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**Circumventing Congress:
The Use of Sex-Stereotyping
Theory to Expand Protected
Classes Under Title VII**

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Letter from the Editor

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The REVIEW is published three times a year, thanks to the hard work of our fifteen Practice Group Executive Committees and authors who volunteer their time and expertise. The REVIEW seeks to contribute to the marketplace of ideas in a way that is collegial, accessible, intelligent, and original.

We hope that readers enjoy the articles and come away with new information and fresh insights. Please send us any suggestions and responses at info@fedsoc.org.

Sincerely,

Katie McClendon

The Federalist Society Review

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CIVIL RIGHTS

CIRCUMVENTING CONGRESS: THE USE OF SEX-STEREOTYPING THEORY TO EXPAND PROTECTED CLASSES UNDER TITLE VII

By J. Gregory Grisham & Frank L. Day, Jr.*

Note from the Editor:

This article is about the EEOC's use of the Supreme Court's sex-stereotyping theory to attempt to extend Title VII to cover sexual orientation and gender identity. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Kevin McGowan and Chris Opfer, *EEOC Sexual Orientation Ruling Brings Strong Reactions*, BNA DAILY LABOR REPORT (July 20, 2015), available at <http://www.bna.com/eec-sexual-orientation-n17179933661/>.
 - J. Randall Coffey, *Right Result, Wrong Path? The Meaning of "Sex" Under Title VII*, ABA LABOR & EMPLOYMENT LAW CONFERENCE (November 2015), available at http://www.americanbar.org/content/dam/aba/events/labor_law/2015/november/annual/papers/25.authcheckdam.pdf.
 - Dana Beyer, Jillian T. Weiss, and Riki Wilchins, *New Title VII and EEOC Rulings Protect Transgender Employees*, TRANSGENDER LAW CENTER (2014), available at <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf>.
 - *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, available at <http://www.workplacefairness.org/sexual-orientation-discrimination>.
 - *EEOC Decides that Sexual Orientation Discrimination = Sex Discrimination*, WORKPLACE PROF BLOG (July 17, 2015), available at http://lawprofessors.typepad.com/laborprof_blog/2015/07/eec-decides-that-sexual-orientation-discrimination-sex-discrimination.html.
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I. INTRODUCTION

Neither sexual orientation nor gender identity is a protected category under Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin."¹ The term "sex" was not defined in the statute,² and the legislative history includes few references that can be used to help determine the intended extent of this protected class. Hence, the question of whether discrimination on the basis of sex could be interpreted to encompass gender identity³ and sexual orientation⁴ has been left to the courts to decide.⁵

II. EARLY VIEWS ON THE MEANING OF SEX-BASED DISCRIMINATION UNDER TITLE VII

In the early years following the adoption of Title VII, few would have argued that the protections provided on the basis of sex extended to protect individuals on the basis of sexual orientation or gender identity. The Equal Employment Opportunity Commission ("EEOC") is charged with enforcing Title VII,⁶ but the original EEOC commissioners did not consider the prohibition on sex-based discrimination a broad concept.⁷ In fact, one Executive Director of the EEOC even said that "no

man should be required to have a male secretary."⁸ Although it was generally accepted that this statutory language offered protection to women, who were a minority in the workforce at the time, it was not until 1983 that the United States Supreme Court held that Title VII made it illegal for employers to discriminate against individuals because they were male.⁹ Until this decision in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, it was not firmly established law that Title VII offered males the same protection against sex-based discrimination that it did to females.¹⁰ The law did not evolve quickly, and it also took until 1983 for a federal circuit court of appeals to recognize that claims of sexual harassment were viable under Title VII as constituting a form of sex-based discrimination.¹¹

III. COURTS REJECT EARLY ATTEMPTS TO EXPAND TITLE VII'S PROTECTION TO ENCOMPASS DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY

The theory that Title VII's prohibition against sex-based discrimination extended to sexual orientation or gender identity proved more controversial than the theories that it offered the same protection to men that it did to women and that it protected against sexual harassment. Thus, it is not surprising that the plaintiffs who brought the initial claims to try to push the limits of sex discrimination beyond its traditional boundaries to include sexual orientation experienced little success. One of the earliest cases to consider whether Title VII prohibited private employers from discriminating on the basis of sexual orientation or gender identity was 1978's *Smith v. Liberty Mutual Insurance Co.*¹²

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*J. Gregory Grisham, Partner, Ford & Harrison LLP, Nashville, Tennessee. Frank L. Day, Jr., Esq., Ford & Harrison LLP, Memphis, Tennessee. The authors would like to thank Jordan T. Puryear, associate, at Leitner, Williams, Dooley & Napolitan, PLLC for his research assistance with this article.

person's failure to conform to traditional gender norms is actionable under Title VII. Hence, it is also possible for one to argue that the Court's decision in *Hopkins* pushed the protections of Title VII beyond what the plain language of the statute provides.

The Sixth Circuit subsequently applied the sex-stereotyping theory from *Hopkins* to conclude that the transgender plaintiff in *Smith v. City of Salem* had asserted a valid Title VII claim against the fire department for which he worked.³⁷ The plaintiff's troubles at work began when he adopted "a more feminine appearance on a full time basis."³⁸ As a result of his appearance, his co-workers began making comments about his feminine attributes, which caused him to raise the issue with his supervisor.³⁹ Smith explained to his supervisor that he had a "gender identity disorder," and his supervisor communicated this information up the chain of command.⁴⁰ Soon thereafter, the city began looking to use his "gender identity disorder" as a basis for terminating Smith's employment, and he eventually filed a lawsuit.⁴¹ The issue of whether Smith had stated a valid claim for relief based on Title VII was appealed to the Sixth Circuit, which held in favor of Smith. In the opinion, the court noted that *Hopkins* did not "provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual."⁴² In fact, the opinion noted:

[D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is not different from the discrimination directed against Ann Hopkins in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman.⁴³

This reasoning has been applied in a number of other cases,⁴⁴ including *Barrett v. Pennsylvania Steel Co., Inc.*, where a male employee claimed that he was discharged for not conforming to the "stereotype" of being male because he did not curse or engage in crude banter like his male co-workers.⁴⁵ The district court concluded that these allegations were sufficient to state a valid claim for relief under Title VII.⁴⁶

While the sex-stereotyping theory has been generally accepted, the courts have been less willing to accept the argument that Title VII protects against discrimination on the basis of sexual orientation under a sex-stereotyping theory. Although lesbian, gay, bisexual, and transsexual individuals can potentially state valid claims for relief by showing that adverse employment actions were based on their failure to conform to stereotypical gender norms, courts have not generally concluded that sexual orientation is a protected category.⁴⁷ In one such case that raised this issue, *Bibby v. Philadelphia Coca-Cola Bottling*, a gay male employee alleged that he was subjected to sex-based discrimination because employees had stated, "everyone knows you're a faggot," and antigay graffiti was allowed to remain in the restroom.⁴⁸ The court, however, found that the plaintiff had failed to plead a valid claim for relief because the harassment had been targeted at his sexual orientation rather than his sex.⁴⁹

V. THE EEOC CONCLUDES THAT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IS SEX-BASED DISCRIMINATION UNDER TITLE VII

On the other hand, the EEOC adopted a more aggressive interpretation of the statutory language. The EEOC in 2011's

*Macy v. Department of Justice*⁵⁰ ruled that "discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and therefore is covered under Title VII."⁵¹ Subsequently, the EEOC adopted a Strategic Enforcement Plan for 2013-2016 in which it announced its intention to focus on extending Title VII's protections to "lesbian, gay, bisexual and transgender individuals."⁵² As part of this agenda, the EEOC "made a landmark ruling in July 2015 in which it concluded that discrimination on the basis of sexual orientation is discrimination on the basis of sex under Title VII."⁵³

In the *Foxx* case, which was an administrative action within the Federal Aviation Administration ("FAA"), the complainant alleged that he was denied a promotion on the basis of his sexual orientation.⁵⁴ The FAA did not decide the case on the merits, but rather dismissed the complaint on the ground that it had not been raised in a timely fashion.⁵⁵ The complainant appealed the dismissal to the EEOC who disagreed with the FAA, finding the complaint timely and remanded it to the agency.⁵⁶ After ruling on the timeliness issue, the EEOC addressed the merits of the claim and ruled, in a lengthy opinion, that discrimination on the basis of sexual orientation is sex-based discrimination which violates Title VII.⁵⁷

The EEOC's opinion claims that it is not assuming the responsibility of the legislature by creating a new category of protection under Title VII.⁵⁸ To justify this reasoning, the EEOC relies on judicial decisions finding, *inter alia*, that Title VII's prohibition of discrimination on the basis of race applied to covered individuals who were disciplined because they were in an interracial relationship as well as the Supreme Court's decision in *Price Waterhouse*.⁵⁹ While the *Foxx* decision does not apply to private employers, it does confirm that the EEOC has adopted a more expansive view of the law which will directly impact private sector employers and may influence how courts interpret Title VII in the future. At least one federal court has denied a motion to dismiss a federal employee's Title VII sex discrimination claim based on a sex-stereotyping theory encompassing sexual orientation.⁶⁰

The position adopted by the EEOC comes from an interpretation of the law that is not limited to the plain language of the statute, and it makes no attempt to argue that Congress intended for the prohibition of discrimination on the basis of sex to encompass sexual orientation. The impact on private sector employers became evident on March 1, 2016 when the EEOC filed its first lawsuits alleging sex discrimination based on sexual orientation.⁶¹ Nonetheless, it concludes that it is not usurping legislative authority by adopting a more expansive interpretation than is arguably justified by either the statute or the legislative history, citing judicial decisions like *Price Waterhouse* as support for its position.

