maintaining good order and discipline. The petitioner’s further objection is based on the Supreme Court decision in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), which sets a limit on the All Writs Act power of military courts. The petitioner argues that Article 76, UCMJ, strips the military courts of any jurisdiction over both the case and the petitioner, and that a writ petitioner must seek relief elsewhere. The argument is that Article 76, UCMJ, is a specified limitation on the All Writs Act jurisdiction of military courts.

The petitioner suggests several alternate remedies for Denedo, including that Denedo could seek relief in the federal district court or the Court of Federal Claims. However, the six-year statutes of limitation for those forms of collateral review expired before the removal proceedings were initiated and Denedo became aware of the gross error in counsel’s advice, according to Denedo. Interestingly, the petitioner suggests Denedo could use the Court of Federal Claims, which like the military courts is established under Article I. As such, the Court of Federal Claims may also sometimes grant relief from a court-martial, but not when the statute of limitations has expired, such as in this case. Denedo takes up the point that Article 76, UCMJ, is “a prudential restraint and not a jurisdictional one,” and the CAAF can act in an appropriate case.

In *United States v. Frischholz*, the Court of Military Appeals found All Writs Act jurisdiction in a case that was final under Article 76, UCMJ. Captain Frischholz had been convicted and sentenced to dismissal. Five years after his conviction was final, Frischholz petitioned the U.S. District Court for the District of Columbia for relief from his conviction. The government objected to jurisdiction in the district court. Frischholz’s case in district court was dismissed and he was told he should petition the Court of Military Appeals (CMA) for relief. In 1994, Congress changed the name of the Court of Military Appeals to the Court of Appeals for the Armed Forces.) In the CMA, the government reversed itself and argued that the CMA lacked coram nobis jurisdiction over Frischholz’s petition. The CMA ruled that it did have authority to issue a writ of error coram nobis.

There have been several other cases post-*Frischholz* in which the military courts have assumed jurisdiction over a petition for a writ of error coram nobis when the case was final. The Supreme Court in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), also seems to put to rest the petitioner’s claim that Article 76, UCMJ, is a jurisdictional bar to a coram nobis petition. “There is no necessary inconsistency between this and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court’s subject-matter jurisdiction.” *Schlesinger v. Councilman*, 420 U.S. at 749, 753, n. 26. There also does not appear to be any inconsistency between *Frischholz*, *Schlesinger*, *Noyd v. Bond*, and *Clinton v. Goldsmith*.

The petitioner now argues that, as a court established under Article I of the Constitution, the CAAF has limited authority under the All Writs Act compared to the federal district and circuit appeals courts, which are established under Article III. The petitioner argues that *Clinton v. Goldsmith* is dispositive of Denedo’s petition against him. Goldsmith was convicted and sentenced at court-martial to six years of confinement as well as partial forfeitures of pay. He was not sentenced to a dismissal from the Air Force.

Goldsmith did not challenge the findings or sentence of his court-martial on appeal. The pay and service regulations in effect at the time

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allowed Goldsmith to receive certain pay and allowances even while he was confined serving a sentence. Acting upon a statutory change in the National Defense Authorization Act for Fiscal Year 1996, the Air Force “dropped” Goldsmith “from the rolls.” The dropping from the rolls stopped Goldsmith’s pay, but had no effect on the validity of his conviction and sentence. Goldsmith sought extraordinary relief with respect to the administrative order dropping him from the rolls. The administrative action was not a punishment “that was (or could have been) imposed in a court-martial proceeding.” Clinton v. Goldsmith, 526 U.S. at 530.

The Supreme Court decided that the CAAF exceeded its authority under the All Writs Act when it granted Goldsmith relief and prohibited him from being dropped from the rolls. But Denedo contends that such an argument carries Clinton v. Goldsmith too far in his case and creates an artificial distinction based upon whether the court is established under Article I or Article III. There is no such distinction or words of limitation in the All Writs Act, which states that, “[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

Further, no express language in Article 76, UCMJ, or the UCMJ, places a limitation on the power of military courts under the All Writs Act. Congress could have made a distinction between Article I and Article III court authority in the All Writs Act, or cabined the CAAF’s authority, but it didn’t. Rather, Clinton v. Goldsmith approves the All Writs Act power in the same degree and manner as for federal district courts.

Both Schlesinger v. Councilman, 420 U.S. at 753 n.26, and Noel v. Bond, 395 U.S. at 695 n.7, referred with approval to the Court of Military Appeals’ decision in United States v. Frischholz, “a landmark case in which the court, tellingly, concluded that it has jurisdiction to issue coram nobis relief post-finality,” according to Denedo.

Ineffective assistance of counsel is a fundamental error that goes to the very core of the reliability and legality of a conviction. Military courts ought to have the first and best opportunity to cure the error, if they agree one exists. In Morgan, the Court noted that the results of a conviction may persist beyond the time in jail. Recidivist laws may apply to a subsequent conviction, civil rights may be affected, or a person may find themselves subject to deportation. “As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that this conviction was invalid.” Morgan, 346 U.S. at 512–13.

As of yet the CAAF has not decided that Denedo’s counsel was ineffective and that Denedo was so prejudiced that his petition should be granted. The CAAF’s remand for further evidence is on hold pending the outcome of the present litigation at the Supreme Court. It is entirely possible that the CAAF could find no reversible prejudicial error and so deny the petition on its merits. For this reason, if the Supreme Court approves of the CAAF’s exercise of jurisdiction, then observers should closely watch the case of Padilla v. Commonwealth of Kentucky.

The Supreme Court has recently granted a petition for a writ of certiorari in Padilla v. Commonwealth, No. 08-651. The question presented in that case is whether “the Sixth Amendment’s guarantee of effective assistance of counsel require a criminal defense attorney to advise a non-citizen client that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation, and if that misadvice about deportation induces a guilty plea, can that misadvice amount to ineffective assistance of counsel and warrant setting aside the guilty plea?” This is Denedo’s underlying issue before the military courts.

If the CAAF exercise of coram nobis power is upheld in this case, the NMCCA must act to make a better record for review. The NMCCA can resort to two traditional methods of gathering evidence to adjudicate post-trial claims of ineffective assistance of counsel. It can solicit affidavits from Denedo and his counsel, or it can order an evidentiary hearing to be conducted by a military judge. See United States v. Henry, 42 M.J. 231, 238 (1995) (affidavits of respective parties); United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) (evidentiary hearing).

Petitioner criticizes the remand and these procedures as unwieldy, burdensome, and potentially disruptive to good order and discipline. Denedo responds that post trial procedures are in regular use in military appellate cases; that the military is used to arranging for trials and the attendant nonmilitary witnesses; and that former service members have an interest in showing up for such a hearing and being nondisruptive to the proceedings.

