



A A L S

FEDERAL COURTS SECTION NEWSLETTER

July 5, 2018

2019 Annual Meeting Program

The jumping-off point for the panel will be two cases from the Supreme Court's October 2017 Term: *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, [138 S. Ct. 1365](#) (2018) and *Patchak v. Zinke*, [138 S. Ct. 897](#) (2018). The cases raise issues of how far Congress can go in taking cases away from Article III courts, either by stripping them of jurisdiction (*Patchak*) or by giving a non-Article III tribunal jurisdiction over a matter that might have been heard by an Article III court (*Oil States*). *Patchak* raises the jurisdiction-stripping issue as part of a *Klein* issue—Congress passed a statute that stripped jurisdiction over a particular, pending case, and the disappointed plaintiff asserted (unsuccessfully) that Congress had effectively exercised the judicial power by deciding a particular case.

In addition, AALS has invited Sections to put on a "pedagogy" program directed primarily at newer teachers. We are planning a program entitled "Teaching the Federal Courts Class," which, unsurpris-

ingly, would be devoted to thoughts about teaching our course, which can be challenging for students and instructors alike. The panel will cover points such as the topics one should teach as part of the Federal Courts class, the themes holding the topics together, whether the course works best using traditional Socratic method, or can be more lively with exercises, small group discussions, or whether other, more innovative teaching methods are available. A panel of experienced instructors will discuss these and similar questions and provide insights that would help newer (and perhaps also experienced) instructors improve their classes.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2017 Term, followed by descriptions of cases awaiting review that appear to present Federal-Courts issues. Material new in this issue of the newsletter appears in [blue type](#). There are [hyperlinks](#) to lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2017 Term

***Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, [138 S.Ct. 1865](#) (2018) (Decision below *sub nom. In re Vitamin C Antitrust Litigation*, [837 F.3d 175](#) (2d Cir. 2016)) (Argument transcript)**

A state's highest court may speak with final authority (*ex cathedra*) about the proper interpretation of the state's laws, but a foreign government's statement of its law in its Ministry of Commerce's *amicus* brief does not. A federal court need merely provide "respectful consideration" to a foreign government's non-judicial statement describing its interpretation of its law, but is not obligated to give "conclusive effect" to such a statement. The Court analogized the situation to the consideration given to the "views of the State's attorney general"

***Artis v. District of Columbia*, [138 S.Ct. 594](#) (2018) (Decision below: [135 A.3d 334](#) (D.C. Ct. App. 2016)) (Argument transcript)**

A sharply-divided Court held that [28 U.S.C. § 1367\(d\)](#)'s toll of a state limitations period extends from dismissal of the state claim for thirty days plus whatever additional time remained in the state limitations period when the toll commenced. The majority declined to read the statute as merely providing a thirty-day grace period to file in state court if the state limitations period, measured from accrual of the claim to the date of dismissal under § 1367(c), has expired.

The dissenters argued that § 1367(d)'s language reads differently, to provide the claimant either with whatever time still remained under the state limitations period or with a thirty-day grace period, whichever is longer. In the dissenters' view, the majority's interpretation of § 1367(d) represented an unwarranted intrusion on the state's policy judgment of how long a claim should remain alive after

accrual and also created serious anomalies from possible interactions of state and federal tolling periods—sometimes to the claimant's benefit and other times to the claimant's detriment.

***Ayestas v. Davis*, [138 S. Ct. 1080](#) (2018) (Decision below: [817 F.3d 888](#) (5th Cir. 2016)) (Argument transcript)**

Decisions regarding requests for funding under [18 U.S.C. § 3599](#) are judicial, not administrative, and therefore subject to judicial review. Although a federal habeas court has discretion pursuant to 18 U.S.C. § 3599(f) over whether to authorize funding for "investigative, expert, or other services . . . reasonably necessary for the representation," it is not unlimited. The lower courts required the petitioner to show substantial need and "to present 'a viable constitutional claim that is not procedurally barred.'" The Court held that the lower court applied an incorrect standard. The statute requires only that the petitioner show that the services are "reasonably necessary." In short, the Court ruled that "substantial" imposes a greater burden on the petitioner than does "reasonable."

***District of Columbia v. Wesby*, [138 S. Ct. 577](#) (2018) (Decision below: [765 F.3d 13](#) (D.C. Cir. 2014)) (Argument transcript)**

Arresting officers would have been entitled to qualified immunity even if there had been no probable cause for the arrests. That dictum, reaffirming the Court's position in *Anderson v. Creighton*, [483 U.S. 635](#) (1987) (qualified immunity for officers reasonably but mistakenly concluding that probable cause was present), came after the Court had decided that the officers did have probable cause.