VI. CONCLUSION

The Equality Act of 1974 was the first legislation introduced in Congress that would have made sexual orientation a protected category under Title VII.⁶² Another push was made to expand the protections provided by federal law with the Employment Non-Discrimination Act, which was introduced in 1994.⁶³ To date, all such legislative attempts to expand the

protections provided by Title VII have failed. Nonetheless, the courts have expanded Title VII's protections by approving the sex-stereotyping theory of liability, and the EEOC has determined that it is possible for the scope of protection provided by Congress to grow beyond the limits established by the plain statutory language and the intentions indicated by legislative activities. "Discrimination on the basis of sex" does not have the same meaning today that it did when it was adopted by Congress in 1964, or when it was later amended by the PDA in 1978.⁶⁴ It seems very likely that this evolution will continue even without legislative action, particularly given national political polarization and rapidly changing societal norms. It is clear that courts (to varying degrees) and the EEOC have rejected the notion expressed in *Smith v. Liberty Mutual Ins. Co.* that congressional action would be necessary to justify interpreting "because of sex" to include gender, gender identity, and sexual orientation.⁶⁵

Endnotes

- 1 42 U.S.C. §§ 2000e et seq.
- 2 Section 701(k) of Title VII was later adopted as part of the Pregnancy Discrimination Act ("PDA") of 1978 in response to the United States Supreme Court's decision in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976). The PDA offered the first statutory definition of the term "sex" as it is used in Title VII, but this definition only clarifies that the language "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).
- 3 "Gender identity refers to 'one's sense of oneself as male, female, or transgender' (APA, 2006). When one's gender identity and biological sex are not congruent, the individual may identify as transsexual or as another transgender category (cf. Gainor, 2000)." American Psychological Association, *The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67 AMERICAN PSYCHOLOGIST 1, at 10 (Jan. 2012), available at <http://www.apa.org/pubs/journals/features/amp-a0024659.pdf>.
- 4 "Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted. Categories of sexual orientation typically have included attraction to members of one's own sex (gay men or lesbians), attraction to members of the other sex (heterosexuals), and attraction to members of both sexes (bisexuals)." *Id.*
- 5 See generally Major Velma Cheri Gay, *50 Years Later... Still Interpreting the Meaning of "Because of Sex" Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61 (2015).
- 6 42 U.S.C. §§ 2000e-2000e-4 (2000).
- 7 CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 187 (1988).
- 8 *Id.*
- 9 *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).
- 10 *Id.*
- 11 *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1983).
- 12 *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d. 325 (5th Cir. 1978).
- 13 *Id.* at 326.
- 14 *Id.*

- 15 *Id.* at 327.
- 16 *Id.*
- 17 *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-663 (9th Cir. 1977).
- 18 *Id.* at 661.
- 19 *Id.*
- 20 *Id.* at 662.
- 21 Equality Act of 1974, H.R. 14752, 93rd Congress (1974).
- 22 *Holloway*, 566 F.2d at 662-63.
- 23 *DeSantis v. Pacific Tel. & Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 2001).
- 24 *Id.* at 328-30.
- 25 See, e.g., *Williamson v. A.G. Edwards*, 876 F.2d 69 (8th Cir. 1989) (holding that sexual orientation discrimination was not a valid basis for relief under Title VII); *Hopkins v. Balt. Gas & Elec. Co.*, 871 F. Supp. 822, 832 n.17 (D. Md. 1994) (explaining that courts have consistently rejected the notion that Title VII prohibits discrimination on the basis of sexual orientation or sexual preference).
- 26 429 U.S. 125, 129 (1976). The Supreme Court's holding in *Gilbert* was overruled by Congress two years later with the enactment of the PDA. See *supra* note 3. Cf. Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 306 (April 2001).
- 27 *Id.* at 135.
- 28 490 U.S. 228 (1989).
- 29 See Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, EMPLOYMENT DISCRIMINATION STORIES 68 (Joel Wm. Friedman ed., Foundation Press 2006).
- 30 *Hopkins*, 490 U.S. at 232.
- 31 *Id.* at 234-35.
- 32 *Id.* at 235.
- 33 *Id.*
- 34 *Id.*
- 35 *Id.* See also *supra* note 29.
- 36 *Hopkins*, 490 U.S. at 251.
- 37 378 F.3d 566 (6th Cir. 2004). See James O'Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1101-02 (2007).
- 38 *Smith*, 378 F.3d at 570.
- 39 *Id.* at 568.
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 *Id.* at 575.
- 44 See, e.g., *Finkle v. Howard Cnty., Md.*, 122 FAIR EMPL. PRAC. CAS. (BNA) 861, 2014 WL 1396386 (D. Md. Apr. 10, 2014) (denying defendant's motion for summary judgment finding that transgender plaintiff asserted a viable claim

of sex discrimination because under *Hopkins*, transsexual individuals who do not conform to sex based stereotypes, fall within the protection provided by Title VII).

45 2014 WL 3572888 (E.D. Pa. 2014).

46 *Id.*

47 *See, e.g.*, *Burrows v. Coll. of Cent. Fla.*, 2015 U.S. Dist. LEXIS 90576, at 26-28 (M.D. Fla. July 13, 2015) (rejecting the argument that sex-stereotyping prohibited as sex-based discrimination under Title VII encompasses sexual orientation discrimination).

48 85 F. Supp. 2d 509 (E.D. Pa. 2000), *aff'd*, 260 F.3d 257 (3d Cir. 2001).

49 *Id.*

50 EEOC Appeal No. 0120120821 (April 20, 2012) available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

51 *Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, EEOC available at <http://www.eeoc.gov/federal/otherprotections.cfm>.

52 *Strategic Enforcement Plan*, EEOC (December 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

53 *Complainant v. Anthony Foxx*, Secretary, Dept. of Transportation (Federal Aviation Administration), Agency, EEOC DOC 0120133080, available at <http://www.eeoc.gov/decisions/0120133080.pdf>.

54 *Id.* at 2.

55 *Id.*

56 *Id.*, at 4-5.

57 *Id.* at 6.

58 *Id.* at 13-14

59 *Id.* at 14

60 *Terveer v. Billington*, 34 F. Supp. 3d 100, 1155-16 (D.D.C. 2014).

61 Equality Act of 1974, H.R. 14752.

62 *See* EEOC v. Scott Medical Health Center, P.C., Case No. 2:16-cv-00225 (W.D. Pa. March 1, 2016) and EEOC v. Pallet Companies d/b/a IFCO Systems, NA, Inc., Case No. 1:16-cv-00595 (D. Md. March 1, 2016). *See also* EEOC Press Release (March 1, 2016) <http://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm>.

63 Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Congress (1994).

64 *Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588 (E.D.N.C. 2015) is a case in which the plaintiff asserted a failure to hire claim. At the time, the plaintiff was receiving hormone therapy to prepare for sex reassignment surgery. The employer filed a motion to dismiss, which was denied by the court because it concluded that Title VII prohibits discrimination on the basis of transgender status.

65 *See Smith*, 569 F.2d. at 327. The EEOC has filed an amicus brief in *Burrows v. The College of Central Florida*, No. 15-14554 (11th Cir.) urging the Eleventh Circuit to find, among other things, that sexual orientation is protected under Title VII's prohibition of sex-based discrimination.



BIRTHRIGHT CITIZENSHIP: TWO PERSPECTIVES

By Gerald Walpin* and David B. Rivkin, Jr. & John C. Yoo**

Note from the Editor:

This pair of articles debates the original meaning of Section 1 of the 14th Amendment, seeking to answer the question: Does the 14th Amendment Guarantee Citizenship to Babies Born to Illegal or Transient Immigrants on U.S. Soil? Mr. Walpin answers “no,” arguing that treating immigrants and the children humanely does not require interpreting the Constitution to grant birthright citizenship. Mr. Rivkin and Prof. Yoo argue that the 14th Amendment does in fact require that anyone born on U.S. soil be granted citizenship.