SIGNIFICANCE
The Supreme Court decision will of course be significant to Denedo, especially if Padilla v. Commonwealth comes out in his favor. It will also be significant to the literati of military appellate litigation.
Among the scholarly commentary is the observation that military appellate courts have “rarely encountered a potential exercise of authority that they thought was beyond their jurisdictional limits.” Rightly or wrongly, critics of an expansive CAAF jurisdiction perceive Denedo as another opportunity, since Clinton v. Goldsmith, to nullify CAAF’s practice of “cookie jar raiding.” See Dwight H. Sullivan, Top 10 military justice stories of 2008—#8: The Denedo cert grant, December 26, 2008, at http://caaflog.blogspot.com/2008/12/top-10-military-justice-stories-of-2008_26.html (last visited March 8, 2009).

But affirming the CAAF’s coram nobis power in cases such as Denedo’s will not release a gusher of frivolous coram nobis claims burdening the military justice system, destroying the rule of finality, and interfering with the regular course of military justice. Rather, the military courts will gain another vote of confidence in their legal maturity, sense of justice, and stature as part of the nation’s largest criminal law system. Some measure of the gained respect may be seen in the amendment of Article 2(a)(10), UCMJ, 10 U.S.C. § 802(a)(10), to permit the prosecution of civilians in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.

To date there have been few coram nobis petitions, and even fewer granted. In the last 10 years the CAAF received only 10 coram nobis petitions. The court’s workload going back to 1997 can be found online at www.armfor.uscourts.gov/Annual.htm (last visited Mar. 8, 2009). During the same decade, there were 176 “writ appeals,” some of them government appeals under Article 62, UCMJ, 10 U.S.C. § 862. In the years 2005 through 2007, the CAAF had 90 requests for extraordinary relief before it. The CAAF granted relief in only four of those cases. Captain Patrick B. Grant, ARTICLE: Extraordinary Relief: A Primer for Trial Practitioners, 2008 Army Law 30. “Most petitions [for extraordinary relief] are unsuccessful.” Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure § 25-90.00 at 25-56 n. 355 (2d ed. 1999) (collecting cases).

Petitioner may be correct that a Denedo victory in this case may result in more coram nobis petitions. But such an uptick is likely to be limited once the novelty of the issue passes among practitioners. A person seeking a coram nobis petition before the military courts must initially proceed pro-se, or convince the military lawyers that their case is worth representation, or hire a civilian attorney. Practitioners will apply their own professional standard to assessing the merit of a particular coram nobis claim, and abide by the ethical requirement not to advance frivolous claims.

In exercising its power the CAAF can also be expected to act with restraint. The CAAF will continue to look to a host of considerations to see if a petition for a writ of error coram nobis is warranted. Some of the many factors include
• are there other adequate means to obtain relief;
• will the petitioner be damaged or prejudiced in a way not otherwise correctable;
• does the lower court’s order raise a new and important problem, or issues of law of first impression;
• is the alleged error of the most fundamental character;
• do valid reasons exist for not seeking relief earlier;
• could the new information in the petition have been discovered through the exercise of reasonable diligence prior to the original judgment;
• does the writ seek to reevaluate previously considered evidence or legal issues; and
• has the sentence been served, but the consequences of the erroneous conviction persist.

See Denedo v. United States; Bauman v. United States Dist. Court, 557 F.2d 650 (9th Cir. 1977).

Even in Frischholz, the court observed that, “our conclusion as to our jurisdiction under the All Writs Act does not help him,” and the court went on to deny his petition. Frischholz, 16 U.S.C.M.A. at 153. The same is a possible result for Denedo.

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When Must an Employer Prove That Age Was Not the Deciding Factor in an Employment Decision?

by Jeannette Cox

Justice O’Connor’s Price Waterhouse opinion indicated that when a plaintiff presents “direct evidence” that discrimination motivated an employment decision, the defendant employer must prove, as an affirmative defense, that it would have made the same decision in the absence of discrimination. The parties ask the Court to either abandon or clarify this litigation structure as it applies to cases under the Age Discrimination in Employment Act.

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This case asks the Court to determine the extent to which the burdens of persuasion that govern race and sex discrimination litigation under Title VII apply to age discrimination litigation under the Age Discrimination in Employment Act (ADEA). Both statutes prohibit employers from making employment decisions that adversely affect an individual “because of” a trait that should not have an adverse influence on employment decisions. Applying these statutory prohibitions, however, has proven both controversial and difficult in “mixed motive” situations: situations in which an employment decision motivated by a prohibited reason (such as the employee’s age) is simultaneously motivated by a legitimate reason, such as the employee’s job performance.

Title VII, as amended by the Civil Rights Act of 1991, provides that an employer violates Title VII whenever an impermissible motive is “a motivating factor for any employment practice, even though other factors also motivated that practice.” Thus, an employer violates Title VII by considering an individual’s race or gender in an employment decision even when the employer is simultaneously influenced by a legitimate consideration, such as an individual’s job performance, which would have led the employer to make the same decision. An employer may avoid paying damages to a Title VII plaintiff, however, by proving that its discriminatory motive did not economically damage the plaintiff because the nondiscriminatory factors that influenced the employer’s decision would have led the employer to make the same decision.

Congress’s articulation of this litigation structure rejected the standard set forth by the Supreme Court in Price Waterhouse v. Hopkins, a 1989 decision that interpreted Title VII’s original text. Since the ADEA substantially parallels Title VII’s original text, most courts regard Price Waterhouse as applicable to ADEA litigation. In Price Waterhouse, the Court concluded that a Title VII violation occurs only when the prohibited criterion was the deciding factor in the employment decision. The
In the years following discrimination. must present “direct evidence” of contrast, provided that the plaintiff Justice O’Connor’s concurrence, by part” in the employer’s decision.hibited motive “played a motivating by any type of evidence, that a pro-
tective, the plaintiff must simply prove, motive was not outcome determina-
ability of proving the prohibited motive was not outcome determinative, the plaintiff must simply prove, by any type of evidence, that a pro-
hibited motive “played a motivating part” in the employer’s decision. Justice O’Connor’s concurrence, by contrast, provided that the plaintiff must present “direct evidence” of discrimination.

In the years following Price Waterhouse, lower courts concluded that Justice O’Connor’s opinion represented the governing rule of law because it articulated the most restrictive grounds in support of the Court’s judgment. They then began the difficult task of devising standards for distinguishing between direct and indirect evidence of discrimination. The courts soon became deeply divided on the appropriate test for determining whether a plaintiff’s evidence met Justice O’Connor’s “direct evidence” standard.

In Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the Supreme Court held that whether the plaintiff’s evidence of discrimination is “direct” is irrelevant under Title VII. Focusing on the language Congress added to Title VII in 1991, the Court concluded that a Title VII plaintiff “need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’” To avoid paying damages, the employer would then have to prove that it would have made the same decision in the absence of discrimination. The Court did not decide what burdens of persuasion would govern non-Title VII employment discrimination cases, such as cases arising under the ADEA.

ISSUE
Must an ADEA plaintiff present direct evidence of age discrimination in order for the employer to bear the burden of proof on whether age was the “outcome determinative” factor in the employer’s decision?

FACTS
In April 2004, Jack Gross, a 54-year-old veteran of the insurance industry, sued his employer, FBL Financial Group, claiming that FBL demoted him on the basis of age. FBL owns and manages several insurance and financial services companies, including Farm Bureau Mutual Insurance. Gross began working for the Iowa division of Farm Bureau in 1987 and received four promotions culminating in his 1997 promotion to “claims administration vice president.” In 2001, FBL changed Gross’s job title to “claims administration director” as part of a department-wide reorganization.

In 2003, after the Iowa Farm Bureau division merged with the Kansas and Nebraska division, FBL reasigned Gross to the position of “claims project coordinator.” Most of Gross’s former duties went to the newly created position of “claims administration manager,” which was filled by Lisa Kneeskern, an FBL employee in her early forties. Gross viewed the reassignment as a demotion because it reduced his standing in the company’s point system for salary grades, which affected his eligibility for salary increases.

Alleging that FBL had demoted him on the basis of age, Gross filed suit under the Age Discrimination in Employment Act. At the conclusion of the five-day trial, the jury found in Gross’s favor and awarded him $46,945 in lost compensation.

The trial court denied FBL’s motion to overturn the jury’s verdict, explaining that even though there was no “direct evidence of discrimination,” there was “ample circumstantial evidence” that FBL discriminated against Gross based on his age. In making this determination, the trial court pointed to evidence that Gross “was far more experienced and qualified than Kneeskern,” that Gross “was never even provided an opportunity to apply for [the job Kneeskern received],” that FBL demoted other employees in their fifties, and that FBL’s stated reason for demoting Gross—namely, that his new position was a “good fit for his strengths and weaknesses”—“was not credible.”

On appeal, the Eighth Circuit ordered a new trial, concluding that the trial court’s understanding of the parties’ burdens of proof and persuasion was incorrect. The trial court had instructed the jury that Gross had the burden of proving that his age was “a motivating factor” in FBL’s decision to demote him. It further instructed the jury that if Gross met that burden of proof, FBL could then avoid liability by proving that it would have demoted FBL regardless of his age.

The Eighth Circuit held that these instructions were erroneous because Gross had not presented “direct evi-

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dence” of age discrimination. The Eighth Circuit accordingly ordered a new trial and explained that in the new trial, the trial court should instruct the jury that Gross, not FBL, bears the burden of proof on whether Gross’s age was outcome determinative in FBL’s decision to demote him.

**Case Analysis**

FBL first argues that the *Price Waterhouse* affirmative defense, which requires employers to prove that age was not an outcome-determinative factor in the contested employment decision, is inappropriate. FBL argues that *Price Waterhouse* unjustifiably “converts an element of the employee’s affirmative case into an affirmative defense that must be proven by the employer, even though in the usual case an employer would not have to prove an affirmative defense unless the employee had established his or her claim.” FBL contends that in all cases, regardless of the type of evidence used to show discrimination, ADEA plaintiffs should carry the burden of demonstrating that age was not only a motivating factor, but also the determining factor, in the employment decision. In making this argument, FBL emphasizes that most courts agree that the ADEA, unlike Title VII, only prohibits employment decisions in which age is outcome determinative.

FBL further notes that the ADEA contains no express provision requiring a shift of the burden of persuasion to the employer on the issue of whether age was outcome determinative. This omission is particularly notable, FBL suggests, in light of the ADEA’s express articulation of five other affirmative defenses.

Gross counters FBL’s position by arguing that an employer motivated at least in part by age should bear the risk that a jury might erroneously conclude that age was outcome determinative. He notes that it will often be difficult for the plaintiff to demonstrate what the employer would have done in the absence of age discrimination. FBL, for example, did not have written guidelines governing the reallocation of personnel during the reorganization that led to Gross’s demotion. If the plaintiff bears the burden of proof on what the employer would have done in the absence of discrimination, employers may escape liability in situations in which age was in fact outcome determinative but the plaintiff was unable to demonstrate, with sufficient certainty, the standards that would have governed the employer’s decision in the absence of discrimination.

Gross further emphasizes a point that FBL concedes: the Court would have to disavow *Price Waterhouse* in order to hold that ADEA plaintiffs always bear the burden of proof on whether age was outcome determinative. Interpreting Title VII’s pre-1991 language, which was functionally identical to the ADEA’s current text, the *Price Waterhouse* Court had concluded that the employer would bear the burden of proving that it would have made the same decision in the absence of age discrimination in at least some “mixed motive” cases.

In the event that the Supreme Court declines to reject the *Price Waterhouse* framework, FBL argues in the alternative that the Court should follow Justice O’Connor’s opinion in *Price Waterhouse* and hold that the ADEA places the burden of proof on the employer only when the employee has presented “substantial and direct” evidence of discrimination. FBL argues that because the plurality opinion in *Price Waterhouse* represented the views of only four members of the Court, Justice O’Connor’s concurring opinion actually states the governing rule of law.

Gross, by contrast, appeals to Justice White’s concurrence, which, like the plurality opinion, did not set out a “direct evidence” requirement. The United States’ amicus brief similarly argues that “Justice O’Connor’s separate opinion in *Price Waterhouse*, in which no other Justice joined, is simply too thin a reed on which to erect an anomalous direct evidence requirement under the ADEA.” The United States stresses that the Supreme Court’s *Desert Palace* decision “embraced an analysis that weighs heavily against adoption of a direct evidence requirement.”

Gross further argues that the Court should reject Justice O’Connor’s “direct evidence” requirement because it has created division and uncertainty among lower courts. He notes that in the Eighth Circuit alone, three distinct definitions of “direct evidence” have emerged. One definition suggests that, unlike circumstantial evidence, direct evidence is evidence that proves the existence of a fact without requiring the fact finder to make any inferences. A second definition provides that direct evidence is “strong evidence,” a standard similar to, although perhaps more demanding than, a “clear and convincing evidence” standard. A third definition, which draws more expressly on Justice O’Connor’s concurring opinion in *Price Waterhouse*, suggests that direct evidence is evidence that shows a specific link between the alleged discriminatory animus and the challenged decision.

