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Section 4: Criminal Law

Institute of Bill of Rights Law, William & Mary Law School

V. CRIMINAL

In This Section:

Black v. United States

08-876

Ruling Below: *United States v. Black,* 530 F.3d 596 (7th Cir. 2008).

Because the defendants deprived their employer of honest services by paying themselves phony management fees disguised as compensation for covenants not to compete, the alleged inducement in the form of money from a third party (anticipation that Canadian government would not treat compensation as taxable income) is no defense to the charge of honest services fraud under 18 U.S.C. § 1346. The defendants forfeited objection to jury instruction, which required only finding that they deliberately failed to render honest services and did so to obtain private gain, by opposing the government's request at trial that jury be required to make separate findings on money or property fraud and honest services fraud.

Questions Presented: (1) Does 18 U.S.C. § 1346 apply to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to a private party to whom honest services were owed? (2) May court of appeals avoid review of prejudicial instructional error by retroactively imposing onerous preservation requirement not found in federal rules?

UNITED STATES, Plaintiff-Appellee,
v.
Conrad M. BLACK, John A. Boultbee, and Mark S. Kipnis, Defendants-Appellants.

United States Court of Appeals for the Seventh Circuit

Decided June 25, 2008

[Excerpt: some footnotes and citations omitted]

POSNER, Circuit Judge

[A jury convicted Black and three co-defendants of mail and wire fraud in violation of 18 U.S.C. § 1341 and Black of obstruction of justice in violation of 18 U.S.C. § 1512(c). The defendants were senior executives at Hollinger International, which was essentially controlled by Black through Ravelson, a Canadian company controlled by Black.

The defendants set up a $5.5 million payment from another company disguised as a covenant not to compete, but the payment was never approved by Hollinger's audit board, nor was it ever disclosed to the shareholders. In fact, the payments were made directly to the defendants, who were not entitled to any payment.

The Court then declines to discuss a second, equally compelling fraud count, stating that it is not necessary to the outcome of the case.]

The evidence established a conventional fraud, that is, a theft of money or other

property from Hollinger by misrepresentations and misleading omissions amounting to fraud, in violation of 18 U.S.C. § 1341. But the jury was also instructed that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders "of their intangible right to the honest services of the corporate officers, directors or controlling share-holders of Hollinger," provided the objective of the scheme was "private gain." That instruction is the focus of the appeals.

Section 1346 of the federal criminal code, added in 1988 in order to overrule *McNally v. United States*, 483 U.S. 350 (1987), defines "scheme or artifice to defraud" in section 1341 to include a scheme or artifice to "deprive another of the intangible right of honest services." The defendants do not deny that Hollinger was entitled to their honest services. They were senior executives of Hollinger and owed the corporation fiduciary obligations, implying duties of loyalty and candor. It is not as if Black had merely been using his power as controlling shareholder to elect a rubber-stamp board of directors or to approve a merger favorable to him at the expense of the minority shareholders. He was acting in his capacity as the CEO of Hollinger when he ordered Kipnis to draft the covenants not to compete and when he duped the audit committee and submitted a false 10-K. On his own theory, the fees that he collected, which the jury was entitled to find were never owed to him, were management fees rather than dividends. The defendants' unauthorized appropriation of $5.5 million belonging to a subsidiary of Hollinger was a misuse of their positions in Hollinger for private gain, which is just the kind of conduct that we said in *United States v. Bloom*, 149 F.3d at 655-57 (7th Cir. 1998), was the essence of honest services fraud.

So if the jury found such a misappropriation, this would mean that the defendants, having both deprived their employer of its right to their honest services and obtained money from it as a result, were guilty of both types of fraud. Nothing is more common than for the same conduct to violate more than one criminal statute. But the section 1346 instruction, which we quoted, did not require that the jury find that the defendants had taken any money or property from Hollinger; all it had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain. The defendants do not deny that they sought a private gain. But they presented evidence that it was intended to be a gain purely at the expense of the Canadian government. They argue that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services—a group not argued to include the Canadian government.

They are making a no harm-no foul argument, and such arguments usually fare badly in criminal cases. Suppose your employer owes you $100 but balks at paying, so you help yourself to the money from the cash register. That is theft, even though if the employer really owes you the money you have not harmed him. You are punishable because you are not entitled to take the law into your own hands. Harmlessness is rarely a defense to a criminal charge; if you embezzle money from your employer and replace it (with interest!) before the embezzlement is detected, you still are guilty of embezzlement.

The application of this principle to honest services mail and wire fraud is straight-

forward. As explained in *United States v. Orsburn*, section 1346 was added "to deal with people who took cash from third parties (via bribes or kickbacks). *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), supplies a good example. Judge Holzer accepted bribes from litigants. What he took from his employer, the state's judicial system, was the honest adjudication service that the public thought it was purchasing in exchange for his salary." Similarly, if the defendants in this case deprived their employer, Hollinger, of the honest services they owed it, the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit) is no defense.

This case is different from those we have cited because Canada was not bribing the defendants with the offer of a tax benefit. But the distinction is unrelated to anything in the text or purpose of section 1346. The grant of a tax benefit is a purposive act, which confers a benefit on the grantor just as a voluntary transfer of money or property to him does; in fact it is a voluntary transfer of money. The defendants do not argue that they were trying to defraud Canada; they argue that their recharacterization of management fees as compensation for granting covenants not to compete was proper under Canadian tax law, even if the receipt of the payments violated American law. Canada, they contend in effect, was willing to "pay" the defendants in the form of a tax benefit in order to advance Canadian policy.

And if the defendants were trying to defraud Canada, that augmentation of their wrongdoing would not help their case. Suppose a third party gives a bribe to a buyer for a department store, and the buyer pockets the bribe but does not carry out his side of the bargain, which was that he would purchase supplies from the principal of the person who bribed him. The buyer has deprived his employer (the department store) of his honest services, and has done so for private gain, but he has conferred no benefit on a third party. Judges who accept bribes invariably argue that they didn't allow the bribes to influence their decisions. But a judge who accepts bribes deprives the judiciary of his honest services even if, as contended by Francis Bacon, the most famous of corrupt judges, he does nothing for the person who bribed him. Such a case does not differ materially from that of the "honest" recipient of a bribe—the recipient who, committed to honor among thieves, performs his side of the illegal bargain.

Notice, too, how honest services fraud bleeds into money or property fraud. In the procurement case, the eagerness of the seller's agent to make a sale might enable the purchasing agent to negotiate a better price, to the financial benefit of his employer; instead he takes the "better price" in the form of a bribe. In this case, had the defendants disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net the defendants a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees. If $10 in tax-free income is worth $15 to the recipient in taxed income, the employer who learns about the tax break may require the employee to accept in tax-free income less than $15 in taxed income.

This is not to say that every corporate employee must advise his employer of his tax status. But the defendants had a duty of candor in the conflict-of-interest situation in which they found themselves. Instead of coming clean they caused their corporation

to make false filings with the SEC, and they did so for their private gain. Such conduct is bound to get a corporation into trouble with the third party and the SEC.

Even if our analysis of honest services fraud is wrong, the defendants cannot prevail. There is no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services; whether they also got (or hoped to get) a tax break from the Canadian government was not an issue at trial, as the defendants acknowledged, albeit back-handedly, when they said in their reply brief in this court that the theory "that defendants 'misused' their positions at [Hollinger] for personal gain in the form of Canadian tax benefits" was "the very theory the government propounded *up to the eve of trial*" (emphasis added). It was not the government's theory at trial.

The defendants point out that *Yates v. United States*, 354 U.S. 298 (1957), held that if the instructions permit the jury to convict of a nonexistent crime, the fact that they also permit it to convict of a genuine crime will not save a conviction declared in a general verdict. That is different from a case in which two correct theories of illegality are presented in the instructions and there is sufficient evidence to convict only on one; the jury is assumed to have followed the instruction on the government's burden of proof and therefore to have rejected the insufficiently supported theory. But a jury that is given an illegal instruction cannot be assumed not to have followed it, since juries are neither authorized nor competent to make judgments of law.

An error in jury instructions is subject to the harmless error doctrine. Submitting an illegal theory to the jury may or may not be subject to it; it is an issue on which the courts of appeals are divided. But giving an instruction that omits a qualification required to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability. The prosecution did not ask the jury to convict the defendants because their private gain was at Canada's expense. The government's honest services theory was straightforward. It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete. Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them.

If the jury had been given a special verdict that separated the two types of fraud, and had indicated on the verdict that the defendants were not guilty of an honest services fraud, the challenge to the instruction would be moot. The defendants were not required to request a special verdict. But there is a wrinkle in this case that shows they forfeited their objection to the instruction: the government requested a verdict that would require the jury to make separate findings on money or property fraud and on honest services fraud. The defendants objected—they wanted a general verdict. In effect, they wanted to reserve the right to make the kind of challenge they are mounting in this court.

They are reduced to arguing that the judge after receiving the verdict should have told the jury to determine whether it had found both a money or property fraud and an honest services fraud. That procedure was tentatively approved by the Third Circuit in *United States v. Riccobene*, 709 F.2d 214, 228 n. 19 (3d Cir. 1983), although that court

has since made clear that it is better to give the jurors the interrogatories on the same form as the verdict. Questioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that a district judge is required to employ; nor has the Third Circuit so suggested. The defendants' proposal could if adopted create a nightmare in which the jury renders a general verdict; the jurors are polled and think they're about to be released from their term of indentured servitude—here four months—and be free to get on with their lives; and then they are told they must take an exam so that the judges and lawyers can know exactly how they evaluated the various theories presented to them in the instructions. Must they resume deliberations? And if they disagree, what then—an Allen charge?

* * *

Three more issues need to be discussed. The first is whether an "ostrich" instruction should have been given. . . .

An ostrich instruction tells the jury that to suspect that you are committing a crime and then take steps to avoid confirming the suspicion is the equivalent of intending to commit the crime. Suppose you think you've rented your house to a drug gang, but to avoid confirming your supposition you make sure not to drive near the house, where you might observe signs of drug activity. That would be the equivalent of knowledge that you had rented the house to the gang. It would be a case of physical avoidance of confirmation of one's suspicions but there is also psychological avoidance, which is the type alleged here and which requires the jury's "distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). It is the distinction between willful ignorance and ordinary ignorance.

The defendants argue that either they knew they were taking money that they were not entitled to, or they were entitled to it; there is no middle ground. But there is. Remember that the defendants received the payments in question not from Hollinger but from APC, which the evidence showed did not owe them any management fees. If you receive a check in the mail for $1 million that you have no reason to think you're entitled to, you cannot just deposit it and when prosecuted for theft say you didn't know you weren't entitled to the money—that it might have been a random gift from an eccentric billionaire. You would have strongly suspected that you weren't entitled to the money and you would therefore have a duty to investigate. By shutting your eyes you tacitly confessed your all-but-certain knowledge that you were stealing the money.

The defendants argue that the judge gave an inadequate limiting instruction with respect to the jury's use of the false filings with the SEC. The instruction, although correct, was abrupt: "You have heard evidence in this case regarding the disclosures of non-competition payments in Hollinger International's quarterly and annual reports and proxy statements in 2001 and 2002. The defendants in this case are not charged with securities fraud." It was important for the jury to understand that it could use the false filings to infer that the defendants had been trying to conceal their receipt of the payments but that the filings themselves were not charged as crimes.

The defendants proposed a misleading instruction as an alternative. It substituted for the second sentence ("The defendants in this case are not charged with securities fraud") the following: "The defendants are not charged with making false or misleading statements in these filings, and you may not conclude that a defendant is guilty of mail or wire fraud based on any alleged false statements or omissions in any of these filings." The defendants were "charged," in the sense of accused, of making false statements in these filings. And the jury was entitled to base a judgment of guilt "on any alleged false statements or omissions in any of these filings," provided that the false statement or omission was material to the alleged mail or wire fraud. At argument, the lawyer who had proposed the instruction told us at first that he had made other, oral submissions as well. But when reminded that he had said in his brief that he had "proposed a series of limiting instructions, culminating with this request for the final charge"—the proposed instruction that we quoted—he backed off.

If one party submits an instruction that is accurate but could be made clearer, and the other party submits a misleading instruction, the judge can go with the first instruction. Not that the cases require "that a submitted charge be technically perfect to alert the court to the need for a particular charge." *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983). But given the number and skill of the defendants' lawyers, the misleading character of their proposed instruction cannot be regarded as a merely "technical" failing, as opposed to an effort to mislead. Nor was the judge's instruction erroneous; it was merely terse.

* * *

The defendants raise some other points in their 161 pages of briefs, but none that has sufficient merit to require discussion. The judgments are

AFFIRMED.

"Conrad Black's Anti-Fraud Case Will Go to Supreme Court"

Los Angeles Times
May 18, 2009
David G. Savage

Reporting from Washington—The Supreme Court announced Monday that it would hear an appeal from jailed newspaper executive Conrad Black, who contends he was wrongly convicted under a broadly worded anti-fraud law that makes it a crime to deprive someone of "honest services."

Black, a Canadian-born historian and media magnate, was prosecuted in Chicago for allegedly skimming more than $5.5 million from Hollinger International and the Chicago Sun-Times to finance a lavish lifestyle. Black said the money was a "management fee," but prosecutors said it had not been approved by Hollinger's board.

A jury convicted him in 2007 on three counts of mail fraud and one count of obstruction of justice, and he was sentenced to 6 1/2 years in prison in central Florida.

In his appeal on Black's behalf, Washington lawyer Miguel Estrada pointed out that his client had been acquitted of charges that he treated his company as his "personal piggy bank," but was convicted of fraud on the grounds that he deprived the company and its shareholders of his "honest services."

Estrada said this "vaguely worded criminal prohibition" allows prosecutors to charge corporate executives and public officials with crimes, even without proving they wrongly took money for themselves.

"This was not fraud in the old-fashioned sense of the term. If the court agrees, he would be at least entitled to a new trial," Estrada said.

Congress expanded the anti-fraud law in 1988 to combat public corruption. Usually, a fraud involves a scheme to deprive someone of their money or property, but the expanded law said it was a fraud to "deprive another of the intangible right of honest services." The law is aimed at officials who engage in kickback schemes to benefit themselves or their friends. In recent years, this law has been a favorite tool of prosecutors because it permits prosecutions for questionable schemes that do not necessarily result in a loss to the government or a business.

Last year, Robert Sorich, an aide to Chicago Mayor Richard Daley, and two other former city officials who were convicted in a patronage hiring scheme raised the same issue in an appeal to the high court. Their appeals were turned away earlier this year, but Justice Antonin Scalia dissented and said the court should act to clarify the law.

Estrada cited Scalia's dissent in his appeal. Last month, U.S. Solicitor General Elena Kagan urged the court to reject the appeal. Black and his codefendants "had abused their positions with Hollinger to line their pockets with phony management fees," she said. But on Monday, the court issued a one-line order saying it had agreed to hear the case of ***Conrad Black vs. the United States*** during the fall.

If the court were to rule for Black and broadly reject the notion of "honest services" fraud, it could allow persons who have already been convicted under this law to file a writ of habeas corpus to reopen their cases.

"Convictions of Black, 3 Other Execs Upheld"

Chicago Sun-Times
June 26, 2008
Mary Wisniewski

Former media baron Conrad Black engaged in a "conventional fraud," a federal appeals court said Wednesday in upholding the convictions of Black and three other former Hollinger International executives.

All had been found guilty last summer of cheating the newspaper company, whose holdings include the Chicago Sun-Times, out of $6.1 million.

A three-judge panel of the 7th U.S. Circuit Court of Appeals unanimously rejected defense claims that the prosecution unfairly criminalized sophisticated business transactions that gave the defendants money they'd earned.

Besides Black, now serving his 6 1/2-year prison term in Florida, the judges upheld the convictions of Peter Y. Atkinson and John A. Boultbee of Canada and Mark S. Kipnis of Northbrook.

"The court found clear evidence that all four defendants engaged in a brazen, multi-million-dollar corporate fraud scheme," U.S. Attorney Patrick Fitzgerald said.

Black's attorney, Andrew Frey, called the decision "very disappointing" and said, "We are carefully studying our options."

Cyrus Freidheim Jr., Sun-Times Media Group Click for Enhanced Coverage Linking Searches's chief executive officer, said, "We're pleased that it happened as quickly as it did and as decisively."

The company plans to proceed with $500 million in civil claims against the convicted defendants and others.

"Judges Appear Cool to Black Appeal"

Chicago Tribune
June 6, 2008
Susan Chandler

Conrad Black's hopes of getting his criminal convictions overturned were dimmed Thursday as his attorney received a highly skeptical reception from a panel of three judges at the 7th U.S. Circuit Court of Appeals.

Andrew Frey, the attorney handling Black's appeal, made little headway as he tried to argue that Black and other former Hollinger International Inc. executives didn't steal from the Chicago-based media company when they carved out individual non-competition payments for themselves from the proceeds of newspaper sales around the country.

In the case of a $5.5 million payment, Frey said the money was owed to the Canadian executives anyway as "management fees" and therefore Hollinger International shareholders were not hurt.

U.S. Appeals Judge Richard Posner, one of the court's most forceful jurists, didn't appear to be buying it. There was no point in debating arcane legal points, he said, when "the bulk of the evidence [in the Hollinger case] has to do with pretty naked fraud."

Posner also was resistant to Frey's contention that Black never intended to obstruct justice when he removed boxes from his Toronto office 10 days before he was to be evicted. A Canadian court order prohibited the removal of documents without the permission of a special monitor.

Frey told the judges that Black believed his files had already been copied and turned over to federal authorities by his attorneys. "Did the Justice Department go through the documents?" Posner asked Frey. The answer was no.

Black was found guilty in July of defrauding Hollinger International and obstructing justice after a four-month trial. The jury acquitted him on nine other counts. Black, a conservative press baron who bought the Chicago Sun-Times in 1994, was sentenced to 6 1/2 years in prison. He began serving his sentence in early March and was not allowed to attend the appeal's oral arguments.

In a Thursday morning e-mail to the Tribune, Black expressed optimism about the outcome. "If it has been essentially decided on the written arguments, I can't imagine us not doing well, as we waxed the floor with them in the briefs and replies. But I have been astonished at the miscarriages of justice that have occurred already, so it should be approached with caution."

As the hearing ended Frey asked the judges to allow Black to go free on bond until their final decision is reached, which could be months away.

Outside the courtroom Frey didn't want to offer an opinion of how the hearing went. "It's in the lap of the gods," he said. "We'll see what happens."

"Media Tycoon Begins Term in Federal Prison"

Orlando Sentinel
March 4, 2008
Stephen Hudak

COLEMAN—Disgraced media mogul Conrad Black surrendered Monday to authorities at the federal prison complex here to begin serving a 6 1/2-year sentence on charges he illegally siphoned money from his international newspaper empire.

Black, 63, a member of Britain's House of Lords and an acclaimed biographer of Franklin Roosevelt and Richard Nixon, officially became inmate number 18330-424 at 12:49 p.m., said Felicia Ponce, a U.S. Bureau of Prisons spokeswoman in Washington, D.C.

His incarceration has attracted international attention, particularly from news agencies in Canada and Great Britain where he is known as Lord Black.

Convicted of fraud and obstructing justice, the high-profile Black was placed in the low-security prison in Coleman, located 50 miles northwest of Orlando and a three-hour drive from his home in Palm Beach.

Ponce said federal inmates are generally housed in facilities within 500 miles of home, a courtesy to the prisoner's family.

The media baron, who has maintained his innocence, remains convinced he will be vindicated, said his appellate lawyer, Andrew L. Frey of New York.

"He is a strong person, and I am confident that he will soldier through this," Frey said in an e-mail to the Orlando Sentinel.

"But he firmly believes he has done nothing unlawful, which makes it difficult to have to suffer even one day of imprisonment."

A Canadian-born business tycoon, Black once headed a sprawling newspaper empire that included The Daily Telegraph of London, the Jerusalem Post and the Chicago Sun-Times.

He often dined with heads of state, business executives and rock stars.

But at the Coleman correctional complex, he will be among 7,447 inmates required to dish grub, scrub toilets or perform other menial tasks for 12 to 40 cents an hour. He could eventually win a job in the prison's law and leisure libraries, where he could tutor other inmates, Ponce said.

She said Black will be treated no differently than other inmates at the complex's low-security unit, which houses 1,995 prisoners. He will wear the standard-issue uniform: a khaki, button-down shirt with collar and khaki pants.

Ponce said Black's day will begin at 6 a.m. and end no later than 11:30 p.m., when cellblock lights are turned out. He will have a cellmate in one of the prison's 7-by-8-foot, double-bunk cubicles.

Federal prisoners at Coleman can exercise on a jogging track and in a recreation yard, but there are "no spas, no tennis courts, no golf courses," Ponce said.
A federal jury in Illinois convicted Black of defrauding shareholders of Hollinger

International Inc., once among the world's largest newspaper-holding companies. The largest papers—with the exception of the Sun-Times—have since been sold.

Black, who led Hollinger for eight years as both chairman and chief executive officer, was found guilty of pirating $6.1 million from the Chicago-based newspaper group now known as the Sun-Times Media Group Inc.

"Unbowed Black Gets 6 1/2 Years"

Chicago Tribune
December 11, 2007
Ameet Sachdev

Two dramatic questions loomed over the Chicago federal courtroom Monday when former press tycoon Conrad Black arrived for sentencing.

How much time would Black, the jet-setting executive and author, face in federal prison for his role in the looting of the Chicago Sun-Times' parent company? And, given his record as an outspoken and at times strident defender of his innocence, what would he say to the judge?

The day provided surprises on both counts.

U.S. District Judge Amy St. Eve sentenced Black to 6 1/2 years in prison, rejecting a government bid for a stiffer sentence of about 20 years, which would have had the practical effect of sending the 63-year-old to prison for the remainder of his life. Black also was fined $125,000 and has to forfeit $6.1 million in ill-gotten gains, but not his home in Palm Beach, Fla., and other assets prosecutors had requested.

When it came time to make his comments, Black was uncharacteristically brief and at times even contrite—in his own way. Black expressed "profound regret" for the huge financial losses that shareholders of Chicago-based Hollinger International Inc. suffered after he left the company in 2004.

He also apologized for the medical problems that have beset him, his family and his co-defendants since the corporate saga began four years ago.

While he refrained from asserting his innocence, he concluded, to no one's surprise, without apologizing for his actions that led to the conviction or admitting criminal wrongdoing.

It was up to the judge to have the last word, making a personal observation that both Black's supporters and detractors have asked themselves as well.

"I frankly cannot understand how somebody of your stature, on top of the media empire you were on top of, can engage in the conduct you did and put everything at risk, including your reputation and integrity," St. Eve said.

Indeed, the former chairman and chief executive of Hollinger, once one of the largest newspaper companies in the world, is going to prison for stealing $6.1 million from shareholders and obstructing justice by removing 13 boxes of documents from his Toronto office after he was warned not to do so.

The amount of the theft is a fraction of Black's wealth at his peak about a decade ago when he was a globe-trotting media baron leading a life of luxury among the upper echelons of society, spending time in the company of such people as Henry Kissinger and Elton John and taking on the British title Lord Black of Crossharbour.

But now all that's left of that empire, which once included holdings in the U.S., Canada,

Great Britain and Israel, is the Sun-Times and a group of suburban papers. The stock of the company, now known as the Sun-Times Media Group Inc., trades at about $1, down from a high of $20.35 in 2004, weighed down by a circulation scandal under Black's watch and nearly $200 million in legal fees it spent defending Black and other former Hollinger executives.

One shareholder, in addressing the court Monday as a victim, urged the judge to make an example out of Black, for looking out for himself instead of investors and employees.

"This didn't have to happen," said Eugene Fox, managing director of Cardinal Capital Management LLC in Greenwich, Conn. "[Black] had many opportunities along the way to make different choices."

Black's stunning downfall began about four years ago when other shareholders started asking questions about payments Black and other executives had received following sales of Hollinger newspapers. At the time, Black dismissed the complaints as "an epidemic of shareholder idiocy."

Ultimately, the grumbling led to an independent board inquiry and criminal allegations that Black and his cohorts had looted the company of about $32 million through a scheme in which they disguised bonuses to themselves as payments not to compete with the new owners of its newspapers. Some of these "non-compete" payments were not disclosed to shareholders or even Hollinger's audit committee.

Black, a native of Canada who gave up his citizenship when he became a British lord, was forced to resign from the company he built and controlled. Since his indictment in 2005, Black has heaped scorn on the government, calling the evidence "flimsy" and even referring to the team of federal prosecutors as "Nazis." He has maintained his innocence since his conviction in July, saying he was acquitted of nine of the 13 charges against him. He recently told one British interviewer that he has done "absolutely nothing wrong."

"Mr. Black, even today, has refused to acknowledge the point behind his being here today was his own greed and his own disdain for rule of law," Assistant U.S. Atty. Eric Sussman, the lead prosecutor, told the judge at the sentencing hearing.

In his comments to the court, Black was quick to point out that he "never once uttered one disrespectful word about this court, your honor, the jurors or the process." He plans to appeal.

When asked whether he was satisfied with the length of the sentence, U.S. Atty. Patrick J. Fitzgerald told The Associated Press: "Mr. Black is going to prison a convicted felon, convicted of fraud. So we proved the case. The bottom line is Mr. Black will do 6 1/2 years in jail. That's a serious amount of time."

St. Eve apparently was unfazed by Black's lack of remorse. She made several favorable rulings on his behalf before deciding on a 78-month term. She took a conservative estimate of the damage from Black's fraud, deciding he was responsible for $6.1 million in losses and not $32 million as the prosecutors had suggested.

St. Eve also based her decision on more lenient sentencing guidelines in effect when the fraud occurred, instead of the rules in place now. Finally, the judge said there should not be a big discrepancy between Black's sentence and the 29 months his

deputy, F. David Radler, is expected to receive when he is sentenced on Dec. 17. She described Black and Radler equally culpable. Radler pleaded guilty to one count of fraud before the trial and testified against Black in court.

The judge gave Black three months to get his affairs in order before he must report to prison on March 3. She suggested he serve his time at the prison camp at Eglin Air Force Base in Florida.

A jury also had found Black's co-defendants, Peter Atkinson, John Boultbee and Mark Kipnis, guilty of three counts of fraud. Atkinson, 60, a former executive vice president, was sentenced to two years in prison. Boultbee, 64, the former chief financial officer, received 27 months. Kipnis, 60, the corporate counsel based in Chicago, will not serve time. The judge sentenced him to five years of probation in part because Kipnis did not receive any non-compete payments.

"Dark Day for Lord Black"

Chicago Tribune
July 14, 2007
Ameet Sachdev, David Greising and Susan Chandler

Unmoved by testimony about a jet-setting lifestyle at company expense but certain that Hollinger International Inc. had been pilfered, a federal jury on Friday found press baron Conrad Black guilty of the lesser but still serious charges of obstruction of justice and three counts of mail fraud.

With Black's former business partner F. David Radler serving as a star witness against him, prosecutors had accused Black, 62, of masterminding a racketeering conspiracy that allegedly plundered more than $60 million from Hollinger, owner of the Chicago Sun-Times, the London Daily Telegraph and other newspapers.

The jury in its verdict found that Black illegally had taken a relatively modest $2.9 million. On the strength of a videotape that showed Black personally removing 13 boxes from his Toronto office in the middle of the government's fraud investigation, the jury also ruled that Black had impeded the investigation.

Black's conviction marks the stunning downfall of one of Canada's most prominent businessmen, who used the power of the press to become an international celebrity known as much for his right-wing views as his high-wattage living.

Born to wealth in Canada, Black parlayed a tidy investment in a group of community newspapers into a media empire with holdings in the U.S., Great Britain, Israel and Canada. Black recruited such luminaries as Henry Kissinger and former Illinois Gov. James R. Thompson to his board, and he entertained global movers and shakers at parties, some funded with Chicago-based Hollinger's money.

The verdict also culminates a saga that first unfolded four years ago, at the height of the scandals over lax corporate governance in the wake of wrongdoing at Enron Corp., Tyco Inc. and other companies.

Black's hold over Hollinger began to unravel when a little-known shareholder, the investment firm Tweedy, Browne Co., complained publicly about millions of dollars that Black and other top Hollinger executives personally received as part of the company's sale of dozens of newspapers in the U.S. and Canada.

Black was ousted as Hollinger's chief executive in 2003, along with Radler, then president of the company now known as Sun-Times Media Group Inc. Black was fired as chairman in January 2004. Soon after, a task force headed by former Securities and Exchange Commission Chairman Richard Breeden issued a scathing report, calling the conduct of Black and Radler at Hollinger a "corporate kleptocracy."

Black, who gave up his Canadian citizenship in order to become a British lord, showed no visible reaction to the verdict Friday and will appear in court Thursday to learn from U.S. District Judge Amy St. Eve if he may leave the country.

He faces a maximum of 35 years in prison, a maximum penalty of $1 million and possible

forfeiture of property. Prosecutors estimate Black's sentence may range from 15 to 20 years.

The jury in Chicago also found Black's three co-defendants guilty of three counts each of mail fraud. They are attorney Mark Kipnis, 59, of Northbrook; former Hollinger Chief Financial Officer John Boultbee, 64, of Victoria, British Columbia; and former Executive Vice President Peter Atkinson, 60, of Oakville, Ontario. Each faces up to 15 years in prison and fines of up to $750,000. All three were released on bond.

All defendants are expected to appeal the verdicts. Prosecutors estimate sentencing ranges of 7 to 10 years for Boultbee, Atkinson and Kipnis. The mixed verdict set off a debate among prosecution and defense lawyers about the meaning of the jury's verdict.

"If you're going to take liberties and break the law with other peoples' money, there are going to be consequences," U.S. Attorney Patrick Fitzgerald said.

Yet after a four-month trial and 12 days of deliberation, the jury found insufficient evidence to convict Black of the most sweeping charges of the indictment, including racketeering.

The government had sought convictions on 42 separate charges in the 16-count indictment, claiming Black, Radler and the others engaged in a scheme to pocket millions of dollars from the sale of dozens of Hollinger newspapers.

In the deals, Black and Radler personally reaped millions in payments from the buyers of the newspapers. In exchange, the Hollinger executives promised not to compete against the new owners. Some of those payments were not disclosed to shareholders or even to Hollinger's audit committee.

But defense lawyers argued that such non-compete payments are legitimate and customary in newspaper deals, a claim the jury appeared to find credible in some instances.

Juror Tina Kadisak, a beautician, in an interview at her Woodridge home, said the jury carefully followed the evidence and was unswayed by testimony about Black's opulent lifestyle.

"The things we felt we could convict on were things we could link up and see obvious proof of," Kadisak said. "On some counts [prosecutors] just couldn't do that."

The guilty verdicts for all four defendants stemmed from charges they received $5.5 million in bogus non-compete agreements with a Hollinger subsidiary—essentially agreeing not to compete with themselves. The third guilty count arose from $600,000 in payments fraudulently attached to the sale of community newspapers.

After the verdict, government lawyers sought to have Black immediately placed in custody as a flight risk.

But Black's defense lawyers vowed their Canadian client would remain in the U.S. to avoid being jailed prior to his sentencing hearing Nov. 30. They also argued that St. Eve should allow a reduction in the bond Black has pledged: the $20 million of equity he has in his home in Palm Beach and proceeds from the $8.5 million sale of a New York apartment.

Well-known Chicago defense lawyer Edward Genson ticked off the names of the

transactions on which the jury found no wrongdoing: CanWest, Horizon and Community Newspaper Holdings.

Genson also noted that the jurors found nothing wrong with Hollinger's allegedly below-market sale of the New York apartment to Black. The jury also did not buy the prosecution's allegation that Black illegally charged Hollinger for a lavish birthday party for his wife, Barbara Amiel Black.

"He was convicted of the two monetarily lowest amounts in the case," Genson said.

Edward Greenspan, the Canadian lawyer who led Black's defense at trial, told reporters the government's effort to put Black in jail for as long as 20 years is off base given the conviction on relatively narrow charges. "When we were indicted the allegation was $90 million in loss. Now the lost amount for Conrad Black alone is $2.9 million. We intend to appeal and there are viable legal issues," Greenspan said.

U.S. Atty. Fitzgerald insisted that because Black and his co-defendants were convicted of the first, most sweeping count in the indictment, the judge at sentencing could find them culpable of taking as much as $30 million from Hollinger.

Still, the evidence connected to that count suggests no more than $3 million was at stake.

Black, dressed in a tan suit and powder blue shirt, sat stoically in the courtroom after the verdict as lawyers argued about his immediate fate.

St. Eve declined to rule immediately on Black's motion to have his bond reduced and be allowed to travel outside the U.S.

John Hueston, a prosecutor in the Enron case now in private practice in Los Angeles, said prosecutors gambled unsuccessfully that jurors would be outraged by testimony about Black's wealthy, globe-trotting lifestyle, including lengthy testimony about a trip to Bora Bora on the corporate jet.

Peter Henning, a law professor at Wayne State University, thinks Black will be sentenced far more harshly than his co-defendants because of his obstruction conviction and his outspoken contempt for the prosecution: "Calling the prosecutors Nazis doesn't put him in a good position."

Even so, Greenspan argued in an interview that he was pleased with the mixed verdict. "This was vindication for Conrad Black," he said.

"Lord Black Is Indicted by U.S."

New York Times
November 18, 2005
Geraldine Fabrikant

Conrad M. Black, once a major force in business, political and social circles in Manhattan and London, was indicted in Chicago yesterday on charges that he and three former colleagues stole $51.8 million from Hollinger International, the giant international newspaper publisher he helped create.

The 11-count indictment charged that Lord Black, 61, and his co-defendants worked out a plan to divert funds to themselves and misused corporate money, citing such instances as he and his wife taking a private jet to Bora Bora and $40,000 he spent to cover much of the cost of a lavish birthday party for his wife.

Patrick J. Fitzgerald, the U.S. attorney who announced the indictment by a federal grand jury, said yesterday: "If you worked at a bank and you wanted to spend $40,000 on yourself, you should ask someone other than you. Failing to do so when there was a legal obligation to do so is a fraud."

Lord Black was accused of wire fraud and mail fraud, charges that carry penalties of up to 40 years in prison and fines up to $2 million. A British citizen, Lord Black has been spending time in Canada. An arrest warrant has been issued for Lord Black, and there were reports last night that he was believed to be in Canada. But Mr. Fitzgerald said he could not comment on his whereabouts, adding: "He will end up needing to appear in front of a judge in Chicago. We think he should be extradited."

The indictment detailed a plan to defraud Hollinger International by diverting $51.8 million in 2000 from its multibillion-dollar sale of assets to CanWest Global Communications. It contended that the defendants engaged in a series of secret and misleading transactions that funneled payments to themselves disguised as noncompetition fees or as a "management breakup fee" to Ravelston, a company controlled by Lord Black.

It also charged that Lord Black and one of the others indicted misused corporate funds in the South Pacific vacation and when the company paid for two apartments on Park Avenue in Manhattan.

"This is the sort of thing," said Mr. Fitzgerald, a national figure from his role in the C.I.A. leak case, "that in the words of Mr. Black is simply unacceptable." The defendants, he continued, "lined their pockets" by taking money from shareholders for themselves.

"Part of the fraud," Mr. Fitzgerald said, "was basically to defraud innocent shareholders."

Yesterday's indictments were the latest in a succession of charges in the last few years against once-highflying chief executives accused of betraying investors. These have included L. Dennis Kozlowski of Tyco International, John J. Rigas of Adelphia Communications and Bernard J. Ebbers of WorldCom.

But perhaps none of those executives sought as much political and social recognition as did Lord Black, whose publishing empire included The Chicago Sun-Times, The Jerusalem Post and The Daily Telegraph of London.

Lord Black and his wife, the conservative newspaper columnist Barbara Amiel, held annual gatherings at the Bilderberg Group, where a variety of leading political figures assembled, including Margaret Thatcher; Richard N. Perle, a high Defense Department official in the Reagan administration and early adviser to the Bush administration; and a former French president, Valery Giscard d'Estaing.

But Lord Black has been under siege for two years, since the Hollinger International board dismissed him as chief executive in 2003, asserting that he and others took $32 million in unauthorized "noncompete payments" associated with the sale of smaller newspapers.

Lord Black has continued to fight back, aggressively challenging the accusations and seeking to retain power through Hollinger Inc., the holding company for Hollinger International. In the last year, he tried without success to take Hollinger Inc. private.

Indeed, the indictment came as he was trying to regain his social standing in the United States, in Toronto where he now lives, and in London. In January he reportedly told guests at Donald J. Trump's Palm Beach wedding: "Don't write me off. I am about to become a corporate-governance counterterrorist."

And last summer, there were newspaper reports that he was looking for a new apartment and having lunch with prominent friends.

Those charged along with him yesterday were John A. Boultbee, a former chief financial officer of Hollinger International; Peter Atkinson, an executive vice president of Hollinger International; and Mark Kipnis, a former vice president of Hollinger International. Ravelston was also charged; its principal asset was its controlling interest in Hollinger Inc.

Yesterday, Lord Black's Toronto lawyer, Edward Greenspan, issued a statement saying, "Conrad Black asserts his innocence without qualification."

A lawyer for Mr. Boultbee, Donald Jack, said his client would "vigorously defend the charges against him and is confident of the outcome."

Lawyers for the two others accused did not return calls seeking comment.

In August, indictments charged the former Hollinger International president and publisher, F. David Radler, and Mr. Kipnis with a scheme to divert more than $32 million from the American-based newspaper holding company through a complex series of unauthorized payments. Mr. Kipnis pleaded not guilty, but Mr. Radler, a longtime close associate of Lord Black, agreed to cooperate with the authorities.

The charges related to the noncompetition payments were laid out in 2004 by a special committee established by the board and led by Richard C. Breeden, a former chairman of the Securities and Exchange Commission. Those payments were the subjects of a subsequent suit by the S.E.C.; that suit is pending.

Yesterday, Mr. Breeden said that "this indictment is focused on a limited number of transactions, and will enable prosecutors to focus a trial on a manageable set of issues." Despite Lord Black's determination to fight the charges, Mr. Breeden was optimistic about the government's case.

"He can fight it," he said of Lord Black, "but the facts are there. His is a situation, unlike others, where there is a mass of evidence concerning what took place."

Mr. Boultbee faces a maximum penalty of 40 years in prison and fines of $2 million. Mr. Kipnis is risking up to 45 years and $2.25 million in fines. Mr. Atkinson faces up to 30 years and fines up to $1.5 million. And Ravelston could face fines of $3.5 million.

The indictment contends that all four cheated public shareholders in the United States and Canada, as well as Canadian tax authorities.

"DOJ May Rein in Use of 'Honest Services' Statute"

National Law Journal
June 15, 2009
Lynne Marek

A key weapon in the arsenal of U.S. Attorney Patrick Fitzgerald and his prosecutors in Chicago has been a section of the federal anti-fraud statute that makes it a crime to deprive citizens or corporate shareholders of "honest services."

It's been used to convict dozens of state and local government officials, as well as newspaper magnate Conrad Black and former Gov. George Ryan of Illinois. Fitzgerald cited the honest services in the April indictment of another ex-Illinois governor, Rod Blagojevich.

But the U.S. Supreme Court's May decision to review Black's 2007 conviction may put the brakes on the honest services provision. The U.S. Department of Justice is likely to rein in use of the provision, 18 U.S.C. 1346, until the high court rules on Black's appeal next term, former federal prosecutors say. "Anytime that there's a high-profile review of a conviction, the department tends to just stop in its tracks, and this is a very high-profile review," said Matt Orwig, a partner and criminal defense attorney in the Dallas office of Sonnenschein Nath & Rosenthal and former U.S. attorney for the Eastern District of Texas. "There's going to have to be some very careful analysis of how they've approached these cases in the past."

Using the honest services section of the fraud statute allows prosecutors to charge defendants with robbing a general group of people, such as shareholders of a public company or residents of a state or city, of the honest fiduciary duties or government services they are due. It's typically used to shore up other fraud counts, but increasingly has been used as a primary count as well.

Orwig, who didn't recall using the charge when he was a U.S. attorney, said he thinks the section has been "over-used." It was the lead charge lodged by U.S. attorney offices against 79 suspects in fiscal year 2007, up from 63 in 2005 and 28 in 2000. (The Justice Department doesn't consistently track it as a secondary charge.)

AGGRESSIVE USE

Fitzgerald, the special counsel who won a conviction against vice presidential aide I. Lewis Libby Jr., so far is bucking the usual turnover for U.S. attorneys and is extending his eight-year stint in Chicago from the Republican Bush administration into the Democratic Obama administration.

Former federal prosecutors-turned-criminal defense lawyers in the Northern District of Illinois said they believe Fitzgerald's office has been among the most aggressive in using the honest services charge. Although statistics show that his office used the law only twice in fiscal year 2007 as a lead charge, the office has often used the statute as a secondary allegation in cases targeting Illinois and Chicago officials for political corruption.

"The Northern District has argued for an aggressive interpretation of this statute on many occasions," said Robert Kent, a partner in the Chicago office of Baker &

McKenzie who was formerly chief of the complex fraud section in the U.S. attorney's office there.

The office has met with success, posting an overall conviction rate for fiscal year 2008 of 96%, compared to the national rate of 92%. Randall Samborn, a spokesman for the office, declined to comment on use of the charge or the Black case.

The criminal defense lawyers said the Supreme Court is likely to focus on the second question presented by the Black petitioners: whether the law "applies to the conduct of a private individual whose alleged 'scheme to defraud' did not contemplate economic or other property harm to the private party to whom honest services were owed."

Black's Supreme Court counsel, Miguel Estrada of the Washington office of Gibson, Dunn & Crutcher, didn't return calls seeking comment, but argued in the petition that the "vagueness" of Section 1346 and differing appellate courts' interpretation of the law call out for Supreme Court clarification.

Solicitor General Elena Kagan contends in response that the law is clear: The government need not show that a defendant intended to deprive a victim of property or money, and the appellate courts differ only slightly in determining whether a given honest services fraud is "material."

The court's decision to grant certiorari in the Black case led to a release from prison of one of Black's three co-defendants, John Boultbee, and Black may resubmit a request for release in the Northern District of Illinois after Justice John Paul Stevens denied his request for release on bail on June 11.

The defendants argue that the Supreme Court may very well overturn their three mail fraud convictions. Black's counsel contends that he would then have to be retried on the only other outstanding charge against him, an obstruction of justice charge, because of the "highly inflammatory evidence" presented in support of the fraud counts.

In the case, prosecutors charged Black and his fellow executives from Hollinger International Inc., publisher of the *Chicago Sun-Times* and other newspapers, with fraud for pocketing money from bogus noncompete agreements drawn up when the company was selling off its smaller newspapers in the 1990s.

Prosecutors argued that millions of dollars should have gone to shareholders of the company. Black was convicted by a jury on four of the 13 counts against him.

U.S. attorney's offices will pursue "honest services" infractions much more carefully while Black's case is pending before the high court to avoid having cases overturned in the future, the criminal defense lawyers said. Prosecutors are more likely to use it to shore up other charges or avoid it altogether, they said. "It's likely to mean that prosecutors will only use it in the circumstances that every court agrees it would work—that way they'll have some level of confidence no matter what happens," Kent said. "At this point, it would be risky to do anything else."

In cases such as the one against Blagojevich, which includes a host of other criminal charges, anticipation of the Supreme Court's decision on Black is unlikely to make a difference, the lawyers said.

A SCALIA DISSENT

Justice Antonin Scalia in February dissented when the Supreme Court declined to grant certiorari in another honest services conviction case against a top aide to Chicago Mayor Richard Daley, also prosecuted by Fitzgerald's office. In his dissent, he said that not taking the case allowed "the current chaos" in application of the statute to prevail. Now it seems Scalia has managed to win over three additional justices on the honest services issue with respect to the Black case.

"They need some sharper definition," said Mark Rotert, a Chicago criminal defense attorney at Stetler & Duffy and a former federal prosecutor who was once chief of the major crimes division in Chicago's U.S. attorney's office. "There are some real questions about . . . the appropriate reach of the criminal statute."

Scalia in his dissent regarding the case of Daley aide Robert Sorich said that the circuits are clearly divided on how to interpret the honest services section. The U.S. Court of Appeals for the 5th Circuit has held that the statute criminalizes only the unlawful deprivation of services, though other courts have disagreed with that, he stated. The 7th Circuit has read the statute to prohibit the abuse of a post for private gain, while some circuits don't see such a gain as part of the crime, he said.

"Without some coherent limiting principle to define what the 'intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct," Scalia wrote.

At the core of the issue is the notion that would-be defendants have a right of due process that provides clarity in the laws that they are expected to obey, said criminal defense attorneys.

This isn't the first time that the Court has wrestled with the statute. In its 1987 ruling in *McNally v. U.S.*, the Supreme Court dismissed prosecutors' and courts' widely held view that the mail fraud statute could be used to fight public corruption and misconduct on the basis that citizens had an 'intangible right' to good government. Congress the following year enacted the honest services section to revive the practice of prosecuting under that right.

"The confusion arises in part from the fact that the law appears to apply differently to public officials and private individuals," said John Cline, a partner in Jones Day's San Francisco office who represented Sorich in his appeal. "It will be interesting to see if the Supreme Court tries to develop a unified standard for the two types of cases."

Some attorneys expect the high court to rule narrowly on the application of the law to private individuals, such as corporate chieftains like Black and avoid weighing in on circumstances related to public officials, at least for now.

Weyhrauch v. United States

08-1196

Ruling Below: *United States v. Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008).

The federal statute defining honest services fraud, 18 U.S.C. § 1346, establishes a uniform federal standard for honest services that governs every public official, and thus the government need not prove independent violation of state law to sustain honest services fraud conviction. The defendant's alleged conduct falls comfortably within the two categories long recognized as the core of honest services fraud: (a) taking bribe or otherwise being paid for decision while purporting to be exercising independent discretion, and (b) nondisclosure of material information.

Question Presented: To convict a state official for depriving the public of its right to the defendant's honest services through nondisclosure of material information, in violation of mail-fraud statute (18 U.S.C. §§ 1341 and 1346), must the government prove that the defendant violated disclosure duty imposed by state law?

UNITED STATES of America, Plaintiff-Appellant,
v.
Bruce WEYHRAUCH, Defendant-Appellee.

United States Court of Appeals for the Ninth Circuit

Decided November 26, 2008

[Excerpt: some footnotes and citations omitted]

FISHER, Circuit Judge:

This is an interlocutory appeal by the government of the district court's pretrial order excluding evidence from a mail fraud prosecution. It presents a matter of first impression in this circuit—whether a federal honest services mail fraud prosecution under 18 U.S.C. §§ 1341 and 1346 requires proof that the conduct at issue also violated an applicable state law. . . . On the merits, we disagree with the district court that a state law violation is required, and thus reverse the court's order excluding certain evidence from trial.