The Federalist Society takes no position on particular legal or public policy matters. Any expressions of opinion are those of the authors. When we publish an article that advocates for a particular position, we generally offer links to other perspectives on the issue, including ones opposed to the position taken in the article. However, in this case, the controversial nature of the issue merited full treatment from both sides. As always, we invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

The 14th Amendment Does Not Grant Citizenship To Babies Born to Illegal Or Transient Immigrants on U.S. Soil

Gerald Walpin

The legal debate over so-called birthright citizenship has lately been spotlighted because of presidential candidate Donald Trump’s statements about immigrants and foreigners.¹ Mr. Trump’s position totally ignores that the words on the Statue of Liberty explain why America is the great country that it is: “Give me your tired, your poor, your huddled masses yearning to breathe free.”² Our country was literally founded by immigrants fleeing religious persecution, followed by waves of more refugees and others fleeing material deprivation. Because it accepted millions upon millions of immigrants, the United States remains the world’s sole rightful owner of the descriptive word, first applied in 1831 by Alexis de Tocqueville: “exceptional.”³

The meaning of the birthright provision in the 14th Amendment has been specifically put in issue by Trump’s questioning whether his opponent Ted Cruz’s birth in Canada to an American citizen allows him to be considered to be a “natural born citizen”—a prerequisite for serving as President. But current events also warrant a fuller examination of the provision as it is being invoked to provide U.S. citizenship to millions of non-Americans. Websites in many foreign countries induce pregnant women to come to and pay up to \$80,000 to “maternity hotels” in the United States, on the promise of American citizenship to the newly-born child who then returns to the

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* Mr. Walpin served as an Inspector General, following nomination by G. W. Bush and confirmation by the U.S. Senate, is a New York attorney, and author of *The Supreme Court vs. The Constitution* (Significance Press 2013). He is, and has been for many years, a member of the Federalist Society Board of Visitors.

** David B. Rivkin, Jr. is a partner at BakerHostetler, where he co-leads the firm’s national Appellate Practice. He also served in the Ronald Reagan and George H. W. Bush administrations. John C. Yoo is Heller Professor of Law at the University of California, Berkeley, a visiting scholar at the American Enterprise Institute, and a former official in the Bush Justice Department. He is co-editor with Dean Reuter of *Liberty’s Nemesis: The Unchecked Expansion of the State* (Encounter 2016).

foreign country.⁴ Mexican pregnant women cross the border to give birth in near-border U.S. hospitals for the same purpose.⁵ Many illegal immigrants in this country have children with the expectation that the child will be a U.S. citizen at birth, and thereby anchor the parents to be able to remain here.⁶

I. THE RULE OF LAW MUST CONTROL

Aside from the contributions of immigrants to our country, there is another fact that has made the United States exceptional that overrides all else: from the very first day of our country, we have lived by the *rule of law*, with our Constitution being the supreme and controlling law. That means that the words of the Constitution control, and that they must be construed as the authors understood and intended—not as current judges might prefer.

One famous Supreme Court Justice, Hugo Black, well described the reason for this rule of construction: “I have an abiding idea that, if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution.”⁷ Oliver Wendell Holmes, another respected Justice, similarly instructed that a judge must construe a provision based on “what those words would mean in the mouth of a normal speaker of English, *using them in the circumstances in which they were used*.”⁸ The proper interpretation of a constitutional provision is best determined by abiding the words in the provision, the authors’ expressed statements as to what they thought it meant, and consistency with other relevant laws, both those enacted relatively contemporaneously and those then held still binding.

II. APPLYING RULE OF LAW PRINCIPLES TO THE BIRTHRIGHT CITIZENSHIP DEBATE

Applying these rule of law principles, how should we construe the words of the Birthright Citizenship clause of the 14th Amendment to the Constitution? Does the clause, as some now assert, give citizenship to a child on the sole condition that he or she was born on United States soil, even if (i) born to a foreign citizen mother who promptly returns to her native land where the child also is a citizen of that foreign country, or (ii) born to foreign citizens while they are illegally in this country? Let’s together do the analysis that is necessary to determine

what the rule of law requires.

We start with the relevant words of the 14th Amendment ratified on July 9, 1868. It requires that two conditions—not just birth in this country—be present for citizenship to be granted: (i) the baby must be “born . . . in the United States;” and (ii) when born, the baby must be “subject to the jurisdiction” of the United States. A cursory glance at the words themselves makes it clear that those who argue that mere birth within the United States results in citizenship fail reasonably to address this second requirement.⁹

Two Supreme Court opinions, both issued within the decade after ratification of the 14th Amendment are particularly relevant to construing the meaning of the Birthright Citizenship provision. Note that, because the meaning of the Birthright Citizenship provision did not determine the outcome in either case, the Court’s statements in both decisions are dicta, not binding holdings. But the Justices’ words should be considered authoritative insofar as they were expressed by Justices who lived through the enactment of the provision they were construing, and thus were well positioned to comprehend the meaning and intention of the words. These Court-expressed views on the meaning of the Birthright Citizenship provision should also be considered authoritative because the Justices were unanimous in making the statement in one case, and, in the other, the dissenters did not disagree with that particular point.

In the *Slaughterhouse Cases*,¹⁰ the Court wrote that “[t]he phrase, ‘subject to its jurisdiction’ was intended to *exclude from its operation children of . . . citizens or subjects of foreign States born within the United States.*” That is as absolute and complete a statement as can be imagined, and it would deny birthright citizenship to a child born in this country to undocumented immigrants or to a transient alien mother. Then, two years later, in *Minor v. Happersett*, the Court unanimously and expressly recognized the existence of “doubts” that citizenship was automatic for “children born within the jurisdiction without reference to the citizenship of their parents,” after noting that citizenship attaches only when the immigrant owes “allegiance” to this country.¹¹ These two Supreme Court rejections of automatic birthright citizenship for anyone born in this country, without regard to the parents’ citizenship status, are supported by facts undoubtedly known to those Justices, and certainly known to us.

During the same session in which Congress approved the 14th Amendment, it had already enacted the Civil Rights Act of 1866, providing that, for a U.S.-born baby to be a citizen, the baby must “not [be] subject to any foreign power.”¹² A child, although born in this country, who, after birth, returns with foreign citizen parents to, and lives in, the foreign country of which the child remains a citizen, is subject to that foreign power. Thus, that statute mandated that such U.S.-born children be denied U.S. citizenship. The record makes clear that, in considering the 14th Amendment, Congress did not repudiate the statute it had just enacted. Not even a single member introduced a bill to rescind that legislation. The absence of any attempts to walk back the statute suggests that Congress remained satisfied with that law, and that the same-session approval of the 14th Amendment did not signal any change of view.

Despite these facts, some might still question why, with this statute already enacted, it was necessary to adopt the 14th Amendment so shortly thereafter, if not to change the condition for granting citizenship. Others might ask why the 14th Amendment did not copy the negative requirement that the baby “not [be] subject to any foreign power,” but instead substituted the affirmative requirement that the baby must be “subject to the jurisdiction” of the United States. If one were to stop the analysis with the substitution, it certainly would leave reasonable questions. However, the statements made by the proposers of the 14th Amendment provide clear answers: The proposers sought to prevent any future Congress, by a simple majority vote, from altering or rescinding the civil rights statute.¹³ In contrast, altering or rescinding a constitutional amendment would require a two-thirds vote of each house of Congress and approval by three-fourths of the state legislatures—a vastly increased burden and, as history has shown, seldom obtained.

We do not know the specific reason for the change in phraseology. However, it is irrelevant in our search for the meaning of the Amendment, because Senator Jacob Howard, the Amendment’s co-author, described it as “simply declaratory of . . . the law of the land already,”¹⁴ referring to the Civil Rights Act already enacted. Thus, he was confirming that the 14th Amendment, with slightly different wording, was intended to constitutionalize the statute’s requirement that the baby must “not [be] subject to any foreign power.”

This conclusion that no change of meaning was intended was also confirmed by the provision’s prime author, Senator Lyman Trumbull, who explained to the Congress before it voted, that “subject to the jurisdiction thereof” required being “subject to the complete jurisdiction thereof,” meaning, as he put it, “not owing allegiance to anyone else.”¹⁵ As Thomas Jefferson earlier wrote, “aliens are the subjects of a foreign power,”¹⁶ and thus owe allegiance to another country; hence, the alien’s children are not U.S. citizens simply by virtue of birth on U.S. soil. Furthermore, Senator Howard’s explanatory words are nearly identical to the Civil Rights Act’s words “not [be] subject to any foreign power,” making explicit that the 14th Amendment was intended to put in Constitutional “stone” what Congress had first enacted as legislation. Applying that meaning, the U.S.-born child, returning to the parent’s country, is a citizen of and subject to that foreign country, and thus does not meet this requirement for birthright citizenship.