***Florida v. Georgia*, 2018 WL 3129786 (U.S. Jun. 27, 2018) (Special Master's Report) (Argument transcript)**

Florida sued Georgia over Georgia's use of water in the Apalachicola-Chattahoochee-Flint River Basin. The Court referred the case to a special master, who recommended denial of Florida's request for relief in part because Florida failed to show by clear and convincing evidence that the relief it sought would effectively redress the injury it claimed. The Court held that in the absence of specific factual findings by the Special Master regarding the nature and scope of harm relevant to the question of equitable apportionment, the clear-and-convincing standard is "too strict." Instead, the complaining state's burden relating to redressability requires a demonstration, using equitable principles of "flexibility" and "approximation" that "it is likely to prove possible to fashion [a workable] decree."

***Hamer v. Neighborhood Housing Service of Chicago*, 138 S. Ct. 13 (2017) (Decision below: 835 F.3d 761 (7th Cir. 2016) (Argument transcript)**

Federal Rule of Appellate Procedure [Rule 4\(a\)\(5\)\(C\)](#)'s time limit for extension of time to file a notice of appeal is not jurisdictional, but rather is a mere claim-processing rule.

***Hughes v. United States*, 138 S. Ct. 1765 (2018) (Decision below: 849 F.3d 1008 (11th Cir. 2017) (Argument transcript)**

Marks v. United States, [430 U.S. 188](#) (1977), held that where the Court fragments in deciding a case, without any common rationale explaining the result, "the holding . . . may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." There were two Federal-Courts questions. (1) Does *Marks* mean that a one-Justice

concurrency represents the Court's holding where neither the plurality's nor the concurrence's reasoning is "narrower" than the other? (2) Where eight Justices on a Court split 4-1-4 disagree with the reasoning of the one-Justice concurrence, does the concurrence nonetheless bind the lower courts?

Those questions were (and are) quite interesting. All nine Justices, however, declined to discuss them. As Justice Kennedy's majority opinion proclaimed:

[A] majority of the Court in the instant case now can resolve the sentencing issue on its merits. So it will be unnecessary to consider questions one and two despite the extensive briefing and careful argument the parties presented to the Court concerning the proper application of *Marks*.

The can is now officially down the road.

On the other hand, the Court avoided a far broader decision with uncertain implications. On the first, in the absence of a yes-or-no answer, the Court would have had to undertake a discussion of what "narrower" means, and different contexts might have called for different views. On the second, the phrasing of the issue arguably did not help the Court; certainly the majority *decision* in a 4-1-4 case binds the lower courts, but it is difficult to articulate a rationale for the one-vote concurrence's reasoning to be binding.

***Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (Decision below: 862 F.3d 775 (9th Cir. 2017)**

A police officer is entitled to qualified immunity against a claim that he improperly employed deadly force against a suspect although (1) he did not announce that he would open fire if the suspect failed to heed police commands and (2) a decision that "postdated the shooting at issue" suggests that deadly force was not necessary. This case is unusual because the Court is-

sued a *per curiam* opinion without oral argument over a spirited dissent by Justice Sotomayor, joined by Justice Ginsburg, who thought the majority "misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield."

***National Association of Manufacturers v. Department of Defense*, [138 S. Ct. 617](#) (2018) (Decision below: [803 F.3d 804](#) (6th Cir. 2018) ([Argument transcript](#)))**

The Court of Appeals does not have jurisdiction pursuant to [33 U.S.C. § 1369\(b\)\(1\)\(F\)](#) to review the Waters-of-the-United-States Rule; such challenges must go to the district courts.

***Ortiz v. United States*, [2018 WL 3073840](#) (U.S. June 22, 2018) (Decision below: [76 M.J. 189](#) (C.A.A.F. Apr. 17, 2017))**

The Supreme Court has Article-III power to review decisions of the Court of Appeals for the Armed Forces, a non-Article-III tribunal.

***Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, [138 S.Ct. 1365](#) (U.S. Apr. 24, 2018) (Decision below: [2015 WL 2089371](#) (Patent Trial and Appeal Board 2015) ([Argument transcript](#)))**

This case and *Patchak v. Zinke* (following) will be the panel subject at the 2019 Meeting, a more general consideration of Congress's latitude in moving cases to non-Article-III courts. Here the Court held that the Patent Trial and Appeal Board's *inter partes* review of a patent does not violate Article III by being conducted by a non-Article-III body.

***Patchak v. Zinke*, [138 S. Ct. 897](#) (2018) (Decision below: [828 F3d 995](#) (D.C. Cir. 2016)) ([Argument transcript](#)))**

This is the second case on which the 2019 Section panel will focus. A landowner in a rural area of Michigan sued to prevent the Gun Lake Tribe from establishing a casino on land allocated to it under the Indian Reorganization Act. The case had already been to the Supreme Court once, over the question of whether the plaintiff had "prudential" standing. After the Court found that he did, and remanded for further proceedings, Congress enacted the Gun Lake Trust Land Reaffirmation Act, ratifying the allocation of land and included in it a provision withdrawing subject-matter jurisdiction in cases relating to the allocated land, specifically mentioning "an action pending in a Federal court as of the date of enactment of this Act."

A statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including the Supreme Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—merely strips courts of jurisdiction and therefore does not violate the Constitution's separation-of-powers principles.

***Trump v. Hawaii*, [2018 WL 3116337](#) (U.S. Jun. 26, 2018) (Decision below: [878 F.3d 662](#) (9th Cir. 2017) ([Argument transcript](#)))**

"[W]e may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue."

***United States v. Sanchez-Gomez*, [138 S.Ct. 1532](#) (2018) (Decision below: [859 F.3d 649](#) (9th Cir. 2017) ([Argument transcript](#)))**

The class action exception to mootness from *Gerstein v. Pugh*, [420 U.S. 103](#)

(1975), does not extend to individual defendants even when the individuals challenge the governmental policy “as a whole” and a determination in the individual’s favor might ultimately benefit future litigants. Moreover, the controversy, which involved a challenge to the practice of shackling pre-trial detainees during non-jury proceedings, is not “capable of repetition” merely because a defendant announces an intention to violate the law in the future.

***U.S. Bank, N.A. v. Village at Lak-
eridge, LLC*, [138 S. Ct. 960](#) (2018) (De-
cision below: [814 F.3d 993](#) (9th Cir.
2016) ([Argument transcript](#)))**

The clear-error standard of review is appropriate for a Bankruptcy Court determination that a creditor was not a non-statutory insider.

***Washington v. United States*, [138 S.Ct. 1832](#) (2018) (Decision below: [853 F.3d 946](#) (9th Cir. 2017) ([Argument transcript](#)))**

This case involved a federal government attempt to enforce treaties with various northwest tribes that guaranteed the tribes “the right of taking fish . . . ,” which the Supreme Court later interpreted to mean half of each salmon run unless less would satisfy the tribes’ needs. The lower court ordered Washington to replace hundreds of culverts under state roads that restrict salmon passage. The Federal-Courts issue is “Whether the district court’s injunction violates federalism and comity principles by requiring Washington to replace hundreds of culverts, at a cost of several billion dollars, when many of the replacements will have no impact on salmon and Plaintiffs showed no clear connection between culvert replacement and tribal fisheries.”

A *per curiam* opinion by an equally divided Court affirmed the Ninth Circuit’s

decision that there was no violation of federalism or comity.

***Wilson v. Sellers*, [138 S. Ct. 1188](#) (2018) (Decision below: [834 F.3d 1227](#) (11th Cir. 2016) ([Argument transcript](#)))**

In reviewing a silent state-supreme-court decision on the merits, a federal habeas court should employ a rebuttable presumption that the state decision rested on the last state-court decision that provided a relevant rationale. The state may rebut the presumption “by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.” (This was not a new idea; Justice Scalia announced it for the Court in *Ylst v. Nunnemaker*, [501 U.S. 797](#) (1991).)

Justice Gorsuch, joined by Justices Alito and Thomas, dissented, essentially arguing that the majority’s presumption shifted the burden of proof from the habeas petitioner’s shoulders (to show that there was no reasonable basis on which the state court could have denied relief), to the state to show that there was a reasonable basis. The dissenters’ view is that the reviewing federal court should itself search the record for reasons that might have supported the decision below. The majority preferred review to rest on what it saw as the state courts’ actual bases for their decision.

This is, perhaps, the Court’s (belated) recognition that an appellate court that performs “review” of a lower-court decision on a silent record is not really reviewing at all; it is considering the case *de novo*.

Cases Argued

***Dalmazzi v. United States*, No. 16-961 (Decision below: [76 M.J. 1](#) (2016) ([Argument transcript](#)))**

The Court dismissed the writ as improvidently granted.

Granted Certiorari

***California Franchise Tax Board v. Hyatt*, No. 17-1299 (Decision below: [407 P.3d 717](#) (Ca. 2017))**

Should the Court overrule *Nevada v. Hall*, [440 U.S. 410](#) (1979), which held that neither the Eleventh Amendment nor Article III nor the doctrine disallowing non-consensual suit against a sovereign in its own courts prevents a state's courts from hearing a case against another state.

***Knick v. Township of Scott*, No. 16-647 (Decision below: [862 F.3d 310](#) (3d Cir. 2017))**

"Should the Court reconsider the portion of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims . . .?"

Comments, Questions, Submissions

Don Doernberg (McGeorge) and Celestine McConville (Chapman) prepared this newsletter. If you would like to contribute to a newsletter, contact Jon Siegel, Chair of the Section for 2019, at George Washington School of Law, (202) 994-7453, jsiegel@law.gwu.edu, Gillian Metzger, Chair Elect of the Section for 2019, at Columbia Law School, (212) 854-2667, gmetzg1@law.columbia.edu, Don Doernberg, McGeorge Law School, (530) 274-1228, DLDD@law.pace.edu, or Celestine McConville, Chapman Law School, (714) 628-2592, mcconvil@chapman.edu, so that your name can be placed in nomination at the 2019 meeting in New Orleans. Please

make the contact as quickly as reasonably possible.

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