I. BACKGROUND

Defendant Bruce Weyhrauch, a lawyer, was a member of the Alaska House of Representatives in 2006 while Alaska's legislature was considering legislation that would alter how the state taxed oil production. According to the criminal indictment against him, VECO Corp., an oil field services company, took an active interest in the legislature's reconsideration of the oil tax, and two of its executives had a series of contacts with Weyhrauch regarding the pending legislation. The indictment alleges that Weyhrauch solicited, by mail,

telephone and personal contact, future legal work from VECO in exchange for voting on the oil tax legislation as VECO instructed and taking other actions favorable to VECO in Weyhrauch's capacity as state legislator, such as maneuvering the legislation and reporting information about proposed changes to the legislation to the VECO executives. The indictment does not allege that Weyhrauch received any compensation or benefits from VECO or its executives during this period, but alleges facts suggesting that Weyhrauch took the actions favorable to VECO on the understanding that VECO would hire him in the future to provide legal services to the company.

Count VII of the indictment charges Weyhrauch with devising "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment" and attempting to execute the scheme by mailing his resume to VECO ("the honest services charge"). Before trial, the parties filed cross-motions regarding the admission or exclusion of evidence related to the honest services charge. Specifically, the government proposed to introduce: (1) legislative ethics publications containing excerpts of various Alaska state statutes addressing conflicts of interest and disclosure requirements; (2) evidence that members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature, and that Weyhrauch never disclosed he was negotiating for employment with VECO; (3) a description of the ethics training Weyhrauch had received; and (4) evidence that Weyhrauch served on the Legislature's Select Committee on Ethics.

The district court found that the proffered evidence related only to duties to disclose a conflict of interest that might be imposed by *state* law, and that state law did not require Weyhrauch to disclose the conflict of interest he faced in discharging his duties while negotiating for future employment with a company affected by pending legislation. The government argued that the evidence should nonetheless be admitted because proof that a legislator knowingly concealed a conflict of interest may be used to support an honest services fraud conviction even if state law does not require disclosure of the conflict of interest. Recognizing an absence of Ninth Circuit precedent and a split among the other circuits on this issue, the district court adopted the approach outlined by the Fifth Circuit in *United States v. Brumley*, and concluded that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law." Accordingly, on September 4, 2007, the district court granted Weyhrauch's motion, denied the government's motion and excluded the proffered evidence. The next day, September 5, the government initiated this interlocutory appeal of the district court's ruling.

II. STANDARD OF REVIEW

We review a district court's ruling excluding evidence for abuse of discretion. "The district court abuses its discretion when its evidentiary rulings are based on an erroneous view of the law or a clearly erroneous assessment of the facts." *United States v. Nguyen*.

* * *

IV. HONEST SERVICES MAIL FRAUD

Accepting our jurisdiction under 18 U.S.C. § 3731, we address whether the district court properly excluded the government's proffered evidence. Weyhrauch was indicted under 18 U.S.C. § 1341, which criminalizes the use of the postal services in carrying out a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Before 1987, we and other courts interpreted § 1341 as covering schemes to defraud another not just of money and property, but also of "intangible rights," including the right of citizens to have public officials perform their duties honestly. In 1987, the Supreme Court rejected the intangible rights theory of mail fraud, holding:

> Rather than construe [§ 1341] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further it must speak more clearly than it has.

McNally v. United States, 483 U.S. at 360 (1987).

Shortly thereafter, Congress in 1988 chose to "speak more clearly" by enacting 18 U.S.C. § 1346, specifying that for the purposes of the mail, wire and bank fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Unfortunately, Congress did not define the concept of "honest services" in § 1346, thereby creating some confusion over the reach of the mail fraud statute. Because the statute's plain language is inconclusive, we turn for guidance in construing the statute to our pre-*McNally* case law and any relevant post-*McNally* decisions, and then consider pre- and post-*McNally* decisions from our sister circuits.

The district court accurately observed that we have not considered what § 1346 requires of public officials and that our sister circuits have expressed divergent views on the proper meaning of "honest services" for public officials. The Fifth Circuit has adopted the so-called "state law limiting principle," which requires the government to prove that a public official violated an independent state law to support an honest services mail fraud conviction. The Third Circuit has adopted a similar rule requiring the government to prove the public official violated a fiduciary duty specifically established by state *or* federal law.

The majority of circuits, however, have held that the meaning of "honest services" is governed by a uniform federal standard inherent in § 1346, although they have not uniformly defined the contours of that standard. The Seventh Circuit has read § 1346 to require public officials to breach a fiduciary duty with an intent to reap private gain to support an honest services mail fraud conviction, and the First Circuit has suggested that the official's misconduct must involve more than a mere conflict of interest to support a conviction. Finally, several circuits have read into § 1346 the requirement that a public official's breach of duty must be material and accompanied by fraudulent intent. In essence, our sister circuits have construed the meaning of "honest services" in ways that limit, to differing degrees, the reach of § 1346 into

state and local public affairs.

One concern is that a literal reading of § 1346 might give federal prosecutors *unwarranted influence* over state and local public ethics standards. This is particularly relevant in light of the Supreme Court's admonition that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." Other valid considerations are (1) the need to give public officials *fair notice* of the conduct that would subject them to the federal fraud statutes' serious criminal penalties; (2) a desire to establish *firm boundaries* lest every dishonest act by public officials lead to federal criminal liability; and (3) the potential for *selective enforcement* against public officials, many of whom engage in partisan political activity.

The Fifth Circuit's state law limiting principle, which the district court adopted, addresses all of these concerns. It limits how much control federal prosecutors have over state public affairs by restricting federal criminal liability to conduct prohibited by the states themselves and sets a clear outer limit to the reach of the federal statute by tying liability to violations of specific state statutes, thereby allaying concerns over fair notice. Moreover, to the extent the honest services doctrine is intended to ensure public officials act ethically, elected state officials are accountable to their constituencies, who can punish dishonest or unethical conduct directly at the ballot box, and nonelected state officials may be subject to state ethics laws, which can be strengthened through the democratic process. Thus, because the federal criminal statutes are not the only remedy for dishonest conduct not proscribed by state law, there is some degree of logic in reserving to the states exclusive control over the ethical standards for their own public officials.

Nonetheless, we decline to adopt the state law limiting principle. As an initial matter, our pre-*McNally* decisions do not support the conclusion that the federal fraud statutes derive their content solely from state law. In *United States v. Bohonus,* we explained that the basis for prosecuting public officials for honest services fraud rests on "the deprivation of the public's right to honest and faithful government." This broad characterization of the duty, without reference to any underlying state law duty, suggests that public officials' duty of honesty is uniform rather than variable by state. We were less equivocal in *United States v. Louderman,* holding that "state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute." Although *Louderman* is not directly on point because it involved a traditional wire fraud prosecution rather than an honest services mail fraud prosecution, our refusal to define the federal fraud statutes based on the contours of state law informs our decision here. In short, we have never limited the reach of the federal fraud statutes only to conduct that violates state law.

We also cannot find any basis in the text or legislative history of § 1346 revealing that Congress intended to condition the meaning of "honest services" on state law. Because laws governing official conduct differ from state to state, conditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not. Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography. Moreover,

although the Supreme Court has warned against interpreting the mail fraud statute to allow federal prosecutors to intrude into areas traditionally governed by state law absent a clear showing that Congress intended to do so, Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases when it enacted § 1346. Because pre-*McNally* honest services fraud cases generally did not require state law to create the duty of honesty that public officials owe the public and the plain language of the statute does not refer to state law, we cannot infer that Congress intended to import a state law limitation into § 1346.

Finally, federal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests. Congress has a legitimate constitutional basis for preventing public officials from using the mails to perpetrate fraud, so the federal interest in establishing a uniform standard of conduct for public officials merits equal consideration. That interest is not limited to preventing individuals from using the mails as a tool in a fraudulent scheme. States often regulate industries that are national and international in scope and that the federal government also regulates under concurrent constitutional authority, including the financial services, transportation, communications, oil, gas and timber industries. State regulations of these industries can have national or international implications, so the federal government may wish to prevent state action in these areas from being improperly influenced. Similarly, state laws that affect economic development within a state can influence the federal budget, reduce federal tax receipts and broadly affect the national economy. In short, Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators, and the happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails.

Having rejected the state law limiting principle, we next consider the appropriate contours of honest services fraud. Our pre-*McNally* cases recognized two core categories of conduct by public officials that other courts have found sufficient to support an honest services conviction: (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion and (2) nondisclosure of material information. Post-*McNally* public honest services fraud cases from other circuits have generally fallen into one of those two categories. The post-*McNally* decisions from our sister circuits confirm our view in *Bohonus* that conduct on par with bribery and nondisclosure of material information lies at the heart of public honest services fraud. Notably, both categories of misconduct undermine transparency in the legislative process and other governmental functions. Because public officials may legitimately disagree over which of the many competing interests in society deserve support from the state, without transparency the public cannot evaluate the motivations of public officials who are purporting to act for the common good to determine whether they are in fact acting for their own benefit. Thus, the two core categories of misconduct supporting public honest services fraud ensure transparency, without which the public cannot determine whether public officials are living up to their duty of honesty. We are persuaded that Congress' intent in reinstating the honest services doctrine after *McNally* was to bring at least

the two core categories of official misconduct within the reach of § 1346.

Here, Weyhrauch allegedly voted and took other official actions on legislation at the direction of VECO while engaged in undisclosed negotiations for future legal work from VECO. These allegations describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work. Because Weyhrauch's alleged conduct falls comfortably within the two categories long recognized as the core of honest services fraud, we need not define the outer limits of public honest services fraud in this case. Accordingly, the government may proceed on its theory that Weyhrauch committed honest services fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so.

V. CONCLUSION

We hold that 18 U.S.C. § 1346 establishes a uniform standard for "honest services" that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction. Because the district court excluded the evidence based, in part, on its conclusion that the government had to prove that state law imposed an affirmative duty on Weyhrauch to disclose a conflict of interest, we reverse. The government did not appeal the district court's ruling that the proffered evidence relates only to state law, and we express no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced and leave that determination to the district court's sound judgment.

REVERSED and REMANDED.

"Supreme Court Takes Weyhrauch Mail-Fraud Question"

Anchorage Daily News
June 29, 2009
Erika Bolstad

WASHINGTON—The U.S. Supreme Court on Monday agreed to hear an appeal by former Alaska Rep. Bruce Weyhrauch that prosecutors shouldn't be allowed to say he cheated Alaska's citizens when he secretly sought work from the oil-field service company Veco during the 2006 legislative session.

In accepting Weyhrauch's pretrial review, the court said it will look at one specific area: whether prosecutors must prove Weyhrauch violated a state disclosure law to convict him on federal mail fraud statutes. The federal law makes it illegal for public officials to use the mails to defraud the public out of their honest services.

Weyhrauch, awaiting trial on federal corruption charges, asked the Supreme Court to overturn an appeals court decision that directly applied the federal mail fraud statute to his case. At issue is one count in Weyhrauch's 2007 indictment where he is accused of mail fraud for seeking post-session work from Veco at the same time Veco was pushing back on an oil-tax bill in 2006. Weyhrauch argued that because his conduct was legal under state law, it shouldn't be illegal under the federal mail fraud statute. His argument prevailed in U.S. District Court. Prosecutors appealed to the 9th U.S. Circuit Court of Appeals and won.

His lawyer, Doug Pope, said that he thought the Supreme Court's decision to hear the matter at issue dealt a "serious blow to the government's case."

"We have felt that all the way along that it was a very weak case that was depending on a theory that, if it was taken away, was a case that many prosecutors would look at it and say, 'This isn't worth pursuing,'" Pope said.

Prosecutors said Weyhrauch should have disclosed his conflict of interest. Weyhrauch said he didn't have to.

The 9th Circuit judges reasoned that even if a state has weak ethics laws, that is no reason for its citizens to be deprived of the honest services of their public officials.

Weyhrauch acknowledged that two other U.S. circuit courts had made similar rulings, but said that another two had a different standard: They required a state law violation before the mail fraud statute could be used in a criminal case.

Weyhrauch asked the Supreme Court to clear up the "confusion" between the different circuits—which the court agreed to on Monday. The court did not set a date for arguments.

"Court OKs Weyhrauch Evidence"

Anchorage Daily News
November 27, 2008
Lisa Demer and Richard Mauer

Federal prosecutors can go forward with the corruption case against former state Rep. Bruce Weyhrauch using evidence that he failed to disclose his efforts to get a job with Veco Corp., under an appeal court ruling issued Wednesday.

The 9th U.S. Circuit Court of Appeals sided with prosecutors, who had appealed a ruling excluding such evidence. The case likely is headed back to Anchorage for trial.

Efforts to reach Weyhrauch's attorney, Doug Pope, and federal prosecutors Wednesday afternoon were unsuccessful.

Weyhrauch, a Juneau Republican, was indicted in May 2007 along with former House Speaker Pete Kott over efforts by Veco and its chief executive, Bill Allen, to pass tax legislation favored by the oil industry. Weyhrauch, a lawyer in private life, was trying to get legal work from Veco, and his job-seeking effort got tangled up in Veco's lobbying for the oil-tax deal.

Just before the trial, U.S. District Court Judge John Sedwick ruled that federal prosecutors couldn't use his failure to disclose his job-seeking as evidence to prove he defrauded Alaskans of honest services because state law didn't clearly require such a disclosure. The government appealed and Kott went on alone to trial in September 2007. He was convicted on three of four corruption counts against him. He is in prison and is appealing the convictions.

In its Weyhrauch decision, a three-judge panel of the 9th Circuit said that all citizens have a right to the honest services of their public officials, free from secret conflicts of interest, regardless of the limits of the law in any particular state.

"Accordingly, the government may proceed on its theory that Weyhrauch committed honest services fraud by failing to disclose a conflict of interest or by taking official actions with the expectation that he would receive future legal work for doing so," the judges said.

The panel noted that Sedwick's ruling didn't come out of the blue. Without guidance from the San-Francisco-based 9th Circuit, the Anchorage judge turned to a decision out of the 5th Circuit, in New Orleans, that "limits how much control federal prosecutors have over state public affairs by restricting federal criminal liability to conduct prohibited by the states themselves," the decision said.

But other appeals courts have ruled differently. The federal government has reason to be interested in what state lawmakers do, the 9th Circuit panel said. For instance, some industries regulated by states, including oil, are national in scope.

"Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators," the panel wrote.

Public officials have a broad duty to be honest, even when there's not a specific state law telling them how to proceed, the

judges found. There's no hint in the federal law that Congress wanted geography to define what behavior is criminal, the panel wrote.

Other appeals courts generally have found two kinds of misconduct that amounts to the crime called "honest services fraud"—taking a bribe while pretending to be independent and failing to disclose material information, according to the opinion.

"Because public officials may legitimately disagree over which of the many competing interests in society deserve support from the state, without transparency the public cannot evaluate the motivations of public officials who are purporting to act for the common good to determine whether they are in fact acting for their own benefit," the 9th Circuit panel said.

The evidence at issue relates to one of four charges against Weyhrauch. He also is charged with bribery, conspiracy and attempted extortion.

For the honest services fraud charge, prosecutors want to present evidence that includes: legislative ethics publications addressing conflicts of interest and disclosure; testimony that lawmakers typically disclose conflicts on the floor and that Weyhrauch never revealed he was negotiating for a Veco job; a description of ethics training that Weyhrauch received; and information that Weyhrauch served on the Select Committee on Legislative Ethics.

On another issue, the judges had harsh words for the prosecution over a procedural matter.

It took the government three tries before it complied with a law that requires a U.S. attorney to certify that a pretrial appeal is being made for legitimate reasons and not just to delay the trial. Because the federal prosecution of Alaska political corruption cases is being managed by the U.S. Justice Department's Public Integrity Section, there wasn't a U.S. attorney in charge and the appeal was not certified properly.

Ultimately, U.S. Attorney General Michael Mukasey authorized it, a year after the fact.

"We will excuse the government's confusion and allow it to supplement the record with the Attorney General's certification," the panel said.

However, the judges threatened to reject government appeals if prosecutors fail to comply with that law: "We will not be so forgiving in the future."

"Corruption Trials Divided; Kott's Hearing Continues, but Weyhrauch's Stalls on Federal Appeal"

Anchorage Daily News
September 6, 2007
Richard Mauer and Lisa Demer

A federal judge Wednesday ordered separate trials for two former Republican legislators to allow jury selection for one to move forward while the government appeals an earlier ruling favoring the other.

The decision on the one-time co-defendants means the bribery, extortion, fraud and conspiracy case against Pete Kott, the former House speaker, will go ahead with opening arguments scheduled for Monday. Jury selection started at midmorning Wednesday and will continue today.

But the trial of Bruce Weyhrauch, a former representative from Juneau, will await the outcome of the government's bid to the 9th U.S. Circuit Court of Appeals in San Francisco, and perhaps longer. Weyhrauch's attorney, Doug Pope, said he'd try to take the case to the U.S. Supreme Court if the 9th Circuit reverses the decision in Anchorage.

U.S. District Judge John Sedwick made his ruling on separating the trials in a hastily called hearing that began at 8 a.m. Wednesday, just before jury selection was to begin. With more than 80 potential jurors from around Southcentral Alaska cloistered in a meeting room across the lobby and down a hall, Nicholas Marsh, a trial attorney from the Justice Department's Public Integrity Section, told Sedwick that his superiors in Washington agreed that an appeal of an earlier ruling was justified.

They are challenging a ruling by Sedwick on Tuesday that said the government couldn't present evidence that Weyhrauch and Kott were duty-bound to report they were seeking employment with Veco, the politically active oil-field service company, in 2006, when they were voting on oil-tax legislation heavily lobbied by Veco's chair, Bill Allen. Sedwick held that state law had no such requirement.

In the Wednesday morning hearing, Marsh told Sedwick the government still had ample evidence against Kott and was prepared to go to trial. But for Weyhrauch, a lawyer who never landed the Veco job, the evidence is crucial, Marsh said.

At issue is whether Weyhrauch used mail fraud to cheat Alaskans of honest services as a state legislator. Pope said Weyhrauch did nothing wrong in sending a personal advertisement for legal services to Veco.

With the trial set to begin, expenses for lawyers and the court adding up, and potential jurors cooling their heels, Marsh proposed that Sedwick revisit a request made in August by Weyhrauch's attorneys to split the trial. At the time, Pope argued that the stronger evidence against Kott could prejudice the jury against his client. The government opposed the motion then, and the judge kept the defendants together.

But now, Pope told Sedwick, the situation has changed. He was fully prepared to go to trial. It would be an undue financial and emotional burden on Weyhrauch and his family to delay any longer. He argued the government's points of appeal were thin and unlikely to succeed.

But Sedwick said federal appeals courts around the country were split on the disclosure issue, while the all-important 9th Circuit, governing courts in Alaska, "hasn't spoken." Sedwick said he followed a line of reasoning adopted by the 5th Circuit in New Orleans.

Jim Wendt, Kott's attorney, opposed the split, mainly because he had prepared a case theory and line of questioning for witnesses based on having a co-defendant. The government agreed to delay opening arguments until Monday, and promised to tell him by Friday whether Allen and former Veco vice president Rick Smith would be called to testify and to reveal the approximate place in the trial they would take the stand.

Following a 90-minute recess to review the law and rulings in related cases, Sedwick called the parties back to his courtroom and announced he would split up the co-defendants so the government could pursue the appeal. He said the government clearly had that right.

After packing up boxes of documents on a cart and clearing the courthouse, Pope stopped to talk with reporters and expressed outrage at the government. He said prosecutors realized late in the pretrial phase that their case was weak and responded by inventing a new case theory that relied on an improper application of federal law.

He said Weyhrauch's day in court may be delayed for more than a year by the appeal.

Marsh said it would be inappropriate to comment on Pope's out-of-court criticism.

Back in the courtroom, potential jurors began filing in to be questioned about their knowledge of the now-smaller case. The lawyers on both sides introduced themselves, and so did Kott, who represented Eagle River in the House.

"I'm Pete Kott, and I'm the defendant in the case," he said, smiling at the packed room of jurors.

Most of those with strong opinions already had been weeded out through written questionnaires.

Sedwick, and sometimes the lawyers, asked detailed questions of about half those remaining on Wednesday to determine whether any were too biased to be fair jurors or had other reasons not to serve.

One had just landed her first full-time job in a year, so she was allowed to go home. A couple of people had medical issues. One is leaving Alaska this month. Another is married to a former contract manager at BP and socialized with Allen. All left the courtroom.

Some were close calls. One man told the judge he thought he could be fair "for the most part." When Sedwick pressed him, he said part of him struggled with the politics of oil in Alaska. The judge sent him home.

While a number of the prospective jurors had a general idea that the matter before them was a bribery case, some said they didn't pay attention to politics. Others followed the political corruption cases closely. Some told the judge they were most interested in trouble faced by U.S. Sen. Ted Stevens and his son, former state Senate President Ben Stevens. Neither has been charged with a crime, but Ben Stevens is accused of being part of a conspiracy that included Kott, Weyhrauch, Allen and Smith.

"Indictment: Weyhrauch Sought Work with VECO"

Juneau Empire
May 6, 2007
Pat Forgey

While the Alaska Legislature was discussing an oil tax bill worth billions to the state, federal prosecutors allege former Rep. Bruce Weyhrauch, R-Juneau, called Bill Allen, CEO of VECO Corp., an oil field services company and influential player in state politics.

Weyhrauch told Allen that he wanted to discuss a "mutually beneficial relationship," according to the seven-count indictment filed against Weyhrauch and former Rep. Pete Kott, R-Anchorage.

VECO was not named in the indictment, but it issued a press release late Friday acknowledging it was the company alluded to by prosecutors.

That relationship allegedly involved Weyhrauch soliciting lucrative legal work after he was no longer a representative in exchange for his support for a lower tax rate that the oil companies wanted.

He and Kott also backed a natural gas pipeline deal supported by Gov. Frank Murkowski and the state's big oil producers.

Later, Weyhrauch and Kott also worked together to get a special session of the Legislature to adjourn early and avoid a vote on legislation the oil companies opposed.

Weyhrauch and Kott pleaded not guilty Friday, but were unavailable for comment.

Weyhrauch did not collect any money, the indictment said. It alleges Kott took numerous cash payments, sometimes hidden as payments to Kott's hardwood flooring business.

The indictment quotes two VECO executives discussing the gas pipeline legislation, and why Kott would support the company's position.

"We got more money in Pete Kott than he can even think about," executives said, according to the indictment.

How prosecutors know of the comments is not explained, but the indictment makes numerous references to private conversations that took place in a VECO suite at the Baranof Hotel in Juneau, as well as phone conversations, suggesting electronic surveillance.

At one point, the indictment says Kott told the company's CEO that "I had to cheat, steal, beg, borrow and lie," to support the company's positions.

The CEO responded, "I own your ass," according to the indictment.

The indictment also recounts a conversation in which VECO executives discussed Weyhrauch's financial struggles and how to "stall a bit" and string him out with the prospect of future legal work.

United States v. Comstock

08-1224

Ruling Below: *United States v. Comstock*, 551 F.3d 274 (4th Cir. 2009).

Graydon Comstock and several other convicted sex offenders in North Carolina were less than a month away from finishing their prison sentences for federal sex offenses when they were found to be "sexually dangerous" under 18 U.S.C. §4248. They were then committed to a medium security facility after the completion of their sentences. The sex offenders challenged the statute, authorizing their commitment as an unconstitutional assertion of power by Congress. The Government claimed that the statute was within Congress's power under both the Commerce Clause and the Necessary and Proper Clause. The district court agreed with the sex offenders and struck down the statute. The Fourth Circuit affirmed.

Question Presented: Did Congress act within its constitutional powers, under the Commerce Clause or Necessary and Proper Clause, in enacting 18 U.S.C. §4248, which allows the federal government to commit persons believed to be "sexually dangerous" after they have already served their terms for prior sexual offenses?

UNITED STATES OF AMERICA, Petitioner-Appellant,
v.
Graydon Earl COMSTOCK, Jr., Respondent-Appellee.

United States Court of Appeals for the Fourth Circuit

Decided January 8, 2009

[Excerpt: some footnotes and citations omitted]

DIANA GRIBBON MOTZ, Circuit Judge:

This case presents the question of whether a newly-enacted federal statute—18 U.S.C. § 4248 (2006)—lies within Congress's power. Section 4248 purports to allow the federal government to place in indefinite civil commitment "sexually dangerous" persons, granting the federal government unprecedented authority over civil commitment—an area long controlled by the states. The district court held that § 4248 exceeds the limits of congressional power and intrudes on the powers reserved to the states. The Government now appeals.

We are the first appellate court to address this question, but the issue has divided trial courts across the nation.

Two fundamental principles guide our inquiry. On one hand, respect for the legislative branch demands that we afford congressional enactments a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607. But on the other, we must invalidate an act of Congress on a "plain showing" that Congress has

exceeded its constitutional authority.

After carefully considering the Government's arguments, we conclude, for the reasons set forth below, that § 4248 does indeed lie beyond the scope of Congress's authority. The Constitution does not empower the federal government to confine a person solely because of asserted "sexual dangerousness" when the Government need not allege (let alone prove) that this "dangerousness" violates any federal law. We therefore affirm the judgment of the district court.

I.

A.

Congress enacted § 4248 as part of the Adam Walsh Child Protection and Safety Act of 2006 ("the Act"). With the aim of "protect[ing] children from sexual exploitation and violent crime," a Senate sponsor described the Act as "the most comprehensive child crimes and protection bill in our Nation's history." 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch). Among other measures, the Act creates a National Sex Offender Registry, increases punishments for a variety of federal crimes against children, and strengthens existing child pornography prohibitions. None of these provisions of the Act is challenged here.

The only portion of the Act at issue here, § 4248, authorizes the federal government to civilly commit, in a federal facility, any "sexually dangerous" person "in the custody" of the Bureau of Prisons—even *after* that person has completed his entire prison sentence. 18 U.S.C. § 4248(a), (d) (2006). To initiate commitment under § 4248, the Attorney General need only certify that a person within federal custody is "sexually dangerous." Such a certification, when filed with the district court in the jurisdiction in which the federal government holds a person, automatically stays that person's release from prison. In the cases at issue here, this stay has extended federal confinement well past the end of any prison term. Thus, pursuant to § 4248, the federal government has civilly confined *former* federal prisoners without proof that they have committed any new offense. Moreover, § 4248 empowers the Attorney General to prolong federal detention in this manner without presenting evidence or making any preliminary showing; the statute only requires that the certification contain an allegation of dangerousness.

The statute defines a "sexually dangerous person" to be one who "has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others," and who suffers from a severe mental illness such that he would "have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5)-(6) (2006). However, neither "sexually violent conduct" nor "child molestation" are terms defined by the statute.

After the Attorney General files the certification, § 4248 directs the district court to adjudicate a person's alleged sexual dangerousness. If the district court finds the person to be sexually dangerous by clear and convincing evidence, the court must commit the person to federal custody. *Only then* does § 4248 direct the Attorney General to make "all reasonable efforts" to transfer responsibility for the person to an appropriate *state* authority. Unless and until

a state assumes this responsibility, § 4248 authorizes federal confinement for as long as the person remains "sexually dangerous."

B.

Graydon Comstock, who filed the first of these consolidated challenges to § 4248, pled guilty to receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) (2006). Six days prior to the end of his 37-month prison sentence, the Attorney General certified Comstock as a sexually dangerous person, staying his release from prison. More than two years later, Comstock remains confined in the medium security Federal Correctional Institution at Butner, North Carolina ("FCI-Butner").

The cases of Markis Revland, Thomas Matherly, and Marvin Vigil followed a similar course, with the Government certifying each man for federal commitment less than one month before he completed his full prison term. In fact, the Government certified Vigil for civil commitment on the very same day that he had completed his 96-month term of imprisonment. Like Comstock, each of these men remains in federal custody at FCI-Butner more than two years after the expiration of his prison term.

As part of each certification, the Government petitioned for a hearing to determine whether the named person qualified as "sexually dangerous" under § 4248. In each case, the named person then moved to dismiss, contending that § 4248 violates the Constitution. The district court agreed and held that § 4248's civil commitment scheme could not withstand constitutional scrutiny.

With this background in mind, we turn to the question presented in this case: whether the Constitution grants Congress the authority to enact § 4248.

II.

In the exercise of their general police and *parens patriae* powers, the states have long controlled the civil commitment of the mentally ill. Unlike the states, the federal government has no general police or *parens patriae* power.

Nonetheless, in the statute at issue here, Congress purports to grant the federal government broad civil commitment authority. This raises a substantial constitutional question because the Constitution requires that a specific enumerated power support every statute enacted by Congress. The Government does not argue to the contrary.

Yet the Government attempts to defend the validity of § 4248 largely by direct reliance on the Necessary and Proper Clause. But that provision, by itself, creates *no* constitutional power; rather, it merely permits Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers *vested by this Constitution* in the Government of the United States . . ." Thus, to sustain § 4248 under the Necessary and Proper Clause, the Government must show that the statute is necessary to achieve ends within Congress's *enumerated* powers.

Perhaps implicitly recognizing this deficiency in its Necessary and Proper Clause arguments, the Government also relies (albeit briefly) on the Commerce Clause. Unlike the Necessary and Proper Clause, the Commerce Clause does vest Congress with enumerated constitutional power. Clearly, if we can uphold § 4248 as a

valid exercise of Congress' Commerce Clause powers, the statute lies within congressional authority. Accordingly, consistent with the "presumption of constitutionality," *Morrison*, 529 U.S. at 607, that we afford every federal statute, we begin our analysis by addressing this question.

A.

The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3.

Recent Supreme Court precedent provides substantial assistance in resolving the question of whether the Commerce Clause authorizes § 4248. First, in *United States v. Lopez*, the Court held that the Gun-Free School Zones Act (GFSZA) of 1990, which made possession of a firearm in a school zone a federal crime, exceeded Congress's Commerce Clause power because it regulated neither commercial nor interstate activity. Then, in *Morrison*, the Court imposed further limits on Congress's Commerce Clause power, holding unconstitutional a provision of the Violence Against Women Act (VAWA) that created a federal civil remedy for noneconomic sexual violence, because such crimes do not substantially affect interstate commerce.

In these cases, the Court identified three specific areas that Congress could regulate pursuant to its Commerce Clause power: (1) the channels of interstate commerce, (2) instrumentalities of or persons and things in interstate commerce, and (3) activities that "substantially affect" interstate commerce. Like the statutes at issue in *Lopez* and *Morrison*, the statute challenged here, § 4248, contains no jurisdictional requirement limiting its application to commercial or interstate activities. Nor does the Government suggest that § 4248 targets the channels of interstate commerce or persons and things in interstate commerce. Therefore, we can uphold § 4248 under the Commerce Clause only if it regulates activities that "substantially affect" interstate commerce.

Morrison forecloses any such argument. Indeed, § 4248 bears striking similarities to the VAWA provision struck down in *Morrison*. First, like VAWA, § 4248 provides a civil remedy aimed at the prevention of noneconomic sexual violence. The *Morrison* Court's rationale for rejecting Commerce Clause authority for such a statute applies with equal force here:

> The regulation and punishment of intrastate violence . . has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Second, the target of the statute challenged here (sexual dangerousness)—no less than the target of the statute invalidated in *Morrison* (gender-motivated violence)—is "not, in any sense of the phrase, economic activity." Like the gender-motivated violence banned in *Morrison*, sexual dangerousness does not substantially affect interstate commerce. Indeed, unlike *Morrison*, the record here does not even contain any legislative findings to the contrary.

Supreme Court precedent thus compels the conclusion that § 4248 does not constitute a valid exercise by Congress of its Commerce Clause power. To construe § 4248 as within

such power would encroach on the police and *parens patriae* powers reserved to the sovereign states, conflating "what is truly national and what is truly local."

Federal commitment of "sexually dangerous persons" may well be—like the suppression of guns in schools or the redress of gender-motivated violence—a sound proposal as a matter of social policy. But policy justifications do not create congressional authority. Hence § 4248 lies beyond Congress's Commerce Clause authority. The Government's apparent reluctance to rely on the Commerce Clause is thus understandable.

B.

What is less understandable is the Government's heavy reliance on the Necessary and Proper Clause, standing alone, as a source of congressional power. Of course, as the Government contends at length, the Necessary and Proper Clause reaches broadly, but it does so only to effectuate powers specifically enumerated in the Constitution. The Necessary and Proper Clause simply does not—in and of itself—*create* any Congressional power. Ordinarily, this would end our discussion of the Necessary and Proper Clause. But because the Government's defense of § 4248 relies almost exclusively on that Clause, we briefly address each of its specific arguments on this point.

1.

The Government's principal argument is that its ability to establish and maintain a "federal criminal justice and penal system" somehow renders § 4248 necessary and proper and thus constitutional. The Government cites *no* precedent in support of this novel theory. Instead, the Government relies on a restatement provision setting forth common law principles on the responsibilities of custodians. In essence, the Government argues that because it may constitutionally imprison persons who violate federal criminal law, it can continue to confine such persons—even after they have served their sentences—if it believes them to be "sexually dangerous."

This argument must fail. Of course, Congress may establish and run a federal penal system, as necessary and proper to the Article I power (usually the Commerce Clause) relied on to enact federal criminal statutes. And, consistent with its role in maintaining a penal system, the federal government possesses broad powers over persons *during* their prison sentences. But these powers are far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly.

The fact of previously lawful federal custody simply does not, in itself, provide Congress with any authority to regulate future conduct that occurs outside of the prison walls. For example, although the Government may regulate assaults occurring in federal prisons, the Government cannot criminalize all assaults committed by *former* federal prisoners. As the district court explained:

> The fact of legitimate custody . . . does not establish Congressional authority to provide for the commitment of a person *after* a person has completed a sentence for a federal crime, i.e., when the power to prosecute federal offenses is exhausted, when that person has not committed any misconduct while in

> custody, and where there has been no showing that the person is likely to engage in conduct that Congress, as opposed to the states, actually has the authority to criminalize.

Comstock, 507 F Supp. 2d at 551.

2.

The Government next contends that § 4248 constitutes a necessary and proper exercise of its power to prevent "sex-related crimes." Brief of Appellant at 36. But the federal government simply has no power to broadly regulate *all* sex-related crimes, as § 4248 purports to do.

Consistent with Congress's limited powers, federal statutes regulating sex crimes are limited in number and breadth, specifically requiring a connection to interstate commerce, or limiting their scope to the territorial jurisdiction of the United States. In contrast, § 4248 targets "sexual dangerousness" generally, without any requirement that this undefined danger relate to conduct that the federal government may constitutionally regulate. Because most crimes of sexual violence violate state and not federal law, many commitments under § 4248 would prevent conduct prohibited *only* by *state law*. Section 4248 thus sweeps far too broadly to be a valid effort to prevent *federal* criminal activity.

The principal case on which the Government relies for its argument to the contrary, *United States v. Perry*, 788 F.2d 100 (3d Cir. 1986), actually offers it no support. Notably, at the outset, the *Perry* court recognized (as the Government fails to here) that a specific, enumerated federal power must support a federal civil commitment:

> [T]he federal government may resort to civil commitment when such commitment is necessary and proper to the exercise of some specific federal authority. *Congress may not, however, authorize commitment simply to protect the general welfare of the community at large.*

Id. at 110 (emphasis added). Applying this test, *Perry* upheld the constitutionality of the Bail Reform Act of 1984, which authorizes *pretrial* detention only if a court finds a likelihood that the detainee will, if released, commit one of *four specific federal offenses*. The Bail Reform Act therefore contained a clear connection between the *pretrial* detentions and the Government's interest in preventing federal crime.

In contrast, § 4248 contains no such connection: it does not refer to any federal crime, let alone require the Government to demonstrate that a person presents a risk of committing a specific federal crime. Indeed, under § 4248, the federal government may commit a person even though he has never been convicted by any court—state or federal—of any crime of sexual violence. Section 4248 only requires that the Government demonstrate that an individual in United States custody is "sexually dangerous," which encompasses *any* "sexually violent conduct"—regardless of whether state or federal law criminalizes this conduct.

At its core, the Government's argument attempts to "pile inference upon inference" so as to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Were we to accept the Government's logic, Congress could authorize the civil commitment of a person on a showing that he posed a general risk of *any* sexually violent conduct, even though not all, or even most, of this potential

conduct violated federal law. This argument would convert the federal government's limited power to criminalize narrow forms of sexual violence into the general power to regulate all sexual violence, including acts which violate no criminal statute. Congressional power does not reach so far.

3.

Finally, the Government maintains that the Necessary and Proper Clause justifies § 4248 because it retains the "power to prosecute" all persons in its custody charged with criminal offenses. But the Government has already charged, tried, and convicted Comstock, Matherly, Vigil, and Revland of all alleged federal crimes; it retains no power to prosecute them.

Greenwood v. United States, 350 U.S. 366 (1956), on which the Government heavily relies, does not suggest, let alone hold, to the contrary. Rather, *Greenwood* simply upholds a statute that permits the federal civil commitment of a person charged with federal crimes *but found incompetent to stand trial.* To prevent "frustrat[ion]" of federal prosecutions in such cases, *Greenwood* authorizes the commitment of these incompetent individuals, reasoning that they might someday regain competence and so be able to stand trial. Furthermore, the statute upheld in *Greenwood* requires the Attorney General to determine that "suitable arrangements for *State* custody and care of the person are *not* available" *before* the federal government can undertake any commitment. 18 U.S.C. § 4246(a) (2006).

In sum, *Greenwood* only approved the federal civil commitment of persons who had been charged with federal crimes but found incompetent to stand trial, and for whom no state would take custody. *Greenwood* certainly did not approve the federal civil commitment of persons—like Comstock, Matherly, Vigil, and Revland—who have stood trial, been convicted, and fully served all federal prison sentences. Accordingly, because no federal prosecution has been frustrated here, we cannot sustain § 4248 under *Greenwood.*

III.

For these reasons, we can only conclude that the district court correctly held § 4248 unconstitutional. The challengers have made a "plain showing" that, in enacting § 4248, Congress exceeded its constitutional authority.

Our holding, however, does not require that the Government's legitimate policy concerns go unaddressed. If the federal government has serious concerns about the dangerousness of a person due to be released from federal prison, it can notify state authorities, who may use their well-settled police and *parens patriae* powers to pursue civil commitment under state law.

Moreover, if the relevant state authorities prove reluctant to take charge of such persons, the Government is not without recourse. The federal government may, for example, wield its spending power to encourage state action by providing funding to state institutions for this purpose. But Congress's perceived need for the sort of civil commitment statute at issue here does not create constitutional power where none exists. Congress must instead seek alternative, constitutional means of achieving what may well be commendable objectives.

The power claimed by § 4248—forcible, indefinite civil commitment—is among the most severe wielded by any government. The Framers, distrustful of such authority,

reposed such broad powers in the states, limiting the national government to specific and enumerated powers. "[T]hat those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). Section 4248 thus cannot be sustained as an exercise of Congress's authority under the Commerce Clause or any other provision of the Constitution. For these reasons, we affirm the judgment of the district court.

AFFIRMED

"Supreme Court to Review Sex Offender Law"

The Christian Science Monitor
June 22, 2009
Warren Richey

The US Supreme Court has agreed to decide the constitutionality of a law that allows the federal government to indefinitely detain a person deemed "sexually dangerous," even after that person has finished serving a full prison sentence.

The issue arises in the case of a man who has been confined to a North Carolina federal prison for more than two years after completing his three-year sentence for receiving child pornography. The man, Graydon Earl Comstock, has no firm release date.

In January, a federal appeals court panel declared the law unconstitutional. "The Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the government need not allege (let alone prove) that this 'dangerousness' violates any federal law," wrote Judge Diana Gribbon Motz of the Fourth Circuit Court of Appeals based in Richmond.

The provision in question was passed as part of the Adam Walsh Child Protection and Safety Act of 2006. It authorizes the attorney general to seek the court-ordered, open-ended civil commitment of any "sexually dangerous person" already in US custody.

The measure is controversial in part because it relies on anticipation of future dangerousness to society, rather than actual or planned violations of law.

The case, which the high court will hear in the fall, is significant legally because it tests the breadth of federal power under the Constitution's necessary and proper clause. The Obama administration is currently considering enacting a legal regime to indefinitely detain Al Qaeda terror suspects currently at Guantánamo who can't be put on trial but who are deemed too dangerous to be released.

In May, a panel of the St. Louis-based Eighth Circuit Court of Appeals upheld the same provision of the Child Protection and Safety Act. That court ruled that Congress had the authority under the necessary and proper clause to provide for civil commitment as a means of preventing future sex crimes.

In contrast, the Fourth Circuit concluded that the law is not a "necessary and proper" function of the federal government because the job of policing violent sexual attacks belongs to state and local law enforcement agencies.

The North Carolina case involves inmates being held at the Federal Correctional Complex at Butner, N.C. Since the law passed, the federal government has sought to indefinitely detain 95 individuals it deemed "sexually dangerous," 77 of whom are housed at Butner.

"Congress could reasonably determine that it is 'appropriate'—and therefore 'necessary and proper' under [the 1819 landmark

decision McCulloch v. Maryland]—to protect private persons from sexually dangerous, mentally ill persons whom the federal government has taken into its custody," writes Solicitor General Elena Kagen.

Mr. Comstock's lawyer, Jane Pearce, an assistant federal public defender in Raleigh, argues that the law exceeds Congress's legislative authority under the necessary and proper clause. In addition, she says the statute violates due process protections because it allows the government to imprison someone potentially for life using a relaxed burden of proof rather than the beyond-a-reasonable-doubt standard required for a criminal conviction and jail term.

"[This law] expands federal civil commitment into an area never before contemplated by the federal government, an area that has historically been the province of the states," Ms. Pearce writes in her brief.

"Release of Sex Offenders Delayed"

SCOTUS Blog
April 3, 2009
Lyle Denniston

Chief Justice John G. Roberts, Jr., put on hold on Friday a federal appeals court ruling that the federal government contended would lead to the early release of "the great majority" of "sexually dangerous" inmates now held in federal prison. In a brief order, the Chief Justice said there was "a presumption of constitutionality" of the 2006 federal law that the Fourth Circuit Court struck down. He thus blocked temporarily the Circuit Court ruling, until the Justices act on a new government appeal filed Friday (***U.S. v. Comstock***, et al., 08-1224).

Roberts took little time to act. The Justice Department in the morning asked for a delay of the appeals court decision, but also sought an "immediate, interim" stay while its request was awaiting the Chief Justice's reaction. Roberts, without seeking a response from the challengers to the federal law, by late afternoon issued his order fully staying the Circuit Court.

The law at issue is the Adam Walsh Child Protection and Safety Act, described by one of its Senate sponsors as "the most comprehensive child crimes and protection bill in our nation's history." It was named for a child who died in a brutal crime attributed to a sex offender.

In a ruling on Jan. 8, the Fourth Circuit nullified the part of the Act that allows the government to put in indefinite civil commitment federal prisoners who have been found mentally incompetent to stand trial, or have had criminal charges dismissed because of their mental condition.

Under the Act, government officials certify such an inmate as "sexually dangerous," and ask a federal judge to order commitment. Once the government files such a request, release of the inmate is delayed until court-ordered review procedures are completed.

If the judge agrees that the individual meets the dangerousness definition, a commitment order must be issued. If such an individual cannot be placed in a state facility, they must remain in federal custody until no longer "sexually dangerous."

The constitutionality of that regime was challenged by five inmates facing commitment in federal court in North Carolina. The federal Bureau of Prisons facility for most of those who have been certified as "sexually dangerous" is at Butner, N.C., in the Fourth Circuit's area. A federal judge, Senior District Judge W. Earl Britt of Raleigh, dismissed the commitment proceedings for each of them.

The Fourth Circuit, in its ruling against the Act's validity, found that Congress did not have the constitutional authority to create a regime involving "unprecedented [federal] authority over civil commitment — an area long controlled by the states." The Court commented: "The Constitution does not empower the federal government to confine a person solely because of asserted 'sexual dangerousness' when the government need not allege (let alone prove) that this 'dangerousness' violates any federal law."

That was the only part of the new federal law that was at issue.

The Fourth Circuit was the first appeals court to rule on the Act's constitutionality; that issue, however, has divided federal District Courts across the country. The Supreme Court, in rulings in 1997 and 2002, had upheld state legislation on commitment of sexually violent predator acts. The federal government contended in the case involving the 2006 federal law that Congress was following the Supreme Court's lead, but challengers contended that the broad commitment scheme of that law differed significantly from what the Justices had upheld.

In asking the Chief Justice to postpone the lower court decision, the Justice Department (in application 08A863) said that the release of inmates at Butner could have come as early as next Tuesday. The application argued: "The court of appeals has held unconstitutional on its face an important Act of Congress that was passed to protect the public from mentally ill and sexually dangerous persons held in federal custody."

The stay of the Circuit Court ruling, the Chief Justice's order said, will last "pending the disposition of the petition for a writ of certiorari," and would remain in effect if review is granted, but otherwise would terminate.

"4th Circuit Strikes Down Indefinite Lock-up of Those Tagged 'Sexually Dangerous'"

The American Lawyer
January 13, 2009
Pamela A. McLean

The 4th U.S. Circuit Court of Appeals has struck down as unconstitutional a 2006 law that allowed the federal government to place under indefinite lock-up anyone considered "sexually dangerous" even beyond the end of prison sentences. The conservative 4th Circuit became the first federal appellate court to weigh in on the constitutionality of the Adam Walsh Child Protection and Safety Act, striking down the civil commitment of five men held years beyond their completed prison terms.

The 4th Circuit panel held that Congress exceeded its power in violation of the Constitution's commerce clause by creating a national program to impose civil commitment of sexually dangerous defendants, a power generally reserved for states. ***U.S. v. Comstock***, 2009 WL 42476 (4th Cir. Jan. 8, 2009).

The Justice Department did not immediately comment on the case.

The case strikes down civil commitment in five combined cases of prisoners held at the federal Butner prison hospital facility in North Carolina, including Graydon Comstock, sentenced to three years for receipt of child pornography. Prosecutors blocked his release six days prior to his release, and he has been held two added years.

Others included Markis Revland, Shane Catron, Thomas Matherly and Marvin Vigil. In each case the men were ordered held under civil commitments less than a month before the release from their prison terms and each has been held more than two added years, according to the court.

The Federal Public Defender's office will not comment on the decision, said Elizabeth Luck, spokeswoman for the office.