In its 1884 decision in *Elks v. Wilkins*, the Supreme Court adopted Senator Trumbull’s formulation that, to receive birthright citizenship, the parents must “not merely [be] subject in *some* respect or degree to the jurisdiction of the United States, but *completely* subject to their political jurisdiction, *and not subject to any foreign power,*” as well as owe the U.S. “direct and *immediate allegiance.*”¹⁷ Parents and child, returning to their native land of which they are citizens, remain subject to that foreign power and must show it allegiance, and thus do not give the U.S. “immediate allegiance.” An immigrant who violated U.S. law by entering or overstaying illegally also fails to show “allegiance,” which by definition requires loyalty and obedience to the law.¹⁸ William Blackstone, the famed English legal commentator in the period the 14th Amendment was

enacted, and to whom American lawyers, judges, and legislators then repeatedly cited and quoted in decisions, legal briefs, and statements in the legislatures, defined “allegiance” in this context as requiring that the subject “will demean himself faithfully.”¹⁹ An illegal alien, breaking America’s laws, by definition, certainly does not meet that requirement. Further, an illegal alien, while subject to the jurisdiction of U.S. courts, is not “completely subject to [U.S.] political jurisdiction” and, as a citizen of a foreign country, remains “subject to [a] foreign power”—thus falling outside of the Court’s stated requirements for birthright citizenship.

Most proponents of the assertion that the Birthright Citizenship provision grants citizenship to all non-diplomats’ babies born in the U.S. ignore the three Supreme Court decisions discussed above, and instead rely on the Court’s 1898 decision in *U.S. v. Wong Kim Ark*.²⁰ In that case, the Court granted citizenship to a child born in the U.S. to alien Chinese parents. But the Court made clear that its decision does not apply to the birth to a foreign alien mother who either promptly returns to the foreign country or is in this country illegally and therefore, under law, subject to deportation back to her foreign country. The Court expressly conditioned its decision on the facts that the parents “have a permanent domicil[e] and residence in the United States, and are there carrying on business.”²¹ Neither the parents nor the child are permanently domiciled here when, after birth, the parents and child return to and continue their allegiance to the parents’ native country. In *Wong Kim Ark*, the child who had been born on U.S. soil to Chinese parents had traveled to China, but only for temporary visits, and this was found not to undercut his claim to birthright citizenship due to his continued permanent and legal domicile in the U.S.²² Illegal status is more like returning to the foreign country than it is like temporary visits, for purposes of the Birthright Citizenship clause. An illegal alien is legally subject to deportation every day she is present on U.S. soil, unless she has been granted relief from deportation. Such a situation cannot be described as “a permanent domicil[e] and residence in the United States,” given that “permanent” is defined as “lasting or intended to last or remain unchanged indefinitely.”²³

Another reason the Birthright Citizenship provision does not give automatic citizenship to U.S.-born children of illegal or transient aliens is that there is no evidence that those who voted to adopt the 14th Amendment even considered such a scenario. The purpose of this portion of the 14th Amendment was, as one senator put it during the Senate debate on the 14th Amendment, “simply to declare that Negroes shall be citizens of the United States,”²⁴ and therefore guaranteed equal citizenship rights in the aftermath of the Civil War.²⁵

Furthermore, they could not have intended to grant citizenship to children of illegal aliens because no category of “illegal aliens” then existed. In 1866, when Congress approved the amendment, immigration was essentially unhindered; any immigrant was a *legal* immigrant, entitled to citizenship after a minimum residence period.²⁶ The first category of “illegal alien” was not created until 1875—nine years later—when federal law denominated the first aliens prohibited from entering; the only ones prohibited even then were convicts, prostitutes, and “orientals.”²⁷ Ellis Island, which housed the first federal

immigration inspection station, was not opened until 1892.²⁸ I have not seen any explanation from those who argue that the 14th Amendment provides citizenship to illegal or transient aliens’ babies born here that reconciles that position with the undisputed fact that no category known as “illegal alien” was then even imagined to exist.

The fact that there were no illegal immigrants when the 14th Amendment was enacted is not the only basis for concluding that the 14th Amendment was never intended to grant citizenship to a child born to transient aliens. To hold otherwise would require attributing to the enactors of this Amendment the intent to scuttle a provision of the original Constitution that was sacrosanct at that time and has remained so until the current date. Article II of the Constitution prohibits anyone who is not “a natural born citizen” from being president. John Jay, later the first Chief Justice of the Supreme Court, wrote a letter to George Washington, then presiding officer of the Constitutional Convention, that sheds light on the purpose of this provision. He suggested that it would “be wise & seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government.”²⁹ Such a “strong check” would be non-existent if a child of foreign parents, who left the U.S. following birth and lived as a citizen of that foreign land, owing it allegiance, could return at age 35, or even 20, and become president. That inconsistent continuing provision in the Constitution—not only never questioned, but specifically mentioned during the debate on the 14th Amendment³⁰—counsels a rejection of the theory that the Birthright Citizenship provision granted citizenship to any child of non-diplomat foreign citizens born in the U.S.

Proponents of the broad view of birthright citizenship also err in asserting their premise that two clauses of the Amendment section that contains the Birthright Citizenship provision—“within the U.S.” and “subject to [U.S.] jurisdiction”—are synonymous as applied to illegal and transient immigrants. But the Amendment’s authors, in fact, made clear that they did not believe that “subject to [U.S.] jurisdiction” meant the same as “within the U.S.” In the same section of this Amendment, it guaranties “any person *within its jurisdiction* the equal protection of the laws.” The “within” phrase was defined by co-author Senator Howard as meaning “all persons *who may happen to be within their jurisdiction*,” meaning that anyone physically present must be treated equally under our laws.³¹ In contrast, the Court has stated and later reaffirmed that “subject to jurisdiction” means much more: “owing ... direct and immediate allegiance.”³² No allegiance, and certainly not immediate allegiance, is given by a parent who, following birth, returns with her newly born baby to live in the country of her citizenship; nor does one who remains here in violation of law show such allegiance.

Further, Congress knows what words to use if it wants to declare that every non-citizen born within the United States is a citizen. The Indian Citizenship Act of 1924³³ provides that “all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States.” There is no reason to believe that the Congress of 1866 was any less able to use such words if it intended to provide citizenship to all persons born within the

territorial limits of the United States. That it did not use such words requires the conclusion that no such all-encompassing grant of citizenship was intended.

I am not the first person to reach this conclusion as to the meaning of the Birthright provision. In 1873—only five years after the ratification of the 14th Amendment—the U.S. Attorney General provided an official government opinion: “The word ‘jurisdiction’ must be understood to mean absolute and complete jurisdiction, such as the United States had over its citizens before the adoption of the amendment. Aliens, among whom are persons born here and naturalized abroad, dwelling or being in this country, are subject to the jurisdiction only to a limited extent.”³⁴ Being subject only to a limited extent does not meet the requirement of “absolute and complete jurisdiction” necessary to obtain citizenship.

III. APPLYING THE RULE OF LAW IN A FAIR MANNER

Many proponents of the view that the Birthright Citizenship provision grants citizenship to any person born in this country, no matter the circumstances, argue that any other interpretation would cause this country to act inhumanely towards millions who have relied upon it. An example of a child born here 40 years ago to a then-illegal alien, and who lived here, and only here, as an American, knowing and speaking only English, being forcibly deported to a country this now-adult never knew, conjures up a totally unacceptable picture. I agree that it is unacceptable, but is not the necessary consequence of enforcing the 14th Amendment as intended by those who enacted it.

Realistically, the Supreme Court must decide this issue. To bring this issue before the Court, Congress must legislate that a child born on U.S. soil to an illegal or transient alien without domiciliary attachment and total allegiance to the United States is not thereby a U.S. citizen. If an illegal or transient alien thereafter gives birth, under this proposed new statute, she would be denied citizenship for the baby. Undoubtedly someone would then represent her to seek the courts’ help to obtain citizenship papers. In that way, a ruling on the meaning of this constitutional provision would be obtained after, presumably, it winds its way through the courts to the Supreme Court.

In the proposed enacted statute, Congress, I suggest, would be correct in preventing inhumane treatment of persons long ago born who have lived lawfully as American citizens. That can be accomplished by including a clause denying retroactive effect to children who were born in this country, prior to the statute’s enactment, and still resided here without any felony convictions. We would thus avoid repeated future violation of the true meaning and intent of our Constitution, without creating an inhumane picture.

The 14th Amendment Guarantees Birthright Citizenship to Every Person Born on U.S. Soil

David B. Rivkin, Jr. & John C. Yoo

Donald Trump’s call to end birthright citizenship roiled the Republican presidential primary late last year. Jeb Bush, John Kasich, and Marco Rubio embrace the traditional view that the Constitution bestows citizenship on anyone born on U.S. territory. Ben Carson and Rand Paul agree with Trump that Congress could dismantle birthright citizenship by itself. Meanwhile, Scott Walker and Ted Cruz acknowledge birthright citizenship, but seek a constitutional amendment to abolish it.³⁵ Conservatives should reject Trump’s nativist siren song and reaffirm the legal and policy vitality of one of the Republican Party’s greatest achievements: the 14th Amendment. Under its text, structure, and history, anyone born on American territory, no matter their national origin, ethnicity, or station in life, is an American citizen.