All of these definitions, Gross notes, are difficult for ADEA plaintiffs to satisfy. Direct evidence, when defined as the opposite of circum-
stantial evidence, appears to require proof of a facially discriminatory directive, such as “fire everyone over 40.” Statements such as this, which demonstrate the prohibited motive without requiring the fact finder to draw any inferences, are rare. The direct evidence standard drawn from Justice O’Connor’s opinion extends to only a slightly broader category of evidence because it encompasses only statements uttered by a person involved in the decision-making process that (1) specifically question the work competence of persons over forty, or (2) demonstrate an ageist bias near the time at which the decision was made. Decision-makers’ statements expressing age-based animus do not constitute direct evidence if they are unconnected to job performance or not made in connection with the decisional process. Similarly, under this standard, ageist statements made by individuals not involved in the decision-making process are never direct evidence, even when they reveal a workplace culture in which such statements are tolerated.

Emphasizing the difficulty that the “direct evidence” requirement has imposed on ADEA plaintiffs as well as the administrative difficulties it has imposed on courts, Gross asks the Supreme Court to hold that when a plaintiff convinces the jury—with any type of evidence—that age discrimination was a motivating factor in an employment decision, the employer then bears the burden of proving that age was not outcome determinative.

**SIGNIFICANCE**

Both parties hope that the Court’s resolution of this case will reconcile the fractured landscape of ADEA precedent that interprets Justice O’Connor’s “direct evidence” standard. The Ninth Circuit Court of Appeals has described the various “direct evidence” standards that lower courts currently apply as “a quagmire that defies characterization despite the valiant efforts of various courts and commentators.”

If the Court concludes that Justice O’Connor’s “direct evidence” standard should continue to govern ADEA litigation, one hopes the Court will provide lower courts guidance about how to determine whether a plaintiff’s evidence meets this standard. This guidance might tell lower courts that many types of evidence normally characterized as circumstantial may be treated as direct evidence for purposes of the Price Waterhouse burden-shifting analysis. Alternatively, the Supreme Court could conclude that burden-shifting is available only in the rare category of cases in which plaintiffs can produce “smoking gun” evidence of age discrimination. Either conclusion will affect the outcome of ADEA cases in which it is difficult for the jury to determine what the employer would have done in the absence of age discrimination.

If the Court decides to depart from Justice O’Connor’s “direct evidence” standard, it may change existing law more dramatically. Gross’s preferred standard, which would require employers to prove that age was not outcome determinative whenever the plaintiff convinces the jury—with any type of evidence—that age discrimination was a motivating factor, would shift the litigation structure slightly in the plaintiff’s favor. FBL’s preferred standard, which would always require the plaintiff to prove “but-for” causation, would have the opposite effect, shifting the litigation structure in a manner that would benefit employers. Either of these changes would significantly simplify ADEA litigation and bring uniformity to the currently disparate approaches in the various circuits.

While it is likely that this case will bring a greater degree of uniformity to ADEA litigation across the country, it is unlikely to bring ADEA litigation standards in line with Title VII. While Gross appears to resist the conventional wisdom that the ADEA, unlike Title VII, imposes liability only when the prohibited motive is the determining factor in an employment decision, he carefully explains that the Court does not need to resolve this issue in order to decide the case.

Nonetheless, the Supreme Court’s resolution of the case—as well as the breadth of its rationale—may reveal the Court’s assumptions about the extent to which the justifications for the ADEA parallel the justifications for Title VII. In constitutional cases, the Supreme Court has regarded age-based decision making as significantly less problematic than race- and gender-based decision making. Although statutory, rather than constitutional, principles govern this case, the AARP, which contributed an amicus brief, expresses concern that if the Court imposes on ADEA plaintiffs “a different and more onerous evidentiary burden” than that applicable to Title VII claimants, the Court may send a message “that age discrimination, disability discrimination, and the other forms of discrimination prohibited by the non-Title VII federal legislation are less onerous, less invidious, and, therefore, less deserving of societal condemnation than those grounds enumerated in Title VII.”

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Three Constitutional provisions are invoked in this case:

(1) The Tonnage Clause of the United States Constitution, Art. I, § 10, Cl. 3: “No State shall, without the Consent of Congress, lay any Duty of Tonnage * * *.”

(2) The Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, Cl. 3: “The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States * * *.”

(3) The Due Process Clause of the Fourteenth Amendment to the United States Constitution: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.”

ISSUES
Does a municipal personal property tax that falls exclusively on large vessels using the municipality’s harbor violate the Tonnage Clause of the Constitution, art. I, § 10, Cl. 3?

Does a municipal personal property tax formula violate the Commerce and Due Process Clauses of the Constitution?

FACTS
The Trans Alaska Pipeline System transports oil from Prudhoe Bay on Alaska’s North Slope to Valdez, Alaska, the northernmost ice-free port in North America. At Valdez there is a terminal, owned and operated by a consortium of oil companies, at which tankers can dock and take on oil.

The joint appendix prepared by the parties details the City of Valdez’s need for revenue and the genesis of the taxing scheme that is being challenged in this case. In short compass, the State of Alaska’s con-
tributions to Valdez diminished and left the city with the need for additional funds. The City of Valdez enacted Ordinance Number 99-17, which provided

Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

Within the reach of the statute were 24 oil tankers and four other vessels. This, the only such property tax in the City of Valdez's arsenal, was unambiguously aimed at the oil tankers.

Part B of the ordinance provided for taxation on an apportioned basis:

Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

The Valdez city council approved a port-day apportionment formula. The formula proscribes

A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation.

Exempted from the calculation were “periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs.”

The apportionment formula contained an escape clause by which a taxpayer could petition for another formula:

If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

After the city council approved the apportionment resolution, Polar Tankers, among others, filed suit in Superior Court claiming that the city tax violated the Due Process, Commerce, and Tonnage Clauses of the federal Constitution. The complaint recited:

1. The apportionment method, which assigns the value of a tanker according to a formula based on days in various ports, violates the Due Process and Commerce Clauses of the U.S. Constitution.

2. “The City further violates the Commerce Clause because the ordinance discriminates against vessels engaged in interstate commerce. The ordinance directly and through its exemptions attempts to impose the tax only on vessels engaged directly or indirectly in the trans-

3. The Valdez ordinance violates the United States Constitution’s Duty on Tonnage Clause because “The ordinance exempts from taxation smaller vessels (such as pleasure craft), vessels engaged in commercial fishing and those that exclusively use the City-owned container terminal (such as container barges and cruise ships). The effect of those exemptions is to impose a fee, in the form of the tax imposed only upon vessels engaged in interstate commerce, for the privilege of entering the port of Valdez.”