The ruling does not affect other terms of the Adam Walsh Act, including creation of a national sex offender registry, increased punishment for crimes against children and stronger prohibitions against child pornography. Referring to prior U.S. Supreme Court rulings that struck down harsher punishment for guns near school grounds and violence aimed at women, the panel stated, "Federal commitment of 'sexually dangerous persons' may well be—like the suppression of guns in schools or the redress of gender-motivated violence—a sound proposal as a matter of social policy. But policy justifications do not create a constitutional authority."

While the federal government enjoys broad power during imprisonment of defendants, "these powers are far removed from the indefinite civil commitment of persons after the expiration of their prison terms, based solely on possible future actions that the federal government lacks power to regulate directly," wrote Judge Diana Gribbon Motz.

She called the civil commitment authority "among the most severe wielded by any government."

The decision points out that federal prosecutors still have the option of asking state authorities to invoke state civil commitment proceedings for those federal prisoners considered "sexually dangerous," in those states with civil commitment laws.

"8th Circuit Says Adam Walsh Act Constitutional"

Missouri Lawyers Weekly
May 15, 2009
Angela Riley

The 8th U.S. Circuit Court of Appeals has upheld the constitutionality of a law allowing for the civil commitment of a "sexually dangerous person."

The decision directly conflicts with a previous 4th Circuit ruling, which said Section 4248 of The Adam Walsh Child Protection and Safety Act was unconstitutional. The Adam Walsh Act was enacted in 2006 and named after the son of "America's Most Wanted" host John Walsh. Adam was kidnapped in 1981 and later found murdered. The act encompasses a wide number of issues designed to protect children from sexual exploitation and violent crimes. The act created a national sex offender registry, instituted new policies on how often sex offenders must update their whereabouts and created civil commitment procedures.

In the 8th Circuit case, Roger Dean Tom pleaded guilty to one count of sexual abuse of a minor. He was sentenced to 120 months in prison and housed in the Federal Medical Center in Rochester, Minn. He was scheduled to be released in October 2006, but his release was stayed after the United States filed a petition alleging a Rochester mental health staff member had examined Tom and determined that he is a sexually dangerous person. The Adam Walsh Act requires the district court to stay a release pending a hearing determining whether the person is sexually dangerous.

Tom's attorneys at the Federal Defender's Office of Minnesota moved to dismiss the proceeding, arguing that Section 4248 was unconstitutional because neither the Commerce Clause nor the Necessary and Proper Clause of the Constitution authorized its enactment. They also argued the section's enactment encroached on the powers awarded to the states under the 10th Amendment.

The district court agreed, and Tom's motion to dismiss was granted.

The issue before the 8th Circuit was one of first impression. No district court in the 8th Circuit has addressed The Adam Walsh Act's civil commitment procedures, said Tom's attorney, Kate Menendez, of the Federal Defender's Office of Minnesota. Mendendez also said the office has not seen another case involving federal civil commitments under the act since Tom's.

On appeal, the government argued that Section 4248 was needed for the operation of the federal prison and criminal justice systems, as well as to prevent federal crimes.

In making its decision, the 8th Circuit looked at the Supreme Court's decision in *Greenwood v. U.S.*, which determined that Congress was authorized by the Necessary and Proper Clause to enact legislation authorizing a civil commitment of a person incompetent to stand trial.

The appeals court applied the same reasoning in Tom's case.
"We conclude that Congress having been empowered by the Commerce Clause to criminalize and punish the conduct of which

Tom is guilty, has the ancillary authority under the Necessary and Proper Clause to provide for his civil commitment so that he may be prevented from its commission in the first place," Judge Diane E. Murphy wrote for the court.

The court also noted that many, if not most, sex offenders are housed outside of their home state or the state in which they were convicted. It is not unreasonable to assume that upon release, the sex offenders will travel outside of the state of their incarceration, the court said.

The court remanded the decision to the district court for a hearing to determine if Tom is a sexually dangerous person.

The 4th U.S. Circuit Court of Appeals has been the only other appellate court to address Section 4248's constitutionality. The court concluded in ***U.S. v. Comstock***, that the provision was unconstitutional because it "neither regulated economic activity nor activities substantially affecting interstate commerce and was therefore beyond the reach of the Commerce Clause." It also rejected the government's arguments the Necessary and Proper Clause could authorize the legislation.

Other district courts that have addressed the issue have split on the statute's constitutionality. District courts in Massachusetts and North Carolina said it was unconstitutional while district courts in Hawaii, Massachusetts and Oklahoma said it was.

The government has appealed the decision in the ***Comstock*** case to the U.S. Supreme Court. While the court has yet to accept transfer, it has granted a stay on the release of the inmate.

Menendez said that the Federal Defender's Office plans on appealing the court's decision and that the issue would be a good one for the Supreme Court to rule on.

"It does seem like there are a lot of contrary opinions about the constitutional issues and not the specific facts," she said. "There might not be other circuits that weigh on this particular issue for a long time because these cases are brought where these prisoners are located at—not where their case originated. There are only sexual predator treatment programs in prisons in certain parts of the country."

Messages left to the U.S. Department of Justice were not returned.

The case is *U.S. v. Tom*, 08-2345.

"4th Circuit Got It Right in *Comstock*"

Sex Crimes Blog
January 8, 2009
Corey Rayburn Yung

(In the interest of full disclosure, I did help out in a very minor way in the ***Comstock*** appeal, so I'm not a wholly disinterested spectator in this case.)

The Fourth Circuit issued a unanimous and very noteworthy AWA opinion today in a case that I have blogged about a few times before. In ***U.S. v. Comstock***, the Fourth Circuit affirmed the district court judgment that 18 U.S.C. 4248 of the Adam Walsh Act was unconstitutional because the federal government lacks the authority to enact the provision. Section 4248 concerns the civil commitment of sex offenders after incarceration. This is from the opinion:

> After carefully considering the Government's arguments, we conclude, for the reasons set forth below, that § 4248 does indeed lie beyond the scope of Congress's authority. The Constitution does not empower the federal government to confine a person solely because of asserted "sexual dangerousness" when the Government need not allege (let alone prove) that this "dangerousness" violates any federal law. We therefore affirm the judgment of the district court.

I have been arguing for quite some time that certain portions of the AWA are unlawful exercises of congressional power under the Commerce Clause so I'm extremely happy to finally see a federal appellate court reach a similar conclusion. I think the case against 4248 is stronger than that against SORNA provisions because there simply was no jurisdictional limitation in the civil commitment section. Given the lack of Congressional findings and jurisdictional statement, Congress was basically thumbing its nose at *Morrison* (which also concerned federal authority over sexual violence).

Eugene Volokh has chimed in and he is a little more critical of the opinion. From his post:

> At the same time, presumably civil commitment of sexual offenders is aimed at preventing repeat sexual offenses. (Let's set aside whether such civil commitment after the end of a sentence may sometimes deny people liberty in violation of the Due Process Clause; that's an issue unrelated to the federal power question, since it would apply equally to states.) And presumably someone who committed a federal sex crime (e.g., possession or trafficking of child pornography) is pretty likely to commit another crime of much the same variety—which will likely be a federal crime—and not just some other random state sex crime. If the Commerce Clause power to regulate commerce authorizes Congress to ban commerce in child pornography, and the Necessary and Proper Clause therefore authorizes Congress to ban even private possession of child pornography, then it's hard to see why the Necessary and Proper Clause wouldn't authorize continued detention of people who have shown

> a willingness to commit such federal crimes.

This was certainly the government's position, but I just don't know how you can reconcile such reasoning with the holding in *Morrison*. The Necessary and Proper Clause alone can never provide a basis for federal jurisdiction. It needs another jurisdictional hook, in this case the Commerce Clause. At the time of civil commitment, the prisoner (or in many cases under 4248, the former prisoner) has no connection to interstate commerce. He or she may have at the time of the original conviction, but that time has long since passed. Volokh argues that prevention of future sex crimes might be sufficient, but that rationale was explicitly rejected in *Morrison*. Even if you believe these particular persons are of a higher risk than the hypothetical tort defendants under VAWA, that risk seems unrelated to a basis for federal jurisdiction. Volokh's argument similarly is in conflict with *Lopez*. Why couldn't the Necessary and Proper Clause have provided sufficient basis for preventing guns from being possessed near schools since such possession could well increase the risk of gun violence toward children?

Volokh then takes his argument in a different direction (which was not in the briefing that I remember) that presents more difficulty than his initial claim:

> One way of thinking about it might be to think about the historically established practice of civil commitment of people found not guilty by reason of insanity. If someone is tried for a federal crime and found insane, he won't be imprisoned for the crime—since he's not criminally guilty—but he will be locked up in a mental hospital so long as he is thought to be dangerous. I think that's right, but how does it fit the panel's decision? After all, the person is not guilty, so Congress can't appeal to its power to punish federal criminals (just as the people in this case can't be further criminally punished, since their terms are up). True, we worry that this insane person will commit another crime, but under the panel's reasoning, that might well be a state crime. So must Congress release such people unless it gets a state to agree to take custody of them? Perhaps that's the right answer, since Congress lacks the enumerated power to detain them—but I'm skeptical that this is so.

I think the initial decision to send someone to a civil facility based upon a finding of insanity is clearly tied to the Commerce Clause in the same way a criminal sentence would be. That jurisdictional hook exists based upon the original crime. I think the tougher issue is the decision to release or not release someone from a civil facility upon completion of their treatment. Such cases seem somewhat analogous to the 4248 provisions. However, I think there is a strong argument for the Necessary and Proper Clause in the insanity case because a decision on further treatment or release simply must be made—it is "necessary." In contrast, the 4248 commitment is a wholly separate procedure that bears no relation to the original conviction (as proven by the fact that the government has attempted to use the procedure for persons not convicted for sex offenses).

Volokh concludes by stating that this case is likely headed to the USSC. I'm not so sure. First, there will almost certainly not be a circuit split on this issue simply because almost all of the cases of this type go

through the same district in North Carolina as that is the site of the only appropriate federal facility. (Edit: As noted in the comments, there is at least one other facility so the possibility of a circuit split is certainly present. I think it is much more likely now that the case will go to the USSC). Second, since this provision affects so few people, I'm not sure it is worth USSC time. Ultimately, I think the USSC is likely to take up a SORNA case instead simply because there is a much tougher legal issue (since a jurisdictional limitation exists) and a far larger number of people are affected by the statute (500,000+). Either way, it is about time for the Court to clean up the Commerce Clause mess after *Raich*, so I hope they look at one of the AWA provisions.

Update: Illya Somin, also at Volokh Conspiracy, has added his thoughts as well. Somin, as exhibited in our previous debates about different provisions of the AWA, takes a very broad view of "economic activity" as defined by *Raich*. Notably, the government did not defend his position in its briefs in ***Comstock***. In fact, the government banked heavily on the Necessary and Proper Clause argument that was well-captured by Volokh's post. From Somin's post:

> Finally, Raich restored the so-called "rational basis" test for judicial review of Commerce Clause cases. In plain English, that means that the government doesn't have to actually prove that Section 4248 regulates "economic activity" or that it is part of a broader regulatory scheme. Rather, the government can win simply by showing that Congress might have had some "rational" reason for believing that one of these two conclusions is correct. And by "rational," the Court means merely that there is some possibility, even if a very remote one, that Congress' putative reasoning might be sound.
>
> Unfortunately, the ***Comstock*** decision dismisses *Raich* in a brief footnote that ignores most of the considerations discussed here. The Fourth Circuit does rely heavily on the Court's two earlier Commerce Clause decisions in *United States v. Lopez* and *United States v. Morrison*, but essentially ignores the way in which *Raich* greatly undercuts those precedents by virtually confining them to their facts. I discuss the impact of *Raich* on *Lopez* and *Morrison* in my article linked above; see also this excellent piece by co-conspirator Jonathan Adler.

I continue to think that Somin overestimates the degree to which courts will adopt such an expansive position as to the definition of "economic activity." Even in cases where courts have upheld other provisions of the AWA (specifically, SORNA), they have most often done so under the 2nd *Lopez* prong. It isn't clear how rational basis applies in such cases. The government briefing in ***Comstock*** was confused as to which prong they felt justified 4248, so the rational basis discussion was not really played out. Hence, the 4th Circuit's dismissal of *Raich* in a footnote seems appropriate.

"U.S. Plans to Detain Worst Sex Offenders"

USA Today
December 14, 2006

The Justice Department is planning to detain an undetermined number of violent sex offenders after they have completed their federal prison sentences as part of a program aimed at protecting children, U.S. Attorney General Alberto Gonzales says.

The initiative, modeled after controversial "civil commitment" laws in 18 states that have kept more than 2,000 sex offenders locked up after they have served their sentences, will identify federal inmates who authorities think would pose a threat if they were released without treatment.

It's unclear how officials would decide which offenders should be held past their sentences. The potential impact on the federal prison system could be significant: Of the system's 190,000 inmates, 11,000 are sex offenders.

"We're working with the Bureau of Prisons to see how we implement" the plan, Gonzales said in an interview. "It's an ongoing project."

Civil commitment laws, which survived a U.S. Supreme Court challenge in 1997, have been one of the most extreme measures states have used to clamp down on repeat sex offenders. This year, the federal government won authority to pursue such a strategy with the passage of the Adam Walsh Child Protection and Safety Act.

"Congress has been creative," Gonzales told federal prosecutors during a recent gathering in Washington. "They've given us the right to pursue (civil commitments) and others like it, and we are going to."

Dennis Doren, a Wisconsin psychologist and a consultant to the Bureau of Prisons, says U.S. authorities are reviewing the backgrounds of imprisoned sex offenders to determine who might pose a threat if they were released.

"They are looking at lots of cases."

Civil commitment programs for sex offenders have passed legal muster on the state level because courts have viewed them as being similar to laws that allow open-ended confinements of mentally ill criminals until they are deemed well enough to return to society.

For years, authorities from Virginia to Washington state have detained sex offenders well past their release dates and kept them in state treatment facilities. Typically, civil trials determine whether offenders should stay in custody past their sentences, be released or submit to a form of monitoring similar to parole.

Since 2003, 41 sex offenders have been committed to indefinite terms of treatment in Virginia. In Minnesota, 342 offenders have been detained since 1994.

Of the more than 2,000 sex offenders who have been committed across the nation, only about 10 percent have been released after achieving an acceptable level of rehabilitation, Doren says.

Civil rights advocates have blasted commitment programs, saying they unfairly extend punishments beyond sentences levied by judges and juries.

"This is merely camouflage for lifetime sentences for some offenses," says William Buckman of the National Association of Criminal Defense Lawyers' sex offender policy task force. "It's hard to consider this a rational criminal justice strategy."

"New Law Designed to Provide More Protection for Children"

Baton Rouge Advocate
August 14, 2006
Sonya Kimbrell

Federal officials say a law recently passed by the Congress and signed by President Bush gives teeth to efforts to investigate and prosecute crimes involving sexual exploitation of children.

"This is just one piece of a larger effort," U.S. Attorney David Dugas said of the Adam Walsh Child Protection and Safety Act, which President George W. Bush signed into law in late July.

The Adam Walsh Act is part of an effort called Project Safe Childhood, an initiative launched earlier this year by the U.S. Department of Justice. The project's mission is to combat technology-related sexual-exploitation crimes against children. The initiative is based on Project Safe Neighborhoods, a national program started in 2001 to reduce gun crime.

Both initiatives coordinate federal, state, local and tribal law enforcement as well as prosecutors, community leaders and nonprofit agencies in each federal judicial district. There are several points in the law that give broader federal authority, but the most significant change is the federal database of sex offenders.

Registration requirements vary by state. Though Megan's Law, a federal law, requires states to release information to the public about convicted sex offenders, the law does not require active notification nor does it specify how the information is to be released.

Megan's Law was named after Megan Kanka, a 7-year-old New Jersey girl who was raped and murdered in 1994 by a neighbor with a history of being a child-sex predator.

Louisiana passed a law in 1997 authorizing a central registry of sex offenders maintained by the Bureau of Criminal Investigation. Information is available online by parish and includes photographs of the offenders, the offenders' addresses, physical descriptions, known aliases and the nature of their crimes. There are more than 7,000 individuals registered on Louisiana's registry.

The Adam Walsh Act specifies that registration information include name, Social Security number, address, license plate information and automobile description, physical description, criminal history, photo, finger and palm prints, and a DNA sample.

The lack of a national database has made it easy for sex offenders to move to another state and not register in their new location, Dugas said.

The Adam Walsh Act also targets sex offenders who use technology such as the Internet to entice children or to distribute child pornography.

"Strangers can get into a home through the Internet; sexual predators have more access to children via the Internet," Dugas said.

In August 2005, a California man was indicted on federal charges for luring a 13-year-old Zachary girl to Texas for sex. They allegedly met in an Internet chat room.

"That happened right here. That crime couldn't have happened without the Internet," Dugas said.

Already, said Dugas and Baton Rouge U.S. Marshal Carey Jenkins, there have been many coordinated efforts among local, state and federal officials in tracking sex offenders. Joining those efforts have been local agents with the FBI, the Louisiana Cybercrimes Task Force and Internet Crimes Against Children Task Force.

"The cooperation has been good, but this gives statutory power to track these people," Jenkins said of the new law.

The Adam Walsh Act designates the U.S. Marshals Service as the lead agency to track fugitive felons who fail to register when they move.

A news release from the U.S. Marshals said unregistered sex offenders will be a priority for deputy U.S. marshals nationwide.

Briscoe v. Virginia

07-11191

Ruling Below: *Magruder v. Virginia*, 275 Va. 283, 657 S.E.2d 113 (Va. 2008).

Virginia's state statutory scheme provides that a certificate of forensic laboratory analysis may be entered into evidence at a criminal trial without testimony from the technician who prepared the report unless the defendant calls the analyst to testify as an adverse witness. Defendants argue that this procedure violates their Sixth Amendment right of confrontation.

Question Presented: If the state allows the prosecutor to introduce a certificate of forensic laboratory analysis without presenting testimony of the analyst who prepared the certificate, does the state avoid violating the confrontation clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

Michael Ricardo Magruder
v.
Commonwealth of Virginia;

Sheldon A. Cypress
v.
Commonwealth of Virginia;

Mark A. BRISCOE
v.
Commonwealth of VIRGINIA

Supreme Court of Virginia

Decided February 29, 2008

[Excerpt: some footnotes and citations omitted]

OPINION BY Justice CYNTHIA D. KINSER.

In each of these appeals, the defendant claims that the admission into evidence, pursuant to Code § 19.2-187, of a certificate of analysis in the absence of testimony at trial from the person who performed the particular analysis and prepared the certificate violated his rights under the Confrontation Clause of the Sixth Amendment. Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis. We will therefore

affirm the judgments of the Court of Appeals upholding the various convictions at issue.

I. RELEVANT FACTS AND PROCEEDINGS

Although these appeals involve a common dispositive question of law, which we review de novo, *Torloni v. Commonwealth,* 274 Va. 261, 267 (2007), their facts and procedural histories differ. Therefore, we will first summarize the relevant facts of each case and then analyze the dispositive issue that the appeals share. The appeal by Mark A. Briscoe involves one additional issue that we will address separately following the analysis of the dispositive issue.

* * *

B. *Cypress v. Commonwealth*

Sheldon A. Cypress was a passenger in an automobile being driven by his cousin when a trooper with the Virginia State Police stopped the vehicle because of its improperly tinted windows. The driver consented to a search of the vehicle. During that search, the trooper found, among other things, two plastic bags—one under the driver's seat and one under the passenger's seat—each containing a "chunky white substance" that the trooper suspected was crack cocaine. Subsequent forensic testing at the Department of Forensic Science revealed that the substance was cocaine, totaling 60.5 grams. A certificate of analysis reporting those results bore the signature of the forensic analyst who conducted the testing and included an attestation that she had performed the analysis.

Cypress was indicted in the Circuit Court of the City of Chesapeake for possession of cocaine with the intent to distribute, having previously committed the offense of distribution or possession with the intent to distribute, in violation of Code § 18.2-248(C). At a bench trial, the Commonwealth moved to admit the certificate of analysis into evidence. Cypress objected, arguing that under the holding in *Crawford* the certificate fell into a core class of testimonial evidence and was therefore inadmissible in the absence of testimony from the person who performed the analysis of the seized substance. The circuit court overruled the objection, holding that "the scientific results stated in the certificate of analysis are not testimonial statements as that term is defined or described in *Crawford v. Washington.*"

Cypress did not call the forensic analyst as a witness and presented no evidence. The circuit court convicted Cypress of possession of cocaine with the intent to distribute, second or subsequent offense, and sentenced him to imprisonment for 15 years, with 10 years suspended, and a fine of $1,000.

The Court of Appeals denied Cypress' appeal in an unpublished per curiam order. Citing its decision in *Brooks,* the Court of Appeals stated: "assuming a certificate of analysis constitutes testimonial evidence under *Crawford,* a defendant's confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1." The Court of Appeals, however, held that Cypress waived his right to confront the forensic analyst who prepared the certificate of analysis because he did not utilize the procedure set forth in Code § 19.2-187.1. For the reasons stated in the January 3, 2007 order, a three-judge panel of the Court of Appeals also denied

the petition for appeal. Now on appeal to this Court, Cypress raises two assignments of error:

> I. The trial court erred by allowing into evidence the certificate of analysis over Defendant's objection that its introduction violated his Sixth Amendment Confrontation Clause rights as articulated in *Crawford v. Washington* and its progeny; the trial court erred by finding Cypress guilty of possession with intent to distribute cocaine where the only evidence that he possessed cocaine came from this drug certificate which should have been excluded from evidence[.]
>
> II. The Court of Appeals erred by ruling that Defendant waived his Confrontation Clause rights by declining to subpoena the chemist who prepared the certificate and this ruling impermissibly, and unconstitutionally, required Defendant to take affirmative steps to safeguard his Confrontation Clause rights[.]

C. *Briscoe v. Commonwealth*

Police officers with the City of Alexandria Police Department executed a search warrant for the apartment of Mark A. Briscoe. During the search, the officers seized suspected cocaine scattered about in the apartment's kitchen area, as well as two scales, a razor blade, a 100-gram weight, a box of plastic sandwich bags, and a plate. Many of these items appeared to have deposits of drug residue on them. In a search of Briscoe's person, the police seized a white, rock-like substance wrapped in plastic from the pocket of his shorts.

The police submitted the items of suspected cocaine to the Department of Criminal Justice Services, Division of Forensic Science, for testing. In two certificates of analysis, a forensic analyst reported that the confiscated substances were "solid material" cocaine totaling 36.578 grams. The certificates also contained the analyst's signature and attestation that she performed the analyses and that the certificates accurately reflected the results of those analyses.

Briscoe was indicted in the Circuit Court of the City of Alexandria for possession with the intent to distribute cocaine, in violation of Code § 18.2-248(C), unlawful transportation of cocaine into the Commonwealth with the intent to distribute, in violation of Code § 18.2-248.01, and conspiracy to distribute cocaine, in violation of Code §§ 18.2-248 and 18.2-256. During a bench trial, the Commonwealth sought to admit into evidence the two certificates of analysis. Briscoe objected, arguing that their admission, without the forensic analyst present to testify, violated his confrontation rights under the Sixth Amendment. Relying on the decision in *Crawford,* Briscoe asserted that the certificates were testimonial because they contained solemn declarations or affirmations that the Commonwealth sought to use in order to establish an element of the charged offenses. Briscoe also claimed that the procedure provided in Code § 19.2-187.1 permitting a defendant to call a forensic analyst as an adverse witness does not protect his confrontation rights and actually imposes an unconstitutional affirmative step that he must take in order to assert his Sixth Amendment right of confrontation.

The circuit court overruled Briscoe's objection, holding that the procedure in

Code § 19.2-187.1 preserved his right to cross-examine the forensic analyst. In response to the circuit court's ruling, Briscoe further argued that the statutory right to call the forensic analyst as an adverse witness does not satisfy his constitutional right to confront the Commonwealth's witness and also impermissibly shifts the burden to produce evidence to a criminal defendant. The circuit court did not change its ruling.

Briscoe did not call the forensic analyst to testify and presented no evidence. The circuit court convicted Briscoe of possession with the intent to distribute cocaine and transportation of cocaine into the Commonwealth with the intent to distribute. The court sentenced Briscoe to a total of 20 years of incarceration, with all but 5 years and 8 months suspended.

The Court of Appeals denied Briscoe's appeal in an unpublished per curiam order. Assuming, without deciding, that the certificates of analysis constituted "testimonial" evidence under *Crawford,* the Court of Appeals held that Briscoe's right to confront the forensic analyst was protected by the procedure provided in Code § 19.2-187.1. The court further held that, by failing to follow that statutory procedure, Briscoe waived his constitutional right to confront the forensic analyst who prepared the certificates. Briscoe sought review of the Court of Appeals per curiam order, and a three-judge panel denied that petition for appeal for the reasons stated in the January 18, 2007 order.

On appeal to this Court, Briscoe raises this assignment of error with regard to the certificates of analysis:

> I. The Court of Appeals erred in upholding the trial court's finding that Defendant's constitutional right to confront and cross-examine adverse witnesses was not violated by the admission of the certificates of drug analysis into evidence.

II. ANALYSIS

A. *Confrontation Clause*

The dispositive issue before us is whether the procedure set forth in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment, and if so, whether Magruder, Cypress, and Briscoe (collectively, the defendants) waived their Confrontation Clause challenges to the admissibility of the respective certificates of analysis by failing to utilize that procedure. Before resolving that issue, we first turn to the decision of the Supreme Court of the United States in *Crawford v. Washington,* since the defendants relied on it in claiming that admission into evidence of the certificates of analysis violated their confrontation rights. Prior to that decision, the Confrontation Clause had not been construed to bar the admission of an unavailable witness' hearsay statement against a criminal defendant if the statement bore sufficient "indicia of reliability" either by falling within a "firmly rooted hearsay exception" or by "a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). In *Crawford,* the Supreme Court rejected the *Roberts* analysis and held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." 541 U.S. at 68.

Now, under *Crawford,* the question whether admission of a hearsay statement against a

criminal defendant violates the Confrontation Clause turns on whether the statement is "testimonial" in nature. The Supreme Court declined to provide a comprehensive definition of the term "testimonial" in *Crawford,* but it did state that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68.

In these appeals, it is not necessary to decide whether a certificate of analysis is "testimonial." Even if we assume the certificates in the cases at bar are testimonial, the decision in *Crawford* did not address the issues before us, i.e., whether a prescribed statutory demand procedure adequately protects a criminal defendant's rights under the Confrontation Clause and whether failure to follow that procedure waives the right to confront a particular witness.

We now begin our analysis by examining the two relevant statutes, Code §§ 19.2-187 and 19.2-187.1. The first statute permits a certificate of analysis, when "duly attested" by the "person performing an analysis or examination" in certain laboratories, to be admitted into evidence "[i]n any hearing or trial of any criminal offense . . . as evidence of the facts therein stated and the results of the analysis or examination referred to therein." Code § 19.2-187. The only proviso is the requirement that the certificate of analysis be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* The second statute, Code § 19.2-187.1, establishes a procedure that presents an accused with the opportunity to question the person performing the analysis or examination as an adverse witness. That statute states:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth. Code § 19.2-187.1.

In each of the cases before us, the Court of Appeals relied on its decision in *Brooks* to hold that the defendants waived their right to confront the forensic analysts who prepared the certificates of analysis admitted into evidence at their respective trials because they failed to utilize the statutory procedure available to them. In *Brooks,* the accused objected to the introduction of certificates of analysis into evidence on the basis that "the Commonwealth's failure to call the forensic scientist who tested the substances denied him his constitutional right to confrontation under *Crawford.*" 49 Va. App. at 158. The Court of Appeals rejected that argument, holding that "Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial and that a defendant's failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.* at 164-65.

Noting that an accused can voluntarily waive the right of confrontation and that reasonable requirements may be attached to the assertion of federal constitutional rights,

the Court of Appeals reasoned that, in light of the decision in *Crawford*, "Code §§ 19.2-187 and 19.2-187.1[ ] are merely a request to the defendant to stipulate to the admissibility of the contents of any properly filed certificates of analysis" and that when an accused "waits until trial to assert his right to cross-examine the analyst who prepared a particular certificate, he accepts the request to stipulate and waives his right to confront that witness." *Id.* at 167. Continuing, the Court of Appeals explained that, if an accused does not wish to accept the requested stipulation, "Code § 19.2-187.1 provides the mechanism by which he may reject the request and have the analyst summoned to appear at trial at the cost of the Commonwealth in order to be subject to cross-examination." *Brooks,* 49 Va.App. at 167-68.

Finally, the Court of Appeals held that the argument claiming the procedure in Code § 19.2-187.1 unconstitutionally places the burden on an accused to present evidence in order to exercise his confrontation rights was not before it because the defendant did not summon the forensic analyst or ask the Commonwealth to do so. Thus, according to the Court of Appeals, the trial court never had the occasion to rule on any challenge regarding the order of proof.

The defendants here assert that *Brooks* was wrongly decided and argue that they did not waive their Sixth Amendment right to confront the forensic analysts by failing to call those persons as adverse witnesses under the provisions of Code § 19.2-187.1. According to the defendants, the procedure provided in Code § 19.2-187.1 does not adequately protect the Sixth Amendment right of confrontation for several reasons: (1) the statute requires an accused to take impermissible affirmative steps to secure the right to confront the forensic analyst; (2) the statute does not provide any notice that failure to utilize its provisions will automatically waive the right to confront the forensic analyst; (3) the statute does not insure that a waiver of the Sixth Amendment right to confront the forensic analyst is knowing, voluntary, and intelligent; (4) the statute by its terms addresses the order of proof and impermissibly requires an accused to present evidence in order to preserve confrontation rights; and (5) the statute allows an accused to cross-examine the forensic analyst only after a certificate of analysis has already been admitted into evidence.

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. This guarantee is enforced against the states through the Fourteenth Amendment. The Confrontation Clause secures the "literal right to 'confront' the witness at the time of trial." *California v. Green,* 399 U.S. 149, 157 (1970). "The substance of the constitutional protection is . . . seeing the witness face to face, and . . . subjecting him to the ordeal of a cross-examination." *Mattox v. United States,* 156 U.S. 237, 244.

The right to confront "(1) insures that the witness will give his statements under oath . . . ; (2) forces the witness to submit to cross-examination . . . ; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement." *Green,* 399 U.S. at 158. "The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an

accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

With this understanding of the Confrontation Clause, the question whether the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's right to confront the forensic analyst turns on whether the statute supplies the "elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Craig*, 497 U.S. at 846. We conclude that it does. Pursuant to Code § 19.2-187.1, the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so. At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them. The trier of fact would then have had the opportunity to observe the demeanor of the witnesses. In short, if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts. Contrary to the defendants' position, the Confrontation Clause does not insure that opportunity before a certificate of analysis is admitted into evidence.

Nevertheless, the defendants argue that this statutory procedure impermissibly burdens the exercise of their right under the Confrontation Clause by requiring them to take certain affirmative steps in order to assert that right. While "[m]ost . . . Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case," *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). For example, " 'trial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' " *Michigan v. Lucas*, 500 U.S. 145, 149 (1991). Even after *Crawford*, the Confrontation Clause does not bar the admission of testimonial hearsay statements if the declarant is unavailable, so long as the accused had a prior opportunity to cross-examine the witness. 541 U.S. at 68.

Moreover, "[a] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955). Virginia has adopted several provisions that require criminal defendants to take certain procedural steps in order to exercise or vindicate a myriad of constitutional rights. Pursuant to Code § 19.2-266.2, an accused must file a written motion to suppress evidence allegedly obtained in violation of the Fourth, Fifth, or Sixth Amendments no later that seven days before trial. Failure to follow this statutory requirement results in a waiver of an accused's constitutional challenge to the admissibility of the evidence. *Schmitt v. Commonwealth*, 262 Va. 127, 145-46 (2001). Similarly, the provisions of Code § 18.2-67.7 impose notice-and-hearing requirements in order to introduce evidence concerning a victim's

past sexual conduct with a person other than the accused. Such requirements are not unconstitutional but "serve[ ] legitimate state interests in protecting against surprise, harassment, and undue delay." *Lucas,* 500 U.S. at 152-53.

An accused must also, upon request of the Commonwealth, disclose whether he intends to introduce evidence to establish an alibi. Rule 3A:11(c)(2). In *Williams v. Florida,* 399 U.S. 78 (1970), the Supreme Court held that a similar alibi-notice rule did not violate the Fifth Amendment. The Court observed that the rule, "[a]t most . . . only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial." *Id.* at 85, 90.

"The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court.' " *Michel v. Louisiana,* 350 U.S. 91, 93. The provisions of Code § 19.2-187.1 pass this test. We agree with the holding of the Court of Appeals in *Brooks:* "Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial." 49 Va.App. at 164.

> Legislatures may pass laws regulating, within reasonable limits, the mode in which rights secured to the subject by bills of right and constitutions shall be enjoyed, and if the subject neglects to comply with these regulations he thereby waives his constitutional privileges.

State v. Berg, 237 Iowa 356 (Iowa 1946). Furthermore, nothing in the records before us suggest that any defendant was somehow precluded from utilizing the procedure provided in Code § 19.2-187.1 or that the procedure was unduly burdensome.

The defendants do, however, claim that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness. This argument is not cognizable under the Confrontation Clause. Instead, it raises due process concerns that are not properly before us in these appeals. Because the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness." Like the situation in *Brooks,* "the trial court never had occasion to address the proper order of proof." 49 Va.App. at 168.

Finally, it is undisputed that a criminal defendant can waive the right to confrontation. The decision in *Crawford* did not alter that fact. *Hinojos-Mendoza,* 169 P.3d at 668. Indeed, a criminal defendant can waive a panoply of constitutional rights.

The defendants, however, contend that any waiver of confrontation rights cannot be presumed from a silent record and that, given the absence of any notice of a waiver in Code § 19.2-187.1, they did not knowingly, intelligently, and voluntarily waive their Sixth Amendment right to confront the forensic analysts. This Court, however, has never held that the record, in all circumstances, must affirmatively reveal that a criminal defendant personally waived his right to confrontation. In *Bilokur v. Commonwealth,* 221 Va. 467, 474 (1980),

we concluded that a defendant's "silence was tantamount to assent" that an incriminating extrajudicial statement would be admitted by stipulation. *Id.* We held "that the defendant, acting through counsel, waived his right to invoke the constitutional guarantee of confrontation." *Id.*

We recognize that "[w]aiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Allen v. Commonwealth,* 252 Va. 105, 111 (1996). "What suffices for waiver depends on the nature of the right at issue." *New York v. Hill,* 528 U.S. 110, 114 (2000). As the Supreme Court explained:

> "Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano,* 507 U.S. 725, 733 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial." *Taylor v. Illinois,* 484 U.S. 400 (1988). As to many decisions pertaining to the conduct of the trial. the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Link v. Wabash R. Co.,* 370 U.S. 626, 634 (1962). Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last. *Id.* at 114-15.

The provisions of Code §§ 19.2-187 and 19.2-187.1 adequately inform a criminal defendant of the consequences of the failure to exercise the right to have a forensic analyst present at trial for cross-examination. Pursuant to Code § 19.2-187, a "duly attested" certificate of analysis that has been timely filed with the appropriate clerk of court is "admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein." The provisions of Code § 19.2-187.1 then inform a criminal defendant about what steps to take in order to secure the physical presence of the forensic analyst and subject that person to an oath, cross-examination, and a credibility determination by the trier of fact—the elements of confrontation. Once the forensic analyst appears at trial for cross-examination, any Confrontation Clause problem disappears.

Based on the provisions of Code §§ 19.2-187 and 19.2-187.1, no criminal defendant can seriously contend that he is not on notice that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis unless he utilizes the procedure provided in Code § 19.2-187.1. Failure to use the statutory procedure obviously waives the opportunity to confront the forensic analyst. Additionally, "everyone is conclusively presumed to know the law—that is, he is estopped from denying such knowledge." *King v. Empire Collieries Co.,* 148 Va. 585, 590 (1927). Thus, we reject not only the

defendants' contention that the statutes need to contain an explicit notice outlining the consequences of failing to utilize the procedure set forth in Code § 19.2-187.1, but also the assertion that their waiver of confrontation rights was not voluntary, intelligent, and knowing. Confrontation Clause rights are waived every day in this Commonwealth when a criminal defendant's attorney chooses not to object to the admission of hearsay evidence or stipulates to the admission of evidence. We have never required, nor should we, that the record affirmatively reflect a defendant's knowing, voluntary, and intelligent agreement to such waivers.

Thus, we hold that the procedure in Code § 19.2-187.1 adequately safeguards a criminal defendant's rights under the Confrontation Clause and that the defendants' failure in these cases to utilize that procedure waived their right to be confronted with the forensic analysts, i.e., to enjoy the elements of confrontation. Other courts have reached similar conclusions. For example, in *Hinojos-Mendoza,* the court addressed a Colorado statute that makes "[a]ny report . . . of the criminalistics laboratory" admissible into evidence "'in the same manner and with the same force and effect as if the employee or technician . . . had testified in person." 169 P.3d at 665. The court noted that pursuant to the statute, "[a]ny party may request that such employee or technician testify in person at a criminal trial on behalf of the state . . . by notifying the witness and other party at least ten days before the date of such criminal trial." *Id.* Failure to make a timely request was held to amount to a waiver of the right to confront the technician. In concluding that the statute does not run afoul of the Confrontation Clause, the court explained that the statutory procedure "for ensuring the presence of the lab technician at trial does not deny a defendant the opportunity to cross-examine the technician, but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation—only the timing of the defendant's decision is changed." *Id* at 668.

The court further noted that when "a defendant chooses not to take advantage of the opportunity to cross-examine a witness, the defendant has not been denied his constitutional right to confrontation." *Id.* Thus, the court held that, "where a defendant . . . is represented by counsel, the failure to comply with the statutory prerequisites . . . waives the defendant's right to confront the witness just as the decision to forgo cross-examination at trial would waive that right." *Id.* at 670.

We recognize that some courts have reached contrary conclusions, but we are not persuaded by their rationales.

Therefore, we hold that the Court of Appeals did not err in affirming the judgments of the circuit courts admitting into evidence the respective certificates of analysis at issue in these appeals.

* * *

III. CONCLUSION

For these reasons, we will affirm the judgment of the Court of Appeals in each of these appeals.

Record No. 070762 - **AFFIRMED.**
Record No. 070815 **AFFIRMED.**
Record No. 070817 **AFFIRMED.**

DISSENT

JUSTICE KEENAN, with whom CHIEF JUSTICE HASSELL and JUSTICE KOONTZ join, dissenting.

Today the majority holds that a defendant's failure to exercise a statutory right under Code § 19.2-187.1 results in the forfeiture of his Sixth Amendment right "to be confronted with the witnesses against him." In my view, this analysis confuses the waiver of a statutory right with the waiver of a constitutional right. Because the certificates of analysis at issue were "testimonial" hearsay, within the meaning of *Davis v. Washington,* 547 U.S. 813 (2006), and *Crawford v. Washington,* 541 U.S. 36 (2004), their admission into evidence under Code § 19.2-187 in the prosecution's cases in the absence of supporting testimony from certificates' authors, violated the defendants' Confrontation Clause rights. Thus, I disagree with the majority's holding that Code § 19.2-187.1 preserves a defendant's Confrontation Clause rights, or that a defendant's failure to exercise rights accorded under that statute results in the surrender of Confrontation Clause rights.

I. "TESTIMONIAL" CHARACTER OF EVIDENCE

I would hold that the certificates of analysis are "testimonial" hearsay based on the Supreme Court's analysis of that term in *Davis* and *Crawford.* In particular, the analysis in *Davis* instructs us to examine the purpose for which a non-testifying witness initially made the statements that were later introduced in evidence at a criminal trial, and to inquire whether the person making the hearsay statements was "testifying" and "acting as a witness." *See Davis*, 547 U.S. at 828.

In *Crawford,* the Supreme Court held that the Sixth Amendment forbids the admission in a criminal trial of "testimonial" hearsay statements made against an accused by a witness who does not testify at the trial, unless the witness is unavailable or the defendant had a prior opportunity to cross-examine that witness. At the defendant's criminal trial in *Crawford,* the trial court admitted in evidence a tape-recorded statement that the defendant's wife made to police officers during a police investigation of the crime for which the defendant was charged. The Supreme Court held that the defendant's confrontation rights were violated by admission of his wife's tape-recorded statement because the statement was "testimonial" in nature and the wife did not testify at trial. Although the Supreme Court in *Crawford* declined to provide a comprehensive definition of the term "testimonial," the Court indicated that some statements would always be categorized as "testimonial," including ex parte testimony given at a preliminary hearing and statements taken by police officers during the course of a police interrogation.

In *Davis,* the Supreme Court revisited the definition of "testimonial" hearsay. The Court held that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to

later criminal prosecution. 547 U.S. at 822.

In *Davis,* the Court considered two separate situations in which the statements of a witness, who did not testify at trial, were admitted in evidence concerning a defendant's illegal conduct. In the first situation, the Court held that statements made to law enforcement personnel during a "911" emergency telephone call were not "testimonial" in nature because the purpose of the statements was to elicit assistance during an ongoing emergency. The Court reasoned that the speaker was not "acting as a witness" or "testifying" because, unlike a witness, she was describing events "as they were actually happening, rather than describ[ing] past events." *Id.* at 827-28.

The second situation in *Davis* concerned statements recorded in an affidavit obtained by police following a domestic dispute. The Court concluded that these statements were "testimonial" in character because the declarant's purpose in making the statements was not to describe an ongoing emergency situation, but to supply information in a police investigation about past criminal conduct. The Court concluded that the statements were "inherently testimonial" because they were "an obvious substitute for live testimony," and they did "precisely what a witness does on direct examination." *547 U.S. at 829-30.*

Based on the holdings in *Davis* and *Crawford,* I would conclude that a certificate of drug analysis, in function, "acts as a witness" against an accused. Much like any other expert witness, the scientist preparing a certificate of analysis does so based on a factual foundation supplied from past events. Thus, the certificate admitted under Code § 19.2-187.1 functions in the same manner as expert witness testimony because the certificate describes the scientist's procedures and conclusions concerning the material submitted for analysis. The holding in *Davis* further reinforces the "testimonial" nature of a certificate of analysis, because the certificate is created "to establish or prove past events potentially relevant to later criminal prosecution." *See Davis*, 547 U.S. at 822. A forensic scientist prepares the certificates in these cases for the purpose of proving a critical element of a criminal offense, namely, that the chemical sample submitted for analysis is an illegal substance. In the parlance of *Davis,* the certificates of analysis in the present cases functioned as "an obvious substitute for live testimony," because the Commonwealth introduced them in lieu of the scientists' testimony, and otherwise would have been required to establish the illegal nature of the substances by presenting actual testimony from the scientists themselves.

Applying additional rationale employed by the Supreme Court in *Davis,* I also observe that the forensic scientists' analyses were not performed under circumstances of an emergency or contemporaneously with the commission of the crimes, but were accomplished well after the criminal events had transpired. In fact, the scientists prepared the certificates in response to police investigations.

Moreover, the certificates fall into the category of "formalized testimonial materials, such as affidavits," which the Supreme Court in *Crawford* included in its examples of the types of statements that would be considered testimonial. The certificates contain a "solemn declaration or affirmation" by the forensic scientists who prepared them, in conformance with the requirement of Code § 19.2-187 that such certificates be "duly attested" before being

admitted in evidence. *See Crawford,* 541 U.S. at 51.

Based on the holdings in *Davis* and *Crawford,* I would conclude that the certificates of analysis admitted in evidence in the present cases served to "bear testimony" against the defendants and, therefore, were "testimonial" evidence within the meaning of those holdings. I would further conclude that the defendants in these cases had a Sixth Amendment right to be confronted with the testimony of the forensic scientists who prepared the certificates, because the Commonwealth failed to demonstrate that the scientists were unavailable or that the defendants had a prior opportunity to cross-examine them.

II. VIOLATION OF CONFRONTATION CLAUSE RIGHTS

I would further hold that the defendants' Confrontation Clause rights were violated when the certificates of analysis were admitted in evidence under Code § 19.2-187. The Confrontation Clause is worded in the passive, rather than in the active, voice. Thus, under that constitutional guarantee, an accused enjoys the right "to be confronted" by the prosecution with the witnesses against him.

As the majority correctly observes, the Sixth Amendment confrontation right has long been held to include a defendant's "opportunity for effective cross-examination." This opportunity is "one of the safe-guards essential to a fair trial," and is "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution." *Pointer,* 380 U.S. at 404. The Confrontation Clause "ensure[s] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *State v. Craig,* 497 U.S. 836, 846 (1990).

This Court consistently has recognized that in criminal trials, the Confrontation Clause preserves for a defendant the right to cross-examine prosecution witnesses. The opportunity for effective cross-examination of prosecution witnesses, however, presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case. Thus, preservation of the Sixth Amendment confrontation right requires that the prosecution call a defendant's accusers as witnesses to actively confront the defendant.

Code § 19.2-187 forces a defendant to relinquish his right "to be confronted" in the prosecution's case in chief, because the statute permits a timely-filed certificate of analysis to be admitted automatically in the absence of testimony from the scientist who prepared the certificate. That statute allows admission of the certificate irrespective whether a defendant chooses to call the forensic scientist to testify in his own case under the provisions of Code § 19.2-187.1. Thus, I would conclude that a Confrontation Clause violation occurred in the present cases because the defendants were not able to subject the contents of the certificates of analysis to adversarial scrutiny before the prosecution concluded its cases in chief.

III. WAIVER INAPPLICABLE

The provisions of Code § 19.2-187.1 did not remedy this Confrontation Clause violation. That section provides a criminal defendant the statutory right to call the forensic scientist who prepared a certificate of analysis as a witness in the defendant's own case. Thus, Code § 19.2-187.1 merely

provides a criminal defendant the opportunity to seek evidence in his favor by questioning the scientist who prepared the certificate that has already been admitted in evidence against him.

The majority asserts, however, that the present cases are analogous to other situations in which we have held that criminal defendants are required to take "certain procedural steps" in order to preserve their constitutional rights. In my opinion, this argument misconstrues the very nature of Code § 19.2-187.1. No "procedural step" under Code § 19.2-187.1 will preserve a defendant's Sixth Amendment confrontation right, because that section merely establishes a separate, statutory right for a defendant to call the forensic scientist as a witness in a defendant's own case. Thus, Code § 19.2-187.1 does not impact a defendant's Sixth Amendment right "to be confronted" by the witnesses against him, because the statute cannot revive a defendant's right to be confronted by the prosecution with the scientist's evidence.

The majority seeks to avoid this dilemma by stating that the defendants failed to raise a due process challenge alleging that Code § 19.2-187.1 impermissibly shifted the burden of producing evidence to the defendants, which is a claim not cognizable under the Sixth Amendment. This argument, however, is unavailing because the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights.