While the original Constitution required citizenship for federal office, it never defined it. The 14th Amendment, however, provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”³⁶ Congress did not draft this language to alter the concept of citizenship, but to affirm American practice dating from the origins of our Republic. With the exception of a few years before the Civil War, the United States followed the British rule of *jus solis* (citizenship defined by birthplace), rather than the rule of *jus sanguinis* (citizenship defined by that of parents) that prevails in much of continental Europe.³⁷ As the 18th century English jurist William Blackstone explained: “The children of aliens, born here in England, are generally speaking, natural-born subjects, and entitled to all the privileges of such.”³⁸

After the Civil War, congressional Republicans drafted the 14th Amendment to correct one of slavery’s grave distortions of our law. In *Dred Scott v. Sanford*, Chief Justice Roger Taney found that slaves, even though born in the United States, could never become citizens.³⁹ The 14th Amendment directly overruled *Dred Scott* by declaring that everyone born in the U.S., irrespective of race, were citizens. It also removed from the majoritarian political process the ability to abridge the citizenship of children born to members of disfavored ethnic, religious, or political minorities.

The only way to avoid this straightforward understanding is to misread “subject to the jurisdiction thereof” as an exception that swallows the *jus solis* rule. Some scholars have argued—wrongly—that this language must refer to aliens, who owe allegiance to another nation and not the U.S.

Proponents of “allegiance” citizenship do not appreciate the consequences of opening this Pandora’s box. Among other things, such a standard could spell trouble for millions of dual-citizens, who certainly owe allegiance to more than one country. This is not an entirely speculative concern; during World Wars I and II, public sentiment ran strongly against German-Americans or Japanese-Americans.⁴⁰ More generally, the whole notion of national loyalty is open-ended, requires person-specific determinations, and would put the government in the business of reviewing the ancestry of its citizens.

Washington, D.C. and the states would have to pour even more resources into an already dysfunctional bureaucracy that cannot even control the borders. Reading allegiance into the 14th Amendment would largely defeat the intent of its drafters, who wanted to prevent politicians from denying citizenship to those they considered insufficiently American.

As a matter of constitutional interpretation, the 14th Amendment's reference to "jurisdiction" means only that the children fall under American law at birth. Almost everyone in the United States, even aliens, comes within American jurisdiction; otherwise, they could violate the law with impunity. "Subject to the jurisdiction thereof" refers to discrete categories of persons that American law does not govern, such as diplomats and enemy soldiers occupying U.S. territory during war.⁴¹ International law grants both diplomats and enemy soldiers protected status, when present on the soil of another state, from the application of that state's laws.⁴²

At the time of the 14th Amendment's ratification, one obvious group not subject to U.S. jurisdiction were American Indians residing on tribal lands, because the tribes exercised considerable self-governance. In the late 19th Century, the federal government began to regulate Indian life, substantially diminishing tribal sovereignty, and in 1924 it extended birthright citizenship to them.⁴³

The 14th Amendment's drafting history supports our reading. The Civil Rights Act of 1866, which inspired the Amendment, extended birthright citizenship to those born in the U.S. except those "subject to any foreign power" and "Indians not taxed."⁴⁴ If the 14th Amendment's drafters had wanted "jurisdiction" to exclude children of aliens, they easily could have required citizenship only for those with no "allegiance to a foreign power."

Significantly, congressional critics of the Amendment recognized the broad sweep of the birthright citizenship language. Senator Edgar Cowan of Pennsylvania, a leading opponent, asked, "[i]s the child of the Chinese immigrant in California a citizen? Is the child born of a Gypsy born in Pennsylvania a citizen?"⁴⁵ Senator John Conness of California responded yes, and later lost his seat due to anti-Chinese sentiment in his state. The original public meaning of the 14th Amendment—which conservatives properly believe to be the lodestar of constitutional interpretation—affirms birthright citizenship.

The traditional American position, finally, works no great legal revolution. The Supreme Court has consistently read the 14th Amendment to grant birthright citizenship. *United States v. Wong Kim Ark* upheld the American citizenship of a child born in San Francisco to Chinese parents, who themselves could never naturalize under the Chinese Exclusion Acts.⁴⁶ The Court held that "the Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and protection of the country, including all children here born of resident aliens."⁴⁷ It also explicitly rejected the argument that aliens, because they owed allegiance to a foreign nation, were not within "the jurisdiction" of the United States.⁴⁸ Critics of birthright citizenship respond that Ark did not involve illegal aliens and therefore does not apply to children of undocumented migrants. (While Ark's parents could not become citizens, they could reside here legally.) But

in 1898, federal law did not define legal or illegal aliens, and so the Court's opinion could not have turned on the legal status of Ark's parents.

In *Plyler v. Doe*, moreover, the Supreme Court held 5-4 that the 14th Amendment's Equal Protection Clause required Texas to provide public schooling to children of illegal aliens.⁴⁹ All nine Justices agreed that "no plausible distinction with respect to Fourteenth Amendment 'jurisdiction' can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful."⁵⁰

The 14th Amendment settled the question of birthright citizenship. Conservatives should not be the ones seeking a new law or even a constitutional amendment to reverse centuries of American tradition.

Endnotes

1 Hunter Walker, *Donald Trump just released an epic statement raging against Mexican immigrants and 'disease,'* BUSINESS INSIDER (July 6, 2015), available at <http://www.businessinsider.com/donald-trumps-epic-statement-on-mexico-2015-7>.

2 *What Is the Quote on the Statue of Liberty?*, YOUR DICTIONARY, available at <http://quotes.yourdictionary.com/articles/quote-on-statue-of-liberty.html> (visited 10/30/15).

3 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, part 2, page 36 (1840).

4 See, e.g., Abby Phillip, *Inside the shadowy world of birth tourism at 'maternity hotels,'* WASHINGTON POST (March 5, 2015), available at <https://www.washingtonpost.com/news/post-nation/wp/2015/03/05/the-shadowy-world-of-birth-tourism-at-californias-luxury-maternity-hotels/>; Lou Alfonso, *Born in the U.S.A.: Birth tourists get instant U.S. citizenship for their newborns,* NBC NEWS- ROCK CENTER (March 7, 2013), available at <http://rockcenter.nbcnews.com/news/2013/03/07/17225891-born-in-the-usa-birth-tourists-get-instant-us-citizenship-for-their-newborns?lite>; Cindy Chang, *Alleged maternity hotel in Chino Hills shuts down,* LOS ANGELES TIMES- L.A. NOW (Jan. 3, 2013), available at <http://latimesblogs.latimes.com/lanow/2013/01/chino-hills-maternity-hotel-shuts-down.html>.

5 See, e.g., Alana Semuels, *The Midwives of El Paso,* THE ATLANTIC (Feb. 4, 2016), available at <http://www.theatlantic.com/business/archive/2016/02/midwives-el-paso/459969/>; Molly Hennessy-Fiske, *Along the border, who's an 'anchor baby' is a guessing game,* LOS ANGELES TIMES (Sept. 3, 2015), available at <http://www.latimes.com/nation/immigration/la-na-texas-anchor-babies-20150903-story.html>.

6 See, e.g., Jon Feere, *Birthright Citizenship in the United States: A Global Comparison,* CENTER FOR IMMIGRATION STUDIES (Aug. 2010), available at <http://cis.org/birthright-citizenship>.

7 *United States v. Wade*, 388 U.S. 218, 249 (1967) (Black, J., dissenting).

8 OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS*, 204 (1920) (emphasis added).

9 Some erroneously attempt to vitiate this second requirement for birth citizenship by suggesting that the phrase "subject to [U.S.] jurisdiction" was limited to excluding a child born to foreign accredited diplomats and American Indians. No basis exists to attribute such defective drafting to the authors; if that had been the limited purpose of the phrase, they would have named the two excluded categories, rather than describe an over-inclusive non-specific exclusion. Moreover, as discussed below, the Supreme Court and the U.S. Attorney General, shortly after the Amendment's adoption, did not so limit the "subject to the [U.S.] jurisdiction" provision.

10 83 U.S. 36, 73 (1873) (emphasis added).

11 88 U.S. 162, 167-68 (1875). It is significant that the Court emphasized that “it was never doubted that all children born in [the U.S.] of parents who were its citizens became themselves, on their birth, citizens also,” in contrast to expressly noting “doubts” as to the citizenship of children of non-citizen parents born on U.S. soil.

12 14 Stat. 27-30 (April 9, 1866).

13 See Senator Howard’s explanation at Congressional Globe, 39th Congress (1866), p. 2896: “We desired to put the question of citizenship . . . under the civil rights bill beyond the legislative power of such gentlemen as the Senator from Wisconsin who would pull the whole system up by the roots and destroy it . . .”

14 Congressional Globe, 39th Congress (1866), p. 2890.

15 *Id.* at 2893.