In 2004 the Superior Court granted the plaintiffs’ motion for summary judgment and held that the vessel tax was an unconstitutional duty on tonnage. The city moved for reconsideration, which the Superior Court granted. The Superior Court vacated its earlier ruling and in January 2005 held that the apportionment method violated the Due Process and Commerce Clauses. The court did not rule on the Tonnage Clause issue at this time. In January 2006, however, the Superior Court issued its final judgment, which added to its January 2005 holding a holding that the tax did not violate the Tonnage Clause.

The lower court ruled that the city could not levy any tax beyond the amount that would be due using an apportionment formula that divides the number of days in Valdez by 365. The court ordered this amount paid into a court-supervised account until the appeal was terminated by agreement of the parties or decision of the Supreme Court.

Both the city and the tankers appealed. The Supreme Court of Alaska denied all of Polar Tankers’ claims. The Court held that the
Because of this geography a great deal of interstate transportation going west must pass through Pennsylvania. In both cases, *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873), and *American Trucking Associations* v. *Scheiner*, 483 U.S. 266 (1987), the tax statutes were facially neutral, an added difficulty which is not a problem in the current case.

The property tax in the present case seems unambiguously targeted at tankers. *American Trucking*‘s facts are somewhat similar. There, Pennsylvania’s tax was levied at six dollars per axle on trucks weighing more than 26,000 pounds, a weight specification that apparently focused the tax on interstate trucks. For fiscal year 1982–1983, the yield of Pennsylvania’s tax was $136 million, with $107 million being derived from trucks registered in states other than Pennsylvania. The 1873 case had a similarly lopsided yield.

A standard applied in *American Trucking* was the “internal consistency” test of *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159 (1983). That test asks whether the challenged tax could be fairly applied by every jurisdiction. The answer in the current case would be “no, such a tax should not be repeated by other states.” It therefore seems likely that the Supreme Court will find the challenged property tax unconstitutional on those grounds. If every state could identify ships involved in exporting goods from the state, design a property tax statute to target them and levy such a tax, interstate commerce would suffer.

Polar Tankers also attacks the tax scheme’s apportionment formula. To refresh the reader’s memory, the apportionment formula provides for a tax “on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports.”

This formula might make some sense if one were reporting income, but in this case it is being applied to a tax on value for use of a port. Under this formula, for instance, if a very large cruise ship spent one day in the port of Valdez, but otherwise at other ports the cruise ship anchored out rather than in port, the cruise ship would pay a tax on 100 percent of its value. If the cruise ship entered a second port, however, the tax would go down from 100 percent to 50 percent of the ship’s value. In each hypothetical, the use of the port of Valdez was the same. If states are to levy taxes of any sort on interstate commerce, the taxes must be rational. According to the petitioners, the Valdez apportionment formula discriminates in arbitrary ways. It is not a true effort to match the tax, which is focused on one class of ships, with those ships’ use of the port.

Currently there are seven standards used by the Supreme Court of the United States to test the constitutionality of a challenged tax.

In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Supreme Court mentioned four of the tests that constitutional attacks on a tax should consider. One should determine whether

1. The tax is applied to an activity with a substantial nexus with the taxing State;
2. The tax is fairly apportioned;
3. The tax does not discriminate against interstate commerce; and
4. The tax is fairly related to the services provided by the State.

Then, in *Container Corporation of America* v. *Franchise Tax Board*,

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463 U.S. 159 (1983), the Court summarized two other tests that income taxes must meet: (1) an external consistency test; and (2) an internal consistency test (the fifth and sixth tests on this current count). Finally, the Court in Container Corp. referred to a test that invalidates a state tax if the income attributed to the state is out of all proportion to the business conducted in the taxing state. This is a standard with ample precedent. As the Court said:

The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business’ incomes being taxed. The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated. The Constitution does not ‘invalidat[e] an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State….’ Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove “by ‘clear and cogent evidence’ that the income attributed to the State is in fact ‘out of all appropriate proportions to the business transacted … in that State,’ or has ‘led to a grossly distorted result.’”

One can fairly say that of the seven tests announced by the Supreme Court, the City of Valdez’s tax on Polar Tankers fails four of them:
– the apportionment formula seems arbitrary and not fairly apportioned;
– the tax targets and discriminates against interstate commerce;
– the apportionment formula is arbitrary and is not fairly related to services provided; and
– that such a targeted tax falling only on interstate commerce is not an internally consistent tax to be adopted by every jurisdiction.

As stated above, the arguments in this case are not normal. A normal constitutional argument would use the seven standards set out above. In this case, however, in the briefs filed supporting Polar Tankers the word “discriminates” appears only five times, all in the petitioner’s brief. On the other hand, the word “Tonnage” from the constitutional provision prohibiting taxes on tonnage appears 257 times. It is to that argument we now turn.

Article 1, Section 10 provides that “No State shall, without the Consent of Congress, lay any duty of Tonnage.” Tonnage concerns the weight of a vessel or perhaps more accurately the water that the vessel displaces. A vessel must displace its weight in tons of water or sink.

Polar Tankers and its supporters hope in this case to expand the constitutional prohibition on tonnage taxes to include the challenged property tax on Polar Tankers. A relevant paragraph in Polar Tankers’ brief reads:

“The Tonnage Clause has fallen into relative obscurity in modern times, in part because it has been generally successful in effectuating the Framers’ goal of discouraging levies that have the effect of taxing vessels for the privilege of using a harbor. But the meaning of the Clause is settled. A duty of tonnage is “a charge for the privilege of entering, or trading, or lying in, a port or harbor.” Transp. Co. v. Parkersburg, 107 U.S. 691, 696 (1883). By enacting the Tonnage Clause, the Framers sought “to guard against local hindrances to trade and carriage by vessels.” Packet Co. v. Keokuk, 95 U.S. 80, 85 (1877), which “never ceased to be a source of dissatisfaction & discord” under the Articles of Confederation. J. Madison, Preface to Debates in the Convention of 1787, in 3 M. Farrand, The Records of the Federal Convention of 1787, at 542 (1911).

Fees for the use of harbors have a long history. For instance in 1827 the Maryland legislature authorized wharfage fees in Baltimore:

The mayor and city council of Baltimore shall be, and they are hereby, empowered and authorized to regulate, establish, charge and collect, to the use of the said mayor and city council, such rate of wharfage as they may think reasonable, of and from all vessels resorting to or lying at, landing, depositing, or transporting goods or articles other than the productions of this State, on any wharf or wharves belonging to said mayor and city council, or any public wharf in the said city, other than the wharves belonging to or rented by the State.