A defendant's constitutional right to be confronted with the witnesses against him arises automatically, and the state may not require a defendant to take an affirmative action to preserve this right. While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial. A defendant cannot waive a right that he has already been denied. The extent of a defendant's waiver of a right under Code § 19.2-187.1 necessarily is limited to rights he possesses under the statute. Thus, the defendants in these cases could not have waived under Code § 19.2-187.1 rights that had already been denied by operation of Code § 19.2-187.

Even if the majority were correct, however, that Code § 19.2-187.1 offers a defendant the protection of a confrontation right, the record does not support a conclusion that these defendants waived that right. A waiver of a constitutional right requires a clear showing that there was an "intentional relinquishment or abandonment of a known right or privilege." *Barber,* 390 U.S. at 725 (1996). The record fails to establish a "knowing and intelligent" waiver under Code § 19.2-187.1 because that Code section does not provide a defendant with notice that if he fails to avail himself of the statute's provisions, he waives his Sixth Amendment right. This Court should not presume a defendant's waiver of his Confrontation Clause rights from a silent record.

I would hold that a constitutional application of Code § 19.2-187 requires that if the prosecution wishes to introduce in evidence a certificate of analysis contemplated by Code § 19.2-187, the prosecution must

obtain from a defendant a stipulation regarding the admissibility of the contents of that certificate, or an affirmative waiver by a defendant of his Confrontation Clause rights regarding the certificate. In the absence of such a stipulation or affirmative waiver, the Sixth Amendment requires that the prosecution call in its case in chief the forensic scientist who prepared the certificate to present this "testimonial" evidence. Because there were no such affirmative waivers or stipulations in the cases before us, and the forensic scientists did not testify regarding the contents of the certificates in the prosecution's cases in chief, I would hold that the certificates of analysis in these cases were admitted in violation of the defendants' Confrontation Clause rights. Therefore, I would reverse the defendants' convictions and remand the cases for new trials, if the Commonwealth be so advised.

"Analysis: Is Melendez-Diaz Already Endangered?"

The Scotus Blog
June 29, 2009
Lyle Denniston

A fascinating possibility emerged Monday afternoon as the Supreme Court closed its Term: Judge Sonia Sotomayor, if confirmed as a Justice, may hold the deciding vote on the future of a controversial ruling that the present Court issued just last Thursday: the ruling in *Melendez-Diaz v. Massachusetts* (07-591).

A strongly worded dissent in that case made it clear that four Justices would not soon be reconciled to that decision—a ruling that they argued would result in "a distortion of the criminal justice system."

The ruling, made under the Constitution's Confrontation Clause, requires the prosecution, if it plans to present a lab report as evidence in a criminal trial, to make the analyst who prepared it available for on-demand cross-examination by defense counsel. The decision came on a 5-4 vote.

If it were possible to pick up a fifth vote, could the dissenters from that case then lead the Court to reconsider—or least narrow considerably—the decision in *Melendez-Diaz*? Perhaps; one of the five in the majority was Justice David H. Souter, who retired on Monday. There is, it would seem, at least a chance that his designated successor, Judge Sotomayor, would not be prepared to embrace *Melendez-Diaz*, at least without some restriction on its scope; she has a record on criminal law issues that appears to be somewhat more prosecution-oriented than Justice Souter's has been.

This is speculation, of course, but there is little else to suggest why the Court announced Monday that, next Term, it will review the case of ***Briscoe, et al., v. Virginia*** (07-11191). Here is the question raised in the ***Briscoe*** petition, filed in May of last year by University of Michigan law professor Richard D. Friedman:

"If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?"

If one reads the majority opinion in *Melendez-Diaz*, the Court appears to have decided that issue already: it is not enough, the Court said last week, to allow the accused to call the lab technician as a defense witness; the prosecution must have the technician available for cross-examination, if the accused wishes to invoke that right under the Sixth Amendment.

The Court clearly had been holding the Briscoe case until it decided *Melendez-Diaz*, and then, according to the electronic docket, scheduled it for consideration at the final Conference Monday, in the wake of *Melendez-Diaz*. If normal procedures had been followed, Justice Antonin Scalia, the author of the *Melendez-Diaz*, would have prepared a memo on what to do with ***Briscoe***—ordinarily, recommending that it simply be denied, or that it be vacated and sent back for reconsideration. Indeed, the

reconsideration alternative was ordered by the Court in five other cases that the Court had been holding for *Melendez-Diaz.*

Instead, the Court—or at least four Justices—voted to grant review in ***Briscoe***, and set the Court on the path to full review next Term. It would be no surprise whatsoever if the state of Virginia—or some of the amici in support—would use Justice Anthony M. Kennedy's rhetoric from the dissent last Thursday to assail *Melendez-Diaz,* and to suggest that, if it is not to be overruled outright, it should be made easier to get around—as in requiring the accused's lawyer to summon the technician to the stand as his own witness.

The Virginia law that is at issue in the case requires an accused to call as a defense witness the technician who prepared a lab report that is being used as evidence supporting guilt. The state Supreme Court ruled that, if an accused does not follow that procedure, he surrenders his right to confront and cross-examine the report's author.

The petition was granted in the second round of the Court's orders Monday, disposing of remaining cases before the summer recess began.

It is a rare thing, of course, for the Court to reconsider a decision so soon after it has been decided. But it is not unprecedented, and the rhetorical and logical assertiveness of the *Melendez-Diaz* dissent certainly raises the chance that the decision's life as a precedent, at least as it fully emerged, may be shortened.

Along with Justices Scalia and Souter, the majority in *Melendez-Diaz* included Justices Ruth Bader Ginsburg, John Paul Stevens and Clarence Thomas. Joining Kennedy in dissent were Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito, Jr., and Stephen G. Breyer.

"U.S. Supreme Court to Hear Virginia Confrontation Case"

Virginia Lawyer's Weekly
June 29, 2009
Alan Cooper

The remand of the Supreme Court of Virginia's ruling in *Magruder v. Commonwealth* appeared to be the most likely result of the U.S. Supreme Court's ruling on Thursday on the application of the Confrontation Clause to lab reports.

The U.S. Supreme Court said, in essence, that an affidavit by a lab technician is no substitute for a live technician in court but described a constitutionally acceptable procedure for presenting the testimony by affidavit unless the defense insists on a personal appearance.

At first glance, Virginia's system appeared to be short of the standard set by the court.

But on the last day of its term today, the high court agreed to hear *Magruder*, now styled ***Briscoe v. Virginia***, Record No. 07-11191, because Magruder, the first of three defendants in separate cases decided by the Virginia Supreme Court, did not appeal.

The grant of certiorari was especially surprising because the U.S. Supreme Court remanded cases to courts in Ohio and California for consideration in light of the Thursday opinion, *Melendez-Diaz v. Massachusetts*.

Veteran Supreme Court observer and analyst Lyle Denniston speculates on SCOTUSblog.com that the dissenters in *Melendez-Diaz* may be setting up a quick reversal of the case. It was decided 5-4, and Justice David Souter, one of the five, is leaving the court. His likely successor, Judge Sonia Sotomayor, could side with the justice who dissented in the Massachusetts case, Denniston says.

The alliance to rewrite the court's Confrontation Clause jurisprudence differs from the high court's predictable division. Three members usually considered part of the court's liberal wing—Souter, John Paul Stevens and Ruth Bader Ginsburg—joined conservatives Antonin Scalia and Clarence Thomas, while the liberal Stephen G. Breyer sided with conservatives John G. Roberts Jr., Samuel A. Alito Jr. and Anthony M. Kennedy in dissent.

The Virginia attorney general's office has a less conspiratorial view of the situation. "In *Melendez-Diaz*, the Court signaled its approval of 'notice-and-demand' statutes. The next logical step in the Court's jurisprudence is to decide which 'notice-and-demand' statutes are permissible, and which are not. We did not expect a remand in light of *Melendez-Diaz*, because the Supreme Court of Virginia expressly declined to hold whether certificates of analysis were testimonial—the core holding of *Melendez-Diaz*."

"Requiring Accused to Demand Presence of Analyst Doesn't Deny Confrontation Right"

US Law Week
March 25, 2008

A Virginia statute that authorizes the admission of laboratory analysis certificates in criminal trials without the supporting testimony of the preparer unless the accused requests that the analyst be called to testify at state expense does not violate defendants' Sixth Amendment right of confrontation, the Virginia Supreme Court held Feb. 29

The court found no constitutional problem with requiring defendants affirmatively to ask for an analyst's presence or with inferring a waiver from their failure to do so.

Crawford v. Washington established that out-of-court testimonial statements by a person who does not testify may be admitted only if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine him or her.

Under Va. Code Ann. § 19.2-187, a certificate containing the findings of lab analysis of forensic evidence is admissible at trial if the person who performed the analysis has duly attested to it. Subsection 187.1 provides that, when such a certificate is admitted, the accused "shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness," at the cost of the state.

In the consolidated cases before the Virginia high court, each defendant was charged with a drug offense and the state offered into evidence at trial a drug analysis certificate compliant with the state rule. The defendants did not call the analysts to the stand. The trial judges rejected the defendants' confrontation clause objections and admitted the certificates. The defendants all were convicted and the state intermediate appellate court upheld the convictions.

Waiver of Confrontation

The state Supreme Court, in an opinion by Justice Cynthia D. Kinser, affirmed, ruling that the scheme for admitting the analysis certificates does not run afoul of *Crawford* and that the defendants' failure to invoke the statutory protections waived their confrontation rights.

At the outset, the court noted that *Crawford* did not address whether the right of confrontation can be waived. Citing with approval the lower appellate court's decision in *Brooks v. Commonwealth*, it concluded both that the right can be voluntarily waived and that reasonable requirements may be placed on defendants' exercise of it. The court decided that it does not place an unreasonable burden on the defense to require it simply to call an analyst to the stand and cross-examine him or her.

The procedure provided by Section 19.2-187.1 adequately safeguards an accused's Sixth Amendment rights, the court said, by providing the essential elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.

The court rejected the defendants' argument that the statutory scheme impermissibly

burdens their confrontation rights by requiring them to take the affirmative step of calling an analyst to testify. It pointed out that defendants must jump through procedural hoops to vindicate a broad array of constitutional rights.

For instance, it noted, defendants must file a motion within a certain time frame to suppress evidence that has been unconstitutionally obtained, they must disclose in advance that they plan to pursue an alibi defense, and they must provide notice they intend to introduce evidence of a victim's prior sexual conduct.

The court added that the defendants' argument that the statutory procedure unconstitutionally shifts the burden of producing evidence to the defense "is not cognizable under the confrontation clause." And because they did not avail themselves of the chance to call an analyst, the court decided that any due process argument was not properly before it.

Affirmative Waiver Unnecessary

Finally, the court explained, there is no dispute that the right to confrontation, like myriad other constitutional rights, can be waived. The defendants argued that a knowing and conscious waiver cannot be presumed from a silent record.

However, the court responded that it "has never held that the record, in all circumstances, must affirmatively reveal that a criminal defendant personally waived his right to confrontation." It noted, for example, that a defendant who stipulates to evidence effectively relinquishes the right of confrontation against the witness who would establish the stipulated fact.

The provisions of Virginia's forensic evidence rules provide adequate notice of the consequences of not calling the analyst to testify, the court said, and it concluded that "[f]ailure to use the statutory procedures obviously waives the opportunity to confront the forensic analyst."

A number of courts from other jurisdictions have come to the same conclusion with respect to similar statutory procedures.

Justice Barbara Milano Keenan, joined by Chief Justice Leroy Rountree Hassell Sr. and Justice Lawrence L. Koontz Jr. in dissent, accused the majority of confusing the waiver of a statutory right with waiver of a constitutional right. Pointing to the confrontation clause's use of the passive phrase "to be confronted," Keenan argued that "[a] defendant's constitutional right to be confronted with the witnesses against him arises automatically, and the state may not require a defendant to take an affirmative action to preserve this right." In any event, she contended, the statute's failure to require that a defendant be notified that he will waive his Sixth Amendment right by neglecting to avail himself of the procedure renders any purported waiver invalid.

Joseph R. Winston, Clement & Wheatley, Danville, Va., represented the lead defendant. Stephen R. McCullough, Virginia Solicitor General's Office, Richmond, Va., and Alice T. Armstrong and Eugene Murphy, Virginia Attorney General's Office, Richmond, represented the commonwealth.

"AG Candidate Wants Special Session After Supreme Court Ruling"

Associated Press
July 10, 2009

Virginia's Republican candidate for attorney general said Friday that the General Assembly should hold a special session to deal with a U.S. Supreme Court ruling that he said could cripple the state's criminal justice system.

Ken Cuccinelli said some prosecutors are suspending drug and drunken driving prosecutions because of last month's decision in a Massachusetts case. In that 5-4 ruling, the court said prosecutors must make forensic scientists available for defense cross-examination about lab reports on drugs and other trial evidence.

The ruling raises questions about a Virginia law that puts the onus on defendants to subpoena scientists if they wish to challenge the accuracy of lab reports. Defendants who fail to take such action in a timely manner waive their rights under the Constitution's Confrontation Clause, according to the Virginia statute.

The U.S. Supreme Court has agreed to review Virginia's law, but Cuccinelli—a state senator from Fairfax County—said the legislature should go ahead and change it rather than wait for a potentially damaging ruling.

"If we lose that case, there's going to be a lot of remands for new trials," Cuccinelli said in a telephone interview. "That's going to be a sudden workload hit."

Cuccinelli sent a letter to Gov. Timothy M. Kaine, urging him to call a special session. He wrote that "there is a need to act quickly to avoid very significant problems once some ongoing cases start to run up against speedy trial limitations as a result of continuances that are currently being requested and granted" because of the ruling.

Kaine spokesman Gordon Hickey said it's too early to convene a special session.

"The governor is well aware of this issue," Hickey said. "Certainly legislation would be one solution, but let's not leap to that before we give it a little thought. The governor's legal team is looking at other ways to fix it."

The General Assembly also could call itself into special session if two-thirds of the members of both houses make written requests to the governor.

Louisa County Commonwealth's Attorney Tom Garrett said prosecutors across the state support a special session.

"You'd be hard-pressed to find a commonwealth's attorney who isn't in support of it," he said, adding that the problems are too urgent to follow the usual procedure and take up the matter at the next regular session in January.

"I can't wait until July 1, 2010, for a new law to take effect," he said.

Garrett said his relatively small jurisdiction has "dozens and dozens" of cases that could be affected by the ruling. He said one

cocaine case in Louisa already has been dismissed because the forensic analyst was not present.

Garrett said the state Department of Forensic Science simply doesn't have the manpower to have its examiners running all over the state to testify. About 160 employees conducting casework handled nearly 60,000 cases last year, the department says. The number of tests would be even higher because many cases involve multiple pieces of evidence.

Fixing the state's law would not be difficult, Garrett said. He said the statute could be amended to require the state to subpoena the scientists and give the defense a deadline for stating whether they want them to appear. The justices signaled in their ruling that such "notice and demand" statutes in three states are constitutional, Garrett said.

VI. FIRST AMENDMENT

In This Section:

Citizens United v. F.E.C.

08-205

Ruling Below: *Citizens United v. F.E.C.*, 530 F Supp. 2d 274 (D.D.C. 2008)

The district court ruled that § 201 of the 2002 Bipartisan Campaign Reform Act (BCRA) applied to ads promoting the documentary *Hillary: the Movie*. The ads should have included disclosures as required by BCRA to comply with federal election law. The ads and movie are considered "electioneering communications" because they are susceptible to no other interpretation than to inform the electorate that Hillary Clinton is unfit for office.

Questions Presented: (1) Were all as-applied challenges to disclosure requirements (reporting and disclaimers) imposed on "electioneering communications" by BCRA resolved by *McConnell*'s statement that it was upholding disclosure requirements against facial challenge "'for the entire range of electioneering communications' set forth in the statute"? (2) Do BCRA's disclosure requirements impose unconstitutional burden when applied to electioneering communications protected from prohibition by appeal-to-vote test, *FEC v. Wis. Right to Life (WRTL II)*, because such communications are protected "political speech," not regulable "campaign speech," in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1 (1976), or because disclosure requirements fail strict scrutiny when so applied? (3) Does *WRTL II*'s appeal-to-vote test require clear plea for action to vote for or against candidate, so that communication lacking such clear plea for action is not subject to electioneering communication prohibition, 2 U.S.C. § 441b? (4) Is a broadcast feature-length documentary movie that is sold on DVD, shown in theaters, and accompanied by compendium book to be treated as broadcast "ads" at issue in *McConnell*, or is a movie not subject to regulation as electioneering communication?

CITIZENS UNITED, Plaintiff,
v.
FEDERAL ELECTION COMMISSION, Defendant.

United States District Court, District of Colombia

Decided January 15, 2008

[Excerpt: some footnotes and citations omitted]

PER CURIAM.

For the reasons that follow we deny Citizens United's ("Citizens") motions for a preliminary injunction to enjoin the Federal Election Commission ("FEC") from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), with respect to Citizens' advertisements for a movie—Hillary: The Movie—and its distribution of The Movie through cable TV video on-demand.

I.

Citizens United is a nonprofit membership corporation, tax-exempt under Internal Revenue Code § 501(c)(4). Citizens produced a movie titled Hillary: The Movie. The Movie focuses on Senator Hillary Rodham Clinton's "Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid," and includes "express opinions on whether she would make a good president." Citizens plans to distribute The Movie in January or February 2008 through theaters, video on-demand ("VOD") broadcasts, and DVD sales. Citizens notified the court on January 7, 2008, that it had released The Movie for "public sale and exhibition." The Movie's release date coincides with the dates when many states will hold primary elections or party caucuses. Senator Clinton is a presidential candidate in those states. Citizens intends to fund at least three television advertisements—two 10-second advertisements, "Wait" and "Pants," and one 30-second advertisement, "Questions" to coincide with the release of its movie. The advertisements promote The Movie and direct viewers to The Movie's website for more information about the film and how to see or purchase it. If Senator Clinton becomes the Democratic presidential nominee, Citizens plans to broadcast the three advertisements and possibly other advertisements within 30 days before the Democratic National Committee Convention and within 60 days before the November general election—both periods are within BCRA's definition of an electioneering communication. Citizens has elected not to broadcast its advertisements pending resolution of this litigation. It has entered into negotiations to broadcast The Movie through the "Political Movies" component of a new nationwide VOD channel, "Elections '08," but has decided to forego the opportunity pending resolution of the current litigation because, according to Citizens, the broadcast would be banned under BCRA and, even if this were not so, the broadcast would require Citizens to disclose certain information and make certain statements as described below.

BCRA amended the Federal Election Campaign Act of 1971 ("FECA"). Passed in 2002, it represented "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell v. FEC*. BCRA introduced a new system for regulating what it termed "electioneering communications." Under BCRA § 201, an "electioneering communication" is:

> any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate. . . .
>
> For presidential candidates, the communication must also be capable of being received by 50,000 or more persons. Citizens recognizes that under this statutory definition, both its advertisements and a VOD broadcast of The Movie would be

> electioneering communications. Electioneering communications are subject to a host of restrictions imposed by BCRA. Three are relevant here: § 203, § 201, and § 311. Section 203 prevents corporations and labor unions from funding electioneering communications out of their general treasury funds, unless the communication is made to its stockholders or members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes. 2 U.S.C. § 441b(b)(2). This provision does not bar electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives and their families. Any electioneering communication that is not prohibited is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311, which are set out in part II.B.

Citizens' complaint, filed on December 13, 2007, contains two major claims: (1) that § 203's prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied to The Movie and to the 30-second advertisement "Questions"; and (2) that BCRA § 201 requiring disclosure and § 311 requiring disclaimers are unconstitutional as applied to Citizens' three advertisements (and to The Movie, if Citizens broadcasts it in a manner that does not violate § 203).

II.

The court will not issue a preliminary injunction unless the movant shows that it has "1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." Granting injunctive relief is an "extraordinary and drastic remedy," and it is the movant's obligation to justify, "by a clear showing," the court's use of such a measure.

A.

We will analyze first Citizens' likelihood of prevailing on the merits of its claims regarding The Movie. In *McConnell*, the Supreme Court upheld § 203 on its face, rejecting claims that the financing of "electioneering communications" constituting express advocacy or its functional equivalent were within the protection of the First Amendment. *McConnell* did not, however, "purport to resolve future as-applied challenges." *FEC v. Wis. Right to Life, Inc.*, ("*WRTL*"). The Chief Justice's opinion in *WRTL* stated that an advertisement could not be considered the functional equivalent of express advocacy unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." To promote the objectivity of this analysis, courts are to disregard contextual evidence of the corporation's intent in running an advertisement.

Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional burden on the First Amendment right to freedom of speech. The theory is that with respect to § 203, *WRTL* narrowed *McConnell* to such an extent that it "left the door open to facial invalidation based on the sort of circumstances that have now arisen." For Citizens to prevail on this claim, we would have to overrule *McConnell*, which is

to say that Citizens has no chance of prevailing. Only the Supreme Court may overrule its decisions. The lower courts are bound to follow them.

With respect to Citizens's as-applied claims regarding The Movie, the first question under Chief Justice Roberts' *WRTL* opinion—and as it turns out, the last question—is whether the film is express advocacy or its functional equivalent. If it is, *McConnell* makes it likely that Citizens would not win on the merits of its claim that the First Amendment permits it to broadcast the movie within the electioneering communications period as currently funded. Citizens contends that The Movie is issue speech and, as it stated in oral argument, that issue speech is any speech that does not expressly say how a viewer should vote. The trouble is that the controlling opinion in *WRTL* stands for no such thing. Instead, if the speech cannot be interpreted as anything other than an appeal to vote for or against a candidate, it will not be considered genuine issue speech even if it does not expressly advocate the candidate's election or defeat.

The Movie does not focus on legislative issues. The Movie references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. Dick Morris, one political commentator featured in The Movie, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." After viewing The Movie and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. The Movie is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her. The Movie is thus the functional equivalent of express advocacy. As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to The Movie.

B.

Citizens' proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC's prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction—buy the DVD of The Movie. Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, 2 U.S.C. §§ 434(f)(2), 441 d, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. Section 311 is a disclaimer provision. For advertisements not authorized by a candidate or her political committee, the statement "____ is responsible for the content of this advertising" must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the

advertisement. In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement.

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court's *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens' reading of *WRTL*, anything that is not express advocacy or not "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate" cannot be constitutionally regulated by Congress under BCRA.

We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. Citizens' advertisements obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens' speech is constitutionally protected, as *WRTL* holds. We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.

The *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied-if disclosure would lead to reprisals and thus "impose an unconstitutional burden on the freedom to associate in support of a particular cause." To this, the Court added that the plaintiff must show a "reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals." Citizens' memorandum in support of its motion states that there may be reprisals, but it has presented no evidence to back up this bald assertion. In that respect, Citizens is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support.

We therefore hold that Citizens has not established the requisite probability of prevailing on the merits of its arguments against the disclosure and disclaimer provisions—§ 201 and § 311, respectively.

C.

Citizens tells us that without a preliminary injunction it will not be able to broadcast The Movie, that it will have to disclose the identity of its contributors to the FEC if it runs the advertisements, and that some portion of the time it purchased for the advertisements would be consumed by the

disclaimers BCRA requires. If Citizens had made more of a showing that it had a chance of prevailing in this court on the merits, these kinds of harms might have warranted preliminary relief. But in the face of *McConnell's* ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment, Citizens is unable to raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

As to the remaining factors governing preliminary relief, we cannot say that enjoining enforcement of the BCRA provisions at issue would serve the public interest in view of the Supreme Court's determination that the provisions assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits.

* * *

Citizens' motion for preliminary injunction with respect to the § 203 Prohibition as applied to "Questions" shall be DENIED as moot as set forth in footnote 9 and shall be DENIED with respect to all other claims. A separate order shall issue this date.

"Court Appears Poised to Rewrite Spending Rules"

New York Times
June 30, 2009
Adam Liptak

WASHINGTON—A Supreme Court case concerning a quirky documentary critical of Hillary Rodham Clinton may result in a major overhaul of rules governing campaign spending by corporations, the court signaled Monday.

Rather than deciding the case, the only one the justices left unresolved before leaving for their summer break, the court asked for more briefs and a second argument, to be held on Sept. 9, almost a month before the start of the next term.

The parties were asked to offer their views on whether the court should overrule a 1990 decision, *Austin v. Michigan Chamber of Commerce*, which upheld restrictions on corporate spending to support or oppose political candidates, and part of *McConnell v. Federal Election Commission*, the 2003 decision that upheld the central provisions of the McCain-Feingold campaign finance law.

"The court is poised to reverse longstanding precedents concerning the rights of corporations to participate in politics," said Nathaniel Persily, a law professor at Columbia. "The only reason to ask for reargument on this is if they're going to overturn *Austin* and *McConnell*."

If Judge Sonia Sotomayor, President Obama's Supreme Court nominee, is confirmed by the Senate by then, the case will be the first one she hears.

The case involves *Hillary: The Movie*, a slashing political documentary released last year while Mrs. Clinton, now the secretary of state, was seeking the Democratic presidential nomination. The film was produced by Citizens United, a conservative advocacy group that is a nonprofit corporation.

The McCain-Feingold law bans the broadcast, cable or satellite transmission of "electioneering communications" paid for by corporations in the 30 days before a presidential primary and in the 60 days before a general election.

The law, as narrowed by a 2007 Supreme Court decision, applies to communications "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate." It also requires spoken and written disclaimers in the film and ads for it, along with the disclosure of contributors' names.

Citizens United lost a suit against the Federal Election Commission last year and then withdrew plans to show its documentary on a cable video-on-demand service and to broadcast television advertisements for it. But the film was shown in theaters in six cities, and it remains available on DVD and online.

Several justices seemed sympathetic to the group's position that its First Amendment rights had been violated when the case was argued in March. The government said Congress had the power to ban political books, signs and Internet videos as long as they were paid for by corporations and

distributed not long before an election.

The court could have ruled in favor of Citizens United in relatively narrow ways. Its decision to set the case down for reargument suggests that it is considering a much broader ruling, one that may allow unlimited spending from corporate treasuries for television advertisements and other communications to support or oppose candidates.

The *Austin* decision said campaign speech financed by corporations was suspect. "The corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," Justice Thurgood Marshall wrote for the majority in 1990, "have little or no correlation to the public's support for the corporation's political ideas."

Shifts in court personnel since then, particularly the replacement of Justice Sandra Day O'Connor by Justice Samuel A. Alito Jr. in 2006, have substantially altered the court's attitude to campaign finance laws.

The Roberts court has struck down every campaign finance regulation to reach it, and it seems to have a majority prepared to do more. Indeed, last year, in *Federal Election Commission v. Davis*, Justice Alito, writing for the majority, said leveling the electoral playing field was not a matter for the courts or constitutional.

The *Davis* case struck down the "millionaire's amendment," which raised the donor limits for rivals of rich politicians who finance their own campaigns.

In his opinion, Justice Alito cited Justice Anthony M. Kennedy's dissent in the *Austin* case. "The notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections," Justice Kennedy wrote in the passage cited by Justice Alito, is "antithetical to the First Amendment."

"High Court Hears Arguments over Anti-Clinton Film"

USA Today
March 25, 2009
Joan Biskupic

WASHINGTON—The Supreme Court appeared open to vigorous arguments Tuesday that federal campaign-finance law wrongly limits corporate-funded messages in political elections.

Theodore Olson, representing the producers of a 90-minute movie highly critical of former Democratic presidential contender Hillary Rodham Clinton, told the justices that the First Amendment freedom to participate in the political process "is being smothered by one of the most complicated, expensive and incomprehensible regulatory regimes ever invented."

Olson specifically protested a provision of the 2002 Bipartisan Campaign Reform Act that kept Citizens United, a conservative group that produced the film, from distributing *Hillary: The Movie* through a video-on-demand program in early 2008.

More significantly, Olson asked the court to reverse long-standing cases allowing government to restrict campaign spending by corporations and unions because of the potentially corruptive aspect of big-money interests.

The justices' comments, along with their recent pattern of increasingly scrutinizing laws that limit corporate-funded political speech, suggested that Citizens United would prevail. Yet it was not clear how broadly the justices might rule and affect money in elections.

Justice Anthony Kennedy questioned whether, if the majority finds corporate campaign limits do not cover the feature-length movie, "then the whole statute (barring corporate-funded broadcasts) should fall."

There was no obvious consensus among a majority of the nine justices on the potential loosening of limits on corporate money.

The law at issue bars TV or radio ads financed with corporate or labor union money that refer to a candidate for federal office 30 days before a primary or 60 days before a general election.

Olson contended the movie, produced partly with corporate contributions, differs from the usual 60-second ads that Congress targeted. He characterized it as a documentary about Clinton, now secretary of State.

Deputy U.S. Solicitor General Malcolm Stewart countered that "the film repeatedly criticizes Hillary Clinton's character and integrity" and said Congress aimed to curb electioneering regardless of a message's length.

He noted that the law applies to any "broadcast, cable or satellite communication" before an election.

Chief Justice John Roberts was skeptical of Stewart's argument. "So if Wal-Mart airs an advertisement that says, 'We have candidate action figures for sale, come buy them,' that counts as an electioneering

communication?"

Stewart said it could. He also said Congress might be able to bar corporate spending to publish and publicize a campaign book before an election.

The four liberal justices, including David Souter, seemed ready to view the movie as a prohibited campaign ad.

"Doesn't this one fall into campaign advocacy?" Souter said, referring to quotations in the movie that say, "'She will lie about anything. She is deceitful. She is ruthless, cunning, dishonest. . .' This sounds to me like campaign advocacy."

"The Supreme Court Reviews *Hillary: The Movie*"

Slate
March 24, 2009
Dahlia Lithwick

Hillary: The Movie: The critics rave.

"This film, which I saw—it is not a musical comedy."

—Justice Stephen Breyer

"As Justice Breyer said, it's not a musical comedy."

—Justice David Souter

In 2008, a conservative group called Citizens United produced *Hillary: The Movie*, a 90-minute documentary in which Hillary Clinton, then seeking the Democratic presidential nomination, is variously described as "deceitful," "ruthless," and "cunning," as well as "dishonest," "reckless," a "congenital liar," and "not qualified as commander in chief." For ideological balance, Dick Morris says that "Hillary is the closest thing we have in America to a European socialist." The movie did not expressly urge voters to vote against her. It simply implied that friends don't let friends vote for evil people.

Citizens United released the film in six theaters and on DVD, actions not subject to federal regulation. But when they sought to distribute the film by paying $1.2 million to sell it through a video-on-demand service, the Federal Election Commission contended that the film was no different from the kind of "electioneering communication" regulated under the McCain-Feingold campaign finance law. That was the 2002 statute that tried to limit the influence of big money on elections. If subject to the constraints of McCain-Feingold, the film could not be financed by corporate treasuries or broadcast within 30 days of a primary or 60 days of a general election. The federal court of appeals agreed with the FEC, finding that the movie could be interpreted as nothing but an effort to "inform the electorate that Senator Clinton is unfit for office." Citizens United appealed.

The question for the high court in ***Citizens United v. Federal Election Commission*** is whether the film is more like a 90-minute version of one of those swift-boat ads or more like The Federalist—core political speech that warrants the highest level of constitutional protection. At oral argument this morning, the government—seemingly unafraid of the latter comparison—takes the position that in the right circumstances, even books can be banned under campaign finance laws. And that's when the justices start hyperventilating.

Former Bush administration Solicitor General Ted Olson represents Citizens United, and because the justices had just screened the virulently anti-Clinton film, his claims that the movie simply "informs and educates" the public about important issues are generally met by stony silence. Nobody really thinks it is an episode of *60 Minutes*. Olson does get the bunch hopping when he characterizes McCain-Feingold as "one of the most complicated, expensive, and incomprehensible regulatory regimes ever invented by the administrative state." Olson notes that the Reporters Committee for Freedom of the Press (which he accidentally calls "the Reporters Committee for the Right

to Life") filed a brief on his side of the case urging that the Hillary movie "is indistinguishable from other news-media commentary." (Disclosure: I am on the steering committee of the Reporters Committee for Freedom of the Press; I am still wait-listed for Reporters Committee for the Right to Life.)

Several of the justices seem bothered by Olson's claim that *Hillary* did not represent electioneering. "This sounds to me like campaign advocacy," insists Justice David Souter. Justice Ruth Bader Ginsburg adds, "If that isn't an appeal to voters, I can't imagine what is." To which Olson replies that the film is merely "a long discussion of the record, qualifications, history, and conduct of someone who is in the political arena, a person who already holds public office, who now holds a different public office, who, yes, at that point, Justice Souter, was running for office." But Justice Anthony Kennedy observes that a 90-minute attack ad is pretty much by definition more potent than a 30-second one: "[I]f we take this as a beginning point—that a short, 30-second campaign ad can be regulated—you want me to write an opinion and say, well, if it's 90 minutes, then that's different. It seems to me that you can make the argument that 90 minutes is much more powerful in support or in opposition to a candidate."

Olson seems to be of the view that a good way to peel off five votes at the court is by berating the justices about the general twirliness of the campaign finance laws, as evidenced by the fact that "since 2003, this court has issued something close to 500 pages of opinions . . . and 22 separate opinions from the Justices of this Court attempting to figure out what this statute means." A defensive Chief Justice John Roberts observes that the statute gives the court "mandatory appellate jurisdiction"—it has to hear these cases. A tetchy John Paul Stevens snaps: "And maybe those cases presented more difficult issues than this one!"

Note to Olson: Don't tell the justices they are too stupid to understand McCain-Feingold.

Deputy Solicitor General Malcolm Stewart rises to argue the case for the FEC. His job is to persuade the court that they can and should ban 90-minute attack ads. But when Justice Samuel Alito asks whether the government—if it can regulate documentaries—might also regulate a book containing "express advocacy" prior to an election, Stewart agrees that it might.

"That's pretty incredible," splutters Alito. "You think that if—if a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?" Not banned, clarifies Stewart. Congress could just "prohibit the use of corporate treasury funds" to publish it. Oh, Malcolm Stewart. Malcolm Stewart. With your Macbeth-y first name and your Macbeth-ier last name. You did not just say the government might engage in a teensy little bit of judicious, narrowly tailored book-banning, did you?

At this point, a horrified Anthony Kennedy gets even paler than his usual pale self: "Is it the Kindle where you can read a book? I take it that's from a satellite. So the existing statute would probably prohibit that under your view? . . . If this Kindle device where you can read a book which is campaign advocacy, within the 60- to 30-day period, if it comes from a satellite, it can be prohibited under the Constitution and perhaps under this statute?" Again Stewart clarifies that it wouldn't be banned, but a corporation could be barred from using its general treasury

funds to publish such a book and would be required to publish it through a PAC. The chief justice seeks to clarify that this would be so even in a 500-page book with only one sentence that contained express advocacy. Stewart cheerfully agrees. The chief justice wonders whether this would apply even "to a sign held up in Lafayette Park saying vote for so-and-so." Stewart doesn't quite say no.

Justice Breyer keeps trying to shake Stewart over his head—like an Etch A Sketch—to erase the noxious image of government-sponsored book banning and get him to stop chatting about issues that are not before the court. But it's too late. Now Souter looks even paler than Kennedy.

For the past few years, the Roberts court has been slowly chipping away at McCain-Feingold, with Justices Roberts and Alito tapping on the brakes as Kennedy, Scalia, and Thomas revved the motor. But it seems to me that all this talk of book banning and government regulation of signs in Lafayette Park is a pretty good way to get all five of them in the mood to run down yet more restrictions on political advertising. And maybe even back up and do it again.

"*Hillary: The Movie* to Get a Supreme Court Review"

Los Angeles Times
November 15, 2008
David G. Savage

The Supreme Court voted Friday to hear an election-related case that will decide whether a politically charged film—in this case *Hillary: The Movie*—can be regulated as a campaign ad.

The justices said they would hear an appeal from a conservative group that had sought to advertise its anti-Clinton documentary as the New York senator competed for the Democratic presidential nomination.

The Federal Election Commission said the group could not broadcast the film on television or air ads close to the election without running afoul of campaign funding laws.

The McCain-Feingold Act forbids corporate-funded broadcast ads that attack a candidate within a month of a primary or general election. The law also requires political groups to disclose who paid for the ads.

But lawyers for Citizens United, the conservative group, say limits on "core political speech rights" are unconstitutional.

The court also said Friday that it would hear a West Virginia case that has highlighted the role of big money in state high court justice races.

* * *

Both appeals were before the U.S. Supreme Court for weeks, but justices waited until after the Nov. 4 election to vote to take them up.

In recent years, the court has been closely split on cases involving money, politics and the 1st Amendment. Since the arrival of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., the court has shifted toward the view that the campaign laws violate the free-speech rights of political groups.

"The 1st Amendment requires us to err on the side of protecting political speech," Roberts said last year in a case involving a Wisconsin anti-abortion group that had broadcast ads critical of Sen. Russell D. Feingold (D-Wis.)

Indiana attorney James Bopp Jr. represented the Wisconsin anti-abortion group. This year, he represented Citizens United, the group that made *Hillary: The Movie*.

The 90-minute film was made by David N. Bossie, a former congressional staffer who was a relentless investigator of the Clintons during the 1990s. The movie includes interviews with Ann Coulter, Newt Gingrich and Dick Morris.

The group planned to show the film in selected theaters and distribute it on DVD. That was not affected by the campaign funding laws.

But the group also planned to run radio and TV ads promoting the film and hoped to broadcast the documentary on television.

Those issues were subject to the McCain-Feingold Act because they were broadcasts

that attacked a candidate just prior to the primary election contests.

In January, a three-judge panel of the U.S. district court in Washington agreed with the FEC that *Hillary: The Movie* was akin to a campaign ad and could not be broadcast on TV.

It told "the electorate that Sen. Clinton is unfit for office . . . and that viewers should vote against her," the court said.

The court did say that the group could run TV ads that mentioned the film—but only with a disclaimer and disclosure of its donors. Bopp renewed his appeal in the Supreme Court, and insisted the rules requiring the disclosure of donors should be thrown out.

He said Friday he was pleased the justices voted to hear ***Citizens United vs. FEC***. The case is expected to be heard in February.

Bopp said in a statement: "The notion that a feature-length movie can be banned is a return to the days of government censorship and book-burnings."

"Now Showing: *Hillary: The Movie* and Election-Law Gripes"

Christian Science Monitor
February 1, 2008
Warren Richey

To many supporters of President Bush, Michael Moore's 2004 documentary *Fahrenheit 9/11* was a blatant attempt to use factual distortions, conspiracy theories, and irreverent wit to undermine the reelection of a sitting president.

The film's popularity did not go unnoticed among Republicans. Now, with the 2008 presidential primaries well under way, a Washington-based conservative advocacy group has produced its own political documentary. It's called *Hillary: The Movie*.

There's just one problem. Without extensive broadcast advertising, few people will see it.

"I could have the movie in hundreds of theaters. I just can't let anyone know it is there by advertising it," complains executive producer David Bossie. "I can't purchase ad time on television or radio stations."

Hillary: The Movie premiered Jan. 16 in Washington. It is being screened in select cities, including showings in San Diego on Feb. 1 and Santa Ana, Calif., on Feb. 2. But because of its hard edge and timely political subject matter, the Federal Election Commission has put restrictions on three broadcast advertisements promoting the movie. Under campaign-finance regulations, ads for the film must include a political disclaimer and the film's financial backers must be disclosed to the FEC and the public.

The group, Citizens United, objects to the preconditions. Its leaders say they are just trying to get people to see their movie or purchase the DVD, not defeat a particular presidential candidate. So they sued in federal court in Washington, D.C.—and lost.

In an appeal to the U.S. Supreme Court, the group's lawyer, James Bopp, argues that the three ads are not "electioneering communications" advocating the election or defeat of a particular candidate. The ads are simply an effort to inform potential viewers about a political documentary. For the FEC to impose disclosure and disclaimer requirements is an unconstitutional infringement of free speech, Mr. Bopp says.

Judges say election rules apply

Last week, a three-judge district court panel rejected Bopp's argument. It found that *Hillary: The Movie* is the functional equivalent of the kind of corporate-funded campaign attacks that election laws are designed to prevent. The panel also ruled that even though the advertisements about the film did not themselves amount to political attacks, the FEC was still within its power to impose disclosure and disclaimer requirements on the ads.

That's the issue Bopp is presenting to the Supreme Court. The justices are scheduled to discuss whether to take the case on an expedited basis during their Feb. 15 conference.

"I just don't see how the Federal Election Commission has the authority to use campaign-finance rules to regulate advertising that is not related to campaigns,"

Bopp said in a phone interview.

The First Amendment lawyer is a prominent opponent of the 2002 campaign-finance reform law cosponsored by Sens. John McCain (R) of Arizona and Russ Feingold (D) of Wisconsin. Last year, Bopp persuaded a majority of justices to scale back rules in the McCain-Feingold law governing "issue advertising." Analysts see the latest lawsuit as a bid to extend that holding.

"The law is clearly being tested, and I think [Bopp's] assumption is that this court now is going to be more sympathetic to these challenges," says Washington lawyer Robert Bauer, an election law expert. But it is not clear, Mr. Bauer adds, that the Supreme Court will agree to hear the case.

The market is now

Time is short, according to Mr. Bossie. The market for a political documentary is directly linked to elections, he says, and that market disappears when the elections are over. "We are harmed every minute the court isn't hearing this case," he says.

The three ads in question can be viewed on www.hillarythemovie.com. One of the 10-second ads depicts an interview with conservative firebrand Ann Coulter.

The narrator speaks: "First a kind word about Hillary Clinton."

Ms. Coulter quips: "She looks good in a pants suit."

The narrator: "Now a movie about everything else." The screen flashes photos of Senator Clinton.

The narrator: "*Hillary: The Movie*, on DVD now."

Under FEC rules, the movie producers must include a four-second disclaimer stating that the message was paid for by Citizens United and is not affiliated with any candidate or candidate's committee.

"What that does is it tells the people watching that it is a political ad," says Bossie, who is also president of Citizens United. But the ads aren't about politics, he says. Rather, they are about trying to drum up business for a movie.

The three-judge panel watched the 90-minute film and studied its 73-page script. The judges concluded: "The Movie is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her."

Bossie defends his work. "Our job is to inform and educate the American people and that is what we do in this film," he says.

A former congressional investigator, Bossie says his efforts were partly inspired by *Fahrenheit 9/11*. But he says he is more faithful to facts than was Mr. Moore. "Documentaries are a new art form for politics. It is a new delivery device for political issues," Bossie says. "I recognized that in 2004 when Michael Moore's film had enormous impact. I didn't like its impact, I didn't agree with the film . . . however, I recognized the power of film."

How did *Fahrenheit 9/11* advertise?

Ads for *Fahrenheit 9/11* ran into similar problems at the FEC. Moore removed any mention of Mr. Bush from ads airing close

to the election to avoid running afoul of the law. "That's impossible for Citizens United because the name of the movie is *Hillary: The Movie*," says Bopp. "You can't say [in an ad], 'Go see a movie, we just can't say the name of it.'"

"We want to fight this [Supreme Court case] and win this battle," Bossie says, "because if Hillary Clinton is not the Democratic nominee we will have an Obama movie out this summer."

Asked about Sen. Barack Obama's squeaky-clean image, Bossie laughs. "Don't worry, I'll have plenty to make a movie."

"Campaign '08: Advertising; Makers of Anti-Clinton Film Lose Ruling"

Los Angeles Times
January 16, 2008
From The Associated Press

A conservative group must abide by campaign finance laws if it wants to run ads promoting its anti-Hillary Rodham Clinton movie, a federal court ruled Tuesday.

Citizens United had hoped to run the television advertisements in key election states during peak primary season. The court ruling means the group must either keep its ads off TV or attach a disclaimer and disclose its donors.

Lawyers for the group had argued that its 90-minute *Hillary: The Movie* was no different from documentaries seen on news shows *60 Minutes* and *Nova*. That prompted skepticism and, at one point, laughter from the judges during a hearing last week.

Campaign regulations prohibit corporations and unions from paying for ads that run close to elections and identify candidates. Citizens United argued that the advertisements promoted the movie and should be treated as commercial speech as opposed to advocacy against the Democratic New York senator.

A three-judge panel disagreed.

The film does not address legislative issues and was produced solely "to inform the electorate that Sen. Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her," the court wrote in its unanimous ruling.

A similar issue surfaced in 2004, when Citizens United sought to keep filmmaker Michael Moore from advertising *Fahrenheit 9/11* in the run-up to the presidential election. The Federal Election Commission dismissed the complaint after Moore said he had no plans to run the ads during election season.

The ads include clips from the movie, including one in which Dick Morris—a former advisor to President Clinton who is now a critic of the Clintons—says the senator is "the closest thing we have in America to a European socialist."

Challenges to campaign finance regulations are considered by a three-judge panel of district and appellate judges in Washington. During last week's hearing, Citizens United drew the most criticism from the panel's two Republican nominees—U.S. District Judge Royce C. Lamberth and Judge A. Raymond Randolph, an appellate judge. U.S. District Judge Richard W. Roberts was a nominee of President Clinton.

"Some Who Fight for McCain Are Fighting Against McCain-Feingold"

The Washington Post
March 5, 2008
Matthew Mosk and Robert Barnes

Some of the same conservative activists who have recently signed on to Sen. John McCain's presidential campaign are also still hard at work trying to undo his most famous legislative accomplishment.

To date, these grudging McCain supporters have mounted four Supreme Court challenges and others in lower courts to dismantle the landmark 2002 law known as McCain-Feingold. The legislation, by McCain and Sen. Russell Feingold (D-Wis.), made broad changes in federal political fundraising. Conservative activists have attacked it since its passage as an infringement on free speech.

Now, with McCain the apparent Republican nominee, these same activists have said they will support McCain but have no intention of dropping their challenges to the fundraising law. Their determination to undo McCain's legislation speaks to the deep fault lines that divide the Republican base from McCain—and to the challenges McCain faces in winning them over.

David Norcross, a former Republican National Committee general counsel and lobbyist who backed Mitt Romney earlier, said he would support McCain "100 percent" while still trying to erase McCain's campaign finance law from the books.

"Whether he's the nominee, the president or whatever, those of us who have been in the trenches are not about to back off," he said.

James Bopp Jr., an RNC member from Indiana and early Romney supporter, said that while he continues to challenge McCain's legislation, he will also work to deliver McCain to the White House.

"If you want to participate in politics, you have to be prepared to deal in a world in which there are imperfect choices," Bopp said.

Some opponents of the law are still weighing whether they will support McCain. David Keating, a longtime conservative activist who wants McCain-Feingold overturned, last week called a McCain presidency "a scary thought." He said McCain's candidacy looks only narrowly more palatable than that of his Democratic opponents.

