

SECTION NEWSLETTER

October, 2007

2008 Annual Meeting Program

The Section will meet on Saturday, January 5, 2008, from 1:30 p.m. to 3:15 p.m. The topic is "The Federal Courts and the International System. The speakers will be Anthony Bellia (Notre Dame), Henry Monaghan (Columbia) and Trevor Morrison (Cornell). Sarah Cleveland (Columbia) will offer a commentary on the pieces from the perspective of an international lawyer.

In the Supreme Court

Here are brief summaries of cases from the October 2006 Term, followed by descriptions of cases awaiting review in the October 2007 Term that appear to present Federal Courts issues.

Decided in the October 2006 Term

***Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007)**

The court of appeals not only may, but must, *sua sponte* dismiss an appeal filed within the time limit ordered by the district court in response to a motion to reopen the time to appeal, when the time limit exceeds the statutorily authorized period for extension. 28 U.S.C. § 2107(c) permits the district court to extend the time for filing a notice of appeal by fourteen days. In this case, the court extended

by seventeen days, and the appellant filed the notice on the sixteenth day. The Sixth Circuit dismissed the appeal, holding that it lacked jurisdiction. A five-to-four Court affirmed. Justice Thomas's majority opinion, stripped to its essentials, refused to permit what would have amounted to jurisdiction by estoppel. Acknowledging that the Court has been less than precise in its use of the word "jurisdiction," the majority retreated to the position that the statutory limit on extension is jurisdictional and thus not modifiable by the judiciary. It explicitly repudiated the unique-circumstances doctrine that the Court appeared to recognize in two earlier cases.

Justice Souter led the four dissenters, arguing that the Court was being inconsistent with four recent precedents. He accused the Court of ignoring its own recent statements that statutory time limits are jurisdictional only if Congress declares them to be, distinguishing between what he called claim-processing rules on the one hand and "prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." (Internal quotation marks omitted.) Justice Souter thought that the proper analogy was to statutes of limitations, which are not jurisdictional and which, therefore, are waivable. The dissent was unable to justify dismissal of the appeal in a circumstance where counsel (in the dissent's view) justifiably relied on the terms of the district judge's order.

***Burton v. Stewart*, ___ U.S. ___, 127 S.Ct. 793, 167 L.Ed.2d 175 (2007)**

A state prisoner who filed a federal habeas corpus action challenging his conviction while the state courts were still reviewing his sentence cannot thereafter maintain a new federal habeas action without complying with § 2244(b).

***Hein v. Freedom from Religion Foundation*, ___ U.S. ___, 127 S.Ct. 2553, ___ L.Ed.2d ___ (2007)**

Taxpayers lack standing to raise an Establishment Clause challenge to the executive's funding decisions when the money comes from general funds rather than funds earmarked by Congress for a religious purpose and disbursed outside the government. The question arose in the context of President Bush's faith-based initiatives, under which various federal government agencies have sponsored conferences for faith-based groups. There was no majority opinion. Justice Alito's opinion for a three-Justice plurality limited *Flast v. Cohen* to situations where a congressional exercise of the taxing and spending power itself directly violates the Establishment Clause. Because the money used for these programs came from undifferentiated funds allocated by Congress to the executive branch rather than to the particular program that the Foundation challenged, the majority refused to find *Flast* standing.

Justice Scalia, joined by Justice Thomas, concurred in the judgment but argued that the Court should either extend *Flast* to its logical limits or overrule it, arguing vociferously for the latter. The opinion focused on "wallet injury" versus "psychic injury," characterizing the latter as insufficient to create standing because it fails to satisfy the traceability and redressability prongs of the Court's standing approach and is indistinguishable from a generalized grievance. The opinion broadened to a more generalized attack on the Court's "judge-empowering" approach to standing and its implications for separation of powers.

The four dissenting Justices declined to distinguish between appropriations that Congress specifically authorizes for expenditure arguably in conjunction with religion and those where Congress or the executive branch merely "earmarks" the funds. Justice Souter's opinion also noted that there are other areas in which the Court has upheld standing in cases not involving what Justice Scalia would characterize as "wallet injury," such as racial gerrymandering cases. (One might also note that requiring "wallet injury" as a part of Article III standing might deprive the district courts of diversity jurisdiction over cases with no demonstrable wallet injury, such as cases for intentional or negligent infliction of emotional harm.)

***Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007)**

The Prisoners' Litigation Reform Act makes non-exhaustion of prison administrative remedies an affirmative defense, so an inmate's failure to plead or demonstrate exhaustion does not permit the court to dismiss. Failure to exhaust remedies on one of multiple claims does not require dismissal of the entire action (resolving a circuit split). The lower court exceeded judges' proper role when it created and imposed contrary rules and when it created a rule that the inmates' original administrative grievance must specifically identify each defendant whom the inmates later sued. The unanimous Court ruled that nothing in the language of PLRA supports the interpretations that the Sixth Circuit had imposed.

***Lawrence v. Florida*, ___ U.S. ___, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007)**

A pending application for certiorari to review state court's denial of post-conviction relief does not toll one-year limitation period of 28 U.S.C. § 2244(d)(2). The Court split 5-4, with the majority holding that a petition for certiorari was not part of the collateral review of the state conviction, in part because it did not want a petition for certiorari to become part of the exhaustion of remedies required of state prisoners before they seek

federal habeas relief. The four-Member minority argued that exhaustion and tolling need not be linked to each other

***Massachusetts v. EPA*, ___ U.S. ___, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)**

States have standing under the Clean Air Act to challenge EPA inaction in the face of a petition to regulate domestic emissions of greenhouse gases from automobiles. A five-to-four majority found that there is significant scientific evidence that emissions of greenhouse gases are causing a rise in surface temperature, accompanied *inter alia* by sea-level rise, shore erosion, reduced snow pack and stronger storms. Because the state owns large amounts of land affected by these conditions, it has a particularized injury sufficient to support Article III standing. The fact that the harm from global warming may be widely shared does not defeat states' standing. The United States' position as a leading global emitter of greenhouse gases, particularly from automobiles, combined with EPA's statutory authority to regulate such emissions and the Clean Air Act's authorization of challenges to agency inaction, satisfy the traceability and redressability prongs of the standing doctrine.

***MedImmune Inc. v. Genentech Inc.*, ___ U.S. ___, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007)**

Article III's case-or-controversy provision does not require a patent licensee either to terminate or breach the license agreement before seeking a declaration of patent invalidity or of non-infringement.

***Morse v. Frederick*, ___ U.S. ___, 127 S.Ct. 2618, ___ L.Ed.2d ___ (2007)**

The Court never reached the question of whether qualified immunity protects a public school principal who, upon observing a student not on school property display a distasteful sign at a public event that the school had released its students to attend, tore up the sign and suspended the student, because it found that the principals action did not violate the student's First Amendment rights. *Saucier v.*

Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), prescribed this sequence of inquiry.

***Office of Senator Dayton v. Hanson*, ___ U.S. ___, 127 S.Ct. 2018, 167 L.Ed.2d 898 (2007)**

Hanson sued Senator Dayton's office for wrongful discharge, resting the district court's jurisdiction on the Congressional Accountability Act of 1995. The lower courts found in Hanson's favor, rejecting the office's claim that the Speech and Debate Clause barred the action. The office sought Supreme Court review, but the Court held that it lacked jurisdiction to review under the Act despite the Speech-and-Debate claim because the lower courts' rulings did not rule on the constitutionality of any provision of the Act, which § 412 requires as a condition of Supreme Court review.

***Permanent Mission of India to United Nations v. New York City*, ___ U.S. ___, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007)**

A federal court has jurisdiction over a claim by New York City to compel payment of taxes on property used to house diplomatic employees because the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(4) removes the foreign country's immunity because "rights in immovable property situated in the United States are in issue."

***Powerex Corp. v. Reliant Energy Services, Inc.*, ___ U.S. ___, 127 S.Ct. 2411, 168 L.Ed.2d 112 (2007)**

A seven-Member majority ruled that 28 U.S.C. § 1447(d) precludes circuit review of a district court order remanding a case removed in part on grounds of sovereign immunity under the Foreign Sovereign Immunities Act. *Osborn v. Haley* had ruled that the Westfall Act's specific removal provision, 28 U.S.C. § 2679(d)(2), displaced the more general provisions of § 1447(d), but Justice Scalia's majority opinion refused to extrapolate that to an implied displacement under the FSIA, as Justice Breyer's dissenting opinion urged.