For a report that recites the above history and considers the tax that Baltimore enacted, see Guy v. Baltimore, 100 U.S. 434 (1879), a case that does not mention the Tonnage Clause. Cited in Guy v. Baltimore are other similar cases. The Supreme Court has not invoked the Tonnage Clause except in instances in which there is an actual tax on tonnage.

The record in this case does not contain any factual support for Polar Tanker’s assertion that “The
Tonnage Clause has fallen into relative obscurity in modern times, in part because it has been generally successful in effectuating the Framers’ goal of discouraging levies that have the effect of taxing vessels for the privilege of using a harbor.” Given that there are thousands, perhaps millions of boats in the United States and not much more harbor space in the 21st century than there was in the 18th century, fees for use of a harbor might be assumed to be at least as prominent as they were in 1827 when Maryland authorized fees in Baltimore and in 1879 when the Supreme Court decided *Guy v. Baltimore.*

It seems very doubtful that the Supreme Court would change a centuries-long understanding of the application of the Tonnage Clause to decide this case. Fees for the use of harbors are somewhat analogous to parking meters and have a centuries-long history. Also, the reader should realize that this case is truly unique, an effort to tax oil tankers carrying exported oil. Fees for harbor use could not normally depend upon a value formula, but would be a set fee for harbor use based on some objectively observed criteria such as length, beam, or the like. For instance, can the reader imagine a harbormaster appearing to quiz the captain of a vessel, be it pleasure or commercial, about the value of the vessel and then about where the vessel had been for the previous year in order to determine a fee for harbor use based on a formula-determined percentage of value?

**Significance**

This is unlikely to be a significant case, as it can be decided according to settled principles. If decided under the Tonnage Clause, however, the decision would be a very significant broadening of the prohibitions of that Clause.

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The Johns-Manville Corporation was for many years this country's largest miner of asbestos and also a major manufacturer of products using that heat and fire resistant material. In the 1960s and 1970s, Manville began to face an increasing volume of lawsuits seeking recovery for respiratory injuries, including mesothelioma, lung cancer, and asbestosis, allegedly caused by inhaling asbestos. By 1982, when Manville filed bankruptcy, it was facing over 12,500 pending lawsuits and thousands of other current claims not yet brought to litigation. Manville also had to anticipate many more such claims in the future: persons exposed to asbestos often do not manifest any resulting injuries until years later.

To reorganize its business on a sound basis, Manville needed a plan to deal with both present and future claims. Otherwise, the present claims alone could so deplete its assets that little (if anything) would be left for either future claimants or Manville's continuing non-asbestos operations. Unless future claimants could be prevented from pursuing Manville, moreover, its susceptibility to them would disqualify it for the credit necessary to stay in business. Yet there appeared to be numerous legal and practical obstacles to working out a sufficiently comprehensive plan of reorganization.

Under the plan confirmed in 1986, present and future claimants were “channeled” to the Manville Personal Injury Settlement Trust. In other words, they could no longer seek recovery for their injuries from either Manville itself or its insurers. The trust was initially funded with 80 percent of the common stock of Manville and some $770 million in contributions from its indemnity insurers, including almost $80 million from Travelers. In return for their contributions, those insurers obtained from the bankruptcy court an injunction protecting them from claims “based upon, arising under or related to [their] Policies.”

In the aftermath of Manville, bankruptcy courts have confirmed some 40 other asbestos reorganization
plans based on its model. Tens of billions of dollars have been contributed to trusts for asbestos claimants, of whom there are hundreds of thousands in the United States. Those reorganizations have also benefited the debtors that have managed to continue in business. Manville itself has so prospered that in 2001 the trust was able to sell its common stock to Berkshire Hathaway for over $2 billion.

In 1994, Congress endorsed the Manville model for asbestos reorganization by adding to the Bankruptcy Code § 524(g) & (h), 11 U.S.C. § 524(g) & (h). (In the absence of explicit statutory authority for the original channeling injunction, the Manville court grounded it on its general authority under 11 U.S.C. § 105(a) to enforce the Code.)

By 2001, the asbestos plaintiffs' bar was seeking to articulate grounds on which its clients could recover from solvent insurers notwithstanding channeling injunctions. In this case, plaintiffs asserted a variety of statutory and common law theories seeking to hold Travelers liable for its own misconduct in allegedly concealing information it had obtained from Manville about the dangers of asbestos. The courts below referred to those complaints as “direct actions” because they were grounded on Travelers' own liabilities rather than on its insurance obligation to provide indemnity for Manville. (In insurance contexts, however, the term “direct action” is often used instead to refer to a claim against an insurer based on the conduct of its insured.)

Travelers took the position that the channeling injunction entered in 1986 barred the direct actions. Plaintiffs, of course, disagreed. After mediation led by former New York Governor Mario Cuomo, the parties reached a settlement under which Travelers would pay almost $500 million into a separate new trust for the benefit of the present plaintiffs. However, the settlement was conditioned on the bankruptcy court's entry of an order “clarifying” that present and future direct actions were and had always been barred by the 1986 injunction.

The case now before the Court arose when a number of third parties objected to the proposed settlement. Although their potential claims against Travelers would be barred by the clarification order contemplated, they had not participated in negotiating the settlement and would have no share in the new trust.

**Issues**

Does a bankruptcy court have jurisdiction to release and enjoin claims against a debtor's insurer arising from its own conduct, not that of the debtor?

Is a challenge to the proposed clarification order an impermissibly tardy attack on the 1986 channeling injunction?

Would it violate respondents' due process or other constitutional rights to bind them by a proceeding instituted to deprive them of their direct actions claims, when they were given no advance notice and no opportunity to participate, either directly or through a representative?

**Facts**

In 1982, Manville filed in the United States Bankruptcy Court for the Southern District of New York a petition to reorganize under Chapter 11 of the Bankruptcy Code. As explained above, it was essential for Manville to obtain relief from both present and future asbestos-related personal injury claims. The court therefore appointed a future claimants' representative to protect their interests. With the participation of that representative, those concerned negotiated a plan under which present and future claims would be channeled exclusively to the trust, relieving both Manville and its contributing insurers from those liabilities.

Bankruptcy Judge Burton Lifland ultimately confirmed a plan along those lines. In re Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986). The plan included an unpublished channeling injunction that “[Travelers] shall have no further duties or obligations based upon, arising out of or related to the Policies and shall thereafter be released from any and all Policy Claims." The injunction went on to bar “[a]ll Persons ... from commencing and or continuing any suit, arbitration or other proceeding of any type or nature for Policy Claims against any or all members of the Settling Insurer Group.”