The McCain-Feingold legislation, known formally as the Bipartisan Campaign Reform Act, infuriated conservative Republicans because of its ban on "soft money"—unlimited contributions from wealthy donors that were funneled through political parties and into the hands of political candidates. The law also limited the ability of special-interest groups to circumvent contribution limits by buying their own ads on behalf of candidates or against their opponents.

While McCain and other advocates considered the ban crucial, opponents contended that the measure trampled on free speech.

Norcross, a trustee with the James Madison Center, which spent more than $1 million last year challenging the law, said efforts to erase McCain's "pernicious" legislation are gaining momentum. Multiple lawsuits are

making their way to the Supreme Court, and two challenges are pending. Bopp is the center's general counsel.

The Supreme Court has already ruled in two previous challenges. In 2003, the court upheld key elements of McCain-Feingold as constitutional. But President Bush has since replaced two justices. When the second case reached the court last year, Chief Justice John G. Roberts Jr. rendered an opinion that, by most readings, knocked a critical peg from the law.

Roberts's ruling said corporate- or union-financed "issue ads" prohibited by McCain's legislation were no longer totally off-limits.

"Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election," Roberts wrote. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor."

Election law expert Edward B. Foley, a law professor at Ohio State University, said the case exposed vulnerabilities in McCain-Feingold. Bush's replacement of Justice Sandra Day O'Connor—the key fifth vote in swatting away the first court challenge—with Justice Samuel A. Alito Jr. has "absolutely" changed the court's view of the law, he said.

One matter that will be argued before the court in April challenges what is sometimes called the "Millionaires Amendment," a provision that loosens fundraising restrictions for candidates running against wealthy, self-financed opponents.

The court should announce soon whether it will also hear the case brought by the makers of *Hillary: The Movie* who want to eliminate a provision requiring groups that finance campaign-related advertising to disclose donor names.

Fred Wertheimer, who heads the watchdog group Democracy 21, an architect of McCain-Feingold, said he recognizes that with the changes in the court's makeup, new challenges are likely. But he said he took solace in the fact that no one has yet challenged the legislation's core provision—the soft-money ban.

Even that may change, said Bopp, who has handled many of the challenges, including the pending disclosure case. Bopp said he believes the soft-money ban is "fraught with the same problems that the rest of the law is fraught with, which is its breadth."

Bopp said he agreed to support McCain after the Arizona senator promised to appoint strict-constructionist judges who are faithful to the First Amendment.

Since McCain's emergence as the likely Republican nominee, he has faced pressure from Bopp and others to clarify his vision for future Supreme Court appointments and mollify concerns that campaign finance would become a litmus test for judicial appointments.

McCain was put on the defensive by conservative columnists who said the senator in a private meeting had questioned whether Alito was too openly conservative. McCain, who supported Alito's confirmation, denied making the statement. He told the Federalist Society he would "insist" on judicial nominees such as Roberts and Alito, who are "faithful to the Constitution" and "had a record that demonstrated that fidelity."

Foley called the comment ironic in the context of McCain's campaign finance legislation. "It occurred to me that might contribute to the undoing of his legislative legacy."

"*Citizens United*: Did the Supreme Court Ask for a Briefing to Cure an Incurable Defect?"

Electionlawblog.org
June 30, 2009
Rick Hasen

As I noted, the parties in this case have been asked to address the question: "Should the Court overrule **either or both** *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. s441b . . .?"

It is an odd formulation, but the reason for the formulation may have to do with the issue I've alluded to yesterday, whether the question of overruling either case is properly before the Court. From my review below, it appears that neither of these questions is properly before the Court.

This may shed more light on why the case was reset for argument in September. Perhaps the five conservatives circulated a draft overruling either *Austin*, *McConnell* or both, and the would-be dissenters made the argument that the question was not properly before the Court. If that's true, it would make overruling these cases even more audacious, leading to charges of conservative "judicial activism."

If this theory is right, the full briefing ordered by the Court may have been ordered with the intent to provide some cover for the overreaching. Supplement briefing will give the parties a chance to fully brief the argument now. Nonetheless—and tellingly the Court did not ask for supplemental briefing on the question whether the issue of overruling *McConnell* and *Austin* is properly before the Court—supplemental briefing cannot cure this defect: If an issue was not raised below or fairly presented in the jurisdictional statement, the Court should not decide it. I expect that his argument will surely figure prominently in any dissent from a majority opinion overruling *Austin*, *McConnell*, or both.

It is hard to imagine any other reason why the Court ordered this supplemental briefing now, rather than decide the case (and, contrary to Mickey, I think if CJ Roberts and Justice Alito just wanted to expand the MCFL exemption, they likely could have gotten some liberal votes for that, and would not have needed to set the case for briefing on a nuclear-type issue).

The rest of this post provides the details on why these questions are not properly before the Court. When the case began, a three-judge court denied Citizens United's request for a preliminary injunction barring FEC enforcement of section 203. 530 F.Supp.3d 274 (D.D.C. 2008). On Citizens United's facial challenge to the law, the court construed it as an attack on *McConnell* and held that it was without power to overrule *McConnell*, as it was bound by Supreme Court precedent. The initial opinion makes no mention of an attack on *Austin*. Citizens United appealed the denial of the preliminary injunction to the Supreme Court, which dismissed the appeal. 128 S.Ct. 1732. The three-judge court then granted summary judgment for the FEC, in a single paragraph opinion concluding: "Based on the reasoning of our prior opinion, we find that the Federal Election Commission is

entitled to judgment as a matter of law." 2008 WL 2788753 (D.D.C. July 18, 2008). The Supreme Court agreed to hear an appeal of the summary judgment decision, 129 S.Ct. 594 (2008).

After the case got to the Supreme Court, CU changed lawyers (from Jim Bopp to Ted Olson) and changed strategy, mounting an attack on *Austin*. It comes in an odd way, as part of what it styles an "as applied" challenge to *McConnell*. It notes that *McConnell* is an "apparent extension" of *Austin* and then offers reasons for *Austin* to be overruled (see around pages 30-31).

The government's brief gives this argument the back of its hand. The government begins by noting that that: "Acceptance of appellant's argument [to overrule *Austin*] would effectively invalidate not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy, as well as any state-law analogues. Notably, appellant does not ask this Court to reconsider *McConnell's* holding that, if corporate spending on express advocacy in candidate elections may be regulated, so may corporate spending that is the functional equivalent of express advocacy. Cf. *WRTL*, 127 S. Ct. at 2686 (Scalia, J., concurring in part and concurring in the judgment) (advocating, as "modest medicine," the overruling of only *McConnell's* comparatively recent holding as to nonexpress advocacy). Rather, appellant seeks to invalidate both forms of regulation."

The government then states:

> Appellant's argument is not properly before the Court. Although appellant previously sought to have BCRA Section 203 declared facially unconstitutional, see J.A. 24a, it later abandoned that claim, and the district court ultimately ordered dismissal of the relevant count pursuant to the parties' stipulation. See p. 10, supra. In addition, appellant's jurisdictional statement presented only "an as-applied challenge to *** BCRA s 203." J.S. 5. In setting out the substantial federal questions that it believed warranted plenary review, appellant identified a dispute over the application of *WRTL* and a question about whether Section 203 can be applied to a "feature-length documentary movie." J.S. i, 24-28. No issue as to the continuing vitality of Austin was either "set out" in the questions presented or "fairly included therein." Sup. Ct. R. 14.1(a) (rule for certiorari petitions), 18.3 (applying Rule 14 to jurisdictional statements).

In any event, this case presents none of the considerations that might support a departure from this Court's customary fidelity to precedent. *Austin* has been relied on by the other branches of the federal government, especially in crafting BCRA; by this Court, which applied *Austin* in upholding that statute, see *McConnell*, 540 U.S. at 203, 205 (explaining that none of the plaintiffs in that case, which included appellant, challenged the correctness of Austin's holding); and by legislatures and courts considering state and local campaign-finance measures. In short, "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded

in our law." *McConnell*, 540 U.S. at 203.

Appellant makes virtually no effort to explain why *Austin* should be overruled under "the doctrine of stare decisis or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). Appellant devotes less than two pages of its 58-page brief (Br. 30-31) to this issue, and it identifies no relevant new evidence or other intervening development that was unavailable to the Court when *Austin* was decided. That "incomplete presentation" is "reason enough to refuse" appellant's extraordinary request to overrule *Austin*, and as a consequence the relevant holding of *McConnell* as well. *Randall*, 548 U.S. at 263 (Alito, J., concurring in part and concurring in the judgment).

In arguing that *Austin* was "wrongly decided" (Br. 30), appellant relies in part on this Court's subsequent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2008). That ruling, however, invalidated statutory conditions placed on a wealthy individual's expenditure of personal funds in support of his own candidacy. See *id.* at 2766-2767, 2770-2774. The case therefore did not implicate this Court's consistent "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" *McConnell*, 540 U.S. at 205 (quoting *National Right to Work Comm.*, 459 U.S. at 209-210). Indeed, neither the Court nor the dissenters in *Davis* suggested that there was any inconsistency between that decision and the prior ruling in *Austin*.

Appellant also relies (Br. 30) on *Bellotti*, which was decided 12 years before *Austin*. But the Court in *Bellotti*, while invalidating state-law restrictions on the use of corporate funds to influence ballot-question referenda, explained that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. The Court further observed that "Congress might well be able to demonstrate the existence of a danger or apparent corruption in independent expenditures by corporations to influence candidate elections." *Ibid.* Far from providing a basis for overruling *Austin*, the decision in *Bellotti* anticipated the rationale on which, the *Austin* Court later relied.

"Justices Restrict Corporate Gifts For Politicians"

New York Times
March 28, 1990
Linda Greenhouse

The Supreme Court today upheld the power of the Federal and state governments to restrict corporate involvement in political campaigns.

The Court, which had previously made clear that corporations might be prohibited from giving their own funds directly to political candidates, held that they could also be barred from spending those funds independently, as with newspaper advertisements, on candidates' behalf.

The 6-to-3 decision leaves corporations free to make political expenditures through their political action committees, which raise money from stockholders and corporate officials.

A Bitterly Divided Court

But the Court, bitterly divided over the scope of First Amendment protection for political expression by corporations, upheld provisions of a Michigan campaign finance law prohibiting corporations from spending money from their own treasuries. Federal election law and the laws of 20 other states have similar prohibitions.

The decision today was the first time the Court has upheld a prohibition on the independent expenditure of funds for political campaigns—that is, spending made independently of a candidate's organization.

A Federal appeals court ruled in 1988 that the Michigan prohibition violated the First Amendment's guarantee of free speech. In his opinion overturning that ruling today, Justice Thurgood Marshall said the state had a "compelling rationale" for placing limits on "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."

Right to Political Expression

The Michigan Chamber of Commerce, which challenged the Michigan law, argued that the right of its member companies to political expression was not adequately protected by the alternative of setting up political action committees.

Under both state and Federal law, these committees are strictly limited in the contributors from whom they can raise money and in the amounts they can spend. The organization's 8,000 members sought the right to spend ordinary corporate funds in the political arena.

Previous decisions by the Court have upheld limits on direct contributions to candidates but have applied a different analysis to spending that is not directed by the campaign.

Recent Decisions Cited

The Court has ruled that such expenditures by individuals are an aspect of political speech that cannot be barred under the First Amendment. But the Court had not directly confronted the question of independent expenditures by corporations.

Some previous opinions had indicated that

limits on corporate political spending would be upheld. But in a recent series of decisions dealing with "corporate speech," the Court has accorded corporations a substantial measure of First Amendment protection without indicating what distinctions it might ultimately find between the rights of individuals and the rights of corporations.

So today's decision was significant, beyond the realm of campaign finance, in announcing an apparent stopping point for the corporate speech doctrine.

Strong Dissenting Opinions

That aspect of the decision drew strong dissenting opinions. In a dissent joined by Justices Sandra Day O'Connor and Antonin Scalia, Justice Anthony M. Kennedy said: "The Court's hostility to the corporate form used by the speaker in this case and its assertion that corporate wealth is the evil to be regulated is far too imprecise to justify the most severe restriction on political speech ever sanctioned by this Court."

Justice Scalia wrote a separate dissenting opinion. He read portions of it from the bench this morning, a step that Justices take only rarely to emphasize the depth of their conviction that the majority has erred.

He said the Court had failed to justify permitting restrictions on corporate spending that it had refused to permit on political spending by individuals.

"The fact that corporations amass large treasuries," Justice Scalia said, is "not sufficient justification for the suppression of political speech unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."

Ideological Lines Blurred

As in earlier disputes over campaign financing, this case, *Austin v. Michigan State Chamber of Commerce*, No. 88-1569, blurred the usual ideological lines both on the Court and among the groups that filed briefs expressing their views.

Chief Justice William H. Rehnquist joined Justice Marshall's majority opinion, as did Justices William J. Brennan Jr., Harry A. Blackmun, Byron R. White and John Paul Stevens. Chief Justice Rehnquist did not write a separate opinion, but in earlier cases he has supported strong state regulation of corporations.

Common Cause, a public affairs lobby that has pressed for campaign financing restrictions, and the Federal Election Commission filed briefs in support of the Michigan law.

The Michigan Chamber of Commerce was supported by a wide array of organizations, including the American Civil Liberties Union, which has long viewed most campaign financing restrictions as unconstitutional, and the American Medical Association. The National Organization for Woman, Planned Parenthood and the National Right to Work Committee were among the nonprofit corporations submitting a joint brief in support of the Chamber of Commerce.

Regulation Dates to 1907

Federal limits on political spending by corporations date to a 1907 law, the Tillman Act, passed at a time of growing concern about the ability of railroads and other big companies to buy influence in the political process. While regulation has ebbed and

flowed since then, it was not until today that constitutional doubts about limits on corporate political spending were resolved.

Three years ago the Court invalidated the Federal campaign spending limits as applied to a small Massachusetts anti-abortion group, ruling that the group's First Amendment right to advocate its views publicly outweighed the Government's interest in regulating its political expenditures.

The United States Court of Appeals for the Sixth Circuit, which struck down the Michigan law, based its decision largely on that Supreme Court ruling, *Federal Election Commission v. Massachusetts Citizens for Life*. But in his opinion today, Justice Marshall said the decision in the Massachusetts case was limited to organizations that, while organized as corporations, were distinguished by their "narrow political focus" and lack of connections to the world of business.

Justice Brennan, who wrote the opinion in the Massachusetts case, filed a separate concurring opinion today, noting that the earlier ruling was intended to apply only to a small category of corporations.

The Michigan Chamber of Commerce filed a lawsuit challenging the state law in 1985. The organization wanted to buy advertising endorsing a candidate in a state legislative election but, fearing prosecution, went to Federal District Court seeking a ruling that the law was unconstitutional. The court upheld the law in 1986 and was in turn reversed by the Court of Appeals.

Besides Michigan, the other states that prohibit direct corporate campaign spending are Alabama, Connecticut, Iowa, Kentucky, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming.

"Justices Uphold Campaign Finance Law"

Washington Post
December 11, 2003
Charles Lane

The Supreme Court endorsed the key provisions of the McCain-Feingold campaign finance law yesterday, issuing a strong affirmation of Congress's authority to regulate the flow of money in politics.

Rejecting opponents' claims that McCain-Feingold stifles free speech, a slender but emphatic five-justice majority upheld both the law's ban on "soft money"—unregulated donations to the parties from wealthy individuals, corporations and unions—and its new rules limiting campaign-season political advertising.

The majority ruled that both parts of the statute were appropriately designed to combat a widespread and well-founded perception that large donors exercise undue influence over government.

The majority's main opinion, written by Justices John Paul Stevens and Sandra Day O'Connor, said the law effectively confronts "the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder."

The court's surprisingly unambiguous reading of a dizzyingly complex statute crowned a movement for campaign finance change that had been energized both by allegations of favoritism by the Clinton White House toward soft-money donors and by the Enron Corp. scandal surrounding the current Bush administration. The movement culminated last year in passage of what is formally known as the Bipartisan Campaign Reform Act (BCRA) and its signing by President Bush.

Yesterday's ruling, delivered on an expedited basis after the justices returned early from their summer recess in September to hear oral argument in the case, removed lingering uncertainty about the impact of McCain-Feingold on the 2004 presidential election campaign, ensuring that virtually the entire law will remain in force through next year—and beyond.

So strongly did the majority back the law that the main opinion often echoed not only the reasoning but also the language of the law's sponsors, Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wis.) and Reps. Martin T. Meehan (D-Mass.) and Christopher Shays (R-Conn.).

Stevens and O'Connor wrote of the need to "plug the soft money loophole" in existing campaign law, of pernicious "sham issue advocacy" paid for by shadowy donors and of the parties' "peddling" access to federal lawmakers.

In the face of these problems, the BCRA was a "modest" law that would have "only a marginal impact on political speech," the majority ruled.

Stevens and O'Connor noted that "in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system," the majority was "under no illusion that BCRA will be the last congressional statement on the matter.

Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day. In the main we uphold BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications."

Stevens and O'Connor were joined by Justices David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer.

"This opinion represents a landmark victory for the American people in the effort to reform their political system," McCain, Feingold, Meehan and Shays said in a statement.

Through it all, the law has been opposed by lawmakers and interest groups, from Sen. Mitch McConnell (R-Ky.) on the right to the AFL-CIO labor federation on the left. They argue that its restrictions on the free flow of cash will stifle the free flow of political ideas that money pays for.

"We believe the Court has moved in a deeply troubling direction that could chill important and worthwhile public expression and activity," the AFL-CIO said in a statement.

In the end, those concerns were shared by only four members of the court: Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas.

"This is a sad day for the freedom of speech," Scalia wrote in a dissenting opinion. Ticking off a list of recent free-speech decisions by the court, Scalia added: "Who could have imagined that the same Court which, within the past four years, has sternly disapproved of restrictions upon . . . virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications and sexually explicit cable programming would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government."

Whereas the majority said it was showing "proper deference" to Congress's judgment "in an area in which it enjoys particular expertise," the dissenters turned that argument on its head, arguing that Congress had enacted McCain-Feingold largely because it stacks the political deck in favor of incumbents.

In upholding McCain-Feingold's ban on the parties' raising and spending of soft money, the court also backed a ban on state parties' using soft money to fund activities that are ostensibly directed to voter registration or state campaigns but also influence federal elections; a prohibition on national and state parties' funneling soft money to tax-exempt organizations that engage in campaign activity; and regulations on federal and state candidates and officeholders' use of soft money in connection with certain election-related activities.

These provisions were consistent with the court's ruling in its last landmark campaign decision, the 1976 *Buckley v. Valeo* case, which upheld limitations on political contributions, the majority ruled. They were indeed necessary if those limitations were to have any meaning, the majority ruled.

"The main goal of the [soft-money ban] is modest," Stevens and O'Connor wrote. "In large part, it simply effects a return to the scheme that was approved in Buckley and that was subverted by" subsequent interpretations of the law by the Federal Election Commission. The FEC permitted

political parties to fund federal campaigns with a combination of soft money and "hard money," cash raised in accordance with disclosure rules and contribution limits.

This part of the decision had been widely expected by legal analysts. More innovative legally, however, was the majority's conclusion that McCain-Feingold's limitations on "issue ads" pass constitutional muster.

The statute defines a new category of "electioneering communications"—basically, television and radio ads that mention a federal candidate during the run-up to a primary or general election.

It then requires such communications to be paid for only with money raised and spent in accordance with federal disclosure rules and limitations on individual donations.

No soft money could be used to pay for the ads. Instead, corporations, unions or interest groups would have to set up federally regulated political action committees and pay for the ads through those.

This part of McCain-Feingold was meant to overcome Buckley, which had said that the government could regulate the financing only of ads that "expressly advocated" the election or defeat of a candidate through the use of "vote for," "vote against" or similar direct language.

McCain-Feingold advocates said that this part of Buckley had turned into a huge loophole that permitted often unaccountable groups to sponsor "sham issue ads" in the waning days of a campaign that were obviously aimed at candidates.

Federal appeals courts and the Supreme Court had hewed to the "express advocacy" definition in the past, but yesterday the court said the McCain-Feingold definition was consistent with Buckley.

Stevens and O'Connor wrote that "although the . . . advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election."

The majority brushed aside concerns that the provision would sweep too broadly and discourage genuine discussion of issues as well as disguised campaign ads.

The vote on this point showed the pivotal role in the case of two justices, Rehnquist and O'Connor.

The chief justice had supported a Michigan ban on corporate-sponsored campaign ads in a 1990 case—an act that had led McCain-Feingold advocates to speculate he would vote with them this time.

But Rehnquist, who had indicated during oral argument in September that he was reconsidering his 1990 vote, dissented on the issue ad provision yesterday.

His vote was offset, however, by O'Connor, who had dissented in the 1990 case, yet supported the issue ad provision yesterday.

In his dissenting opinion, Kennedy called the provision "a new and serious intrusion on speech."

The court also upheld provisions of the law that require election ads to identify the candidate or other person who sponsors them and that require broadcasters to keep publicly available records of all requests to purchase broadcast time for political communications.

The vote was 8 to 1 on the first of those provisions, with Thomas dissenting. The vote was 5 to 4 on the second, with the same justices in the majority as on the soft-money ban and issue-ad provisions.

By a 6 to 3 vote, with Stevens, Ginsburg and Breyer dissenting, the court let stand a provision that offers cheaper air time to candidates who pledge not to use "attack ads" against their opponents. The court could not rule on the provision, Rehnquist wrote, because McConnell, who had sued to stop it, would not be subject to it until his reelection campaign in 2008.

And by a 9 to 0 vote, the court upheld provisions of McCain-Feingold that raised the maximum allowable campaign donations and indexed them for inflation. By the same vote, it ruled that opponents lacked standing to challenge the "millionaire's provisions" that permit candidates running against wealthy opponents to receive campaign money in larger chunks than otherwise permitted. That issue would have to be litigated in another case.

There were only two minor exceptions to the court's ruling that McCain-Feingold is constitutional.

By a vote of 9 to 0, the court struck down a provision that would have required political parties to choose between making unlimited independent expenditures or limited coordinated expenditures in support of their nominees.

And, also unanimously, the court struck down a provision that would have prohibited minors from donating to parties or campaigns.

United States v. Stevens

08-769

Ruling Below: *United States v. Stevens*, 533 F.3d 218 (3rd Cir. 2008)

Respondent sold videos of pit bulls engaged in dogfights and attacks on other animals. He was prosecuted and found guilty of violating a federal law prohibiting the creation or sale of videos depicting cruelty against animals. The law was designed to combat the sale of so-called "crush videos," which depict women stepping on and torturing small animals, appealing to a very specific sexual fetish. Stevens challenged his conviction on First Amendment grounds in the Third Circuit. The Third Circuit reversed Stevens's conviction.

Question Presented: Is 18 U.S.C. § 48's ban on the creation and distribution of depictions of animal cruelty valid under the Free Speech Clause of the First Amendment?

UNITED STATES of America, Petitioner,
v.
Robert J. STEVENS, Respondent.

Third Circuit
Filed July 18, 2008

[Excerpt: some footnotes and citations omitted]

SMITH, Circuit Judge.

The Supreme Court has not recognized a new category of speech that is unprotected by the First Amendment in over twenty-five years. Nonetheless, in this case the Government invites this Court to take just such a step in order to uphold the constitutionality of 18 U.S.C. § 48 and to affirm Robert Stevens' conviction. For the reasons that follow, we decline the Government's invitation. Moreover, because we agree with Stevens that 18 U.S.C. § 48 is an unconstitutional infringement on free speech rights guaranteed by the First Amendment, we will vacate his conviction.

I.

[Stevens was indicted in 2004 for knowingly selling depictions of animal cruelty with the intention of placing them in interstate commerce, violating 18 U.S.C. § 48. The charges arose out of an investigation by federal and Pennsylvania law enforcement agents who discovered Stevens selling the videos out of his Virginia residence.

Stevens moved to dismiss his case on the basis that § 48 violated his free speech rights, but the District Court denied his motion. Stevens was convicted on each of the three counts in the indictment.]

II.

Stevens' case is the first prosecution in the nation under § 48 to proceed to trial, and this appeal represents the first substantive constitutional evaluation of the statute by a

federal appellate court.

[The court quotes the language from § 48.]

Resort here to some legislative history is instructive, not as a device to help us construe or interpret the statute, but rather to demonstrate the statute's breadth as written compared to what may originally have been intended. The legislative history for § 48 indicates that the primary conduct that Congress sought to address through its passage was the creation, sale, or possession of "crush videos." [The court defines crush videos as fetish videos depicting women inflicting torture on animals.

These videos never show the woman's face and make it difficult to prove jurisdiction in state-law claims or that the acts occurred within state statute of limitations.

The discussions in the House and Senate focused on § 48 as a tool to eliminate the crush videos.]

Yet, the government interests identified in the House Committee Report in support of § 48 do not focus on crush videos. The primary interest identified there is the federal government's interest in "regulating the treatment of animals." Similarly, the House Report states that the Government has an interest in discouraging individuals from becoming desensitized to animal violence generally, because that may serve to deter future antisocial behavior toward human beings.

This broader focus on animal cruelty is consistent with the text of § 48 and it is also reflected in the House Report's discussion of why the speech that § 48 targets should be deemed outside the protection of the First Amendment. The Report concedes that § 48 is a content-based restriction, but states that the harm it would address, by reducing cruelty to animals, "so outweighs the expressive interest, if any, at stake, that the materials [prohibited by § 48] may be prohibited as a class." The Report minimizes the expressive interest of any speech prohibited by the statute because "[b]y the very terms of the statute, material depicting cruelty to animals that has serious utility—whether it be religious, political, scientific, educational, journalistic, historic, or artistic—falls outside the reach of the statute."

III.

The Government does not allege that Stevens participated in the interstate transport of "crush videos." Nor does the Government allege that the videos Stevens sold contained prurient material. The Government also concedes that § 48 constitutes a content-based restriction on speech. Nonetheless, the Government argues that the type of speech regulated by § 48 falls outside First Amendment protection. By doing so, the Government asks us to create a new category of unprotected speech. . . . As shown below, the statute cannot withstand [a] heightened level of scrutiny.

[The court condemns animal cruelty, but states that § 48 is not a prohibition of animal cruelty.] Rather, § 48 prohibits the creation, sale, or possession of a depiction of animal cruelty. That regulating a depiction has First Amendment implications is obvious. We begin, then, with the Government's contention that the depictions of animal cruelty restricted by 18 U.S.C. § 48 qualify as categorically unprotected speech.

A. § 48 Regulates Protected Speech

It has been two and a half decades since the Supreme Court last declared an entire

category of speech unprotected. See *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography depicting actual children is not protected speech). Other types of speech that are categorically unprotected include: fighting words, threats, speech that imminently incites illegal activity, and obscenity. The common theme among these cases is that the speech at issue constitutes a grave threat to human beings or, in the case of obscenity, appeals to the prurient interest.

The Government acknowledges that the speech at issue in this case does not fall under one of the traditionally unprotected classes. The Government argues, however, that these categories may be supplemented. That, in itself, is an unassailable proposition. But, we disagree with the suggestion that the speech at issue here can appropriately be added on the extremely narrow class of speech that is unprotected. Out of these categories, only *Ferber* is even remotely similar to the type of speech regulated by § 48. Recognizing this difficulty, the Government attempts to analogize between the depiction of animal cruelty and the depiction of child pornography. That attempt simply cannot carry the day.

* * *

[In *Ferber*, the Supreme Court upheld a New York statute banning child pornography,] holding that the statute was constitutional because child pornography, whether obscene or not, is unprotected by the First Amendment. In reaching that conclusion, the Court cited five factors favoring the creation of a new category of unprotected speech:

> 1. The State has a "compelling" interest in "safeguarding the physical well-being of a minor."
>
> 2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed in order to control the production of child pornography. The Court explained that the production of child pornography is a "low-profile, clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use.
>
> 3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography.
>
> 4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*."
>
> 5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance.

Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech. The reasoning that supports *Ferber* has never been used to create whole categories of unprotected speech outside of the child pornography context. Furthermore, *Ferber* appears to be on the margin of the Supreme Court's unprotected speech

jurisprudence. Part of what locates child pornography on the margin as an unprotected speech category is the conflation of the underlying act with its depiction. By criminalizing the depiction itself, "[c]hild pornography law has collapsed the 'speech/action' distinction that occupies a central role in First Amendment law[,]" and "is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the depiction of a crime." Child pornography contrasts with other categories of unprotected speech that share a much closer nexus between speech and an unlawful action that proximately results from the unprotected speech. For these reasons, we are unwilling to extend the rationale of *Ferber* beyond the regulation of child pornography without express direction from the Supreme Court.

Even assuming that *Ferber* may, in limited circumstances and without Supreme Court guidance, be applied to other categories of speech, 18 U.S.C. § 48 does not qualify for such treatment. The Court cited five bases in *Ferber* for upholding the anti-child pornography law. The reasoning does not translate well to the animal cruelty realm. We address the five-factor rationale in its entirety, although the first factor is the most important because, under *Ferber*, if the Government's interest is not compelling, then this type of statute necessarily violates the First Amendment.

1. First *Ferber* Factor

The compelling government interest inquiry at issue here overlaps with the strict scrutiny analysis discussed presently. No matter how appealing the cause of the animal protection is to our sensibilities we hesitate—in the First Amendment context—to elevate it to the status of a *compelling* interest.

Three reasons give us pause to conclude that "preventing cruelty to animals" rises to a compelling government interest that trumps an individual's free speech rights. First, the Supreme Court has suggested that the kind of government interest at issue in § 48 is not compelling. The Supreme Court in *Lukumi* held that city ordinances that outlawed animal sacrifices could not be upheld based on the city's assertion that protecting animals was a compelling government interest. The Government contends that *Lukumi* is inapplicable to a compelling government interest analysis.

* * *

When we consider *Lukumi* along with the fact that the Supreme Court has not expanded the extremely limited number of unprotected speech categories in a generation, the only conclusion we are left with is that we—as a lower federal court—should not create a new category when the Supreme Court has hinted at its hesitancy to do so on this same topic.

Second, while the Supreme Court has not always been crystal clear as to what constitutes a compelling interest in free speech cases, it rarely finds such an interest for content-based restrictions. When it has done so, the interest has—without exception—related to the well-being of human beings, not animals. When looking at these cases, as well as the interests at issue in the unprotected speech categories, it is difficult to see how § 48 serves a compelling interest that represents "a government objective of surpassing importance."

* * *

Similarly, and even more fatal to the Government's position, because the statute does not regulate the underlying act of

animal cruelty—which must be a crime under state or federal law in order to trigger § 48—we can see no persuasive argument that such a statute serves a compelling government interest. While the statute at issue in *Ferber* also prohibited the distribution of the depiction of sexual performances by children under the age of 16, the Supreme Court went to great lengths to cabin its discussion of the depiction/act conflation because of the special role that children play in our society. Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as protecting children from physical and psychological harm.

Third, there is not a sufficient link between § 48 and the interest in "preventing cruelty to animals." . . . Section 48 does nothing to regulate the underlying conduct that is already illegal under state laws. Rather, it regulates only the depiction of the conduct.

In order to serve the purported compelling government interest of preventing animal cruelty, the regulation of these depictions must somehow aid in the prevention of cruelty to animals. With this depiction/act distinction in mind, it seems appropriate to recast the compelling government interest as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." The House Committee Report for § 48 stated that the statute targeted the depiction rather than the act because under-enforcement of state animal cruelty laws is a particular problem in the crush video industry. The Report approvingly cited witnesses who testified to this effect. Consistent with these findings, the Government states that "as a practical matter, it is nearly impossible to identify the persons involved in the acts of cruelty or the place where the acts occurred." While this justification is plausible for crush videos, it is meaningless when evaluating § 48 as written. By its term, the statute applies without regard to whether the identities of individuals in a depiction, or the location of a depiction's production, are obscured.

The Government also argues that § 48 indirectly serves to deter future animal cruelty and other antisocial behavior by discouraging individuals from becoming desensitized to animal violence. As support for its position, the Government approvingly cited the House Committee Report, which cited research that "suggest[ed] that violent acts committed by humans may be the result of a long pattern of perpetrating abuse, which 'often begins with the torture and killing of animals.'"

* * *

We read this passage to mean that, by broadly prohibiting these depictions of animal cruelty, the drafters of the House Committee Report believed that fewer individuals will see and make such depictions and therefore not be subject to this desensitization.

This reasoning is insufficient to override First Amendment protections for content-based speech restrictions. The Supreme Court has rejected a similar argument in the context of virtual child pornography. . . . When balanced against First Amendment rights, the "mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." . . .

For these reasons, we fail to see how 18 U.S.C. § 48 serves a compelling government interest.

2. Second *Ferber* Factor

The second factor in the *Ferber* rationale, that child pornography is "intrinsically

related to the sexual abuse of children," is a similarly weak position for the Government to rely upon in this case. In *Ferber*, the Court reasoned that child pornography should be banned, in part, because the pornographic material continues to harm the children involved even after the abuse has taken place. While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend that the animals themselves suffer continuing harm by having their images out in the marketplace. . . .

3. Third *Ferber* Factor

Both the second and third *Ferber* factors assert that the distribution network for child pornography must be closed so that the production of child pornography will decrease. This drying-up-the-market theory, based on decreasing production, is potentially apt in the animal cruelty context. However, there is no empirical evidence in the record to confirm that the theory is valid in this circumstance. Indeed, the fact that most dog fights are conducted at live venues and produce significant gambling revenue suggests that the production of tapes such as those at issue in this case does not serve as the primary economic motive for the underlying animal cruelty the Government purports to target. Moreover, standing alone this factor sweeps so broadly it should not be deployed to justify extracting an entire category of speech from First Amendment protections. Restriction of the depiction of almost any activity can work to dry up, or at least restrain, the activity's market.

4. Fourth *Ferber* Factor

The fourth *Ferber* factor is that the value of the prohibited speech is "exceedingly modest, if not *de minimis*." The Government finds support for the low value of the speech restricted by the Act by pointing to the exceptions clause of 18 U.S.C. § 48(b). Section (b) states that the Act "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value." . . .

The exceptions clause cannot on its own constitutionalize § 48. The exceptions clause in this case is a variation of the third prong of the *Miller* obscenity test. This prong asks "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California, 413 U.S.15, 24 (1973)*. . . .

This type of exceptions clause has not been applied in non-prurient unprotected speech cases, and taking it out of this context ignores the essential framework of the *Miller* test. Congress and the Government would have the statute operate in such a way as to permit the restriction of otherwise constitutional speech so long as part of the statute allows for an exception for speech that has "serious value." The problem with this view is twofold. First, outside of patently offensive speech that appeals to the prurient interest, the First Amendment does not require speech to have serious value in order for it to fall under the First Amendment umbrella. What this view overlooks is the great spectrum between speech utterly without social value and high value speech. Second, if the mere appendage of an exceptions clause serves to constitutionalize § 48, it is difficult to imagine what category of speech the Government could not regulate through similar statutory engineering. That is not a road down which this Court is willing to proceed.

In sum, the speech restricted by 18 U.S.C. § 48 is protected by the First Amendment. The attempted analogy to *Ferber* fails

because of the inherent differences between children and animals. Those profound differences require no further explication here.

B. § 48 Cannot Survive Heightened Scrutiny

Because the speech encompassed by § 48 does not qualify as unprotected speech, it must survive a heightened form of scrutiny. A content-based restriction on speech is "presumed invalid," and the Government bears the burden of showing its constitutionality. One scholar notes that "a majority of the Court has never sustained a regulation that was strictly scrutinized for content discrimination reasons."

We have already shown why § 48 does not serve a compelling government interest, thus failing strict scrutiny. Because of the peculiarities of this statute, though, we briefly discuss the relationship between § 48 and the strict scrutiny analysis. The Supreme Court's free speech jurisprudence regarding content-based restrictions on speech in the first instance appears simple to apply. First, is the speech protected or unprotected? If the speech is unprotected, then Congress can regulate fairly easily. If the speech is protected, does the statute survive strict scrutiny? In practice, as pointed out previously, this heightened level of scrutiny nearly always results in the statute being invalidated. At the risk of complicating this parsimonious two-tiered structure, we note that federalism concerns illustrate the difficulties with the strict scrutiny analysis.

The problem lies in defining the compelling government interest when Congress does not have the constitutional power to regulate an area that has traditionally been governed by state statutes. When federalism concerns arise, the "least restrictive means" analysis necessarily informs the "compelling government interest" analysis. The stated governmental interest in 18 U.S.C. § 48 is to "prevent cruelty to animals." Taking federalism concerns into account, the interest stated in this manner is too broad. Absent demonstration of the requisite impact on commerce which is absent on this record, Congress does not have the constitutional authority to pass the types of animal cruelty statutes that are seen in the fifty states and the District of Columbia. It is for this reason that we have suggested that the compelling government interest should be redefined as "preventing cruelty to animals that state and federal statutes *directly* regulating animal cruelty under-enforce." And once this reformulation of the interest targeted by § 48 is accepted, we do not see how a sound argument can be made that the Free Speech Clause is outweighed by a statute whose primary purpose is to aid in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime. Conversely, if we agree with the Government that the compelling government interest is "preventing cruelty to animals," then we do not see how a sound argument can be made that § 48 is narrowly tailored and uses the least restrictive means.

The Supreme Court routinely strikes down content-based restrictions on speech on the narrow tailoring/least restrictive means prong of strict scrutiny. Accepting for a moment that Government's interest is "preventing cruelty to animals," then § 48 is not narrowly tailored.

First, with respect to the reach of the Commerce Clause, § 48 does not prohibit *any* depictions—including crush videos—that are made solely for personal rather than interstate commercial use. . . . Accordingly, if we accept that the government interest

served by § 48 is to prevent animal cruelty, the statute is—by its very terms—under-inclusive.

. . If the government interest is to prevent acts of animal cruelty, the statute's criminalization of depictions that were legal in the geographic region where they were produced makes § 48 overinclusive.

Third, the second *Ferber* factor implicitly addressed the fit between regulating the depiction of a behavior with preventing that behavior. Specifically, the Supreme Court stated that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." To the extent that this aspect of the intrinsic relationship between banned speech and the harm to be prevented applies to § 48, it applies to a lesser degree, and the arguments by the Government in support of this analogy fall flat. The Government first asserts that, as is true in the case of child pornography, the actors and producers of crush videos and other speech banned by § 48—i.e., the perpetrators of the underlying acts of animal cruelty—are very difficult to find and prosecute for those underlying acts. This is true as to crush videos because the only person typically onscreen is the "actress," and only her legs or feet are typically shown. However, as demonstrated by Stevens' prosecution, crush videos constitute only a portion of the speech banned by the terms of § 48. Prosecution of this sliver of the speech covered by § 48 could not, by itself, justify banning all of the speech covered by the statute.

As to dog fighting, the Government argues that the camera typically focuses on the dogs, with their "handlers" being shown mostly from the waist or elbows down, and it is often difficult to determine when and where such fights occur for purposes of the statute of limitations and other enforcement matters. At least with respect to the videos at issue in this case, we find the Government's argument empirically inaccurate. It is true that in the first video, "Pick-A-Winna," much of the footage is old, but the faces of the individuals involved are sometimes quite clear. In the second video, "Japan Pit Fights," the fights take place in Japan, where dog fighting is apparently legal and prosecution of those individuals for those particular acts of animal cruelty could not be pursued. The third video, "Catch Dogs," primarily features footage of dogs hunting and subduing wild hogs and being trained to do so. This video gives the name and address of a catch dog supplier, and also takes the viewer on several hunting trips with these dogs. There is no effort to conceal any of the faces of the people in the video, and Stevens at several points mentions their names and the location of the hunts. In short, the research and empirical evidence in the record before us simply does not support the notion that banning depictions of animal cruelty is a necessary or even particularly effective means of prosecuting the underlying acts of animal cruelty. Much less is it the "most expeditious" or the "only practical method" of prosecuting such acts, as is the case within the realm of child pornography and child sexual abuse.

For these reason, § 48 is not narrowly tailored using the least restrictive means.

IV.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." The Government has not met this burden. Therefore, we will strike down 18 U.S.C.

§ 48 as constitutionally infirm because it constitutes an impermissible infringement on free speech. In light of this conclusion, we will vacate Robert Stevens' conviction.

DISSENT

COWEN, Circuit Judge, dissenting with whom FUENTES and FISHER, Circuit Judges join

The majority today declares that the Government can have no compelling interest in protecting animals from intentional and wanton acts of physical harm, and in doing so invalidates as unconstitutional a federal statute targeting the distribution and trafficking of depictions of these senseless acts of animal cruelty. Because we cannot agree, in light of the overwhelming body of law across the nation aimed at eradicating animal abuse, that the Government's interest in ensuring the humane treatment of animals is anything less than of paramount importance, and because we conclude the speech prohibited by 18 U.S.C. §48 to be of such minimal socially redeeming value that its restriction may be affected consistent with the First Amendment, we respectfully dissent.

I.

* * *

a.

In discussing the contours of permissible content-based regulations, the Supreme Court has explained speech may be restricted when its "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." . . . Justice Brennan, in his concurrence in *Ferber*, isolated the salient features: "[T]he limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly 'slight social value,' and the State has a compelling interest in their regulation." These statements establish the constitutional floor: for speech to be unprotected, at a bare minimum, its value must be plainly outweighed by the Government's asserted interest. The speech in this case shares those repeatedly emphasized features.

1.

We agree with the Government that its interest in preventing animal cruelty is compelling. The importance of this interest is readily apparent from the expansive regulatory framework that has been developed by state and federal legislatures to address the problem. These laws serve to protect not only the animals, but also the individuals who would commit the cruelty, and more generally, the morals of society.

Our nation's aversion to animal cruelty is deep-seated. [The dissenting judges recounted the history of anti-animal cruelty laws in America.] The fact that many states have taken the additional step of empowering local humane societies to directly enforce anti-cruelty laws further highlights the ardor with which our society seeks to prevent cruelty.

[The dissenting judges discuss laws enacted to protect animals, arguing that the large body of law shows that the government has a compelling interest in protecting animals.]

Our nation has extended solicitude to animals from an early date, and has now established a rich tapestry of laws protecting

animals from the cruelty we so abhor. This interest has nested itself so deeply into the core of our society—because the interest protects the animals themsevles, humans, and public mores—that it warrants being labeled compelling.

Notwithstanding the majority's assertion, the Supreme Court in no way suggested to the contrary in *Church of the Lukumi Babalu Aye, Incorporated v. City of Hialeah*. . . . [T]he ordinances there failed not because preventing cruelty to animals was not a sufficiently paramount interest to be deemed compelling; rather, the Court found that the ordinances were so riddled with exceptions exempting all other killings except those practiced by Santeria adherents betrayed that the real rationale behind the prohibitions was an unconstitutional suppression of religion. Indeed, Justice Blackmun was explicit in rejecting the majority's instant characterization of the decision. . . . Thus, *Lukumi* does not contradict our conclusion that preventing animal cruelty is a compelling interest.

Furthermore, insofar as we understand the majority to suggest that Congress cannot have a compelling interest to advance a goal when the subject of the regulation is not directly within its constitutional sphere of legislative authority, we must disagree with this novel proposition. A congressional act may certainly significantly advance a governmental interest of paramount significance, whether or not it does so directly. For example, Congress has sought to protect children from physical harm by criminalizing the distribution of child pornography, and to ensure the public's health and general welfare by enacting laws proscribing narcotics trafficking. That the states have already comprehensively criminalized child abuse and drug distribution in no way relegates the federal government's interests in doing the same to a subordinate level; the *means* through which Congress seeks to advance these interests—that is, pursuant to its Commerce Clause authority—has no bearing on the uncontroversial propositions that the interests implicated are nevertheless ones of the most paramount order. . . .

Nor do we find that section 48 is sufficiently underinclusive as to undercut the Government's claim of significance of its interest. Where the allegedly ignored evils are at the fringes of Congress's legislative authority, that section 48 does not criminalize the personal possession of depictions of animal cruelty or the intrastate trafficking of such materials does not render it impermissibly under-inclusive. On the contrary, Congress could have reasonably decided to focus its attention on purely interstate conduct, lest enforcement efforts be hampered by costly constitutional litigation. This is especially so in light of the indication that the materials Congress sought to prohibit "were almost exclusively distributed for sale through interstate or foreign commerce." We thus find no under-inclusion in section 48 sufficient to cast doubt on the Government's asserted interest here.

2.

Next, we find that the depictions of animal cruelty prohibited by section 48 also satisfy the second part of the fundamental First Amendment balancing inquiry because they have little or no social value. This is guaranteed by the very terms of the statute, which excepts speech that has "serious religious, political, scientific, educational, journalistic, historical, or artistic value" from its reach. While this exception removes the possibility of the statute reaching serious works, we consider it unlikely that visual

depictions of animal cruelty will often constitute an important and necessary part of a literary performance, a scientific or educational work, or political discourse. Nor do we see any reason why, if some serious work were to demand a depiction of animal cruelty, either the cruelty or the animal could not be simulated. . . .

* * *

b.

We read *Ferber*, at its core, to stand for the narrow proposition that a category of speech may be constitutionally restricted where it depicts—and thus necessarily requires—the intentional infliction of physical harm on a class of especially vulnerable victims in violation of law, where the distribution of such depictions spurs their production but laws prohibiting the underlying acts are woefully under-enforced, and where the speech's social value is so de minimis as to be outweighed by the important governmental goal of protecting the victims. We find that the depictions of animal cruelty proscribed by section 48 possesses these essential attributes.

In *Ferber*, the Supreme Court justified the prohibition of child pornography based on four grounds: [The dissenting judges list the four *Ferber* factors.] We elaborate each of these four parts below and detail how depictions of animal cruelty implicate the same interests.

First . . . we find preventing animal cruelty to also be a governmental interest of the most paramount importance.

Second, the Supreme Court explained that child pornography was an unprotected form of speech because of the intrinsic relationship between the distribution of child pornography and the sexual abuse of children. . . .

The speech at issue here is also intrinsically related to the underlying crime of animal cruelty, most clearly because its creation is also predicated on a violation of criminal law. Implicated by the depictions at hand is not the mere *prospect* of future crime, nor is the instant proscription premised on society's disapproval of the views of the underlying depictions. . . . We do not quarrel with the majority's statement that it would be difficult to directly analogize this ongoing psychological harm suffered by child abuse victims to that of animals. However, even a cursory consideration of well-documented circumstances surrounding animal abuse, such as those present in the dogfighting context, counsels toward the conclusion that the harms suffered by abused animals also extend far beyond that directly resulting from the single abusive act depicted. Indeed, dogs that are forced to fight are commonly the subjects of brutality and cruelty for the entire span of their lives. . . . In addition, law enforcement officials face similar difficulties in prosecuting the creation of animal cruelty depictions as they do in policing child pornography, and Congress could have thus reasonably concluded that targeting the distributors would be the most effective way of drying up the animal-cruelty depictions market. . . .