16 V Thomas Jefferson, *The Writings of Thomas Jefferson* 276 (1903).

17 112 U.S. 94, 102 (1884) (emphasis added).

18 See *Definition of Allegiance*, MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/allegiance>.

19 William Blackstone, *Commentaries*, THE FOUNDERS’ CONSTITUTION, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_4_citizenships1.html.

20 169 U.S. 649 (1898).

21 *Id.* at 653, 705.

22 *Id.* at 652-53. Those who assert a contrary view on this Birthright Provision also put misplaced reliance on one sentence in one judge’s opinion, taken out of context, in *Inglis v. Trustees Of Sailor’s Snug Harbor*, 28 U.S. 99 (1830). First, this ruling was rendered 38 years before enactment of the 14th Amendment and thus did not construe it. Moreover, that case concerned the impact of the Declaration of Independence on the citizenship of British subjects residing in the Colonies before the Revolution. As that judge stated, “[a]ntecedent to the revolution, the inhabitants of the Colonies, whether natives of the Colonies or of any other of the British dominions, owed no allegiance except to the British Crown.” *Id.* at 158. Given “the peculiar circumstances of the Revolution,” *Id.* at 159, that Judge described this case as “sui generis,” *Id.* at 157, involving an attempt to decipher citizenship of British subjects who were American colonists until they departed for Britain after the Revolution.

23 See *Definition of Permanent*, OXFORD DICTIONARIES, available at http://www.oxforddictionaries.com/us/definition/american_english/permanent.

24 Congressional Globe, 39th Congress (1866), p. 2897.

25 *Elk v. Wilkins*, 112 U.S. 94, 101 (1884).

26 Naturalization Act, ch. 54, 1 Stat. 566 (June 18, 1798).

27 Page Act of 1875, 18 Stat. 477 (March 3, 1875).

28 *Ellis Island: History and Culture*, NATIONAL PARK SERVICE, available at <http://www.nps.gov/elis/learn/historyculture/index.htm>.

29 Letter from John Jay to George Washington (July 25, 1787), available at <http://founders.archives.gov/documents/Washington/04-05-02-0251>.

30 Congressional Globe, 39th Congress (1866), p. 2893.

31 *Plyler v. Doe*, 457 U.S. 202, 214-15 (1982) (quoting Senator Howard).

32 *Elk v. Wilkins*, 112 U.S. 94, 102 (1884), reaffirmed in *U.S. v. Wong Kim Ark*, 169 U.S. 649, 680 (1898).

33 43 Stat 253.

34 14 U.S. Attorney General Opinions 300.

35 See Mark Murray, *Where the GOP 2016 Candidates Stand on Birthright Citizenship*, NBC NEWS (August 18, 2015), available at <http://www.nbcnews.com/politics/2016-election/where-gop-2016-candidates-stand-birthright-citizenship-n411946>.

36 U.S. CONST. amend. XIV, § 1.

37 See, e.g., *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. 99, 164 (1830) (“Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government and owing a temporary allegiance thereto are subjects by birth.”).

38 1 William Blackstone, *Commentaries* *373, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_4_citizenships1.html.

39 60 U.S. 393 (1857).

40 See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944), *Meyer v. Nebraska*, 262 U.S. 390 (1923).

41 *Cong. Globe*, 39th Cong., 1st Sess. 2890 (1866), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=073/llcg073.db&recNum=11>.

42 22 U.S.C. § 254a et seq. (Diplomatic Relations Act of 1978, following principles introduced in the Vienna Convention on Diplomatic Relations).

43 Indian Citizenship Act, H.R. 6355, 68th Cong. (1924).

44 S. 61, 39th Cong. § 1 (1866).

45 See *Cong. Globe*, 39th Cong., 1st Sess. 2890, *supra* n.7.

46 169 U.S. 649 (1898).

47 *Id.* at 693.

48 *Id.* at 665.

49 457 U.S. 202 (1982).

50 *Id.* at 211 n.10 (citing C. BOUVE, EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 425-427 (1912)).



CRIMINAL LAW & PROCEDURE

DOMESTIC CONVICTIONS FOR FOREIGN VIOLATIONS

By Paul J. Larkin, Jr.*

Note from the Editor:

This article discusses the Lacey Act and argues that its incorporation of foreign law renders it unconstitutional. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- *The Lacey Act: Leading the Fight Against Illegal Logging*, SIERRA CLUB, available at <http://www.sierraclub.org/interactive/lacey-act>.
 - Craig Havighurst, *Why Gibson Guitar Was Raided By The Justice Department*, NPR (August 31, 2011), available at <http://www.npr.org/sections/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department>.
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The statutory definition of most criminal offenses is entirely self-contained. That is, the law creating the offense defines every element of that crime. In some cases, however, a criminal law may refer to other statutes to fill out one or more elements of an offense. One example is the Racketeer Influenced and Corrupt Organizations Act (RICO).¹ RICO makes it a federal offense for an “enterprise,” which can consist of one person or a group of offenders, to commit a “pattern of racketeering activity” through two or more “predicate offenses,” which can include numerous crimes defined by other provisions in the United States Code.²

In a few instances, however, the government³ makes it a crime to violate a foreign law.⁴ One example is the Lacey Act.⁵ Originally enacted in 1900, the Lacey Act prohibits, on pain of criminal penalties, the importation of flora or fauna obtained in violation of “any foreign law.”⁶ The federal government has applied that statute to various types of imported items.

There is a particularly odd feature of the Lacey Act. Unlike the RICO Act, the Lacey Act incorporates foreign laws as elements of the offense. A person therefore can violate domestic law if the imported goods were obtained in violation of a foreign law. Moreover, the foreign law need not be a criminal law; the violation of a civil statute is sufficient.⁷ The foreign law also need not be a statute; not only is the violation of a regulation sufficient, but the failure to comply with other rules issued by a foreign nation is satisfactory as long as it amounts to a “law” in that country. Moreover, it is not necessary that a foreign law be adopted by a branch of a foreign government that is the equivalent of our legislature, executive, or judiciary, because the Lacey Act does not limit who may create “law” overseas. Indeed, one American circuit court has even held that the act does not even require that the foreign “law” be valid in the land that adopted it.⁸

The result is that the Lacey Act creates a remarkable anomaly in federal criminal law because it delegates federal

lawmaking authority to foreign officials. Because of this delegation, the act violates Articles I and II of the Constitution, as well as the Due Process Clause of the Fifth Amendment. Those provisions forbid Congress and the President from handing over to foreign officials the ability to adopt rules or regulations that govern the conduct of the people in this country.⁹

I. THE ORIGIN OF THE LACEY ACT

The Lacey Act did not start its life with that breathtaking scope. It began as a humble anti-poaching law. Late in the nineteenth century, the states found themselves unable to enforce their game laws against non-resident hunters. States were able to enforce their games laws against residents, but found that out-of-staters were violating their laws with relative impunity. People would travel from one state (e.g., North Dakota) to another state (e.g., South Dakota), hunt without a license, take more than the state limit, and return home before anyone was the wiser. Since state law enforcement officers cannot exercise authority in another state, even an adjacent one, poachers were able to escape the reach of the law.

Congress could have left the problem to the states to work out by cross-designating each other’s game officers as their own law enforcement officers,¹⁰ but Congress decided to make a federal case out of the matter by enacting the Lacey Act.¹¹ The original version of the act, however, did not raise the constitutional problems noted above. That did not occur until a 2008 revision of the statute.¹²

In that year environmentalists, members of the domestic timber industry, and labor unions combined to support a revision to the statute that added the importation of plants obtained in violation of state law, as well as any products made from plants obtained in violation of foreign law, to the list of punishable offenses. The combination was a classic example of the quip that politics makes strange bedfellows. Environmentalists wanted to prevent the deforestation of foreign lands, while timber industry employees and their unions wanted to make it difficult to import foreign timber for use in the construction of houses or furniture. The combination persuaded Congress to enact their sought-after revision of the Lacey Act. In all likelihood, what helped those groups succeed was the fact that the Lacey Act revision was added to an entirely unrelated

* Paul J. Larkin Jr. directs The Heritage Foundation’s project to counter abuse of the criminal law, particularly at the federal level, as senior legal research fellow in the Center for Legal and Judicial Studies. This “overcriminalization” project is part of Heritage’s Rule of Law initiative.

farm policy bill.¹³ Members of Congress therefore likely paid little attention to what appeared to be a minor revision to a statute that had not generated much controversy in its 108-year existence. It certainly is difficult to believe, however, that the Members of Congress in office that year consciously intended to subject American individuals and businesses to governance by foreign nations.