***Schriro v. Landrigan*, ___ U.S. ___,
127 S.Ct. 1933, 167 L.Ed.2d 836 (2007)**

A state court's finding that the federal habeas petitioner had refused to allow counsel to present any mitigating evidence in a capital case was not unreasonable. The district court's subsequent refusal to hold an evidentiary hearing on the effectiveness of counsel's assistance was not an abuse of discretion. The state court's conclusion that petitioner could not satisfy the prejudice prong of *Strickland v. Washington* was not unreasonable.

***Sinochem International Co. v. Malaysia International Shipping Corp.*, ___ U.S. ___, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007)**

The district court may dismiss on *forum non conveniens* grounds before considering either subject matter or personal jurisdiction. This ruling must come as something of a shock to those who have thought and taught that jurisdiction is the first consideration and that if a court dismisses a case on *forum non conveniens* grounds, it has both subject matter and personal jurisdiction.

***Sole v. Wyner*, ___ U.S. ___, 127 S.Ct. 2188, 167 L.Ed.2d 1069 (2007)**

The granting of a preliminary injunction is not "relief on the merits" with respect to prevailing-party status under 42 U.S.C. § 1988 when the party granted the injunction subsequently loses on the merits.

***Watson v. Philip Morris Cos., Inc.*, ___ U.S. ___, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007)**

In a case filed in the Arkansas courts under the state's unfair-business-practice laws against Philip Morris, a unanimous Court found that the case was not removable under 28 U.S.C. § 1442(a)(1). Philip Morris had argued that because it conducted cigarette testing using a government-prescribed method, it was acting under the Federal Trade Commission within the meaning of that subsection. The Court ruled that simply complying

with the law did not constitute acting under federal authority, which instead requires a private individual's acting to assist or help carry out the *federal entity's* duties. Mandated cigarette testing, not being a duty of the FTC, does not qualify. The Court also explicitly rejected Philip Morris's argument that it exercised testing authority delegated by the FTC, finding instead that the absence of any sort of formal relationship between the defendant and the FTC, the absence of any sort of compensation for the private entity carrying out testing ostensibly on the government's behalf, and the presence of an extensive regulatory scheme all militated against finding the company acting under or for the government.

***Wilkie v. Robbins*, ___ U.S. ___, 127 S.Ct. 2588, ___ L.Ed.2d ___ (2007)**

A strong majority refused to imply a *Bivens* action on Robbins's behalf when he challenged an alleged Bureau of Land Management harassment and intimidation campaign against him and his business designed to compel him to grant the federal government an easement across his Wyoming ranch without compensation, in violation of the Fifth Amendment's Takings Clause. Justice Souter's opinion for seven Justices (which the remaining two Justices joined with respect to denial of a civil RICO claim against the government officials) declined "to devise a new *Bivens* damages action for retaliating against the exercise of ownership rights, in addition to the discrete administrative and judicial remedies available to a landowner. . . ." The majority characterized the *Bivens* remedy as an exception to a more general rule of non-implication. Justice Souter observed that Robbins had a variety of sub-constitutional remedies at his disposal, many of which he eschewed. (Note the contrast with Justice Douglas's characterization of § 1983 in *Monroe* as supplementary and independent of any other claims that a plaintiff might have.)

The Court rejected Robbins's argument that the harm to him from the government's continued pattern of conduct

was greater than could be remedied by the Court's atomistic approach to individual incidents. In part, the majority found that it would be undesirably difficult to engage in reasoned line-drawing if it fashioned a *Bivens* retaliation claim. Justice Souter distinguished situations where the ends are unlawful from those where the ends are lawful but the means adopted may not be. In the majority's view, the goal of acquiring an easement across the land was permissible, and the Justices refused to be drawn into the "endlessly knotty" problem of "identify[ing] illegitimate pressure going beyond legitimately hard bargaining. . . ." In the end, the majority left the problem to Congress.

Justice Ginsburg, joined by Justice Stevens, dissented on the *Bivens* point, accusing the majority of soft-pedaling the facts underlying Robbins's claim and expressly adopting the plaintiff's characterization of his situation, even with the availability of various piecemeal administrative and judicial remedies, as "death by a thousand cuts." She also noted that, in contrast to cases like *Schweiker v. Chilicky*, here there was no extensive remedial scheme available to Robbins. She argued that the majority invented a new special factor counseling hesitation: fear of multitudinous lawsuits, the very factor that the *Bivens* Court specifically rejected. As to the difficulty of judicial line-drawing, she suggested a parallel to the manner in which the courts handle sexual harassment claims. Finally, she criticized the Court's attempted distinction between impermissible ends and impermissible means.