Third, the Supreme Court held in *Ferber* that the advertising and sale of child pornography must be targeted since they "provide an economic motive for and are thus an integral part of the production of such materials." . . .

These factors are self-evidently present in the instant case. As discussed, substantial obstacles exist in effectively detecting and prosecuting those directly involved in the

creation of animal cruelty depictions. Furthermore, the record here amply demonstrates that thriving market exists for depictions of animal cruelty. . . .

* * *

Fourth, the Supreme Court justified its restriction in *Ferber* on the fact that the value of child pornography is de minimis. [The dissenting judges conclude that depictions of animal cruelty are of de minimis value and § 48 excludes any work that might have value]

The speech at issue in this case possesses the essential attributes of unprotected speech identified generally in *Chaplinsky* and of child pornography as discussed in *Ferber*. To reiterate, the Government has a compelling interest in eradicating animal cruelty, depictions of animal cruelty are intrinsically related to the underlying animal cruelty, the market for videos of animal cruelty incentivizes the commission of acts of animal cruelty, and such depictions are of de minimis value. In reaching this decision, however, we emphasize that we have before us, not a statute broadly purporting to ban all depictions of criminal acts, but merely one prohibiting depictions of a narrow subclass of depraved acts committed against an uniquely vulnerable and helpless class of victims. As such, we deem it unlikely that our ruling as to the constitutionality of the latter would have broad negative repercussions to First Amendment freedoms. Accordingly, because Congress may proscribe depictions of animal cruelty without running afoul of the First Amendment, we would reject Stevens's challenge to the constitutional validity of 18 U.S.C. § 48.

II.

Section 48 is also not unconstitutionally overbroad. . . . As the Supreme Court recently emphasized: "In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Courts should invalidate a statute on overbreadth grounds only when the law "reaches a *substantial* number of impermissible applications." . . . There is no such substantial overbreadth here.

. . . The Government may legitimately endeavor to quash the entire industry in all its manifestations. Furthermore, because the difficulty in determining where or when the underlying acts of animal cruelty occurred was part of Congress's motivation for enacting section 48 in the first place, excepting depictions that occurred at a time or in a place where the conduct was not illegal would essentially gut the instant statute.

Stevens also argues that the statute is overbroad because it reaches individuals who took no part in the underlying conduct. This argument is likewise foreclosed by *Ferber*, where the Court ruled that it was permissible for the government to annihilate the child pornography market at all levels, which included penalizing distributors. Similarly, for the Government to extinguish the market for depictions of animal cruelty, it must be allowed to attack its most visible apparatus—the commercial distribution network.

Stevens's final argument that the statute is overbroad because it could extend to technical violations of hunting and fishing statutes is also unpersuasive. . . .

Turning to the statute at hand, we are unable to imagine circumstances that would have to coalesce for such a video to come within the

reaches of section 48, especially in light of its exceptions clause. In short, there is simply no "realistic danger" that the challenged statute will deter such depictions. Moreover, even if technical violations were to slip through the section 48(b) bulwark, we are confident that they would amount to no more than a "tiny fraction" of the depictions subject to the statute, which thus may "be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." Accordingly, section 48 is not substantially overbroad.

III.

Finally, Stevens contends that the statute is unconstitutionally vague. . . .

Stevens's primary argument, that the statute is necessarily vague because the definition of "depiction of animal cruelty" is predicated on state law is unavailing. A federal statute is not rendered unconstitutionally vague merely because it incorporates state law; to the contrary, such is a legitimate drafting technique frequently utilized by Congress. . . .

* * *

IV.

To be sure, we are not insensitive to the concerns implicated when a federal court declares an entire category of speech outside the purview of the First Amendment. Nor can we disagree with our majority colleagues that judicial power in this realm of constitutional law is one that should be wielded sparingly, and then only with great deliberation and care. However, we know of no principle that lower courts should refrain from developing our nation's free speech jurisprudence and decline to analogize and apply the Supreme Court's precedents in this area without first receiving the express permission to do so. In the absence of a Supreme Court pronouncement to the contrary, and in light of the unique circumstances before us, we believe our determination—that the depictions of animal cruelty prohibited by 18 U.S.C. § 48 are not protected by the Constitution—both faithfully discharges our judicial obligation to duly advance the law's development when appropriate to do so, and comports with the Supreme Court's articulation of the limits of the First Amendment's protections as set forth in *Chaplinsky* and *Ferber*.

In conclusion, 18 U.S.C. § 48 significantly advances the Government's compelling interest in protecting animals from wanton acts of cruelty, and the depictions it prohibits are of such minimal social value as to render this narrow category of speech outside the scope of the First Amendment. Furthermore, the statute is neither substantially overbroad nor unconstitutionally vague. Thus, we would hold that section 48 is a valid congressional act, and would therefore **AFFIRM** Stevens's conviction.

"Animal Cruelty Law Draws U.S. High Court Review in Speech Case"

Bloomberg
April 20, 2009
Greg Stohr

The U.S. Supreme Court will consider reviving a federal criminal law aimed at videos that show animal cruelty, agreeing to review a federal appeals court's conclusion that the measure infringes speech rights.

The court will hear a government appeal in the case of a Virginia man who was sentenced to three years and one month in prison for selling videos that depict pit bulls fighting each other and attacking other animals. The lower court overturned the sentence.

The dispute centers on a 1999 law aimed primarily at "crush videos," which show women crushing small animals with their feet in a manner that some people find sexually arousing. Although the law has yet to be applied in a crush-video case, the government has pressed at least three prosecutions in other contexts.

The Justice Department in its appeal likened animal cruelty to child pornography, which the Supreme Court has said doesn't qualify as speech protected by the Constitution.

"Depictions of the intentional infliction of suffering on vulnerable creatures plays no essential role in the expression of ideas," the appeal contended.

The law covers interstate, commercial trafficking in depictions of animal cruelty. The measure contains an exception for items that have "serious religious, political, scientific, educational, journalistic, historical or artistic value."

Law Voided

The Philadelphia-based appeals court struck down the law on a 10-3 vote, saying the Constitution generally "does not require speech to have serious value in order for it to fall under the First Amendment umbrella." The court rejected the analogy to child pornography, pointing to "the inherent differences between children and animals."

The man challenging the law, Robert J. Stevens, describes himself as a 69-year-old book author and documentary film producer who specializes in promoting pit bulls.

Stevens says his small business sells educational material about the breed, including a video that documents the use of pit bulls to help hunters catch prey. The video shows a Japanese pit bull fight, a scene that Stevens says is used to distinguish dogs trained for hunting from those trained for fighting.

Stevens was indicted after law enforcement officials bought three videos from him through the mail. The Justice Department said in its appeal that Steven's videos "include scenes of savage and bloody dog fights and of pit bulls viciously attacking other animals."

The government didn't allege that Stevens took part in any acts of cruelty, a fact he says is constitutionally crucial.

"While the government may well have a significant interest in combating acts of

animal cruelty, it has not established a compelling interest in prohibiting speech—visual or aural depictions—about such conduct," Stevens argued.

All 50 states and the District of Columbia have laws banning animal cruelty.

The court will consider the case during its 2009-10 term, which starts in October. The case is ***United States v. Stevens***, 08-769.

"No Crime to Depict Animal Cruelty, Court Rules"

Los Angeles Times
July 18, 2008
David G. Savage

In a setback for the animal-rights movement, a U.S. appeals court struck down on free-speech grounds Friday a federal law that made it a crime to sell videos of dogs fighting and other acts of animal cruelty.

All 50 U.S. states have laws against the abuse of animals, the appeals court said, but "a depiction of animal cruelty" is protected by the First Amendment.

The ruling overturns a Virginia man's conviction, the nation's first under the law. Robert J. Stevens of Pittsville, Va., advertised and sold two videos of pit bulls fighting each other and a third showing the pit bulls attacking hogs and wild boars.

He sold the videos to prosecutors in Pittsburgh, was prosecuted, convicted and given three years in prison.

In Friday's decision, the appeals court in Philadelphia, by a 10-3 vote, said it was not prepared to recognize a new category of speech that is unprotected by the First Amendment.

Acts of cruelty to animals "warrant strong legal sanctions," the appeals court said, but it ruled unconstitutional the effort to criminalize for-profit depictions of animal cruelty.

Congress passed the law in 1999 in hopes of stamping out the trade in animal-cruelty videos. Because the videos rarely showed persons who could be identified, state prosecutors often could not prove where the videos were made.

The law also was designed to stop so-called "crush videos." According to a congressional report cited by the court, these were said to be "depictions of women inflicting torture (on animals) with their bare feet or while wearing high-heeled shoes. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos."

The law itself spoke broadly. It called for up to five years in prison for anyone who "creates, sells or possesses a depiction of animal cruelty" for the purpose of making money. This includes the showing of a "living animal" being "maimed, mutilated, tortured, wounded or killed."

Usually, videos and photographs are protected as free speech, even if they show illegal or abhorrent conduct. But in 1982, the Supreme Court made an exception for child pornography. It ruled that sexual depictions of children could be prosecuted as a crime, despite the First Amendment. This was the only way to stamp out such abuse of children, the high court said.

Government lawyers said the animal-cruelty law should be upheld on the same basis. It was needed to stop the abuse of animals for profit, they said.

The appeals court disagreed, however. "Preventing cruelty to animals, although an exceedingly worthy goal, simply does not implicate interests of the same magnitude as

protecting children from physical and psychological harm," wrote Judge Brooks Smith of the 3rd U.S. Circuit Court of Appeals.

The three dissenters said the law should have been upheld so as to help in "protecting animals from wanton acts of cruelty."

The Justice Department had no reaction Friday to the ruling. Normally, however, the government appeals to the Supreme Court when a federal law is struck down as unconstitutional.

"Dogfighting Underworld Stretches Through Western Pennsylvania"

Pittsburgh Post-Gazette
August 28, 2007
Torsten Ove

NFL star Michael Vick's guilty plea may have raised news media awareness of dogfighting, but police, prosecutors and humane officers have long battled this bloody underworld.

In Western Pennsylvania, as elsewhere, the subculture attracts a range of enthusiasts, from urban gangsters reveling in the my-dog-is-tougher-than-your-dog ethos to purists who regard the blood sport as legitimate, lucrative competition.

Kathy Hecker, humane officer for Animal Friends in Ohio Township, has described the Pittsburgh region as a "hotbed" of dogfighting.

One sign of dogfighting's growth is the increasing number of pit bulls arriving at her shelter and others.

Much of the fighting seems to have shifted away from the city, where pit bulls have been associated with drug dealers protecting their turf, to more remote areas like Fayette and Greene counties.

Arrests are not particularly high here, police say. But there have been some significant cases in recent years, including the first federal prosecution in the United States for the sale of dogfighting videos.

The most prominent local case started in 2001, when state troopers began infiltrating a six-county dogfighting network in which wagering reached $50,000 a bout and injured animals were sometimes killed.

In buying treadmills, steroids and other items related to the industry, undercover troopers also came across a device made of plastic pipe rigged with an extension cord and alligator clips used to electrocute dogs.

The following year, police arrested men from Verona, Jeannette and Bedford and three others from McKeesport, including two brothers. They all pleaded guilty to animal cruelty for their roles in staging dogfights, supplying equipment or drugs, or handling promotion.

In 2004, the second phase of that investigation culminated in the arrest of two out-of-state men who ran the *Sporting Dog Journal*, a national underground magazine devoted to ranking dogs and promoting fights across the country.

Agents filed animal cruelty charges against James J. Fricchione, then 34, of Westtown, N.Y., and John "Jack" Kelly, then 80, of Jefferson, Ga., the owner and editor, respectively, of the journal.

The attorney general's office said the case was the largest of its kind ever brought in Pennsylvania and shut down a major conduit that fed illegal betting.

In another dubious distinction, the region became the focal point of a unique case in U.S. District Court which sent a Virginia man to federal prison in 2005 for selling dogfighting videos here.

Robert J. Stevens, 67, of Pittsville, Va., was

the first person to go to trial under a 1999 law that prohibits the sale of depictions of animal cruelty.

The statute was originally motivated by a movement in California to ban "crush videos," in which women wearing spike heels and short skirts slowly crush small animals to death for the sexual gratification of foot fetishists.

All states ban cruelty to animals, but no laws made distribution of videos showing cruelty illegal until then-President Clinton signed the law.

Mr. Stevens and his wife, Julie, advertised videos in the *Sporting Dog Journal* and sold tapes to undercover agents.

Mr. Stevens sold "Pick-A-Winna" and "Japan Pit Fights," both of which feature dogs mauling each other in a ring, complete with handlers, spectators and voice-over narration.

A judge sent Mr. Stevens to prison for 37 months and ordered him not to associate with dogfighting anymore.

"I'm through with pit bulls," he promised.

But as the Michael Vick case shows, lots of others are not.

"Authorities Out to Crush Animal Snuff Films"

USA Today
August 27, 1999
Martin Kasindorf

The two snippets of videotape played in criminal court here Thursday were not for the squeamish. The scenes came from a one-hour commercial tape produced for a kinky worldwide Internet trade in what devotees call "crush videos." Titled "The 'Tails' of Charlie's Ankles," the tape first shows a woman stomping a squeaking mouse with her high-heeled pumps.

The other segment introduced as evidence shows the same deep-voiced woman, wearing short shorts, torturing a white mouse with nudges from open-toed shoes with 6-inch heels. The woman taunts the mouse. "You're going to listen, and you're going to die my way," she says. Then she crushes the mouse's head underfoot.

Diane Chaffin, 35, the star of the production, wore a lime-green jail uniform at the defense table. Municipal Court Judge R. Bruce Minto denied a defense motion to reduce three felony charges of animal cruelty to misdemeanors "because of the maliciousness involved." Instead, he ordered the La Puente, Calif., woman held for trial. Arrested two weeks ago, she remains in custody and has pleaded innocent.

Crush videos have emerged from underground whispers to become the focus of police investigations and outcries from national animal-rights organizations. Proposed federal legislation that would clamp down on the sadistic filmmakers will get a hearing before a House committee in October.

The alleged producer of the stomach-turning footage shown in court Thursday, Gary Thomason, 47, of Long Beach, is being sought on an arrest warrant. The video is similar to 21 others hawked at prices up to $90 on Thomason's Web site, prosecutors say.

Thomason allegedly is one of four known U.S.-based producers of crush videos.

American-made animal snuff films typically show scantily dressed women stomping rats, mice, hamsters or insects. But Tom Connors, deputy district attorney of Ventura County, Calif., says he has downloaded photos from overseas Web sites showing the killing of kittens, puppies and monkeys.

Devotees buy nearly $1 million worth of the tapes every year, Connors says. Mexico, Brazil, Britain, and Japan are among other production and distribution centers, he says.

The charges against Chaffin and Thomason mark the second U.S. crush video investigation to result in police action. In May 1998, Long Island authorities charged Thomas Capriola, 28, with animal cruelty for allegedly taping spike-heeled women killing rabbits, guinea pigs, mice, rats, turtles and snakes. Capriola will go on trial Sept. 28.

Crush videos incense Hollywood's celebrity animal-rights activists. The Doris Day Animal League is taking the lead in supporting a bill introduced in Congress in May by Rep. Elton Gallegly, R-Calif. The bill would make it a crime for anyone to offer any "depiction of animal cruelty" for

sale in interstate commerce. If convicted, a person could face up to five years' imprisonment.

Soon, there could be something even worse than animal crush tapes, Connors worries. "We have some stills of a baby doll they're crushing," he says. "So our feeling is that in time, like all perversions, buyers will get desensitized and it'll get to be a baby. It's a sick world."

That forecast is "nonsense," says former crush-video maker Jeff Vilencia, of Lakewood, Calif. Vilencia says recent publicity forced his Squish Productions out of the business of selling insect-crushing videos through adult magazines.

The desire to see women stomping tiny creatures is "a very focused, specific fetish" among 2,000 men at most, and they're uninterested in seeing babies killed, Vilencia says. Vilencia blames the accessibility of the Internet for putting the spotlight on a decades-old underground practice.

Nobody should profit from the killing of "hamsters or any domestic pet," Vilencia says. But "mice and rats might be a gray area. We have a love-hate relationship with mice and rats. If you're an apartment owner in Los Angeles and you don't kill rats, you'll get fined."

Gallegly sees no allowable distinctions. "Even if you are killing vermin, there's still a humane way to do it," he says.

In most states, animal cruelty laws criminalize the conduct often shown on the videos. But Gallegly says federal legislation is needed because local authorities essentially must catch someone in the midst of videotaping to prove that the cruelty took place within the criminal statute of limitations period.

"It's difficult to get to the actual perpetrators," he says. "The most effective way of stopping this trade is by getting to the people who are distributing this product and making a profit."

"They're Perverted, but Are They Protected?"

Time
October 1, 1999
Jessica Reaves

Members of Congress have a pretty extensive exposure to all things sordid, but most of them were probably not prepared for what they heard and saw this week.

On Thursday, the House Judiciary Committee's crime panel heard testimony from animal-rights activists pushing for criminal penalties for traffickers of animal "squish" or "crush" movies.

According to the Associated Press, the films, which feature the graphic torture and death of animals, are part of what one witness called a multimillion-dollar, worldwide industry.

"It's time to stop this windfall," said Rep. Elton Gallegly (R-Ca.), the sponsor of the bill that would make it illegal to create, sell or possess any depiction of cruelty to animals.

The laws would be enforced, one California deputy district attorney explained, in much the same way as those criminalizing the traffic of child pornography.

With all the well-funded causes filling up their hearing rooms, will Congress take the proliferation of animal crush films seriously?

Time senior writer Frederic Golden thinks so.

"It's not surprising to me at all that these movies are making it into Congressional hearings," he says.

"The animal-rights movement is gaining a lot of momentum in the U.S., and they've got enormous support in Congress."

But there is one obstacle the backers of the bill may not be able to jump over.

"This is a classic First Amendment situation," says *Time* senior reporter Alain Sanders.

"The problem with the law the animal-rights advocates are proposing is that it's almost impossible to target only the evil you want to suppress."

You run the risk, says Sanders, of eliminating other forms of expression: for example, documentaries about bullfights or cockfights, or movies in which cruelty to animals is simulated for legitimate purposes but not actually carried out.

Sanders doubts this case is Supreme Court material, but even if it did end up on the Justices' docket, there's little chance of a ruling against free speech.

"The First Amendment," he says, "is the most closely guarded Amendment in the Supreme Court."

Salazar v. Buono

08-472

Ruling Below: *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008)

Frank Buono, a former National Park Service employee and Roman Catholic, sued to have a Latin cross removed from a prominent outcropping of rock in the Mojave National Preserve. The district court found that the cross violated the Establishment Clause of the First Amendment and ordered an injunction prohibiting the display of the cross.

In response to litigation of this matter, Congress passed several pieces of legislation to protect the cross and prevent its removal. Once the district court issued the injunction barring display of the cross, Congress effected a transfer of the land upon which the cross sits to a private party. The district court found that the federal government's transfer to a veterans' group, via statute, of that small parcel of land violated the prior injunction against the display of the cross.

Questions Presented: (1) Does respondent have standing to maintain this action when he has no objection to the public display of a cross, but instead is offended that public land on which the cross is located is not also a forum on which other persons might display other symbols? (2) Even assuming respondent has standing, did the court of appeals err in refusing to give effect to the act of Congress providing for the transfer of the land to private hands?

Frank BUONO, Plaintiff-Appellee,
v.
Dirk KEMPTHORNE, Secretary of the Interior, in his official capacity; Jonathan B. Jarvis, Regional Director, Pacific West Region, National Park Service, Department of the Interior, in his official capacity; Dennis Schramm, Superintendent, Mojave National Preserve, National Park Service, Department of the Interior, in his official capacity, Defendants-Appellants.

United States Court of Appeals for the Ninth Circuit

Decided May 14, 2008

[Excerpt: some footnotes and citations omitted]

McKEOWN, Circuit Judge:

A Latin cross sits atop a prominent rock outcropping known as "Sunrise Rock" in the Mojave National Preserve ("Preserve"). Our court previously held that the presence of the cross in the Preserve—which consists of more than 90 percent federally-owned land, including the land where the cross is situated—violates the Establishment Clause of the United States Constitution. We affirmed the district court's judgment permanently enjoining the government "from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

During the pendency of the first appeal, Congress enacted a statute directing that the land on which the cross is situated be transferred to a private organization in exchange for a parcel of privately-owned land located elsewhere in the Preserve. That land exchange is already in progress and would leave a little donut hole of land with a cross in the midst of a vast federal preserve. The issue we address today is whether the land exchange violates the district court's permanent injunction. We conclude that it does, and affirm the district court's order permanently enjoining the government from effectuating the land exchange and ordering the government to comply with the original injunction.

BACKGROUND

I. THE MOJAVE NATIONAL PRESERVE

The Preserve encompasses approximately 1.6 million acres, or 2,500 square miles, of primarily federally-owned land in the Mojave Desert, located in Southeastern California. In 1994, the Bureau of Land Management ("BLM") transferred the land to the National Park Service ("NPS"); both the BLM and the NPS are federal agencies under the Department of the Interior ("DOI"). Within the Preserve, approximately 86,000 acres of land are privately owned and 43,000 acres belong to the State of California. Thus, slightly more than 90 percent of the land in the Preserve is federally owned. The Preserve is a "unit of the National Park System" and is given "statutory protection as a national preserve." The Preserve is under NPS jurisdiction and authority.

II. THE CROSS

The current incarnation of the cross atop Sunrise Rock is between five and eight feet tall and is constructed out of four-inch diameter metal pipes painted white. It is a Latin cross, meaning that it has two arms, one horizontal and one vertical, at right angles to one another. It is undisputed that "[t]he Latin cross is the preeminent symbol of Christianity. It is exclusively a Christian symbol, and not a symbol of any other religion." *Buono I, 212 F Supp. 2d at 1205.*

Historic records reflect that a wooden cross was built on that location as early as 1934 by the Veterans of Foreign Wars ("VFW") as a memorial to veterans who died in World War I. Photographs depict the wooden cross and signs near it stating: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884." The wooden signs are no longer present, and the original wooden cross, which is no longer standing, has been replaced by private parties several times since 1934. The cross has been an intermittent gathering place for Easter religious services since as early as 1935, and regularly since 1984.

The current version of the cross was built by Henry Sandoz, a local resident, sometime in 1998. When NPS investigated the history of the cross, Sandoz explained that he drilled holes into Sunrise Rock to bolt the cross in place, making it difficult to remove. Sandoz did not receive a permit from NPS to construct the cross.

Following *Buono I's* injunction against display of the cross, the cross has been covered by a plywood box. When uncovered, the cross is visible from vehicles traveling on Cima Road, which passes through the Preserve, from a distance of approximately 100 yards away. No sign indicates that the cross was or is intended to

act as a memorial for war veterans.

III. LITIGATION OVER THE CROSS AND THE CONGRESSIONAL RESPONSE

The current controversy surrounding the cross surfaced in 1999, when NPS received a request from an individual seeking to build a "stupa" (a dome-shaped Buddhist shrine) on a rock outcropping at a trailhead located near the cross. NPS denied that request, citing *36 C.F.R. § 2.62(a)* as prohibiting the installation of a memorial without authorization. A handwritten note on the denial letter warns that "[a]ny attempt to erect a stupa will be in violation of Federal Law and subject you to citation and/or arrest." The letter also indicates that "[c]urrently there is a cross on [a] rock outcrop located on National Park Service lands. . . . It is our intention to have the cross removed."

In 1999, NPS undertook a study of the history of the cross. NPS determined that neither the cross nor the property on which it is situated qualifies for inclusion in the National Register of Historic Places. Specifically, NPS recognized that the cross itself "has been replaced many times and the plaque that once accompanied it (even though it is not known if it is original) has been removed." Also, the property does not qualify as an historical site because, among other things, "the site is used for religious purposes as well as commemoration."

Following the announcement by NPS of its intention to remove the cross, the United States Congress passed a series of laws, described below, to preserve the Sunrise Rock cross. The first piece of legislation, enacted in December 2000, provided that no government funds could be used to remove the cross.

A. *BUONO I*

Frank Buono filed suit in March 2001 against the Secretary of the DOI, the Regional Director of NPS, and the Superintendent of the Preserve (collectively, "NPS" or "Defendants"). The district court concluded that the presence of the cross in the Preserve violates the Establishment Clause. In July 2002, the court entered a permanent injunction ordering that the "Defendants, their employees, agents, and those in active concert with Defendants, are hereby permanently restrained and enjoined from permitting display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve."

B. DESIGNATION OF THE CROSS AS A NATIONAL MEMORIAL

In January 2002, while this matter was pending in district court, Congress passed a defense appropriations bill, which included a section designating the Sunrise Rock cross as a "national memorial."

* * *

The cross is designated the "White Cross World War I Memorial."

NPS is statutorily charged with "the supervision, management, and control of the several national parks and national monuments." National "memorials" fall within the broader category of national "monuments."

In October 2002, less than three months after the district court's injunction, in legislation aimed at the Sunrise Rock cross, Congress passed a defense appropriations bill that included a provision barring the use of federal funds "to dismantle national

memorials commemorating United States participation in World War I."

C. *BUONO II* AND PASSAGE OF § 8121

The government appealed the district court's order and injunction. In September 2003, one month after oral argument before a panel of our court but before a decision issued, Congress enacted another defense appropriations bill that included a land exchange agreement regarding the Sunrise Rock cross.

* * *

In June 2004, in affirming the district court's permanent injunction, we held that the presence of the cross in the Preserve violates the Establishment Clause, agreeing with the district court that this case is "squarely controlled" by *Separation of Church and State Committee v. City of Eugene,* ("*SCSC*"). In *SCSC,* we reasoned that the presence of a cross on city land, even where it bore a plaque dedicating the cross as a war memorial to veterans, violated the Establishment Clause because "the presence of the cross may reasonably be perceived as governmental endorsement of Christianity."

The government's several attempts to distinguish *SCSC* were not persuasive. For example, we held that it was "of no moment" that the cross in *SCSC* was significantly taller, located in an urban area, or illuminated during certain holidays:

> Though not illuminated, the cross here is bolted to a rock outcropping rising fifteen to twenty feet above grade and is visible to vehicles on the adjacent road from a hundred yards away. Even if the shorter height of the Sunrise Rock cross means that it is visible to fewer people than was the *SCSC* cross, this makes it no less likely that the Sunrise Rock cross will project a message of government endorsement. . . . Nor does the remote location of Sunrise Rock make a difference. That the Sunrise Rock cross is not near a government building is insignificant—neither was the *SCSC* cross. What is significant is that the Sunrise Rock cross, like the *SCSC* cross, sits on public park land. *National parklands and preserves embody the notion of government ownership as much as urban parkland, and the remote location of Sunrise Rock does nothing to detract from that notion.*

We also held that a reasonable observer, even without knowing whether Sunrise Rock is federally owned, *would believe—or at least suspect*—that the cross rests on public land because of the vast size of the Preserve, more than 90 percent of which *is* federally owned. A reasonably informed observer aware of the history of the Sunrise Rock cross would know not only that the cross was erected by private individuals (which the government argued favored its view), but also that Congress has taken various measures to preserve the cross, i.e., designating it a war memorial, prohibiting use of federal funds to remove it, and denying similar access for a Buddhist shrine.

Acknowledging the passage of § 8121 while the appeal was pending, we addressed the government's challenge that § 8121 rendered the appeal moot or would soon do so. We rejected the government's mootness challenge for two reasons: First, we held that the case was not moot because the land transfer had not yet taken effect. Second, because "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case," we held that *even if* the land transfer had taken effect, the government still had

not carried its heavy burden to show mootness. Even if the land were transferred under § 8121 (a), it *may revert* to the government under § 8121(e), or as provided in other statutes. In particular, we noted that 16 U.S.C. § 431 authorizes relinquishment of lands containing "national monuments" to the federal government, and 16 U.S.C. § 410aaa-56 authorizes the Department of the Interior to "acquire all lands and interest in lands within the boundary of the [Mojave] preserve by donation, purchase, or exchange."

D. *BUONO III*

Despite the injunction against display of the cross in the Preserve, the government began moving forward with the mechanics of the land exchange under § 8121. Buono then moved to enforce the district court's prior injunction, or modify it to prohibit the land exchange as a violation of the Establishment Clause. In April 2005, the district court granted Buono's motion to enforce the injunction, and denied as moot the request to amend the permanent injunction. According to the district court, "the transfer of the Preserve land containing the Latin Cross which as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunrise Rock." The district court deemed the exchange "invalid" and permanently enjoined the government "from implementing the provisions of Section 8121 of Public Law 108-87" and ordered the government "to comply forthwith with the judgment and permanent injunction entered by th[e] court on July 24, 2002." It is that decision that the government now appeals.

STANDARD OF REVIEW

We review for abuse of discretion the district court's order enforcing its prior injunction. A district court abuses its discretion in this regard if "it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact."

ANALYSIS

In the district court, Buono advanced two alternative arguments challenging the land exchange under § 8121. First, Buono argued that the land exchange is an attempt to evade the permanent injunction. Alternatively, he argued that the land exchange itself violates the Establishment Clause because it is an improper governmental endorsement of religion. The district court's holding is grounded only on the first basis, i.e., that the land exchange is a sham transaction with the purpose of permitting continued display of the cross in violation of the permanent injunction. On appeal, the government contends that § 8121 was a bona fide attempt by Congress to comply with the injunction. The government also argues that because it was not given the opportunity to fully effectuate the transfer, there are unknown facts that render this controversy "unripe" for judicial review.

* * *

[The Court concludes that the issue is ripe for judicial review.]

* * *

II. VIOLATION OF THE PERMANENT INJUNCTION

We next address whether the district court abused its discretion in concluding that "transfer of the Preserve land containing the

Latin Cross, which "as [a] sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion" . . is an attempt by the government to evade the permanent injunction enjoining the display of the Latin Cross atop Sunset Rock."

A. GOVERNMENT ACTION

* * *

1. CONTINUING GOVERNMENT OVERSIGHT AND CONTROL OVER THE CROSS AND PRESERVE PROPERTY

Although Congress sought to transfer the property to the VFW, a private entity, the various statutes, when read as a package, evince continuing government control. The following summary highlights that control:

> NPS retains overall management and supervision of the Preserve.
>
> NPS is responsible for "the supervision, management, and control" of national memorials.
>
> The "five-foot-tall white cross" in the Mojave National Preserve is designated as a "national memorial."
>
> The transfer of land to the VFW is conditioned on the VFW's maintenance of the conveyed property as a memorial to World War I veterans.
> The Secretary must carry out its duties under § 8137, which provides $10,000 for NPS to acquire and install replicas of the original cross and plaque.
>
> The property "shall revert" to government ownership if "it is no longer being maintained as a war memorial."

The government retains various rights of control over the cross and the property. NPS is granted statutory powers of "supervision, management, and control" of national memorials. Thus, NPS's general supervisory and managerial responsibilities with respect to the cross remain, despite a land transfer.

In addition, § 8121(a) expressly reserves NPS's management responsibilities under § 8137. Section 8137 not only designates the cross a national memorial, but provides for $10,000 in funds for NPS to acquire and install replicas of the original plaque and cross located at the site. The district court found that these provisions gave the government an easement or license over the subject property for this particular purpose. Such an easement or license reflects ongoing control over the property requiring compliance with constitutional requirements on that land.

The district court also focused on the significance of the government's retention of a reversionary interest in the property under § 8121(e). As in *Hampton* and *Eaton,* the reversionary clause in § 8121(e) results in ongoing government control over the subject property, even after the transfer.

Although the government argues that reversionary interests are run-of-the mill clauses in contracts with the government, the commonality of such clauses does not diminish their power or effect. The fact remains that the government has an *automatic* reversionary interest in the property if it determines that the property is no longer being used as a "war memorial,"

which, at this juncture, is the cross itself.

As it did with respect to ripeness, the government argues that the court must await exercise of the reversionary interest before determining whether it is a real factor in government control over the property. We reiterate the import of the reversionary interest; it shows the government's ongoing control over the property and that the parties will conduct themselves in the shadow of that control. The courts in *Hampton* and *Eaton* found dispositive the ongoing control resulting from the reversionary interest; their analysis is persuasive here.

Based on the government's ongoing supervisory, maintenance and oversight responsibilities with respect to the cross and the property, coupled with the reversionary interest, the district court found that the government retains important property rights in, and "will continue to exercise substantial control over," the property on which Sunrise Rock is located, even after the land exchange. The government has failed to show that this determination is either clearly erroneous or an abuse of discretion.

2. METHOD FOR EFFECTUATING THE LAND EXCHANGE

Next, we examine the method of sale by which § 8121 transfers the property to a private buyer outside the normal NPS procedures for transfer of parklands. The Secretary of DOI is authorized to exchange federal land for non-federal land under its jurisdiction. In this case, however, the decision to exchange the land was made by Congress and authorized by a provision buried in an appropriations bill. The government did not hold a hearing before enacting such exchange. Nor did the government open bidding to the general public. Rather, § 8121 directs that the land be transferred to the VFW, the organization that originally installed a cross on Sunrise Rock some years ago and desires the continued presence of the current cross in the Preserve. The private land being exchanged for the federal property is owned by the Sandozes, who constructed the present cross and who have actively sought to keep the cross on Sunrise Rock.

The government argues that, of all parties, the VFW is the "logical purchaser" because it originally erected the cross at the site more than seventy years ago. The government cites *Marshfield* and another Seventh Circuit case, *Mercier v. Fraternal Order of Eagles*. In both cases, the respective courts upheld the sale of property to a private party without an open market bidding process for the land.

Although neither the exclusion of other purchasers, nor the fact that Congress acted outside the scope of normal agency procedures for disposing of federal park land is dispositive, both acts demonstrate the government's unusual involvement in this transaction. These facts, coupled with the government's selection of beneficiaries of the land exchange who have a significant interest and personal investment in preserving the cross that has been ordered removed, provide additional evidence that the government is seeking to circumvent the injunction in this case. We see no basis to upset the district court's conclusion that the VFW was a straw purchaser.

3. HISTORY OF THE GOVERNMENT'S PRESERVATION EFFORTS

Finally, the government's long-standing efforts to preserve and maintain the cross

atop Sunrise Rock lead us to the undeniable conclusion that the government's purpose in this case is to evade the injunction and keep the cross in place. In brief, when litigation was first threatened against NPS, Congress banned the use of government funds to remove the cross (§ 133), the first step in forestalling inevitable enforcement of a federal injunction. After litigation commenced, Congress designated the cross and adjoining Preserve property as a national memorial commemorating World War I. Congress also appropriated up to $10,000 for NPS to acquire replicas of the original cross and plaque at the site, once more trying to bolster the presence of the cross. Once the district court enjoined display of the cross in *Buono I,* Congress again prohibited the use of federal funds to remove any World War I memorials (which, obviously, includes the cross); and, while the appeal was pending in *Buono II,* Congress enacted § 8121, directing the transfer of the subject property to a private organization, but maintaining effective government control over the memorial and the use of that property.

The government does not contest these legislative responses to various stages of the litigation in this case, or their purpose aimed at preserving the cross. Rather, the government attempts to diminish their importance. For example, the government argues that § 8137(c), which earmarks funds for the replica plaque and cross, was passed before the district court's injunction and that after the injunction, DOI has taken no action to acquire the replicas. While this may be true, when Congress enacted § 8121, it specifically incorporated the Secretary's duty to carry out the responsibilities set out in § 8137; Congress did not repeal the funding provisions, or any other provision permitting ongoing government control. The funding provisions offer historical evidence of the governmental responses aimed at preserving the cross, as well as ongoing legislative authorizations. In that context, it does not matter whether DOI has exercised its powers to obtain such replicas; the important fact is that Congress directed that it do so, further showing its intent to preserve and maintain the cross.

We agree with the district court that the government engaged in "herculean efforts" to preserve the cross atop Sunrise Rock. We also agree that "the proposed transfer of the subject property can only be viewed as an attempt to keep the Latin Cross atop Sunrise Rock without actually curing the continuing *Establishment Clause* violation."

B. CONTINUING GOVERNMENTAL ENDORSEMENT OF RELIGION

Our inquiry into a purported cure of an Establishment Clause violation must also analyze whether the improper governmental endorsement of religion has ceased. Because of the procedural posture of this case, we have necessarily already considered that question. We previously held that the presence of the cross in the Preserve violates the Establishment Clause.

We also concluded that a reasonable observer aware of the history of the cross would know of the government's attempts to preserve it and the denial of access to other religious symbols. Even a less informed reasonable observer would perceive governmental endorsement of the message, given that "[n]ational parklands and preserves embody the notion of government ownership," that the Sunrise Rock area is used as a public campground, and finally, because of "the ratio of publicly-owned to privately-owned land in the Preserve."

Nothing in the present posture of the case

alters those earlier conclusions. Under the statutory dictates and terms that presently stand, carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it—will do nothing to minimize the impermissible governmental endorsement. Nor does the proposed land exchange under § 8121 end the improper government action. Such a transfer cannot be validly executed without running afoul of the injunction.

In sum, the government has not shown the district court's factual findings to be clearly erroneous. Nor has the government shown that the district court applied erroneous legal standards. Finally, the district court's decision does not reflect any clear error of judgment.

The district court did not abuse its discretion in enjoining the government from proceeding with the land exchange under 16 U.S.C. § 8121 and ordering the government to otherwise comply with its prior injunction that it not permit the display of the Sunrise Rock cross in the Preserve.

AFFIRMED.

"Cross Display Draws U.S. Supreme Court Review in Test for Obama"

Bloomburg
February 23, 2009
Greg Stohr

The U.S. Supreme Court will consider the fate of a cross erected as a war memorial on federal land in a case that calls upon the Obama administration to take a stance on the role of religion in public life.

The justices today said they will review a federal appeals court decision that would force removal of the cross, located in the Mojave National Preserve in California, as a violation of the constitutional ban on government establishment of religion. Bush administration lawyers appealed the ruling in October.

The dispute, which the justices will consider during the nine-month term starting in October, will be the first Supreme Court religion fight to confront the new administration. Solicitor general nominee Elena Kagan must decide whether to adopt the Bush administration's defense of the cross or to shift positions and perhaps even withdraw the government's appeal.

"There's no question the Obama administration will change the perspective," said Marci Hamilton, a professor at Yeshiva University's Cardozo School of Law in New York. She said that, even if the new administration presses ahead with the appeal, "they don't have to put everything into it."

The Bush appeal contends that Frank Buono, the Oregon resident objecting to the cross, lacks legal "standing" to sue. The appeal also argues that Congress resolved any constitutional problems by authorizing the transfer of the land on which the cross sits to a private citizen. The cross, currently covered by a plywood box because of the litigation, is perched on a rock outcropping about 100 yards away from a road in the southern California park.

A cross has been on the site since 1934, when the private Veterans of Foreign Wars erected a wooden version and a plaque as a memorial to fallen troops.

Cross Replaced

The cross has been replaced several times. The current version, which isn't accompanied by a plaque, is made of white pipes and is between five and eight feet high.

A federal judge ruled that the cross, as a Christian symbol, unconstitutionally promoted religion. Congress responded in 2004 by enacting a law that directed the Interior Department to transfer about an acre of land to the Veterans of Foreign Wars in exchange for a privately owned plot nearby.

The San Francisco-based 9th U.S. Circuit Court of Appeals ultimately agreed that the cross display was unconstitutional. The court also said the 2004 law was an improper effort to circumvent the order to remove the cross.

The Bush administration appeal called the 2004 law "an eminently sensible and constitutionally permissible way of resolving any establishment clause

problem."

Ongoing Role

Buono, represented by the American Civil Liberties Union, said in court papers that the transfer wouldn't eliminate the government's involvement with the cross. He points to provisions that would keep the cross's designation as a national monument and would require the return of the land to the government if the war memorial isn't maintained.

Buono, a Roman Catholic, also argued in his court filing that the government had a "history of favoritism" toward Christianity at the site. The National Park Service in 1999 refused a request from a person who wanted to erect a Buddhist memorial near the cross.

The Supreme Court in 2007 limited the power of taxpayers to challenge government actions as unconstitutionally promoting religion, throwing out a suit aimed at President George W. Bush's faith-based initiatives office. That case divided the court along ideological grounds, with Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, Samuel Alito and Anthony Kennedy forming the majority.

The case is ***Salazar v. Buono, 08-472***.

"Intriguing Issues About Religion"

SCOTUSblog
February 23, 2009
Lyle Denniston

The Supreme Court has given itself two choices to resolve a decade-old controversy over a Christian cross that stands on an isolated acre in the desert, amid the vast 1.6 million acres of the Mojave National Preserve in San Bernardino County in southeastern California. Either one is likely to be of considerable importance, in the ongoing national dispute over placing religious symbols on public property—a dispute that regularly returns to the Court.

The Court can end the controversy by ruling that the only challenger to the cross had no right to file his case. That seems, on the surface, to be a somewhat mundane issue of court procedure. It is, however, a question of deep consequence for those who oppose religious symbols. That's because the underlying question is: What kind of harm must such an opponent show before being allowed to seek a remedy in court?

Or, the Court can decide whether Congress, stubbornly defending such a religious symbol's place on public property, can get around the constitutional question by simply transferring the site to a private buyer, thus leaving the symbol intact where it is. That outcome of the case likely will have wide impact on a variety of statutes and other monuments with religious themes that stand on government property, in cemeteries, parks and elsewhere. Many tributes to war veterans, for example, use religious imagery. Several veterans' groups, in fact, told the Court in this case that "without action by this Court, countless veterans memorials will perish."

Both of those fundamental questions are at issue in the case of ***Salazar (Interior Secretary) v. Buono*** (08-372). The case involves a 74-year-old war memorial in the form of a Christian cross (several times replaced). It is made of white metal pipes, and stands at about five feet on Sunrise Rock, a granite outcropping rising from the desert floor. It is in a remote part of the huge Preserve, but it is clearly visible to those who approach it on a nearby road. There is nothing near it except rock, weeds and some cactus.

The controversy over its presence there has been an active issue since 1999; several times, Congress has stepped in to save the cross.

Ten years ago, a Utah man, a National Park Service retiree, asked permission to put up a Buddhist shrine near the cross. The Park Service said no, and indicated it would take down the cross. The American Civil Liberties Union pressed the Service to do so, but then Congress stepped in amid protests from one of its members and local officials. Ultimately, after several other measures did not succeed, Congress in 2004 ordered a one-acre site including the cross swapped for a five-acre parcel of privately owned land, elsewhere in the Preserve.

That action was taken while the Ninth Circuit Court was considering a case filed by another former Park Service official, Frank Buono, who lives in Oregon but once worked at the Preserve and returns from time to time for visits. He is a Roman

Catholic, and does not object to a cross being on public land. But he does say he is offended if a cross is allowed on government property, when the site is not open to other displays, including, perhaps, emblems of other religions.

The Interior Secretary—now Ken Salazar, in the new Obama Cabinet—is pursuing the government appeal, continuing the case originally taken to the Court by his predecessor, Secretary Dirk Kempthorne. The government petition seeks to have Buono's challenge dismissed, first on the argument that he had no right to sue (no "standing," in Article III terms). Buono's claim of injury, it contends, is not a religious problem at all. Rather, it says, it is an "ideological objection that public lands on which crosses are displayed should also be public fora on which other persons may display other symbols."

Salazar's lawyers argue that Buono has only a "policy disagreement," and the Court has never allowed a lawsuit based on the Constitution's religious clauses for such a complaint. Since Buono has no "spiritual stake" in the placement of the cross on national lands, it asserts, he is suffering no injury the courts can remedy.

Buono's lawyers contend that the Court's precedents only require evidence of "direct and unwelcome contact with a government-sponsored religious display or practice." That, they say, is Buono's objection, and his resulting injury. It is not an "abstract, generalized objection," the response contends.

If the Court were to accept the government contention that Buono had no injury, and thus no right to sue, that would be the end of the case. But, in reaching that conclusion, the Court presumably will make some new law, clarifying the injury component of "standing" to challenge religion in the public square.

If, however, the Court finds Buono was properly allowed into court, it would then decide whether the tactic chosen by Congress—a giveaway, or trade, of a site containing a religious display—cures any constitutional problem. The Court, in this particular case, however, is not confronted with a simple disposal of the property into private hands. Even while ordering the transfer, Congress officially designated the one acre plot with the cross as "a national memorial commemorating United States participation in World War I and honoring the American veterans of that war."

This, according to Buono's lawyers, brings into play a federal law requiring the National Park Service to regulate national parks, monuments, and reservations, whether on federal or private land. That is enough to make the cross a continuing object of the government's care and concern, making its presence still a constitutional problem, his lawyers assert.

"If Congress had wanted to limit the NPS's jurisdiction to national monuments or memorials on federal lands, it could have done so, as it has done in other statutes," they say.

The case will come up for argument some time in the Court's next Term, starting Oct. 5.

"High Noon at Sunrise Rock"

Wall Street Journal
May 27, 2005
Christopher Levenick

Just west of the California-Nevada border, 11 miles south of the freeway that connects San Diego with Las Vegas, a small hill rises above the sunbaked floor of the Mojave Desert. Atop that hill stands a six-foot cross, fashioned out of four-inch-diameter steel pipe. That dusty hilltop and its lonely marker just might become the scene of the most significant church-state controversy since last year's fight over the Pledge of Allegiance.

In 1934, a gritty prospector named J. Riley Bembry gathered a couple of his fellow World War I veterans at Sunrise Rock. Together they erected the cross, in honor of their fallen comrades. The memorial has been privately maintained ever since, with small groups still occasionally meeting to remember the nation's veterans.

A wrinkle developed in 1994, when the federal government declared the surrounding area a national preserve. With the cross now located on newly public land, the memorial soon caught the attention of the American Civil Liberties Union. Working with Frank Buono, a retired park ranger turned professional activist, the ACLU demanded that the National Park Service tear down the cross.

Mr. Buono insists that his seeing the monument ("two to four times a year") violates his civil rights. A federal district court found in his favor, and the decision was subsequently upheld by the Ninth Circuit. Last-ditch attempts to deed Sunrise Rock over to the local Veterans of Foreign Wars were struck down in April. Defenders of the memorial hope to appeal, but their options are narrowing.

The ACLU, however, has made out quite nicely. Not only has it prevailed in the courts to date, but it has managed to pocket $63,000. Owing to a quirk in civil-rights law, the taxpayer once again ended up paying the ACLU for pressing a highly controversial church-state lawsuit.