II. THE REACH OF THE LACEY ACT

As revised, the Lacey Act makes it is unlawful to “import, export, transport, sell, receive, acquire, or purchase” fish, wildlife, or plants that have been “taken, possessed, transported, or sold . . . in violation of any foreign law.”¹⁴ Some federal courts of appeals have concluded that the Lacey Act does not require proof of a foreign law violation.¹⁵ The text of the Lacey Act, however, is clearly to the contrary. Whether a case involves “fish” “wildlife,” or “any plant,” Section 3372(a) (2)(A) and (B) of Title 16 requires the government to prove that item was “taken, possessed, transported, or sold . . . *in violation of any foreign law.*”¹⁶ The italicized phrase is, when properly read, an element of the offense. Indeed, the act makes little sense otherwise. Disregarding the phrase “taken, possessed, transported, or sold . . . *in violation of any foreign law*” transforms the Lacey Act into a flat ban on imports. Yet, Congress did not design the Lacey Act to work in that manner. Congress sought to ban only the importation of unlawfully obtained items in order to pay respect to the law of the home state or nation. Any court that holds otherwise is misreading the statute to avoid addressing the serious, and likely fatal, constitutional issues discussed in this article.¹⁷

The Act does not define the term “any foreign law” or restrict its meaning.¹⁸ The federal courts have read that term broadly, to reach civil laws, regulations, and an agency’s statement of the governing law.¹⁹ Moreover, the Lacey Act is not limited to only those foreign laws in existence in 2008; the act reaches later-adopted laws as well. The effect is to delegate lawmaking authority to every foreign nation, enabling them to alter or amend the scope of the crime defined by federal law over time as they see fit.

A violation of the Lacey Act can result in long-term imprisonment and crushing fines. A person who “knowingly” imports or exports wildlife or plants in violation of the Act can receive a sentence of five years’ imprisonment and a fine of \$250,000 (\$500,000 for corporations) for each offense.²⁰ The act also authorizes criminal penalties for mere negligence. A person who “in the exercise of due care” should have known that the statute prohibited his conduct can receive one year’s imprisonment and a fine of \$100,000 (\$200,000 for an organization) for each offense.²¹ Each unlawful act is a violation of the statute, so a commercial fisherman who negligently hauls in one thousand fish, or an importer who brings into America one thousand different pieces of furniture, is subject to one thousand years of imprisonment and a fine exceeding the gross domestic product of most of the world’s nations. Moreover, liability is not limited to the person who violates a foreign law on foreign soil. An importer, for example, is liable if anyone in the potentially long and convoluted chain of parties responsible for the harvesting, processing, finishing, shipping, and entry of

original material (such as wood) or a processed item (such as bagpipes) violated a foreign law.²² The Lacey Act therefore has the potential to expose a person engaged in a facially legitimate activity—such as importing fish or furniture—to the onerous sentences society ordinarily reserved for dangerous felons and heinous crimes.

III. THE CONSTITUTIONAL FLAWS IN THE LACEY ACT

It is impossible to believe that the Framers would have countenanced any delegation of federal lawmaking authority to a foreign power. After all, “foreign control over American law was a primary grievance of the Declaration of Independence. The Declaration’s most resonant protest was that King George had ‘subject[ed] us to a jurisdiction foreign to our constitution.’”²³ The colonists railed against Parliament for making laws governing the colonies notwithstanding their lack of representation in that assembly, laws that, from 1763 to 1775, generated the friction that led to the clashes at Lexington and Concord.

The delegates to the Constitutional Convention of 1787 hotly debated the question of how Congress should be structured to ensure that both large and small states would be adequately represented in that body.²⁴ It would be absurd to believe that the Framers would have delegated to Parliament the authority to continue to pass legislation governing the United States. It is even more absurd to infer from the Framers’ silence on the matter that something as drastic as delegating to a foreign government the ability to make laws for the new nation would have gone unnoticed. If the Founders contemplated any such result, someone would have mentioned it, and the overwhelming response would have been negative. Yet, that is the effect of the Lacey Act on Americans. Not surprisingly, therefore, the act violates Articles I and II of the Constitution

A. The Lawmaking Power in Article I

Start with the text of the Constitution. Article I grants “[a]ll legislative Powers” to a Congress consisting of a Senate and a House of Representatives.²⁵ To exercise that power, individuals must be elected (and re-elected) to office and satisfy certain defined criteria to be sworn in as Senators and Representatives.²⁶ Article I also establishes a rigorous process for the House and Senate to enact a “Bill” and “[e]very Order, Resolution, or Vote” requiring the approval of both chambers.²⁷ In order to create a “Law,” each chamber must pass the identical bill and present it to the President, and the President must sign it (or both houses must re-pass it by a two-thirds vote following the President’s veto).²⁸ The effect is to give the Members the opportunity for study and debate over any bill and to compel each Senator, each Representative, and the President to take a public position on what conduct should be outlawed, encouraged, supported, protected, or funded.²⁹ As noted elsewhere:

The Article I lawmaking procedure not only offers the opportunity for reasoned consideration and debate over the merits of proposed legislation, but also—and perhaps more importantly—provides voters with a basis for holding elected federal officials politically accountable for the decisions that they make and must stand behind

when they run for re-election. The bicameralism and presentment requirements therefore enable the electorate to decide whether Representatives, Senators, and the President should remain in office or be turned out every two, six, or four years.³⁰

The incorporation as “Law” of whatever edicts or instruments foreign nations may adopt is tantamount to vesting lawmaking authority in those nations or, what is the same thing, delegating lawmaking authority to foreign nations.³¹ Article I, however, vests the authority to create a “Law” only in Congress and the President. On its face, therefore, the Lacey Act violates the Legislative Vesting, Senate and Representative Qualification Clauses, Election Regulations, Bicameralism, and Presentment Clauses of Article I.

The text of Article I strongly suggests that only Congress (with the President’s assistance) can create a “Law,” which gives rise to the necessary corollary that Congress cannot delegate its lawmaking responsibilities elsewhere.³² There are circumstances, however, where Congress may delegate to federal agencies the authority to promulgate regulations that are tantamount to a law.³³ To do so, Congress must define an “intelligible principle” in the authorizing legislation for the agency to use when exercising that power. The U.S. Supreme Court has been extraordinarily generous in its interpretation of what constitutes an “intelligible principle,” with even a delegation to promulgate regulations that are in the “public interest” being held sufficient.³⁴ Since 1935, the Court has upheld every delegation of congressional authority to a federal agency to issue governing regulations.³⁵ The Supreme Court has found a delegated standard “unintelligible” only twice in the Court’s history,³⁶ and those delegations gave the recipient of delegated power utterly no standard to apply when creating law.³⁷ Accordingly, as presently interpreted, the Delegation Doctrine imposes a rather low hurdle for Congress to overcome if it wants to delegate rulemaking authority to an executive agency.

Even if this low standard is applied to delegations of lawmaking authority to foreign governments, the Lacey Act would not pass muster because the statute supplies no standard whatsoever for a foreign nation to use when creating a “law” whose violation can trigger liability under the Lacey Act. The act does not identify the foreign laws it incorporates, the form that those laws may take, or the elements that American law deems essential to qualify a proclamation as a “law.” The act does not give foreign government officials any test, standard, factors, or principles to use when enacting laws that create civil and criminal liability under American law. Indeed, the Lacey Act does not even require that a foreign law be readily accessible to Americans or have an English translation. The Supreme Court has set the bar low for Congress to empower a delegated party to adopt law, but the Lacey Act provides no standard at all for a foreign nation to use. Finally, even if it were possible to imply a “public interest” standard into the Lacey Act, there is no justification for assuming that officials of a foreign government will act with the interests of the *American public* in mind. Accordingly, the Lacey Act violates Article I.

B. *The Appointment Power in Article II*

The Constitution expressly contemplates that there will be federal offices other than the three specifically created in Articles I, II, and III. How do we know that? Because the Constitution empowers the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”³⁸ Congress can create those offices by exercising its power under the Necessary and Proper Clause³⁹ to assist the President in his duty to see to the execution of federal law.⁴⁰ The Constitution does not provide a mechanism for the election of those officers, however, so how do they come to hold office? That is where the Appointments Clause of Article II comes into play.⁴¹

The Framers knew that they had to fill out a government with non-elected officials, but they were troubled by the Crown’s “manipulation of official appointments” and remembered the appointment power as “the most insidious and powerful weapon of eighteenth-century despotism.”⁴² To avoid that problem, the Framers carefully regulated the appointment of “officers of the United States,”⁴³ a term that refers to any person who exercises “significant” federal authority.⁴⁴ The Framers “carefully husband[ed] the appointment power to limit its diffusion” to officials who would be subject to “the will of the people.”⁴⁵ The Appointments Clause serves that role. Only the President, “the Heads of Departments,” and “the Courts of Law” may appoint “officers of the United States.” Only those parties who have been properly appointed, who have received a commission from the appointing official, and who have taken the oath of office may exercise federal power.⁴⁶ The Clause “ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people.”⁴⁷

Foreign officials come in all shapes and sizes. Some foreign presidents run the country; others are just figureheads. Some national leaders have terms lasting four years; others, up to seven. Our Interior Secretary is responsible for America’s federal parks and other properties. The Interior Minister in other nations is their chief domestic law enforcement officer. And so on and so forth. But whatever office they hold, whatever authority they may exercise, and whatever period they exercise that power, they all have two elements in common: None of them were elected by Americans, and none of them were appointed by one of the three entities specified in Article II. Accordingly, none of them may exercise authority under federal law, and the making of laws to govern the people of the United States is the most fundamental federal authority imaginable. The result is that none of them may define the elements of a Lacey Act violation.