“Policy Claims” were defined to include “any and all claims, demands, allegations, duties, liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against [Manville] or against [Travelers] based upon, arising out of, or relating to the [insurance policies].” Joint Appendix at 303a, 307a.

In MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), the Second Circuit upheld the channeling injunction over a challenge to the bankruptcy court's jurisdiction. MacArthur, a distributor of Manville products, claimed rights as a co-insured under the policies covered by the injunction. While recognizing that the court could enjoin suits against Manville itself, he disputed
its jurisdiction and authority to bar suits against its insurers.

In rejecting MacArthur’s arguments, the court of appeals held that “the Bankruptcy Court has jurisdiction over the insurance policies as property of the debtor’s estate. Moreover, the court had authority to issue the injunctive orders pursuant to its power to dispose of a debtor’s property free and clear of third-party interests and to channel such interests to the proceeds of the disposition.” 837 F.2d at 91-93. The Supreme Court denied certiorari. MacArthur Co. v. Johns-Manville Corp., 488 U.S. 868 (1988).

Notwithstanding the channeling injunction approved by the Second Circuit and used as a model by Congress, persons injured by Manville asbestos began to advance a variety of claims against Travelers based on its alleged concealment of knowledge garnered from Manville about the dangers of its products. As described above, the plaintiffs in the present direct actions (who are represented here by petitioners Common Law Settlement Counsel) initially maintained that their claims lay outside the scope of that injunction. As part of a proposed settlement with Travelers, however, they later agreed to entry of a new injunction expressly applying the 1986 original to present and future direct actions.

When the settlement was submitted for the bankruptcy court’s approval, there were objections from non-settling parties with potential direct action-type claims against Travelers, including respondents Pearlie Bailey et al. The proposed clarification order also drew objections from respondent Chubb Indemnity Insurance Company. Chubb is potentially liable for claims on which Travelers may share liability. The new injunction would bar Chubb from pursuing Travelers for contribution and indemnity if Chubb has to pay those claims.

Despite respondents’ objections, Judge Liland concluded that his 1986 channeling injunction barred any direct actions against Travelers. That conclusion rested largely on his factual finding that whatever Travelers knew “of the hazards of asbestos was derived from its nearly three decade long insurance relationship with Manville and the performance by Travelers of its obligations under the Policies.” The bankruptcy court declared that all future claims “against Travelers that directly or indirectly are based upon, arise out of or relate to Travelers insurance relationship with Manville or Travelers knowledge or alleged knowledge concerning the hazard of asbestos” were barred. In re Johns-Manville Corp., 2004 WL 1876046, at *13 (Bankr. S.D.N.Y. 2004), aff’d in relevant part, 340 B.R. 49 (S.D.N.Y. 2006).

On further appeal, the Second Circuit took a fundamentally different approach:

The courts below appeared to view the jurisdictional inquiry as a factual one: if the direct actions “arose out of” or are “related to” the Manville-Travelers relationship, then the court had jurisdiction [to enjoin them]. But the factual determination was only half of the equation. The nature and extent of Travelers’ duty to the direct action plaintiffs is a function of state law. Neither court looked to the laws of the states where the claims arose to determine if indeed Travelers did have an independent legal duty in its dealing with plaintiffs, notwithstanding the factual background in which the duty arose. In re Johns-Manville Corp., 517 F.3d 52, 63 (2d Cir. 2008).

At first glance, that language may be puzzling. Under 28 U.S.C. § 1334(b), “the district court shall have original but not exclusive jurisdiction of civil proceedings arising under title 11, or arising in or related to cases under title 11.” (Title 11 of the United States Code consists of the Bankruptcy Code; its provisions are identified below simply by section number). The bankruptcy courts exercise that jurisdiction by way of reference from the district courts. 28 U.S.C. § 157(a). So why might it not be enough for jurisdiction to enjoin the direct actions they “arose out of” or are “related to” the Manville-Travelers relationship?

The decision below was primarily based on 28 U.S.C. § 1334(e)(1), which confers on the court where a bankruptcy case is pending “exclusive jurisdiction . . . of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” The estate in bankruptcy (under § 541(a), essentially the debtor’s assets when bankruptcy is filed) is sometimes called “the res,” and authority to collect and dispose of it is “in rem jurisdiction.” Like some other courts, the Second Circuit construed the terms “related to” and “arise out of” from the perspective of bankruptcy as fundamentally an in rem proceeding. 517 F.3d at 64-67.

Why that matters here is this. A debtor’s rights under its insurance policies are assets of the estate. Manville’s right to be indemnified by Travelers for asbestos-related personal injury liabilities was therefore part of the res in Manville’s reorganization, as the Second Circuit concluded in 1988. There is a plausible argument that the bankruptcy court had in rem jurisdiction in 1986 to enjoin asserting those liabilities directly against Travelers in return for a contribution to the trust: the
injunction was part of the process of collecting the estate. The Second Circuit reached that very conclusion in 1988 in *MacArthur*, 837 F.2d at 92-94.

In contrast, Travelers’ liabilities for its own misconduct are not in themselves an asset of the estate. That makes it hard to argue that there was in rem jurisdiction in 2004 to enjoin the direct actions, unless they ultimately seek to recover under Travelers’ insurance policies for Manville’s wrongdoing. Recognizing that state law does sometimes provide for that sort of recovery, the Court of Appeals remanded to the bankruptcy court to determine for each of the direct actions in issue whether under applicable law it was claiming insurance coverage for Manville’s liabilities. If so, it could be enjoined by the bankruptcy court. If not, it was beyond that court’s in rem jurisdiction.

The Second Circuit dismissed arguments that the clarifying order was authorized by § 524(g), which does support certain asbestos-related channeling injunctions. The court relied primarily on the language of BC § 524(g)(4)(A)(ii)(III), which provides in that context for bankruptcy courts to enjoin “any action directed at a third party … alleged to be directly or indirectly liable for the conduct of, claims against or demands on the debtor to the extent such alleged liability of such third parties arises by reason of … the third parties’ provision of insurance to the debtor” (emphasis added by the court, 517 F.3d at 680).

As the court of appeals commented in its conclusion, “The irony in all of this is that while the direct actions, with one categorical exception, involve a claim of an independent duty on the part of Travelers, they have met with almost universal failure in the state courts.” *Id.*

Travelers and Common Law Settlement Counsel separately petitioned for certiorari. The Court granted both petitions and consolidated the cases.