The Civil Rights Attorney's Fees Award Act of 1976 specifies that anyone bringing an even partly successful civil-rights suit may have the defendant pay all legal fees for both parties, a discretionary award that is routinely granted. Such fee-reversals are not permitted to successful defendants. Congress meant for the law to help citizens with little or no money, but since then wealthy and powerful organizations have perverted that intention. They use the specter of massive attorney fees to force their secularist agenda on small school districts, cash-strapped municipalities and, now, veterans' memorials. According to Rees Lloyd, a former ACLU staff lawyer, such litigation is "manifestly in terrorem," intended to terrify defendants into settling out of court.

And what if the defendants don't knuckle under? For advocacy groups that use staff or volunteer lawyers as plaintiffs' counsel, the result is pure gravy. If they lose their cases, they have lost no money. If they win, defendants pay attorney's fees at the private sector's market rate, which the advocacy

groups can keep for themselves.

Working to amend the Attorney's Fees Award Act is Rep. John Hostettler, a Republican from Indiana. Yesterday, he reintroduced the Public Expression of Religion Act, under which plaintiffs could still ask the courts to prevent governmental endorsement of religion—but could no longer soak the public for the privilege of being sued.

By eliminating the financial incentives for advocacy groups to take on trivial church-state cases, the measure would actually help restore the civil-rights law to its intended purpose. Equally important, it would signal that Congress is exercising its duty to correct the judicial branch when it goes astray of the Constitution. Such is clearly the case here.

If ***Buono v. Norton*** stands, the distance between the cross at Sunrise Rock and the headstones at Arlington National Cemetery will have effectively disappeared. It is only a matter of time until someone visits that field of heroes and takes offense at all the religious symbols inscribed in marble. Then the courts will have a hard time devising a principle by which those thousands of crosses on federal land are not as unconstitutional as the one in the desert.

Undoing the unholy mess the courts have made of the Establishment Clause will be the work of many years. In the meantime, Congress should at least deter those who would rather destroy veterans' memorials than allow them any religious symbols whatsoever. As Memorial Day approaches, swatting their hand from the taxpayer's pocket is a good place to start.

"Veterans Fight to Be Remembered"

Reuters: Liberty Legal Institute
May 21, 2009
Jennifer Grisham

WASHINGTON—Today, days before Memorial Day—Liberty Legal Institute joins five veterans groups, representing over four million veterans, to ask the U.S. Supreme Court to save the Mojave Desert Veterans Memorial from being torn down by the ACLU, the subject of ***Salazar v. Buono*** to be heard in The High Court's 2009-2010 term. The coalition is launching a major campaign to draw attention to the case: www.DontTearMeDown.com.

"Our nation is only as secure as we remember those who have given their lives for the freedom that we now have," said Kelly Shackelford, chief counsel of Liberty Legal Institute and attorney for the veterans groups. "The issue of saving this veterans memorial is something nearly every American will be interested in."

The seven-foot-tall memorial cross, erected in 1934 by World War I veterans as a war memorial to honor all fallen soldiers, stands in the midst of the 1.6 million-acre Mojave Preserve. The legal case arose when a former National Park Service (NPS) employee living in Oregon sued for the memorial's removal.

Following attempts by Congress to designate the memorial as a national memorial and to transfer the land to the VFW, the District Court and Ninth Circuit Court both ruled that the memorial is unconstitutional and must be removed. The court also ordered the memorial covered with a plywood box until the U.S. Supreme Court ruling.

"A story untold is a story forgotten," said Joe Davis, public affairs director for the VFW. "We must tell the story of our veterans and fallen heroes, and we must keep this veterans memorial."

Henry and Wanda Sandoz, current and longtime caretakers of the memorial agree: "If they were to tear down the memorial which has been there for 75 years, I would lose faith in our government," said Wanda Sandoz. Henry agreed, "It would be sad. It would be so sad." The Sandoz's have been caring for the memorial since 1984 when they promised their friend Rily Bembrey, a WWI veteran, on his death bed, that they would look after the monument. Bembrey was one of many veterans who erected the memorial after relocating to the desert after the war to find physical and emotional healing.

"If the plaintiff is so offended by the possibility of seeing this memorial cross in the desert, will he be offended when he drives by Arlington National Cemetery?" asked Jim Sims, National Senior Vice Commander of the Military Order of the Purple Heart. "It's our opinion that this case is not about a single memorial cross, it is a larger issue of honoring veterans who served and sacrificed for our country."

The American Legion is also concerned about the fate of the memorial. "If you don't think this is not the first domino in a series, you're not paying attention," said Mark Seavey, Assistant National Legislative Director for The Legion. "The cross is

emblematic of sacrifice, not religion."

This case is part of a larger trend of assaults on war memorials with religious imagery and all displays with religious symbolism on public property. In addition to the lawsuit against the Mojave Desert War Memorial, the ACLU is suing for the removal of the Mount Soledad Memorial (*Paulson v. Abdelnour, et al.*). A related case in which the veterans were involved, *Pleasant Grove City v. Summum*, which dealt with donated monuments on public property, was resolved in the Supreme Court earlier this year.

Liberty Legal Institute is a legal organization committed to the defense of religious freedoms and First Amendment rights and is often before the U.S. Supreme Court.

"Supreme Court Agrees to Hear Mojave Cross Case"

L.A. Times
February 24, 2009
David G. Savage

In a case that could reshape the doctrine of separation of church and state, the Supreme Court agreed Monday to decide whether a cross to honor fallen soldiers can stand in a national preserve in California.

The case will give the Roberts court its first chance to rule directly on the 1st Amendment's ban on "an establishment of religion."

In the last two decades, the justices have been closely divided on whether religious symbols, such as the Ten Commandments or a depiction of Christ's birth, can be displayed on public property.

Four years ago, then-Justice Sandra Day O'Connor cast a fifth and deciding vote against the display of the Ten Commandments in a Kentucky courthouse. She said such a public display of a religious message violated the 1st Amendment because it amounted to a government endorsement of religion.

In dissent, the court's conservatives said religious displays on public land generally do not violate the 1st Amendment, since no one is forced to listen to a religious message or participate in a religious event.

A year later, O'Connor retired and was replaced by Justice Samuel A. Alito Jr., President Bush's second appointee, who could form a new majority on religion.

At issue is an eight-foot-tall cross in the Mojave National Preserve in San Bernardino County. A smaller wooden cross was first erected by the Veterans of Foreign Wars in 1934 and was originally maintained as a war memorial by the National Park Service.

The American Civil Liberties Union objected to the cross and filed a suit on behalf of Frank Buono, a Catholic and former Park Service employee. The suit noted that the government had denied a request to have a Buddhist shrine erected near the cross.

Two years ago, the U.S. 9th Circuit Court of Appeals ruled for the ACLU and declared the cross an "impermissible governmental endorsement of religion."

Congress had intervened to save the cross. It ordered the Interior Department to transfer to the VFW one acre of land where the cross stood. The 9th Circuit judges were unswayed, however.

Bush administration lawyers appealed to the Supreme Court last fall and said the "seriously misguided decision" would require the government "to tear down a cross that has stood without incident for 70 years as a memorial to fallen service members."

The government also questioned Buono's standing to challenge the cross, since he lives in Oregon and suffers no obvious harm because of the Mojave cross.

In a friend-of-the-court brief, the VFW, American Legion and other veterans groups said the 9th Circuit's ruling, if allowed to stand, could trigger legal challenges to the

display of crosses at Arlington National Cemetery and elsewhere.

The court said it had voted to hear the case, now relabeled ***Salazar vs. Buono***. Arguments will be heard in October, and Obama administration lawyers will be in charge of defending the presence of the cross. Monday saw the return of Justice Ruth Bader Ginsburg. She had surgery for pancreatic cancer on Feb. 5, but as promised, she was back on the bench when the court resumed hearing oral arguments. Lab tests said her cancer was in a very early stage and had not spread.

"Desert Cross May Lead to Landmark Church-State Ruling"

The Los Angeles Times
October 22, 2008
David G. Savage

A long-running dispute over a cross in the Mojave National Preserve in Southern California may give the Supreme Court a chance to shift the law on church-state separation. Bush administration lawyers urged the justices last week to take up the case and to reverse a series of rulings that would "require the government to tear down a cross that has stood without incident for 70 years as a memorial to fallen service members."

The appeal may be well timed. For two decades, the court has been closely divided over the presence of religious displays—such as a Christmas tree, the Ten Commandments or a cross—on public property.

Three years ago, the justices were evenly split in a pair of cases involving the Ten Commandments. They upheld, 5 to 4, a granite monument on the grounds of the Texas state capitol, but struck down a similar display inside a courthouse in Kentucky in another 5-4 ruling.

Soon afterward, Justice Sandra Day O'Connor, who said both displays were unconstitutional, retired. She was replaced by Justice Samuel A. Alito Jr.

"I think the court is poised for a major change as to the Establishment Clause," said UC Irvine Law Dean Erwin Chemerinsky, referring to the 1st Amendment's ban on "an establishment of religion."

"Under Chief Justice [William H.] Rehnquist, there were four votes to say the Establishment Clause is violated only if the government literally establishes a church or coerces religious participation," said Chemerinsky, who argued one of the Ten Commandments cases before the high court. "Now, I think there are five."

The Mojave cross is in a remote location on federal land in San Bernardino County, near the border with Nevada. It dates to 1934, when the Veterans of Foreign Wars erected a wooden cross atop an outcropping known as Sunrise Rock.

Since then, the cross has been replaced several times. The current cross—two white metal pipes welded together—stands less than 8 feet high, but can be seen from Cima Road, about 11 miles south of Interstate 15.

The dispute over the cross arose in 1999, when the National Park Service considered and rejected a request to put a dome-shaped Buddhist shrine at a nearby trail head. Afterward, the park service said it planned to remove the cross.

But Congress intervened, blocking the agency from taking down the cross. In 2001, Frank Buono, a retired park service employee, sued the park service with the help of the American Civil Liberties Union chapter in Southern California. Buono, a Roman Catholic, alleged that the cross was an unconstitutional religious display on public land.

A federal judge and the U.S. 9th Circuit Court of Appeals ruled for Buono, saying

the cross must be removed. But Congress intervened again and told the Interior Department to give the VFW the acre of land under the cross.

Undaunted, the 9th Circuit struck that down too, saying it "would leave a little doughnut hole of land with a cross in the midst of a vast federal preserve." A "reasonable observer would perceive" this as a "government endorsement of religion," the ruling said.

U.S. Solicitor General Gregory G. Garre urged the high court to review the 9th Circuit's decision, saying it was wrong for at least two reasons: First, Buono, the park service employee, did not have standing to sue over the display of the cross, and second, Congress had solved the problem by giving the land to a private group.

Chief Justice John G. Roberts Jr. has been skeptical of according standing to litigants who cannot show that they have suffered an "actual injury" of some sort. A ruling in favor of the government on the standing issue could have a broad impact, as it would be hard for any objectors to prove that a religious symbol on government property had caused them a true injury.

The two sides also disagree over who is violating the essence of the 1st Amendment. The ACLU and the 9th Circuit said the park service should not show a "preference" for Christianity over Buddhism by allowing a symbol of one while forbidding the other. But the Bush administration's lawyer countered by saying the court's order to tear down the cross could be seen as "demonstrating hostility toward religion."

Next month, ACLU lawyers will file a brief urging the court to turn away the government's appeal. A decision on whether to take up the issue may come in December or January.

"9th Circuit Topples Mojave Desert Cross"

The Associated Press
June 8, 2004

A federal appeals court ruled yesterday that an 8-foot cross in the Mojave National Preserve is an unconstitutional government endorsement of religion.

Ruling 3-0 in ***Buono v. Norton,*** the 9th U.S. Circuit Court of Appeals upheld a lower court that had ruled against the cross, which has become both a war memorial and a place of worship at a Southern California desert site known as Sunrise Rock.

The case was brought by the American Civil Liberties Union on behalf of a retired National Park Service employee who objected to the religious symbolism of the steel-pipe structure, which sits about 10 miles south of Interstate 15 between Las Vegas and Barstow.

The cross, the subject of constant attack by vandals, was constructed in 1934 by a group of World War I veterans. According to a plaque they placed nearby, the cross was intended as a memorial, but has since attracted Christian worshipers.

The cross has been covered by a heavy tarp after a federal judge in Riverside sided with the ACLU in 2002, ruling that the "primary effect of the presence of the cross" was to "advance religion."

The San Francisco-based appeals court, however, did not indicate whether the cross must be immediately removed or whether it can remain covered pending new appeals.

"We think this opinion makes it clear that the government has an obligation to take down the cross as soon as possible," said Peter Eliasberg, an ACLU attorney.

The park service did not return calls seeking comment yesterday on whether it would ask the 9th Circuit to reconsider, appeal to the Supreme Court or drop its appeals and remove the cross.

Sixty years after the cross was constructed, Congress in 1994 declared the 1.6 million-acre area, which is covered with Joshua trees, a national preserve under the National Park Service's jurisdiction.

The park service, however, defended the cross in court, saying the outcropping it rests on was being transferred to a local Veterans of Foreign Wars post in exchange for five acres of privately held land near the preserve, which is in San Bernardino County.

Congress has also declared the site a war memorial.

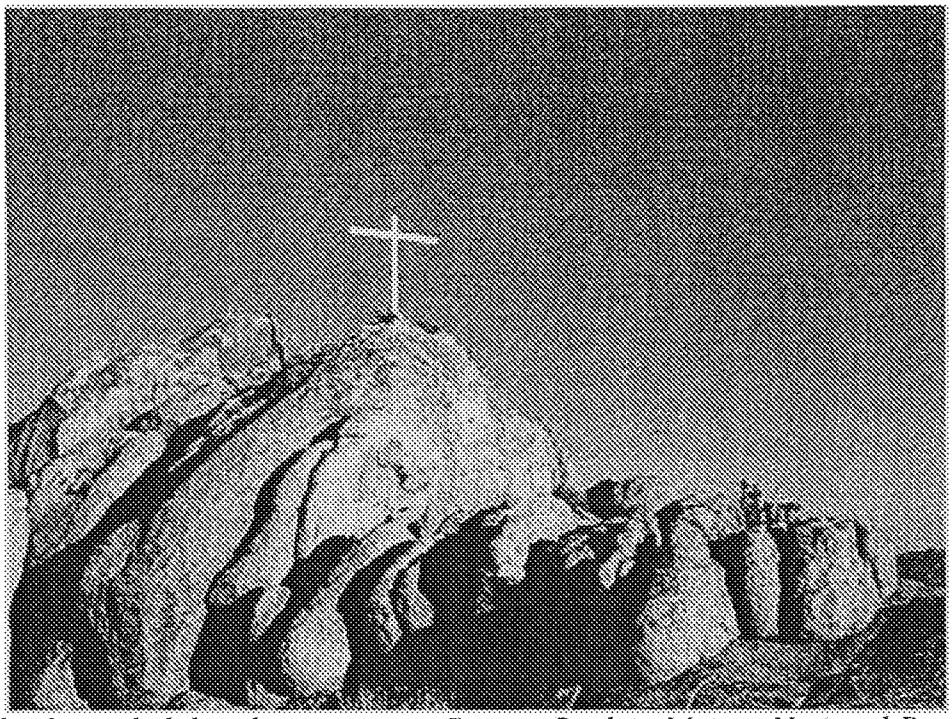
The government told the court that the pending land transfer made the case moot.

But the appeals court said the transfer could take years, meaning that the cross was still on public land. Judge Alex Kozinski, a Reagan appointee, said that, even if the land was transferred, the cross may still be a government endorsement of religion.

In ruling against the government, Kozinski noted that the park service has not opened the cross site to other permanent displays, religious or not. In 1999, the park service rejected an application for a monument to Buddha near the cross.

"Judge Orders Cross Removed from Mojave National Preserve"

National Parks Traveller
September 8, 2007
Kurt Repanshek



A federal judge has ruled that this cross atop Sunrise Rock in Mojave National Preserve must be removed. NPS Photo.

Brace yourself, I'm about to delve into one of those public conversation taboos. You know, you don't talk sex, politics, or religion in public.

But at times I find the debates spurred by symbols fascinating. And, of course, religious symbols seem to spur the most debates. The one I want to focus on involves Mojave National Preserve, where a federal judge has ruled that a cross can no longer stand atop Sunrise Rock.

The cross, a simple unadorned one, dates to 1934, when a wooden one was raised in honor of Americans who died during World War I. It later was replaced by a more enduring metal cross. As you look at it, it seems like a simple tribute. And yet in 2001 Frank Buono, a former National Park Service assistant superintendent at the preserve, filed a lawsuit, supported by the American Civil Liberties Union, to have the cross removed.

Court papers from an earlier stage in the case noted that Buono was "deeply offended by the display of a Latin Cross on government-owned property," reads a story from the *San Bernardino Sun*.

Look at the picture. Are you "deeply offended" by the cross?

In her ruling, Judge M. Margaret McKeown held that the cross's location within the national preserve is an unconstitutional federal endorsement of Christianity.

This case has me wondering if there's a point when a symbol, religious or otherwise, becomes more a part of our country's history, of our social fabric, our culture, than it does a symbol of what it was initially viewed as?

Beyond that, will this ruling lead the Park Service to remove any and all symbols or structures located within its properties that can be construed as religious? Should it prohibit any and all religious services?

Why did the judge in this case rule against the federal government, and yet back in 2000 a court dismissed a lawsuit claiming the federal government was endorsing a Native American religion by restricting access to Rainbow Bridge at Rainbow Bridge National Monument?

Of course, in the Rainbow Bridge case the court held that the couple that brought the lawsuit had suffered no personal injury and so had no standing. But what personal injury did Mr. Buono suffer in the Mojave Preserve matter?

Look elsewhere in the park system. The Park Service earlier this year designated a synagogue designed by Frank Lloyd Wright as a National Historic Landmark. Could someone argue that means the government endorses Judaism?

At Devil's Tower National Monument in Wyoming, conflicts arise when Native Americans want to hold ceremonies at the tower and ask that climbing be restricted.

And then there's the Christian Ministry In the National Parks, which holds non-denominational services every Sunday during the summer in more than 35 national parks. By permitting these services, does the Park Service tacitly endorse religion in general?

As these cases reflect, there are no quick, clearcut answers to these questions. Judges seemingly have different standards when weighing the merits of the cases before them. Across the country, different segments of our population hold different values.

Where do you draw the line? How do you decide what should be allowed, and what should not? Should the parks be so aseptic of some segments of America's culture? How do you decide which symbols are offensive and which are not? If the cross in question were taken down and replaced by a monument, would that be OK?

Religion long has played a role in this country's evolution. The Founding Fathers were pious men, the explorers who opened up the West often talked of the majesty "He" created. Even John Muir referred to God in his writings about nature:

> In God's wildness lies the hope of the world—the great fresh unblighted, unredeemed wilderness. The galling harness of civilization drops off, and wounds heal ere we are aware. John of the Mountains, (1938) page 317.

I've long viewed myself as a secularist, and certainly don't want to see crosses and other symbols, religious or otherwise, sprouting on hills and mountaintops across the park system. And yet, are there times when you wonder whether we go too far in striving to be politically correct?

Frankly, perhaps it would have been best if the judge in the Mojave case simply ruled that the cross did not belong in the preserve, regardless of whether it had any religious connotations.

"Critics Say the Park Service Is Letting Religion and Politics Affect Its Policies"

The New York Times
January 18, 2004
Michael Janofsky

To halt the removal of a cross placed in the Mojave National Preserve almost 70 years ago to commemorate World War I veterans, a Republican lawmaker from California has proposed swapping the land it sits on with a private group.

The National Park Service recently ordered the return of plaques bearing biblical verses that had hung in Grand Canyon National Park for more than 30 years before they were taken down last summer. The Park Service also approved selling a book at the Grand Canyon that suggests the canyon was created in six days several thousand years ago.

And here at the Lincoln Memorial, an eight-minute film that shows historical events at the memorial, including demonstrations for civil rights, abortion rights and gay rights, is being revised by the Park Service to add four minutes of more politically neutral events.

While the Park Service says these are unrelated incidents, reflecting no overarching political policy, a national alliance of public environmental workers says the efforts are evidence of a new program of "faith-based parks" promoted by the Bush administration with the strong support of conservative groups.

The apparent trend, the alliance says, has resulted in a willingness by Republican appointees now in senior positions in the Park Service to resolve disputes by protecting religious or conservative content, even in the face of arguments that the establishment clause of the First Amendment, which safeguards the separation of church and state, is being violated.

"What this shows," said Jeff Ruch, executive director of the alliance, Public Employees for Environmental Responsibility, "is that Christian fundamentalists and morally conservative groups have a special entree with the decision makers at the Park Service and the White House."

A spokesman for the Park Service, Dave Barna, denied that decisions made in these recent cases reflected political motives, insisting that political appointees have sought advice from career employees in resolving problems. "These are a few unrelated issues that have been put together just to criticize this administration," said Mr. Barna, who has worked for the Park Service for eight years.

Even so, in all but the case involving the cross, a senior political appointee at the Park Service has influenced the resolution of the dispute, fueling at least the impression that political considerations could have played a part in the decision.

At the Grand Canyon, three plaques quoting psalms had been hanging on buildings at the South Rim since the plaques were given to the park in the late 1960s by the Evangelical Sisterhood of Mary, a Christian group founded in Germany during World

War II.

Maureen Oltrogge, a Grand Canyon spokeswoman, said that a handful of visitors each year complain about them, but that it was not until the American Civil Liberties Union inquired last February that officials at the canyon sought counsel from regional Park Service officials in Denver and a Park Service lawyer in Santa Fe, N.M. Those discussions led to a decision last July by the Grand Canyon superintendent, Joe Alston, to take the plaques down.

Within a few weeks, however, complaints over his ruling had reached Washington, prompting the Park Service's deputy director, Donald W. Murphy, to ask the Sisterhood to return the plaques so they could be displayed again.

In a letter to the Sisterhood last July, Mr. Murphy said he regretted that "further legal analysis and policy review did not take place" before the plaques were removed and apologized for any inconvenience. He said he would like to "return to the historical situation that had been in place" while the department conducted a more comprehensive examination of the issue.

Mr. Barna said the issue was still under review.

The other matter, involving a coffee-table book that promotes a creationist view of the Grand Canyon, has been resolved—at least for now. After the book, "Grand Canyon: A Different View" (2003, Master Books), by Tom Vail, a river guide and evangelical Christian who leads religious-oriented excursions, first appeared on shelves at the park's six bookstores last summer, a park employee raised objections. That led to a review by several members of the Grand Canyon staff, who recommended that the book remain on the same shelves with books that offer evolutionary explanations of how the park formed. About 300 copies have been sold, Ms. Oltrogge said, and more have been ordered.

But the book's presence clearly troubles some Park Service employees. As Mr. Barna said, "We're still struggling with it."

When the controversy arose at the Grand Canyon, a copy of the book was sent to Park Service officials in Washington for review. This month, the Alliance Defense Fund, a conservative law firm that specializes in First Amendment issues and is representing Mr. Vail, threatened to sue the Interior Department if the book did not receive "the same treatment as books on the same topic from differing viewpoints." Mr. Barna said that Mr. Vail's book had not led senior officials to ask for a change in policy. They have determined, he said, that the book can remain on sale as an alternative theory to Grand Canyon history—but one that the Park Service does not necessarily support.

The film at the Lincoln Memorial has been shown for nearly a decade. But because so many of the events held there have been large protests sponsored by liberal groups, they tend to dominate the presentation. Last year, Mr. Barna said, several conservative groups complained that the film reflected "a leftist political agenda," leading to a decision by Fran P. Mainella, the Park Service's director, to order the film lengthened to include events like the gulf war victory parade in 1991 and tape of every president since the memorial opened in 1922.

A dispute over the Mojave Desert cross arose when a former Park Service employee, Frank Buono, objected to the presence of a religious symbol on federal land. After Mr.

Buono and the American Civil Liberties Union tried repeatedly to have it taken down, Congress passed a measure in December 2000, sponsored by Representative Jerry Lewis, a 13-term Republican from California, that prohibited spending money on its removal. A year later, the cross was designated a National Memorial, giving it federal protection.

Mr. Buono then sued the Park Service and won, with a federal judge in Riverside, Calif., ordering the government to remove the cross. Rather than comply, the Park Service appealed.

With the case now before the Ninth Circuit Court of Appeals, Mr. Lewis succeeded in getting a provision into the 2004 defense appropriations bill that could resolve the dispute by trading the acre around the cross for land owned by a private veterans group in Barstow, Calif.

The government now claims that the land transfer, which could take several years, makes the litigation moot. Not so, say Mr. Buono's lawyers, who argue that the designation of the cross as a memorial keeps it in federal hands—and should keep the court case alive.

"Lawmaker Seeks Land Swap to Let Mojave Cross Stand"

The Los Angeles Times
October 18, 2002
Julie Cart

A 5-foot cross that has been a fixture in the Mojave National Preserve for 68 years and the subject of intensive removal efforts is now included in a proposed legislative land exchange that would redraw the park boundary to place the cross in private hands.

The white cross stands on a rocky slope called Sunrise Rock, about 11 miles south of Interstate 15 near the Nevada border.

The Bush administration is backing the efforts of Rep. Jerry Lewis (R-Redlands) to preserve the cross, which is fashioned out of metal pipe and was erected in 1934 to honor World War I veterans. The issue of a permanent religious symbol on the remote desert site has been simmering for three years. The American Civil Liberties Union has sued to have the cross taken down.

Lewis has successfully interceded twice before. First, he presented a bill to prohibit the Park Service from using federal money to remove the cross.

Then he inserted language in the 2002 defense appropriations bill that declared the site a national memorial.

The latest attempt is part of a massive federal lands bill introduced last week in the House of Representatives.

Lewis' provision calls for one acre around the cross to be given to the Barstow Veterans of Foreign Wars post in exchange for five acres of land that would be donated by a private landowner who owns property within the preserve.

The exchange would allow local residents to continue to gather for Easter sunrise services or other religious worship because the ceremonies would take place on private land and satisfy the constitutional requirement for separation of church and state.

Critics say the land swap is an effort to circumvent the July ruling of a federal judge who ordered the cross to be taken down. The Park Service has not complied.

"It's truly amazing that what is a clear-cut constitutional issue could engender the depth of legislative enactment and amount of effort that has gone into saving this cross," said Frank Buono, a former deputy superintendent at the Mojave National Preserve now retired from the Park Service. It was Buono who notified the Southern California ACLU after determining that the cross was on public land.

Buono said he defends citizens' rights to worship and he supports the idea of a veterans' memorial, as long as it is nonsectarian.

"The issue, as a federal judge has ruled, is the permanent placement of the cross—a religious symbol—on public land," Buono said.

Lewis' spokesman, Jim Specht, said the congressman had acted on behalf of constituents who oppose changes to the cross site. Lewis regards the cross as a war

memorial, rather than a religious symbol, Specht said.

Park officials have tried to be sensitive to residents who love the site even though, officials say, the remote area is seldom visited.

"People out here feel very strongly about it, and we wanted to work with them to find a resolution," said Mojave's chief ranger, Sean McGuiness. "Taking it down wasn't a high priority for us."

Religious symbols are not unknown on national parkland. The Chapel of Transfiguration is a major draw at Grand Tetons National Park in Wyoming. But, to be allowed, the structure or site must be found to have historical significance.

In the case of the Mojave cross, a Park Service study found no historical merit in the site, which has changed significantly since the cross was first erected.

Henry Sandoz has been taking care of the cross since 1983, fulfilling a promise he made to a dying veteran. Sandoz, a retired mine employee who lives nearby, said he has re-erected the cross more than 18 times in 20 years, as the elements and vandals have had their way with the isolated site.

The cross began life as two wooden planks and is now made of sturdy iron pipes welded together and sunk into concrete.

According to Joe McGuire, quartermaster of the Barstow VFW post, the Barstow area—with its cluster of military bases—is a mecca for military retirees. McGuire said he could envision a tradition of decorating the site on Memorial Day.

"We look forward to having it," he said.

The ACLU's case is still pending. The Park Service has not appealed the judge's ruling but has asked for a clarification. The judge has not yet responded.

"Context is Key to Sorting out Commandments Rulings"

First Amendment Center
June 28, 2005
Tony Mauro

There are only 10 commandments, but it took the Supreme Court 138 pages of opinion to decide whether displays of those commandments belong on public property. And in spite of the verbiage, it all boiled down to the views of one justice: Stephen Breyer.

The Supreme Court splintered yesterday on the issue in *Van Orden v. Perry* and *McCreary County v. ACLU,* virtually guaranteeing further litigation. The justices said a Ten Commandments monument on the Capitol grounds in Austin, Texas, could stay where it has been since 1961. But the Ten Commandments displays in two county courthouses in Kentucky, put up in 1999 with unabashed pro-Christian intent, had to come down.

How to reconcile the two decisions? At the strictly numerical level, the answer is Breyer. He was the only justice in the majority in both 5-4 cases.

But beyond that, Duke University law professor Erwin Chemerinsky put it best yesterday: "Context is everything." Chemerinsky argued before the high court against the Texas monument, and lost. Chemerinsky was pleased to have won the vote of O'Connor, who has voted on both sides of the church-state divide, but sorry to have lost Breyer, the deciding vote.

Indeed, context was the driving force in the Court's decisions, and nothing made that clearer than the color photographs that were included in the Court's opinions in the Texas case. Breyer's concurring opinion, upholding the Texas display, includes a panoramic photo of the Capitol grounds that shows the Ten Commandments monument as a sliver of granite that can barely be picked out among an assortment of other memorials and lampposts. But dissenting Justice John Paul Stevens, who said flatly that the message of the memorial is that "this state endorses the divine code of the Judeo-Christian code," included a very different photo in which the face of the memorial, etched with the words of the Ten Commandments, almost fills the frame, with none of its surroundings visible.

For Breyer, the wide-range photo demonstrated one part of the crucial context. "The physical setting of the monument," he wrote, "suggests little or nothing of the sacred. . . . The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals."

Breyer was also swayed by the fact that the monument had stood unchallenged since it was placed there in 1961. It took a homeless lawyer named Thomas Van Orden, who often passed the monument on his way to the state law library, to take offense and take the state to court. "Those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect," wrote Breyer.

In dissent, Justice David Souter said the 40-

year quiescence had no importance in deciding this establishment-clause case. Past potential challengers might have been deterred by financial and social considerations, he said. "Suing a state over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent."

But Breyer's view held sway. And, just as he was willing to let the monument stand, so too Breyer was content to let other sleeping dogs lie: the Court's own precedents, contradictory as they may be at times. Reviewing those precedents, Breyer said, "The Court has found no single mechanical formula that can accurately draw the constitutional line in every case."

The so-called *Lemon* test, which appeared to survive yesterday's decisions, can explain some of the Court's judgments but not others, Breyer said, because it is so hard to draw the line. Legislatures may open their sessions with prayers, the Court has said, but public school football players may not.

The Texas monument, like other cases the Court has faced, was "borderline," Breyer said. "And in such cases, I see no test-related substitute for the exercise of legal judgment. . . . That judgment is not a personal judgment. Rather, as in all constitutional cases, it must reflect and remain faithful to the underlying purposes of the Clauses, and it must take account of context and consequences measured in light of those purposes."

Breyer's celebration of nuance and seeming contradiction was unacceptable to Justice Antonin Scalia, who wants clear principles to be applied without exception. In his angry dissent in the Kentucky case, some of which he read from the bench, Scalia wrote, "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle. That is what prevents judges from ruling now this way, now that—thumbs up or thumbs down—as their personal preferences dictate."

So why does the Court sometimes embrace government neutrality toward religion and sometimes not? A lack of courage, Scalia said. "I suggest it is the instinct for self-preservation, and the recognition that the Court . . . cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches."

But Justice Sandra Day O'Connor had a more principled explanation that seemed to drive her own surprisingly strong stance against the Ten Commandment displays in Texas as well as Kentucky. Maintaining a sometimes wandering boundary between church and state, she seemed to say, is the key to avoiding the religious strife that besets many parts of the world.

"At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish," O'Connor wrote. "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a

system that has served us so well for one that has served others so poorly?"

And in a seeming response to Scalia's repeated reference to the widespread public acceptance of the Ten Commandments and other acknowledgements of God, O'Connor added, "It is true that many Americans find the Commandments in accord with their personal beliefs. But we do not count heads before enforcing the First Amendment."

So at the end of the day, what is the Court's verdict on the Ten Commandments? Displays with long and benign histories seem OK; the thousands of Ten Commandments memorials like Austin's that were placed across the country will not be uprooted. But those displays that are new and sectarian-driven are vulnerable to legal attack.

In short, the justices needed only to look up and to the left of their own chamber to see the paradigm example of what passes muster as of yesterday: the sculpted frieze of Moses holding the tablets, standing for the last 70 years in a row of other lawgivers.

"We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments," wrote Justice David Souter for the majority in the Kentucky case. "In the company of 17 other lawgivers, most of them secular figures, there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion."

Reed Elsevier Inc. v. Muchnick

08-103

Ruling Below: *In re Literary Works in Electronic Databases Copyright Litig.*, 509 F.3d 116 (2nd Cir. 2007)

In the 2001 Supreme Court case of *New York Times Co. v. Tasini,* freelance authors brought suit against publishers, alleging that their copyrights were infringed when versions of their works were published in electronic form. While §201(c) of the Copyright Act extends privileges to reproductions of the copyrighted works, the authors argued that the provision did not include electronic versions. The Supreme Court agreed. This case was part of the litigation that followed the *Tasini* decision. In *In re: Literary Works in Electronic Databases Copyright Litigation*, the parties were seeking District Court approval for a settlement reached between freelance authors and electronic database publishers. However, the Plaintiff class includes a large population of freelance authors whose copyrights are unregistered, leading the court to question their jurisdiction. The 2nd Circuit found that the District Court did not have jurisdiction to approve the settlement, and the parties appealed.

Question Presented: Does 17 U.S.C. § 411(a) restrict subject matter jurisdiction of federal courts over copyright infringement actions?

IN RE: LITERARY WORKS IN ELECTRONIC DATABASES COPYRIGHT LITIGATION. Irvin Muchnick, Abraham Zale Znik, Charles Schwartz, Jack Sands, Todd Pitock, Judith Stacey, Judith Trotsky, Christopher Goodrich, Kathy Glicken and Anita Bartholomew, Objectors-Appellants,

v.

Thomson Corporation, Dialog Corporation, Gale Group, Inc., West Publishing Company, Inc., Dow Jones & Company, Inc., Dow Jones Reuters Business Interactive, LLC, Knight Ridder Inc., Knight Ridder Digital, Mediastream, Inc., Newsbank, Inc., Proquest Company, Reed Elsevier Inc., Union-Tribune Publishing Company, New York Times Company, Copley Press, Inc., Ebsco Industries, Inc. and Participating Publisher Tribune Company, Defendants-Appellees, Michael Castleman Inc., E.L. Doctorow, Tom Dunkel, Andrea Dworkin, Jay Feldman, James Gleick, Ronald Hayman, Robert Lacey, Ruth Laney, Paula McDonald, P/K Associates, Inc., Letty Cottin Pogrebin, Gerald Posner, Miriam Raftery, Ronald M. Schwartz, Mary Sherman, Donald Spoto, Robert E. Treuhaft and Jessica L. Treuhaft Trust, Robin Vaughan, Robley Wilson, Marie Winn, National Writers Union, The Authors Guild, Inc. and American Society of Journalists and Authors, Plaintiffs-Appellees, Edward Roeder, Appellant.

United States Court of Appeals for the Second Circuit

Decided November 29, 2007

[Excerpt: some footnotes and citations omitted]

STRAUB, *Circuit Judge*:

This class action copyright litigation arises from the unauthorized electronic reproduction of various written works. Named plaintiffs and class members consist mainly of freelance writers who contracted with publishers to author the works for publication in print media, and retained the copyrights in those works. The contracts did not grant the publishers the right to electronically reproduce those works or license them for electronic reproduction by others. But the publishers did so anyway. Plaintiffs then brought this class action on the theory that such electronic reproduction infringed their copyrights. After years of negotiations, class and defense counsel finally agreed on a settlement. Following lengthy motion practice, the District Court for the Southern District of New York certified a class and approved the settlement. We review that order and judgment on this appeal.

The overwhelming majority of claims within the certified class arise from the infringement of unregistered copyrights. We have held, albeit outside the class action context, that district courts lack statutory subject matter jurisdiction over infringement claims arising from unregistered copyrights. The District Court never specifically addressed this potential jurisdictional flaw. The precise issue on appeal is whether the District Court had jurisdiction to certify a class consisting of claims arising from the infringement of unregistered copyrights and to approve a settlement with respect to those claims. We hold that it did not. We therefore vacate its order and judgment and remand the case for proceedings consistent with this opinion.

BACKGROUND

In *New York Times Co. v. Tasini,* the Supreme Court held that *§201(c)* of the Copyright Act does not permit publishers to reproduce freelance works electronically when they lack specific authorization to do so. *Tasini* effectively requires publishers wishing to electronically reproduce written works to obtain a separate license to do so. Shortly after the Court decided *Tasini*, three preexisting class action infringement suits, which had been suspended pending the decision, were activated and consolidated in the Southern District of New York. A fourth, nearly identical action was coordinated with that consolidated action. Together, these claims comprise the instant litigation.

In this case there are basically two kinds of plaintiffs: individual authors and trade groups representing authors. Defendants also fall into two classes: companies that publish original electronic content, such as the New York Times Co., and companies that operate databases that license content from publishers, such as Thomson Corporation, the owner of Westlaw.

The named plaintiffs, and the class members they purport to represent, produced written works for certain defendants on a freelance basis. Based on their copyrights in those freelance works, plaintiffs assert claims for two types of infringement. They first claim that publishers, such as the New York Times Co., infringed their copyrights. This infringement allegedly occurred when the publishers licensed the articles for print publication only but also reproduced the articles in their electronic databases. Since the publishers needed but never received a

license for this second, electronic reproduction, plaintiffs allege that it constitutes infringement.

Plaintiffs next claim that the electronic database services infringed their copyrights. This infringement allegedly occurred when those companies licensed the articles from the publishers and then reproduced the articles in their own electronic databases. Because the publishers never possessed the right to electronically reproduce the articles, plaintiffs urge, the publishers could not grant any license for electronic reproduction. Thus, any such license that the publishers sold to the aggregators and databases was legally ineffective. Consequently, according to plaintiffs, the electronic reproduction by the databases is unauthorized and infringing.

Since *Tasini* established the basic soundness of plaintiffs' liability theory, the District Court swiftly referred the parties to mediation. Before the mediator, defendants contended that this litigation possessed scant settlement value because the District Court could never certify the vast majority of the claims for inclusion in any proposed class. Defendants noted that section 411(a) of the Copyright Act provides that "no action for infringement of the copyright in *any* United States work shall be *instituted* until preregistration or registration of the copyright claim has been made in accordance with this title." *17 U.S.C. § 411(a)* (emphases in defendants' mediation submission). "That rule," defendants wrote, "whose language could hardly be clearer, precludes the certification of any class respecting works in which a copyright has not been registered." Defendants then cited authority for the proposition that the District Court "lacks jurisdiction . . . to certify a class covering any unregistered works." Citing survey evidence showing that freelancers register less than one percent of their works, defendants noted that this jurisdictional failure likely affected more than 99 percent of the claims at issue.

* * *

Having reached an agreement, plaintiffs and defendants moved the District Court for class certification and settlement approval. Objectors opposed the motion on the ground, *inter alia*, that the settlement was inadequate and unfair to Category C claimants because they were paid little and singled out for reduction if the total claims exceeded $18 million. Objectors also maintained that the disparate treatment of Category C claimants illustrates that named plaintiffs, who each possess at least some registered copyrights, did not adequately represent those absent class members who possess only unregistered copyrights.

Defendants responded that Category C claimants were adequately represented and treated fairly because their claims were essentially worthless. In justifying the C-reduction, defendants renewed their jurisdictional argument, urging that Category C claims mainly concerned "works in which [the] copyright had never been registered, and which were not, therefore, within the court's subject matter jurisdiction." Somewhat similarly, plaintiffs maintained that "freelance authors typically did not register their works and thus lacked standing to bring an infringement action."

After prolonged proceedings, the District Court granted final class certification and final settlement approval in September of 2005. The District Court never considered whether it had jurisdiction to certify a class consisting mostly of claims arising from unregistered copyrights, or to approve a settlement resolving those claims.

Objectors appealed, again challenging the settlement's fairness and the adequacy of named plaintiffs' representation. Prior to oral argument, we became concerned that the District Court and the parties had passed over a nettlesome jurisdictional question. We ordered the parties to submit letter briefs "addressing the issue of whether the District Court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights." *In re Literary Works in Elec. Databases Copyright Litig.*, No. 05-5943-cv (2d Cir. Jan. 31, 2007). Those submissions were timely filed and we further questioned the parties at oral argument.

DISCUSSION

We review *de novo* whether the District Court had subject matter jurisdiction. In the following sections, we first ask whether the Copyright Act's registration requirement is jurisdictional and then ask whether each claim within the class must satisfy that requirement. We answer both questions affirmatively. Since most of the claims within this purported class do not satisfy the registration requirement, we also analyze whether the supplemental jurisdiction statute, 28 U.S.C. § 1367, remedies that jurisdictional defect. We conclude that it does not. Based on those determinations, we ultimately hold that the District Court lacked jurisdiction to certify the instant class or approve the settlement.

I. The Copyright Act's Registration Requirement Is Jurisdictional

Federal district courts possess only limited jurisdiction, which Congress regulates by statute. In a copyright action, a district court initially derives its jurisdiction from two sources: 28 U.S.C. §§ 1331 and 1338. Section 1331 provides district courts with a general grant of original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1338 more specifically grants district courts original jurisdiction over "any civil action arising under any Act of Congress relating to . . . copyrights."

But these provisions are not necessarily the end of the matter. Congress may supplement or limit these basic provisions with additional requirements "expressed in a separate statutory section from jurisdictional grants." *Barnhart v. Peabody Coal Co., 537 U.S. 149, 159-60 n.6, (2003)*. Section 411(a) of the Copyright Act, which regulates a district court's authority to adjudicate a copyright claim, is one such additional provision. It provides that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." *17 U.S.C. § 411(a).*

Whether this requirement is jurisdictional is not up for debate in this Circuit. On two recent occasions, we have squarely held that it is.

We are far from alone in this regard; there is widespread agreement among the circuits that section 411(a) is jurisdictional.

Given our own binding precedent, not to mention the persuasive authority of our sister circuits, we again conclude that section 411(a)'s registration requirement limits a district court's subject matter jurisdiction to claims arising from registered copyrights only.

The parties advance several arguments that effectively ask us to overrule our holdings in *Morris* and *Well-Made*. The short answer to

these arguments is that this panel simply cannot overrule a prior panel's holding. Nevertheless, for the sake of completeness we explain why these arguments fail.

The parties first urge that section 411(a) is jurisdictional in a very minimal sense. They claim that if a plaintiff brings a single claim based on a registered copyright, the district court acquires jurisdiction over any and all related copyright claims, even if those other claims arise from unregistered copyrights. Defendants contend that "§ 411(a) is merely the plaintiff's ticket to court," that once stamped, allows him to raise all sorts of claims arising from unregistered copyrights. Although defendants are not necessarily bound by earlier arguments, their current tack cuts against their position before the mediator and the District Court, where they broadly maintained that "works in which [the] copyright had never been registered . . . were not . . . within the court's subject matter jurisdiction."

Anyway, our holding in *Well-Made* shuts the door on this line of argument. There, the plaintiff brought two infringement claims: one based on the infringement of its *registered* copyright in a 20-inch doll, the other based on the infringement of its *unregistered* copyright in a derivative 48-inch doll. The district court decided the first claim on the merits but dismissed the second claim for lack of jurisdiction. We affirmed on both scores. We specifically upheld the dismissal, for lack of jurisdiction, of the claim based on the unregistered copyright even though the plaintiff had paired that claim with a related claim stemming from the registered copyright in the 20-inch doll. Thus, the existence of a claim based on a registered copyright does not bring within a district court's jurisdiction all related claims stemming from unregistered copyrights.

In similar vein, defendants also point out that other courts have enjoined the infringement of unregistered copyrights when at least one of the plaintiff's copyrights-in-suit was registered. This is another, although more limited, variation on the theme that where one of the plaintiff's claims arises from a registered copyright, section 411(a) vests jurisdiction over any related infringement claim. There are several problems with this argument.

First, we have never held that a district court may enjoin the infringement of unregistered copyrights so long as the underlying action arises from a registered copyright held by the same party. Second, even if injunctive relief against infringement of an unregistered copyright is available, that relief is properly limited to situations, as were found to exist in *Olan Mills* and *Pacific and Southern Co.*, where a defendant has engaged in a pattern of infringement of a plaintiff's registered copyrights and can be expected to continue to infringe new copyrighted material emanating in the future from the plaintiff. That sort of prophylactic relief furthers the purposes of the Copyright Act generally and does not undermine the intended effect of section 411(a). To the extent that *Perfect 10, Inc.* suggests a broader exception, we decline to follow it. In any event, defendants' position calls for an exception vastly broader than is found in any case by asking us to rule that registration of one party's copyright would somehow provide jurisdiction over claims stemming from the unregistered copyrights of many other parties. We decline to do so.

In addition to the parties' arguments, we have considered whether the Supreme Court's recent decision in *Eberhart v. United States,* 546 U.S. 12, (2005) (per curiam), "casts doubt" on *Morris* and *Well-*

Made; if so, we may reconsider our holdings in those cases. We conclude that *Eberhart* does not undermine our holdings in *Morris* and *Well-Made*.

In *Eberhart*, the Supreme Court held that the seven-day time limit for moving under Federal Rule of Criminal Procedure 33 was not jurisdictional. The Court underscored the "critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule," and slotted Rule 33's time limit within the latter category. *546 U.S. at 13.*

A key difference between section 411(a) and Rule 33 renders *Eberhart* inapplicable. Rule 33 merely sets forth a time limit for moving in a case that undoubtedly already falls within the district court's subject matter jurisdiction. The rule is nothing more than an "'emphatic time prescription[] in [a] rule[] of court'" that regulates motion practice within a jurisdictionally-sound cause of action—namely, a prosecution for a violation of federal law. *Id. at 18.* By contrast, section 411(a) creates a statutory condition precedent to the suit itself. In so doing, it "'delineat[es] the classes of cases . . . falling within a court's adjudicatory authority.'" *Id. at 19.* Given that fundamental difference between Rule 33 and section 411(a), *Eberhart's* holding does not cast doubt on *Morris* and *Well-Made*.

For these reasons, we conclude that section 411(a)'s registration requirement is a jurisdictional prerequisite to a copyright infringement suit.