Granted Certiorari

***Al Odah v. United States*, No. 06-1196**

1) Is the D.C. Circuit's reliance on *Johnson v. Eisentrager* (1950), leading to dismissal of the petitions for habeas corpus relief despite petitioners' reliance on the Suspension Clause, consistent with the Court's ruling in *Rasul v. Bush* (2004). 2) Does *Rasul's* conclusion that at common law the habeas writ would have extended

to persons like those held at Guantanamo undermine the D.C. Circuit's declaration that at common law petitioners would have had no habeas rights? 3) Do the Guantanamo petitioners, detained for more than five years by the United States, have any claim under the Fifth Amendment's Due Process Clause? 4) Does § 7(b) of the Military Commissions Act compel dismissal of petitioners' habeas cases pending when Congress passed the MCA, given that that section does not mention habeas?

***Boumediene v. Bush*, No. 06-1195**

1) Is the Military Commission Act of 2006, which eliminates federal court jurisdiction over habeas corpus petitions for persons detained at Guantanamo as enemy combatants, a valid exercise of Congress's power to define the jurisdiction of the federal courts? 2) Is non-judicial imprisonment at Guantanamo for more than five years unlawful confinement requiring at least a hearing on the merits?

***Danforth v. Minnesota*, No. 06-8273**

Are state supreme courts in a criminal case required to use the *Teague* standard for retroactivity of federal constitutional rights

***Global Crossing Telecommunications Inc. v. Metrophones Telecommunications Inc.*, No. 05-705**

Does the 1934 Communications Act create a private right of action for the provider of payphone services to sue long distance carriers for violations of FCC regulations concerning compensation for coinless payphone calls?

***John R. Sand & Gravel Co. v. United States*, No. 06-1164**

Does the limitations period in the Tucker Act, 28 U.S.C. § 2501, limit the subject matter jurisdiction of the Court of Claims?

***Smith v. Texas*, No. 05-11304**

May a state court of appeals, hearing a case on remand from the Supreme Court

after the Court determined that there was constitutional error under the *Penry* cases, determine that the error that the Supreme Court identified was harmless? Can the state court hearing the case on remand impose a higher standard of harm on the petitioner that the state court had declined to impose when it originally heard the case?

Synclair v. Fresno County, California, No. 05-71

In a summary disposition, the Court affirmed the district court's dismissal of a disappointed father's § 1983 challenge to the constitutionality of state officials' implementation of a state court's order relating to the father's visitation rights, agreeing with the lower courts' determination that the officials' actions were inextricably intertwined with the state court's order.

Wallace v. Chicago, Illinois, No. 05-1240

When does a claim for damages for false arrest or other Fourth-Amendment-forbidden conduct accrue if the court in the defendant's criminal trial received the fruits of the search in evidence?

Whorton v. Bockting, No. 05-595

1) Does the Court's holding in *Crawford v. Washington*, governing admissibility of testimonial hearsay evidence apply retroactively to habeas corpus cases? 2) Did the Ninth Circuit's retroactive application of the rule violate *Teague v. Lane*? 3) Did 28 U.S.C. § 2254(d)(1, 2) adopt the *Teague* exceptions for private conduct that is beyond criminal proscription and watershed rules?

Zurich Insurance Co. v. Chatham County, Ga., No. 04-1618

Does a county partake of the state's immunity from suit in admiralty when the county operated and maintained a drawbridge over navigable waters, with the state having no control over maintenance and operation of the bridge and no financial exposure to an adverse judgment?

Comments, Questions, Submissions

Anyone who would like to contribute to (or do entirely) a future newsletter should contact Ernie Young, Program Chair of the Section for 2007-08, at eyoung@law.utexas.edu or Don Doernberg, Pace University School of Law, 78 North Broadway, White Plains, NY 10603-3796. Telephone: (914) 422-4368; e-mail DLD@law.pace.edu so that your name can be placed in nomination in New York. Please make the contact as quickly as possible.

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