**CASE ANALYSIS**

The Constitution empowers Congress to enact “uniform Laws on the subject of Bankruptcies.” U.S. Const. art. I, § 8, cl. 4. That subject has been consistently understood to encompass at least a process for the distribution of the debtor’s assets among creditors, usually accompanied by a discharge releasing it from further liability for past debts. Like the Second Circuit, respondents look to that in rem model in arguing that the bankruptcy court’s jurisdiction did not encompass entry of the clarifying order.

Travelers notes, however, that there is no reference to that model in 28 U.S.C. § 1334(b), which provides for bankruptcy jurisdiction over “civil proceedings arising under title 11, or arising in or related to cases under title 11.” Moreover, the Court recently observed that the “Framers would have understood that ‘Laws on the subject of Bankruptcies’ included laws providing in certain limited respects, for more than simple adjudications of rights in the res,” including the power “to issue ancillary orders enforcing in rem adjudications.” *Central Virginia Community College v. Katz*, 546 U.S. 356, 370 (2006). Travelers finds more specific support for the clarification order in Congress’ codification of channeling injunctions in § 524(g) & (h).

The Bailey respondents endorse the Second Circuit’s conclusion that § 524(g) & (h) provide no support for enjoining claims arising from Traveler’s own misconduct. Moreover, they contend, neither that statute’s language nor its legislative history contains any suggestion that it was expanding bankruptcy jurisdiction beyond its previously established limits.

Parties on both sides rely on *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). There the Court upheld a bankruptcy court injunction barring asbestos judgment creditors’ efforts in federal district court to enforce against the surety an appeal bond posted by debtor Celotex. The Court concluded “that the ‘related-to’ language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.” *Id.* at 308.

The Court there quoted with approval a widely accepted test for “related to” jurisdiction: “whether the outcome of [a] proceeding could conceivably have any effect on the estate being administered in bankruptcy. … An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the estate.” *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984).

Petitioners contend that broad insurers’ protections (such as those in the channeling injunction as recently clarified) were essential to getting contributions to a trust fund for personal injury claimants, which was the centerpiece for handling and administering the Manville estate. Respondents object, however, that direct actions based on Travelers’ misconduct could not at this point (after confirmation of Manville’s plan) affect either Manville itself or the trust.

From petitioners’ perspective, the relevant time to assess the impact of

(Continued on Page 374)
the clarification order was in 1986, when the original channeling injunction was entered. Back then, both Manville and Travelers were exposed to serious consequences if a plan could not be confirmed.

Because petitioners view the clarification order as simply a means of enforcing the 1986 injunction, they contend that respondents are impermissibly attacking that earlier decision. Such an attack would raise both legal and practical concerns. Once a decision has become final, it generally may not be called into question in a later proceeding (“collaterally attacked”), even if the first court had no jurisdiction. See, e.g., *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). Moreover, Manville, Travelers, hundreds of thousands of injured asbestos claimants, and the public at large have long relied on the effectiveness of the reorganization plan and the channeling injunction.

From respondents’ vantage, however, there would have been no point to the clarification order if the original injunction had clearly barred claims arising from Travelers’ own misconduct. If such a bar was already well-established, why would Travelers be willing to pay almost $500 million to settle the direct actions? The Bailey respondents suggest that the proposed settlement is essentially a “sale of indulgences,” with Travelers paying a few current litigants for the purpose of escaping liability from others with similar claims who have not yet sued and are not sharing in the settlement.

Amici Jagdeep S. Bhandari et al. (a group of law professors) particularly emphasize that respondents’ tort claims are “property” in the sense of the Fifth and Fourteenth Amendment Due Process Clauses. Yet neither they nor any of their representatives were given either advance notice or an opportunity to participate in the bankruptcy court proceedings to enjoin assertion of their claims. “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and the opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950).

The professors go on to identify related constitutional issues under the “Takings” Clause of the Fifth Amendment and under the right to trial by jury under the Seventh Amendment.

The Second Circuit’s opinion below reads at times as if it is addressing the bankruptcy court’s jurisdiction to adjudicate direct actions, as distinguished from jurisdiction to enjoin them from being pursued in other courts (ordinarily state courts). E.g., 517 F.3d at 61. Petitioners’ Amicus Resolute Management Inc., an arm of the Berkshire Hathaway Insurance Group, focuses on that distinction in *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367-381-82 (1996), holding that a state court could validly approve a settlement releasing claims within the exclusive jurisdiction of the federal courts, despite the state court’s lack of authority to determine the merits of those claims.

From Resolute’s perspective, this case is ultimately not even about the bankruptcy court’s jurisdiction to enter the clarification order. Rather, given that there undisputedly was jurisdiction to confirm Manville’s reorganization plan, the real question should be whether the channeling injunction and the clarification order were proper exercises of the court’s equitable discretion. In light of *Matsushita*, the answer does not depend on jurisdiction to adjudicate the direct actions.

**SIGNIFICANCE**

Travelers and others contend that affirmation here would make it hard to enlist contributions from insurance companies in asbestos and other mass-tort reorganizations, hurting both debtors and personal injury claimants. That contention is debatable: insurers benefit considerably from channeling injunctions limited to claims based on policy-holders’ liabilities, and direct actions alleging misconduct by insurers have thus far been notably unsuccessful.

The scope of bankruptcy jurisdiction is very much unresolved. Any clarification from the Court would help.

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

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

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

Class action lawsuit — As a general rule, a class action lawsuit is one in which one or several named individuals sue for themselves and others believed to have sustained injuries or losses similar to those sustained by the named plaintiffs, but who, at the time the case is filed, are unknown both as to their identities and their actual numbers. In order for a plaintiff’s lawsuit to be given class action status, the named plaintiff must show that (1) the class is so large as to make it impracticable to specify each and every plaintiff by name, (2) there exist questions of law or fact common to all members of the plaintiff class, (3) the claims of the named plaintiffs are representative of the claims of the unnamed plaintiffs, and (4) the named plaintiffs can fairly and adequately represent the interests of the entire plaintiff class. (Note: Less common is the class action lawsuit in which the class is composed of named and unnamed defendants or in which both the plaintiff’s and the defendant’s side of the case constitute a class.)

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

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

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

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

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

Direct review — In American criminal law, a defendant is tried once, but the trial itself can be reviewed many times by many appellate courts. One channel of review is called direct review because it is initiated by a first appeal as a matter of statutory right. Direct review also is wide-ranging review because the convicted defendant is permitted to raise all procedurally proper issues regarding the trial court’s disposition of his or her case — including issues of law, issues of fact, 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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Funding for this issue has been provided by the American Bar Association Fund for Justice and Education; we are grateful for its support. The views expressed in this document are those of the authors and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association, the Fund for Justice and Education, or the Standing Committee on Public Education.

ISSN 0363-0048