II. Each Claim within the Certified Class Must Satisfy Section 411(a)'s Registration Requirement

Having established that *section* 411(a) imposes a jurisdictional requirement, we must decide whether each claim within the certified class must satisfy that requirement. The parties urge that jurisdiction is proper so long as the named plaintiffs' works were registered. Based upon the named plaintiffs' registrations, the parties maintain, the District Court had jurisdiction to certify a class containing thousands of claims arising from unregistered copyrights. We disagree.

Initially, we note that the class action certification device, Federal Rule of Civil Procedure 23, does not offer any alternative source of jurisdiction in the class action context. We therefore must look to the language of section 411(a), as well as any applicable case law, to determine how the registration requirement applies in the class action context.

Again, section 411(a) provides, in relevant part, that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of *the copyright claim* has been made in accordance with this title." *17 U.S.C. § 411(a)* (emphasis added). The question, as we see it, is whether the phrase "the copyright claim" refers to all the claims within the class or only those claims of the named plaintiffs.

On the literal level, the language is not dispositive. The phrase "the copyright claim" does not require, or even tend toward, one reading. But case law does provide some useful guidance as to how we should interpret that phrase. To begin with, we have applied Article III's jurisdictional requirements to each member of a class. Since statutory and constitutional jurisdictional requirements are equally binding, the same approach should hold here.

And case law indicates that it does. In *Zahn*,

the Supreme Court considered whether the diversity statute, 28 U.S.C. § 1332, requires each class member to satisfy the amount-in-controversy requirement. The Court held that the phrase "matter in controversy" in § 1332(a) refers to each class member's claim and therefore requires each claim to satisfy the statute's amount-in-controversy requirement. In so holding, the Court reasoned that Rule 23 does not authorize one plaintiff to "ride on another's coattails." *414 U.S.. at 301* (internal quotation marks omitted). In order to alter this result, Congress needed to pass, and did pass, a new statute, 28 U.S.C. § 1367, which we analyze in the next section.

Two years later, in *Weinberger v. Salfi,* the Court addressed whether a district court properly certified a class of Social Security claimants who asserted that they had been denied benefits wrongfully. Like the Copyright Act, the Social Security Act contains a provision limiting jurisdiction over social security claims: section 205(g) of the Social Security Act, which grants subject matter jurisdiction over only "final" decisions of the Secretary. In determining whether the district court had jurisdiction to certify the class in *Weinberger*, the Supreme Court applied this finality requirement to *all* the claims within the class. It concluded that the named plaintiffs' claims satisfied the finality requirement but that claims of absent class members did not. Given this statutory jurisdictional defect, "the District Court was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal." *422 U.S. at 763. Weinberger* thus supports the proposition that when a statute imposes a jurisdictional requirement, each member of a putative class must satisfy that requirement.

Four years later, the Court reaffirmed this approach in *Califano v. Yamasaki.,* There, the Court held that section 205(g) of the Social Security Act permits social security claimants to seek relief via the class action device. But the Court carefully reiterated that each class member must meet the jurisdictional requirements of section 205(g). Stating the proposition more generally, the Court wrote, "Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding." *442 U.S. at 701.*

We see no reason to interpret or apply the jurisdictional requirement of section 411(a) any differently. In light of these precedents, we hold that the phrase "the copyright claim" in section 411(a) refers to each claim within a purported class, and thus requires that each class member's claim arise from a registered copyright. Only when each claim satisfies that jurisdictional prerequisite may the district court utilize Rule 23 to "exercise [its] jurisdiction over the various individual claims in a single proceeding." *Id.*

III. The Supplemental Jurisdiction Statute Does Not Apply Here

[The Court addresses the possibility that the supplemental jurisdiction statute might provide an alternate source of jurisdiction. They conclude that it does not, holding that the text of the statute would not apply to jurisdictionally-deficient *federal* claims asserted together with another, jurisdictionally-proper claim.]

* * *

CONCLUSION

Because the District Court lacked

jurisdiction to certify the class and approve the settlement agreement, we VACATE and REMAND for proceedings consistent with this opinion

VACATED, REMANDED.

DISSENT

JOHN M. WALKER, JR., Circuit Judge, dissenting:

The majority insists that the copyright-registration requirement, 17 U.S.C. § 411(a), presents a "jurisdictional" bar to this class-action settlement. To be sure, in the past we have labeled the copyright-registration requirement as "jurisdictional," at least with respect to an action for damages. The Supreme Court, however, in *Eberhart v. United States,* urged us to more carefully distinguish between true jurisdictional bars and claim-processing rules that may be waived and to revisit our use of the "jurisdiction" label in that light. Following that instruction and bearing in mind the underlying purpose of 17 U.S.C. § 411(a), as well as our recent holding that not all members of a settlement-only class need to possess a valid cause of action under the applicable law, leads me to conclude that the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement.

In *Kontrick v. Ryan*, and *Eberhart*, the Supreme Court held that even "emphatic" time prescriptions in the rules of court are not necessarily "jurisdictional," *Kontrick, 540 U.S. at 454.* It explained, "[c]larity would be facilitated . . . if courts and litigants use the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Eberhart, 546 U.S. at 16* (internal quotation marks omitted). Then, in *Arbaugh v. Y&H Corp.*, the Court applied *Eberhart* and *Kontrick* to a statute, concluding that the employee-numerosity requirement of Title VII, 42 U.S.C. § 2000e(b), is not jurisdictional, noting that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts,'" *546 U.S. at 515.* Finally, and most recently, in *Bowles v. Russell,* the Supreme Court determined that 28 U.S.C. § 2107(a), which explicitly provides that in a civil action "no appeal shall bring any judgment . . . before a court of appeals for review unless notice of appeal is filed[] within thirty days" of entry of judgment, is jurisdictional. The Court emphasized the jurisdictional significance "of the fact that a time limitation is set forth in a statute," *127 S. Ct. at 2364*, and noted that § 2107(a) admits of no exception.

As will be explained, I think that § 411(a) is more like the employee-numerosity requirement in *Arbaugh* than it is like § 2107(a) in *Bowles*. Moreover, because Congress passed § 411(a) to facilitate the enforcement of copyrights, I conclude that compliance with § 411(a) is a mandatory prerequisite to the accrual of a cause of action for damages, but not a prerequisite to the possession of constitutional standing. Thus this suit falls within the ambit of our holding in *Denney v. Deutsche Bank A.G.*, that not all members of a settlement-only class must possess a valid cause of action under the applicable law at the time of settlement.

Plaintiffs are a class of mostly freelance authors whose work has been reproduced without their consent in defendants'

electronic databases. An individual infringement suit for damages requires that the plaintiff's copyright be registered; yet few members of the class hold registered copyrights in their work. Of course, should any wish to sue individually, the formality of prior registration could be met. After several years of intense negotiation, and prior to trial (and hence without registration of many of the copyrights held by class members), plaintiffs and defendants reached the comprehensive settlement that is the subject of this appeal. The majority vacates that settlement on the basis that the district court lacked jurisdiction over the class because most of its members have not registered their copyrights. For the reasons that follow, I respectfully dissent.

I. Jurisdiction and Section 411(a)

Section 411(a) of Title 17 provides that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." I turn first to the text of § 411(a) and ask whether it speaks in "jurisdictional" terms. It does not.

Section 411(a) does not, by its terms, provide the copyright holder with any of the sticks in his bundle of rights.

Indeed, it is addressed to the copyright holder, not the courts, and it simply sets forth a prerequisite to suit—namely, registration. Furthermore, as 17 U.S.C. § 501(b) makes clear, § 411(a) speaks not to rights but to the means of their vindication. It stipulates, "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that *particular right committed* while he or she is the owner of it." *17 U.S.C. § 501(b)* (emphasis added).

As we have emphasized, the distinction between a rights-creating statute and an enforcement mechanism is an important one: we typically consider the latter a claim-processing rule within the meaning of Eberhart. For instance, in *Richardson v. Goord, 347 F.3d 431 (2d Cir. 2003)* (per curiam), we concluded that the exhaustion requirement of the Prison Litigation Reform Act ("PLRA") is a claim-processing rule because exhaustion is not "essential to the existence of the claim . . . and therefore to the presence of an Article III case or controversy," *id. at 434* (internal quotation marks and citation omitted). Similarly, registration is not essential to the existence of a copyright claim or, as is discussed below in Part II, to the presence of an Article III case or controversy. Section 411(a) provides that even if registration has been refused by the Copyright Office, "the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. . . . [T]he Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue." *17 U.S.C. § 411(a)*. Thus, the registration requirement appears simply to be a procedural or "administrative prerequisite[]," *Boos, 201 F.3d at 183*, to ensure that the "deposit, application, and fee . . . have been delivered to the Copyright Office in proper form," *17 U.S.C. § 411(a)*. And failure to comply with an administrative prerequisite "would not deprive district courts of jurisdiction." *Boos, 201 F.3d at 183*. Indeed, under § 411(a), district courts' jurisdiction is not disturbed by the denial of registration or by the Register's failure, in that event, to become a party to the litigation.

Second, the legislative history of Title 17

confirms that § 411(a) does not create rights but is rather like the enforcement mechanisms or claim-processing rules in *Kontrick*, *Eberhart*, and *Arbaugh*.

Congress passed § 411(a) to implement a policy preference that courts, before they process a copyright claim, should consider the views of the Copyright Office, whose duty is to determine whether "'the material deposited constitutes copyrightable subject matter and the other legal and formal requirements of [Title 17] have been met.'" H.R. Rep. No. 94-1476, at 156. Indeed, "[t]he Copyright Office certificate of registration is prima facie evidence of the facts stated therein. This has generally been held to mean prima facie proof of ownership and validity." *Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092 n.1 (2d Cir. 1977)* (citation omitted). In this respect, § 411(a) is like other statutory exhaustion requirements, which are designed to permit agencies to pass first on contested questions, the resolution of which requires a certain quantum of expertise, and most such exhaustion requirements are not jurisdictional. Furthermore, because this suit was settled before trial, the views of the Copyright Office are unhelpful; the copyright registration requirement only serves its statutory purpose when a cause is litigated, not settled.

The legislative history of the Copyright Act also suggests that registration, rather than being a prerequisite to federal jurisdiction, is a prerequisite to certain remedies—namely statutory damages and attorney's fees. Registration furthers the important policy behind copyright of disclosing works and making them part of the public domain. But because registration is not required for copyright protection, the Copyright Act provides the additional remedies of statutory damages and attorney's fees as incentives to register.

Third, § 411(a) is riddled with jurisdictionally recognized exceptions. For instance, courts routinely permit plaintiffs to file suit before applying for a copyright or while the Copyright Office is considering their application. The general exception that allows post-suit registration is particularly telling because "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux v. Atlas Global Group, 541 U.S. 567, 571, (2004).*

Moreover, as the majority notes, several circuits have seen fit to enjoin the infringement of an unregistered copyright. These circuits have reasoned that, by the very language of 17 U.S.C. § 502(a), "[t]he power to grant injunctive relief is not limited to registered copyrights, or even to those copyrights which give rise to an infringement action." *Olan Mills, 23 F.3d at 134.* Permitting district courts to enjoin the infringement of unregistered copyrights is not only consistent with § 502(a), but also gives meaning to § 408(a)'s provision that "registration is not a condition of copyright protection," and to the congressional policy of making available the additional remedies of statutory damages and attorney's fees to those who register.

Finally, it is evident that § 411(a) is not a definitive limitation on the court's power, characteristic of a jurisdictional provision, from § 411(a)'s explicit exception of foreign works from its reach. The history of this exception further counsels concluding that § 411(a), unlike jurisdictional provisions, is not meant to be inflexible. In discussing possible ways to amend the Copyright Act to bring it into compliance with the Berne Convention, the Senate Judiciary Committee argued that because:

> [r]egistration . . . [while] not, technically speaking, a condition for the existence of copyright . . is, however, a precondition for the exercise of any of the . . . rights conferred by copyright, . . . [the] metaphysical distinction between the existence of a right to prevent unauthorized use of a copyrighted work, and the exercise of that right, [should not be] maintain[ed].

Although the House did not endorse the Senate's view, Congress as a whole was able to reach consensus on an amendment to the Act only because it deemed § 411(a) a "formality," and the Berne Convention did not forbid signatories from "'impos[ing] [formalities] . . . on works first published in its own territory.'" *La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1206 & n.11 (10th Cir. 2005).*

Taken together, § 411(a)'s language, legislative history, jurisdictional exceptions, and exception for foreign works strongly indicate that the registration requirement is more akin to a claim-processing rule than a jurisdictional prerequisite.

II. Constitutional Standing in the Class-Action Context and Section 411(a)

This appeal concerns the pre-trial settlement of a class action. Whether or not § 411(a) is a claim-processing rule, compliance with its requirements is not necessary for a copyright plaintiff to have constitutional standing. Indeed, as the Seventh Circuit has aptly explained, it is hard to see how the filing of an administrative claim could ever be the prerequisite to asserting constitutional injury.

And, in the class-action context, there is a distinction between constitutional standing, which is always required, and statutory standing, which is not required of all members of a settlement-only class. For instance, in *Lerner v. Fleet Bank, N.A.*, a RICO class action, we held that RICO standing was not "jurisdictional," at least in the class-action context. We explained that "plaintiffs' lack of statutory standing does not divest the district court of original jurisdiction over the . . . action." *318 F.3d. at 130.* And we went on to conclude that the district court could exercise supplemental jurisdiction over plaintiffs' state-law claims despite the fact that certain members of the plaintiff class lacked RICO standing. We emphasized that RICO standing was "sufficiently intertwined with the merits," *Lerner, 318 F.3d at 128*, and thus not jurisdictional.

Drawing such a distinction between constitutional standing, the absence of which deprives the court of authority to redress harm to that plaintiff, and statutory standing, the absence of which may be waived, makes particular sense in the settlement context. We have, for example, approved the settlement of mass-tort lawsuits involving plaintiffs who have been exposed to toxic substances and therefore run the risk of incurring actionable injuries at some point in the future—but who, while they may have constitutional standing, surely could not survive a motion to dismiss for failure to state a claim were they to bring their case to trial. And I am not disposed to undo such settlements because certain class members may not, at the moment of settlement, possess the statutory cause of action that they could have in the future and could then litigate.

A plaintiff alleging copyright infringement must show ownership of a valid copyright and copying by the defendant, the registration requirement, and resulting

opinion of the Copyright Office, bear upon the validity of the copyright and its ownership and thus "go[] to the merits of the action," cf. *Lerner, 318 F.3d at 129*. But a plaintiff alleging copyright infringement has suffered an injury-in-fact whether or not he has registered his copyright. As the Eighth Circuit has explained, "infringement itself is not conditioned upon registration of the copyright." *Olan Mills, 23 F.3d at 1349*. Thus, all members of the plaintiff class—whether or not they have registered their copyrights—have been injured by defendants if we assume the truth of plaintiffs' allegations.

The other two requirements of Article III standing—an injury that is traceable to the challenged action and redressable by a favorable decision—are also satisfied in this case. Plaintiffs' injuries are a direct result of defendants' infringement and would be redressed by an award of damages for their economic losses. Plaintiffs therefore have standing in the constitutional sense.

Finally, as I noted in Part I, claim-processing rules are not essential to the presence of an Article III case or controversy, *Richardson, 347 F.3d at 434*. That plaintiffs have established an Article III case or controversy regardless of whether they have registered is further support for the conclusion that § 411(a)'s registration requirement is a claim-processing rule rather than a jurisdictional prerequisite, and that plaintiffs' settlement should not be disturbed.

III. Well-Made Toy, Morris, and Weinberger Are Distinguishable

In concluding that § 411(a) is "jurisdictional," the majority relies on two decisions of our court—*Well-Made Toy Manufacturing Corp. v. Goffa International Corp.*, and *Morris v. Business Concepts, Inc.*,—that attach the "jurisdictional" label to § 411(a). I have already sought to explain why we should reconsider our too-facile use of the jurisdictional label in the wake of *Eberhart*. I now explain why those cases, in any event, offer only equivocal support.

The plaintiff in *Well-Made Toy*, for instance, manufactured two similar rag dolls, differing principally in their size. Although it registered a copyright in only the smaller of the two dolls, Well-Made Toy sought damages from the defendant based on the defendant's alleged reproduction of the larger of the two dolls. In concluding that Well-Made Toy could not maintain such a suit, we distinguished *Streetwise Maps, Inc. v. VanDam, Inc.* In *Streetwise Maps*, while the plaintiff had registered a copyright in only the second of two maps it published (as in *Well-Made Toy*), the second map incorporated the substance of the first map (unlike the dolls in *Well-Made Toy*); and thus, we concluded, the "registration certificate [for the second map]. . . suffice[d] to permit [the plaintiff] to maintain an action for infringement based on defendants' infringement [of its unregistered copyright in the first map]." *159 F.3d at 747*. The difference between *Well-Made Toy* and *Streetwise Maps* was a matter of logic, not locution: "Because a derivative work is cumulative of the earlier work, it is *logical* that the registration of the derivative work would relate back to include the original work, while registration of the original material would not carry forward to new, derivative material." *Murray Hill Publ'ns v. ABC Commc'ns, Inc., 264 F.3d 622, 632 (6th Cir. 2001)* (emphasis added).

Morris v. Business Concepts, Inc. is equally unhelpful to the majority. In that case, while we did say that "subject matter jurisdiction was lacking because the registration

requirement of § 411(a) was not satisfied," *259 F.3d at 72*, we also asserted, without mentioning "jurisdiction," that "proper registration is a prerequisite to an action for infringement," *id. at 68*. Thus, Morris is hardly a beacon of clarity.

The majority likewise relies upon *Weinberger v. Salfi, 422 U.S. 749 (1975)*, to support its contention that each member of a settlement-only class must satisfy the "jurisdictional" requisites to a suit under the Copyright Act–including as it so happens, § 411(a). But the majority misses the point: Weinberger supports the conclusion that the essential question is whether compliance with a statutory exhaustion requirement is necessary for plaintiffs to have constitutional standing. And, indeed, in Weinberger it was. Weinberger involved 42 U.S.C. § 405(g), a provision of the Social Security Act that channels social security and medicare claims through an administrative process and precludes federal courts from exercising general federal question jurisdiction over such claims. The Court explained, "it is the Social Security Act which provides both the *standing* and the substantive basis for the presentation of th[e] constitutional contentions." *Weinberger, 422 U.S. at 760-61* (emphasis added); But, as I have already explained, in this case, constitutional injury does not depend upon compliance with § 411(a): whether or not they have registered their copyrights, all members of the class in this case have suffered sufficient injury to satisfy Article III.

For the foregoing reasons, I would not dismiss the settlement on jurisdictional grounds. I respectfully dissent.

DISSENTING

"Court to Rule on Copyright Settlement"

SCOTUSblog
March 2, 2009
Lyle Denniston

After examining the case multiple times, the Supreme Court agreed on Monday to rule on the scope of federal court authority to decide cases involving copyright infringement, when the claims have been settled. The Court limited its review to a question it had composed: "Does 17 USC 411 (a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?" The case is ***Reed Elsevier, et al., v. Muchnick, et al.*** (08-103). It was the only case granted Monday.

As stated, the question appears to be a variation on the first question raised by the petition: "Whether the usual power of lower courts to approve a comprehensive settlement releasing claims that would be outside the courts' subject matter jurisdiction to adjudicate, confirmed in *Matushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), was eliminated in copyright infringement actions by 17 USC 411 (a)."

As a practical matter, the case involves whether the courts had authority to scuttle an $18 million, nationwide settlement of copyright infringement claims that authors made when their free-lance articles or photos in major publications were made freely available in those publishers' electronic databases. This was a class-action lawsuit.

A District Court had approved the settlement, but the Second Circuit Court ruled that the federal law limiting copyright lawsuits to those who have registered their works meant that the District Court had no jurisdiction over the lawsuit, and thus had no authority to approve the settlement. Some 99 percent of the claims covered by the settlement were by creators of unregistered works. A group of publishing companies then took the issue on to the Supreme Court, arguing that the nullification of the settlement contradicted the Supreme Court's decision in 2001 in *New York Times, et al., v. Tasini, et al.*

* * *

The copyright case the Court added to its docket for decision at its next Term had been pending at the Court since before the Term opened. It was listed ten times for consideration at the Justices' private Conferences, leading finally to Monday's order.

The provision at issue in the case, part of the Copyright Act of 1976, says that "No action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." Congress adopted that clause to assure that courts, in dealing with infringement claims, would have a chance to consider the views of the U.S. Copyright Office, which decides whether a work may qualify for copyright protection.

The Second Circuit, in its decision in the ***Elsevier*** case, ruled that when a class action involving copyright infringement claims is before the court, every member of the class must have registered the work before suing. Since many of the authors involved in this

case had not done so, the class had no right to sue, the Circuit Court said, so the District Court had no authority to approve the settlement.

The Court's grant was limited to the jurisdictional question. It thus did not accept for review a second question, testing whether the Second Circuit had ignored the Supreme Court's *Tasini* opinion seeming to encourage settlement of the copyright claims at issue.

"Supreme Court to Revisit a Case on Breach of Copyright"

The New York Times
March 3, 2009
Adam Liptak

WASHINGTON—The Supreme Court agreed on Monday to revisit a case it decided eight years ago in favor of freelance writers who said that newspapers and magazines had committed copyright infringement by making their contributions available on electronic databases.

In that 2001 decision, *New York Times Company v. Tasini*, the Supreme Court seemed to contemplate and even encourage a settlement of the case, saying that the parties "may enter into an agreement allowing continued electronic reproduction of the authors' works."

After the *Tasini* decision, many freelance works were removed from online databases. Most publishers these days require freelance writers to sign contracts granting both print and online rights.

In an effort to settle the original copyright infringement claims, authors, publishers and database companies undertook four years of what they said were intensive, complex and costly negotiations. In the end, the defendants agreed to pay $18 million for a global settlement of all claims in four class actions to two groups of authors—those who had registered copyrights in their works and those who had not.

The second group was by far the more numerous. But the federal copyright law allows suits claiming copyright infringement only after works are registered.

In November 2007, a divided three-judge panel of the United States Court of Appeals for the Second Circuit, in New York, declined to approve the settlement, saying it did not have jurisdiction over the claims of the second group of authors.

The question for the Supreme Court this time is whether courts may approve global class action settlements that include claims they would not have had jurisdiction to decide.

Many authors supported the settlement, but some objected. The objectors said that authors who had not registered their works were treated unfairly because their share would be reduced if there was not enough money to go around.

But all concerned urged the court to hear the case, ***Reed Elsevier v. Muchnick***, No. 08-103.

A brief for one group of authors said that most freelance writers "will not spend $35 or $45 to register a year's worth of works" to bring a lawsuit over "articles they sold years ago for $50 or $100."

"With no comprehensive settlement in place," the brief added, "the publishers and databases will have no choice but to search for and delete whole swaths of freelance works from their digital archives, or risk repetitive litigation over the same dispute the parties sought to settle in this case."

"Tasini Parties Ask Supreme Court to Overturn Settlement Rejection"

Library Journal Academic Newswire
July 8, 2008
Andrew R. Albanese, Contributing Editor

Parties to the *Tasini v. New York Times* case recently filed a petition for certiorari, meaning they will ask the U.S. Supreme Court to reverse a November 2007 decision by the Second Circuit that rejected a proposed settlement. In a surprise decision, the Second Circuit rejected the settlement proposal last year, ruling that the federal courts could not approve payments of claims to those holding unregistered copyrights. If the Supreme Court agrees to hear the appeal, the Justices will see a rare sight: both parties to the case will argue to reverse the lower court ruling. The deadline for the parties to file their petitions is August 13, 2008.

Although a group of "objectors" still opposes the settlement terms put forth, and would like to see the settlement fail, all parties agree that the Second Circuit ruling rejecting the case, which essentially leaves freelancers with unregistered copyrights with no standing to resolve their complaints—was wrong. "Neither the appellants (objectors) nor the appellees (defendants plus plaintiffs) raised the issue the [Second Circuit] addressed in its ruling," objector Irv Muchnick told the LJ Academic Newswire in an interview last year. "In fact, we all argued against it when the Second Circuit asked for a briefing on it."

If left to stand, the current ruling would leave both parties in legal limbo, Muchnick explained, with publishers unable to get the "complete peace" they seek, and with unregistered claimants unable to settle through a class-action. "I think the current ruling is terribly inconvenient and inefficient for all concerned, as well as for information consumers and for society," Muchnick added. "A failure to reverse would mean not only that this settlement is rejected but also that no other settlement could include unregistered claims."

That would mean that some publishers would likely remove articles by unregistered writers from their databases rather than "face a potential wave of lawsuits even greater than they might have budgeted to handle earlier," Muchnick noted.

"Second Circuit Holds Copyright Class Action Claims Must Be Based on Registered Copyright"

JOLT digest
December 4, 2007
Andrew Ungberg—Edited by Wen Bu

On November 29, the Court of Appeals for the Second Circuit vacated and remanded a decision of the District Court for the Southern District of New York to certify a class of freelance authors and accept a settlement of their copyright infringement claims. The claims arose from unauthorized reproduction of the authors' works on Internet sites and web databases.

The Second Circuit vacated the district court's ruling on jurisdictional grounds. Citing Section 411(a) of the Copyright Act, which provides that claims will not be instituted until preregistration or registration of the copyright claim has been made, the court held that the district court lacked jurisdiction over the claims raised by the majority of the class members, who had not registered their works. The court held that because § 411(a) requires each class member's claims to be based on a registered copyright, the district court lacked the authority to both certify the class and accept any settlement.

Judge Walker dissented, arguing that the majority fundamentally misunderstood the nature of § 411(a), treating it as a jurisdictional bar when in reality it is a claim-processing rule. Relying on *Eberhart v. United States*, 546 U.S. 12 (2005) and a series of other Supreme Court decisions to define the distinction, he argued that § 411(a) is more like claim-processing rules than a jurisdictional bar because the rule primarily allows consideration of the Copyright Office's views on the validity of a copyright (which is not at issue in a settlement), is a prerequisite only to particular remedies, and is limited through a number of recognized exceptions.

He stated that as Congress passed the Act to facilitate the enforcement of copyrights, the statute makes registration a prerequisite to recover damages, but not all members of a settlement-only class need to hold registered copyrights for the court to have jurisdiction over their claims.

Interestingly, Judge Walker and Judge Winter are possible members of the plaintiff class but declined to recuse themselves, issuing a separate opinion explaining their non-recusal.

"Appeals Court Voids Agreement to Pay Freelancers for Work Published on the Web"

New York Times
November 30, 2007
Richard Pérez-Peña

A federal appeals court yesterday threw out a hard-fought agreement between publishers and freelance writers to pay the writers for electronic reproduction of their work.

In a 2-to-1 decision, an appellate panel ruled that the courts had no jurisdiction over the copyright dispute and that a lower court erred in accepting the writers' lawsuit and approving the settlement.

People on both sides of the dispute said it was unclear what would happen next—whether the decision would be appealed, a new suit filed, or a new agreement negotiated.

"The decision is an outrage, and I hope it's appealable to the Supreme Court," said Gerard Colby, president of the National Writers Union, and a plaintiff.

In 2001, the United States Supreme Court ruled that digital reproduction of newspaper, magazine and other articles without the writers' permission violated their copyrights. Publishers removed such articles from their digital archives and began requiring freelancers to explicitly cede electronic rights to their work.

But that did not resolve claims for monetary damages for the earlier violations. In Federal District Court in Manhattan, Judge George B. Daniels allowed a class-action suit by writers and their organizations; without that crucial step, each writer determined to win payment would have had to sue individually.

The suit named major publishers and archive services, including the Thomson Corporation, The New York Times Company, Dow Jones & Company, the LexisNexis unit of the Reed Elsevier Group and the Tribune Company.

After years of negotiation, the companies and the writers reached a settlement in March 2005, which the judge approved. It provided for mostly modest payments to freelancers, and capped the publishers' payout at $18 million.

But yesterday, the United States Court of Appeals for the Second Circuit in Manhattan voided the settlement.

In his decision, Judge Chester J. Straub wrote that federal copyright law allows claims for damages only by writers who have registered their work with the United States Copyright Office. The vast majority of freelancers did not register, so he said the courts had no jurisdiction over their disputes, and the case should not have been approved as a class-action suit.

He noted that the defendants had themselves made similar arguments before settling and stated that they settled the case out of "the desire to achieve global peace in the publishing industry."

The settlement had recognized the gap in standing, providing higher payments for writers who had registered their work with the copyright office.

Judge Ralph K. Winter joined in the majority. In a dissenting opinion, Chief Judge John M. Walker argued that the registration requirement was a malleable procedural rule for processing a legal claim, not a strict limit on the court's jurisdiction.

"Righting a Wrong Against Writers"

The Legal Intelligencer
April 4, 2005
Shannon P. Duffy

A federal judge has granted preliminary approval of an $18 million settlement in a class-action suit on behalf of thousands of freelance writers who sold literary works to newspapers and magazines and whose works later appeared in electronic databases without their consent.

Lead plaintiffs' lawyer Michael J. Boni of Kohn Swift & Graf in Philadelphia said the settlement is believed to be the largest copyright class-action settlement in history.

"This is a terrific result for the freelancers," said Boni. "This settlement will finally provide payment to thousands of freelance authors who woke up one day and found their works being sold on electronic databases without their permission."

Under the terms of the proposed settlement, publishers including the New York Times, Time Inc., and the Wall Street Journal, and database companies including Dow Jones Interactive, Knight-Ridder, Lexis-Nexis, Proquest and West Group agreed to pay writers up to $1,500 for stories in which the writers had registered a copyright.

Writers who failed to register their copyrights will receive up to $60 per article. The amount paid will depend on a number of factors, including whether the writer registered the copyright, the original fee paid for the article, the year it was published and whether the writer permits the future use of the article in the databases.

U.S. District Judge George M. Daniels of the Southern District of New York granted preliminary approval of the settlement, clearing the way for the lawyers to spend $1 million from the settlement fund to notify the class.

The settlement also provides that the plaintiffs' lawyers—Boni, along with co-lead counsel Diane Rice of Hosie Frost Large & McArthur and A.J. De Bartolomeo of Girard Gibbs & De Bartolomeo, both in San Francisco—may petition for up to $4.4 million in attorney fees.

Several prominent authors served as named plaintiffs in the suit, including E.L. Doctorow, Lettie Cotton Pogrebin, James Gleick and Derrick Bell. The Authors Guild, the National Writers Union, and the American Society of Journalists and Authors also joined as co-plaintiffs.

According to court papers, it was industry practice for years for freelance authors to sell their works to publications without a written contract. Customarily, for a fee paid to the author, the author granted to the publisher the first right to publish the work in a specified edition of the newspaper or magazine, but in all other respects the author retained copyright ownership to the work.

In the 1980s and early 1990s, when electronic databases such as LEXIS/NEXIS came into existence, print publishers entered into license agreements authorizing the databases to copy and sell the first text (or portions) of the publications, including articles written by freelance contributors.

But the print publications typically did not

obtain the freelance authors written permission for this subsequent publication of their works on the electronic databases.

In the suit, captioned ***In re Literary Works in Electronic Databases Copyright Litigation***, a group of freelance writers alleged that the databases and print publications violated their copyrights in the electronically reproduced works.

In the settlement, the defendants denied any wrongdoing or liability, and denied that any member of the class would be entitled to damages if the case proceeded to trial.

According to court papers, the settlement was struck after extensive negotiations mediated by attorney Kenneth R. Feinberg of The Feinberg Group in Washington, D.C.

Feinberg, a former federal prosecutor in New York who served as the special master of the federal Sept. 11th Victim Compensation Fund, now focuses his practice on negotiated resolutions of complex legal disputes.

"Copyright Developments You Should Know About"

Interface, Volume 5, Issue 6
October 2005
Leonard D. DuBoff

In 2001, the United States Supreme Court handed down one of the most significant copyright cases it had decided in decades. In that case, *New York Times Co. v. Tasini*, the Supreme Court confirmed what many of the lower courts had earlier stated, namely, that the copyright laws of the United States do apply in cyberspace. It also attempted to clarify some of the rules with respect to this form of new technology and to establish guidelines for the future. The Supreme Court then remanded the case to the original trial court for adjudication based on the new rules.

Shortly before the Supreme Court's pronouncement, a number of prominent authors (including Derrick Bell, E. L. Doctorow, Lettie Cotton Pogrebin, and James Gleick), as well as the American Society of Journalists and Authors, the Authors Guild, and the National Writers Union, filed a class action against numerous publishers and database companies, including the New York Times, Time, Inc., the Wall Street Journal, Dow Jones Interactive, Knight-Ridder, Lexis-Nexis, Proquest, and West Group for copyright infringement, based on facts similar to those in the *Tasini* case. In both this case, ***In re Literary Works in Electronic Databases Copyright Litigation***, and the *Tasini* case, it was noted that it was typical for independent writers to sell their articles to publishers without a written agreement. Customarily, it was argued, the arrangement was for the publisher to have only first publication rights for the article, whereas all other rights were retained by the author.

In the 1980s and 1990s, when electronic communication emerged, many publishers, such as those involved in the *Tasini* and ***Literary Works*** cases, either created electronic databases themselves or entered into arrangements with electronic publishers to have articles included in electronic databases. When the authors whose works were involved learned that their materials were being made available online without their consent, the litigation began. In the *Tasini* case, several freelance authors sued the New York Times Co., Newsday, Inc., and Time, Inc., for those publishers' licensing of electronic rights to Lexis-Nexis and University Microfilms International.

It was the authors' position that the publishers had acquired only the right to first publication for their articles in a tangible newspaper or periodical, and, since all other rights were retained by the author, publication online without the authors' permission was unauthorized. The publishers argued that the electronic publication of the articles was simply a "revision" of the original collective works, expressly permitted by the U.S. Copyright Act.

The Supreme Court agreed with the authors' position. The Court made it clear that publishing online is not merely a "revision" since the articles were not published in the same context and noted that the databases offered individual articles rather than intact periodicals.

The Supreme Court's approval of

republication of an article when the republication is in the same context was recently relied on by the United States Court of Appeals for the Second Circuit in another landmark case, *Faulkner v. National Geographic Enterprises, Inc.* In this case, many authors and photographers whose works appeared in National Geographic magazines over the years filed suit against the publisher alleging that it infringed their copyrights when it distributed a collection of CDs containing the entire collection of National Geographic magazines from 1888 to 1996. It was the position of the complainants that republication of their copyrighted works in electronic form without permission was an infringement. This position had, in fact, previously been upheld by the United States Court of Appeals for the Eleventh Circuit in Greenberg v. National Geographic Society, in which the magazine was held liable for copyright infringement.

The Second Circuit distinguished the earlier Eleventh Circuit case, however, because it predated the Supreme Court's pronouncement in *Tasini* and was apparently inconsistent with the Supreme Court's position on electronic publishing. It is now clear that at least in the area covered by the Second Circuit (which includes New York, Connecticut, and Vermont), republication of the works in a different medium is permissible so long as that republication is in context (i.e., the entire newspaper or periodical). In this case, the court noted that the National Geographic reproduction of the articles preserved the context and was, in fact, similar to reproduction on microfiche, which the Supreme Court had expressly approved as a simple legal conversion from one medium to another. The National Geographic articles appeared exactly as they had within each issue; the entire magazine was scanned, showing the page numbers, photographs, and advertisements exactly as they had appeared in the original magazine.

Presumably based on the holding in *Tasini*, the District Court for the Southern District of New York recently gave preliminary approval for a settlement of between $10 and $18 million to be paid to the authors involved in the ***Literary Works*** case, which involved articles that were not reproduced exactly as they had originally appeared. The actual amount to be paid depends on a number of factors, including copyright registration, the original fee paid, the year published, and whether the writer permits future electronic publication.

There is a host of lessons to be learned from these cases by writers and photographers, as well as publishers. The first—and perhaps most important—is that the publishing landscape is in flux. Arrangements with publishers are subject to interpretation by the courts, but the rules in effect today may very well change tomorrow. It is for this reason that authors, photographers, and publishers should reduce their agreements to writing. It is also important to have those agreements reviewed by attorneys who have experience with intellectual property so that ambiguities can be avoided, since an ambiguous written contract may be even more problematic than an oral contract.

It is also important for those involved in communication arts to recognize the fact that the World Wide Web and electronic publishing are established in today's publishing world, but it is difficult to predict what will come next. Unlike its predecessors, the 1976 Congress recognized that the world was in technological expansion and that new media were inevitable when it revised the copyright law

to include language that would deal with media which was "now known or later developed."

Publishers are generally sensitive to this fact, and it is quite common for them to use the broad language of the statute in their publishing agreements. Writers and photographers are also beginning to recognize the importance of having written agreements for their works that anticipate future uses.

Another issue that was significant in the ***Literary Works*** settlement was copyright registration. The settlement approved by the Court in ***Literary Works*** distinguished the amounts available for the settling author by, among other things, whether the works were registered. Those writers whose works were registered before the infringing acts occurred were entitled to a greater amount of the $18 million settlement than were the authors whose works had not been registered. In fact, the amount available for registered works was up to 25 times more than that for unregistered works.

Many writers and photographers do not timely register their works. It seems to be their position that the cost of registration need not be incurred since the statute provides copyright protection without registration. While this is true, it is somewhat shortsighted because any infringer of a work that is not registered will not be liable for statutory damages or attorneys' fees. The law provides that those infringers will be liable only for the copyright owner's actual damages, that is, the copyright owner's losses resulting from the copyright or the infringer's profits, whichever is greater.

Unfortunately, most infringements are discovered when the infringer has not earned much profit, and it is rarely possible to prove with particularity that the copyright owner was deprived of profit because of the infringement. As a result, recovery of actual damages is often far less than the cost the copyright owner incurs in litigating the case. If, therefore, costs and attorneys' fees are not recoverable, then copyright owners will find it economically impractical to redress an infringement. Even the other remedies available, namely, an order to prevent future infringement and an order to have the infringing works destroyed, will likely not provide the copyright owner with the financial incentive to redress the wrong.

Copyright registration is by no means difficult. The forms are available online from the Copyright Office at www.copyright.gov. By downloading a form, filling it out, depositing two of the best copies of the work when published (only one copy is required if unpublished), and paying a $30 registration fee, the work will be registered in due course. As of the date of this writing, the turnaround time for copyright registration is approximately eight months, though an expedited registration can be obtained by paying an additional $580. For this additional $580, a registration will be accomplished within two weeks. Given the significant additional cost for expediting the registration, copyright owners generally expedite registrations only when it is important to do so for purposes of litigation.

The Copyright Office has been sensitive to the financial stress that registration imposes on many creative people. It was for this reason that in the year 2001, a regulation was adopted that permitted photographers the ability, in some circumstances, to register groups of photographs with a single application, single filing fee, and a single deposit. If photographs in a group are all by the same photographer, the copyright

claimant is the same for all photographs and the photographs are published in the same calendar year, then a photographer can register that group of photographs with one application. The savings could be enormous for a prolific photographer.

At the same time, rules for deposits for unpublished collections of photographs were liberalized. The following variety of deposit options were made available for those registering either published or unpublished groups of photographs: CD-ROMS, DVD-ROMS, unmounted prints measuring at least three inches by three inches but not exceeding 20 inches by 24 inches, contact sheets, slides with single or multiple (up to 36) images, the format in which the photographs were published (e.g., newspaper and magazine clippings), photocopies clearing depicting the photographs or videos clearly depicting the photographs.

Unfortunately, the Copyright Office has recently announced a retreat from this liberal program with regard to the number of images that can be registered with one application. Under the new rule, if the photographer identifies the date of publication for each photograph in the group on a continuation sheet, the application may include no more than 50 continuation sheets and no more than 750 photographs. This is likely to work a hardship on many photographers. Concerned individuals should write their representatives in Congress to express their displeasure with the Copyright Office's recent change.

Creative people are continuously stretching and exploring new dimensions of their creativity. This is important for professional growth and is beneficial for cultural growth as well. Despite the fact that all benefit from expanded creativity, it is essential not to lose sight of the necessity of written agreements that spell out the rights, obligations, and limitations of the arrangements between the parties.

"Did Second Circuit Eviscerate Copyright Class Actions?"

New York Law Journal
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Peter L. Simmons and Mitchell Epner

Six years after the U.S. Supreme Court held in *New York Times v. Tasini*, 533 U.S.483 (2001), that freelance writers do not implicitly convey rights to electronic reproduction of their works when they license their materials to newspapers and other publishers for print media, a group of copyright holders seeking to vindicate those *Tasini* rights was poised finally to recover some money in a negotiated class action settlement that was approved by the U.S. District Court for the Southern District of New York.

But the U.S. Court of Appeals for the Second Circuit threw out the entire settlement and held that the district court lacked jurisdiction even to entertain the claims of most of the class members, even though the rights being asserted were the very ones that the Supreme Court had ruled were, in fact, protectible.

The Second Circuit, in a split decision, concluded that most of the class had a right without a remedy. Even though the copyright interests were, on the face of things, valid and infringed, because the majority of the works for which damages were claimed were never registered with the Copyright Office, the class was not entitled to sue for—and the district court was powerless to approve a settlement requiring payment of—damages with respect to those unregistered works.

Yet copyright infringement class actions are quite common, and ownership, validity and valid recordation of the asserted copyrights is frequently a disputed issue. If, as the Second Circuit said, the district courts cannot adjudicate claims involving copyrights not properly registered, does ***Literary Works*** represent a turning point in the viability of copyright class actions? Under an extreme reading of the case, defendants might now be able to cut off class claims early merely by raising a jurisdictional challenge predicated on the failure to prove registrations for each work in the class. In all likelihood, the decision probably does not represent such a break with precedent. But it does highlight some of the hazards of pleading and settlement structuring that could become land mines, as they did here, if not properly navigated.

Disconnect Between Rights and Remedies

At the core of the Copyright Act, there is a tension between when a copyright is created and when a copyright holder may bring an action to enforce that copyright.

Section 102 of the Copyright Act provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ." However, s411(a) of the Copyright Act provides that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." In other words, although s102 provides that the copyright exists, and can be infringed, from the moment an author places an original work on paper (or any other tangible

medium), s411(a) disables the copyright holder from suing to enforce that copyright until it has been registered.

Following that interdiction, the Second Circuit seems to hold that district courts cannot approve class-action settlements that adjudicate claims involving unregistered copyrights. Yet in reality, writers and publishers routinely litigate in class actions the alleged infringement of their works, particularly when electronic mass distribution (including online file-sharing services) is involved.

And whether those works have been properly registered is frequently an issue in dispute. For example, the defendants in the Napster, Grokster and Streamcast class-action litigations each raised as an affirmative defense the claimed lack of valid copyright registrations for the copyrighted works allegedly unlawfully disseminated over those services. Nevertheless, classes were certified in each of those cases; and, in each case, membership in the class is predicated on ownership or control of a copyrighted musical that had been made available without permission through the challenged service, and not on whether the infringed work was the subject of a valid registration. Moreover, settlement agreements were reached and approved by the courts in those cases that resulted in payments being made to the plaintiffs despite the challenge to whether the works were properly registered, or registered at all.

When the Second Circuit's decision is properly understood, there is no need to assume that ***Literary Works*** would subject those settlements, or others like them, to collateral challenge for lack of jurisdiction, or that the decision would preclude such settlements from being reached and enforced in other cases going forward.

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***Literary Works* Settlement**

Following years of litigation, the parties reached a settlement that provided for the payment of between $10 million and $18 million by the defendants. The parties sought and obtained certification of a settlement class which, like so many others, was predicated on copyright ownership, and which did not explicitly state whether class members had registered their copyrights.

Where the parties appear to have outsmarted themselves was in dividing the so-called "subject works," the works for which claims were being settled, into three groups based upon whether and when each work had been registered with the Copyright Office. "Category A" works were defined as subject works "properly registered as an individual work with the U.S. Copyright Office in time to be eligible for statutory damages under 17 U.S.C. s412(2)." "Category B" works were defined as subject works "properly registered before Dec. 31, 2002, but not in time to be eligible for statutory damages under 17 U.S.C. s412(2)." "Category C" works were defined as "all other Subject Works."

The settlement agreement provided varying amounts of damages to the three categories of subject works, with Category A (timely registered) works obtaining the greatest recovery, Category B works (those not registered in time to claim statutory damages but still entitled to pursue claims for actual damages) receiving a reduced amount, and Category C works (those not registered at all) receiving a sliding scale payment of a much more modest amount. Moreover, in the event that total allowed claims would lead to damages of more than the $18 million maximum payment by the settling

defendants, the settlement agreement provided that the damages available to Category C works would be ratably reduced or eliminated before any reduction would be made in the damages available to Category A or Category B works.

The settlement thus highlighted quite starkly, in a way the class definition did not, the substantial merit of the defense predicated on a failure to register the works. Compounding the problem, some of the Category C plaintiffs, those with the weakest claims, objected to the settlement on the theory that they should actually have gotten more out of the deal. And the settling parties (both plaintiffs and defendants) responded by shooting themselves in the foot and contending that the settlement was fair and should be approved precisely because those Category C claims concerned unregistered copyrights that were outside of the district court's subject matter jurisdiction and thus entitled to very little compensation. The district court approved the settlement without addressing the jurisdictional question.

The objectors continued their attack on the fairness of the settlement on appeal, and the Second Circuit sua sponte required the parties to submit additional briefs "addressing the issue of whether the District Court had subject matter jurisdiction over claims concerning the infringement of unregistered copyrights."

Second Circuit Decision

The Second Circuit's majority opinion in ***Literary Works*** held that "the District Court lacked jurisdiction to certify the instant class or approve the settlement," reasoning that although Congress granted (in 28 U.S.C. s1338) the district courts jurisdiction over "any civil action arising under any Act of Congress relating to . . . copyrights," that jurisdiction was limited by s411(a) of the Copyright Act. Slip op. at 8-9. Relying upon *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp*, and *Morris v. Business Concepts, Inc.*, the majority held that "Section 411(a)'s registration requirement limits a district court's subject matter jurisdiction to claims arising from registered copyrights only." Slip op. at 10. "[S]ection 411(a) creates a statutory condition precedent to the suit itself. In so doing, it 'delineates the classes of cases . . . falling within a court's adjudicatory authority.'" *Id. at 14.* "In other words, a copyright claim does not exist absent registration or preregistration—and the law is clear that courts lack subject matter jurisdiction over claims that Congress has specified do not yet exist." *Id. at 14 n.5.*

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Judge John M. Walker Jr. dissented from the finding that s411(a) presented a jurisdictional bar, writing that "in the class action context, there is a distinction between constitutional standing, which is always required, and statutory standing, which is not required of all members of a settlement-only class." *Dissent at 14.* The dissent contended that holders of infringed unregistered copyrights satisfied the three requirements for Article III standing: (a) injury-in-fact, (b) traceable to the challenged action and (c) redressable by a favorable decision. *Dissent at 16-17.*