C. *The Due Process Clause of the Fifth Amendment*

There is yet another constitutional flaw in the Lacey Act. The delegation of federal lawmaking authority to foreign parties violates the Fifth Amendment Due Process Clause.⁴⁸ To understand why, it is helpful to start with some history.

The Due Process Clause is the lineal descendant of Magna Carta. King John signed the Great Charter in 1215 in order to end a civil war brought on by the barons because of King John’s arbitrary use of royal power. Article 39 of Magna Carta is the most relevant provision. It provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in

any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”⁴⁹ The “chief grievance to be redressed” by Chapter 39, as one scholar has noted, “was the King’s practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his curia.”⁵⁰ The guarantee that the crown could administer punishment only in accordance with “the law of the land” meant, according to Sir Edward Coke, that “no man [could] be taken or imprisoned, but per legem terrae, that is, by the common law, statute law, or custome of England.”⁵¹ Said differently, Article 39 protected “life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property.”⁵² In the fourteenth century, Parliament changed the phrase “the law of the land” to “due Process of the Law,” but the revision did not alter its meaning.⁵³ The principal teaching of Article 39 is that every component of the government—executive, legislative, and judicial—is subject to “the rule of law,” the principle that, as *Marbury v. Madison* put it, “ours is a government of laws, and not of men.”⁵⁴

The constitutional history of the Due Process Clause reveals that the clause serves as an additional regulation of federal lawmaking power. The Election and Term Limit Clauses in Articles I and II, along with the Twelfth and Seventeenth Amendments, require that Senators, Representatives, and the President be elected to the limited terms of office defined in those provisions.⁵⁵ The Bicameralism and Presentment Clauses of Article I establish the procedure necessary for those federal elected officials to make “Law.”⁵⁶ The Take Care Clause in Article II directs the President to see to the faithful execution of that “Law,”⁵⁷ the Judicial Power Clause in Article III grants the Supreme Court and lower federal courts the power “to say what the law is,”⁵⁸ and the Appointments Clause of Article II ensures that only parties properly appointed to their posts may enforce or interpret the “Law.”⁵⁹ Read together those Articles define the “Republican Form of Government” that the Framers created for the nation and that Article IV guarantees each state.⁶⁰

The Due Process Clause bars Congress from circumventing that regulatory scheme by delegating federal lawmaking power to private parties. As noted elsewhere:

[T]he due process requirement that federal government officials act pursuant to “the law of the land” when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate. That is the bedrock due process guarantee, one so fundamental that we take it for granted. The principle that government officials are governed by “the rule of law” is so deeply ingrained into the nation’s culture, psyche, and legal systems that we forget just how important it is. The Barons at Runnymede had no Parliament to which they could turn for protection against King John. They had only their own troops and the common law, representing

the accepted, common understanding of Englishmen regarding the permissible operation of the crown and its institutions, as enforced by the courts. In order to avoid a continuing need to rely on the former, they forced the king to agree to be governed by the latter. The requirement that the crown act pursuant to “the law of the land” was a protection against the king going outside the law to accomplish his will through brute force.⁶¹

But the Due Process Clause protects the public against more than the arbitrary exercise of government power. It also keeps the government from trying to avoid the constitutional restrictions imposed on federal lawmaking by delegating that power to politically unaccountable private parties.

Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King’s delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The “plan of the Convention” was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government’s choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers’ signal accomplishment of establishing a government under law.⁶²

By delegating lawmaking power to foreign government officials, the Lacey Act takes a giant step beyond a delegation of lawmaking power to private parties in this nation. Members of Congress and officers in the executive and judicial branches take an oath or affirmation to uphold the Constitution of the United States.⁶³ That oath is no less important than the one that a person takes as a witness before Congress, before an executive hearing officer, or in court. It is a solemn pledge to honor and support our nation’s fundamental law—and probably is similar to the oath that foreign officials take to uphold their own nation’s laws. The Lacey Act therefore turns over

can trigger federal criminal liability. Third, the foreign law need not altogether forbid taking an animal or plant. Violation of a foreign law regulating only the process of harvesting wood can trigger federal criminal liability, as can the failure to pay an export fee or the erroneous completion of required paperwork. Fourth, the Lacey Act does not restrict the form that foreign law may take. That law can be a statute, a regulation, a local ordinance, a nation's interpretation of one of its laws, or anything else that a foreign nation defines as "law." For example, in 2012 the Department of Justice investigated the Gibson Guitar Corporation for a violation of the laws of Madagascar, which the government described as "Departmental Memorandum 001/06/MINENVEF/Mi" and as Madagascar Interministerial Order 16.030/2006. That interpretation suggests that a foreign legal edict of any type can trigger criminal liability. Fifth, the Lacey Act incorporates not only the foreign laws in effect at the time that statute was adopted, but also whatever laws a foreign nation may hereafter adopt. Sixth, the Act does not require that the foreign law, in whatever land and in whatever form it appears, be readily accessible or even be written in English. In the Gibson Guitar case, the Department of Justice investigated Gibson Guitar for a violation of the laws of Madagascar even though at least one of the relevant laws had to be translated into English." (footnotes omitted).

19 See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 825 n.2, 828–30 (9th Cir. 1989) (holding that the Lacey Act makes it a federal crime to violate a Taiwanese board's "announcement" that was not technically a "regulation").

20 16 U.S.C. § 3373(d) (2012); 18 U.S.C. § 3571 (2012); LACEY ACT PRIMER, *supra* note 7, at 8.

21 16 U.S.C. § 3373(d)(2) (2012).

22 See, e.g., *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (commercial fishermen); *United States v. Lee*, 937 F.2d 1388, 1393 (9th Cir. 1991) (same); LACEY ACT PRIMER, *supra* note 7, at 7; *id.* at 19 ("Example: Bagpipes with wooden pipes . . . HTS Section 92059020—no declaration required . . . The Lacey Act itself still applies to the wooden pipes . . . If the pipes were made from illegally harvested trees then the bagpipe shipment is in violation of the Lacey Act"); Dieterle, *supra* note 12, at 1303.

23 Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL'Y 475, 477–78 (2009) (footnote omitted).

24 See, e.g., BERNARD BAILLYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1992); JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* (2011); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); CHARLES HOWARD MCILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* (1923); EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89* (4th ed. 2013); JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

25 See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

26 See U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *id.* cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."); *id.* §3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State[.]"); *id.* cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); *id.* art. IV, § 4 ("The Times, Places and Manner of holding

Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

27 See U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."); *id.* cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

28 See U.S. CONST. art. I, § 7, cls. 1 & 2; *INS v. Chadha*, 462 U.S. 919 (1983); *cf.* *Clinton v. City of New York*, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law).

29 See Larkin, *supra* note 3, at 356.

30 *Id.*

31 See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 105 (2008) ("dynamic incorporation does delegate lawmaking authority").

32 Article I expressly contemplates that Congress may select certain officers. See U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers"); *id.* § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."); *id.* § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States."). The Necessary and Proper Clause implicitly empowers Congress to hire staff. See *id.* § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). Article I, however, does not suggest that Congress may empower anyone other than elected Senators and Representatives to cast a vote on an bill subject to the Bicameralism and Presentment requirements.

33 How to classify such delegations is somewhat of a mystery. On occasion, the Supreme Court has said that Congress cannot delegate its legislative power. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("Article I, § 1, of the Constitution vests [a]ll legislative Powers herein granted . . . in a Congress of the United States." This text permits no delegation of those powers."). If so, agencies cannot enact laws. Agencies, however, can fill in the blanks that Congress left for them in statutes, see, e.g., *Touby v. United States*, 500 U.S. 160, 167 (1991) (holding that Congress can delegate to the Attorney General the authority to list controlled substances whose distribution is a federal offense); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding statute that made violations of the price administrator's regulations a criminal offense); *United States v. Grimaud*, 220 U.S. 506 (1911) (Congress can delegate authority to an

administrative agency to promulgate regulations whose violation is punishable as a crime); cf. *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (noting that administrative agency rulemaking is not subject to the Presentment Clause), and those regulations have the force and effect of law, see, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979) (“It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the ‘force and effect of law.’ This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause.”) (footnotes omitted).

34 See *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding against a delegation challenge a statute authorizing the licensing of radio communication “as public interest, convenience, or necessity [requires]”); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940) (same, a statute authorizing an agency to set maximum prices for coal “when in the public interest”); *New York Central Securities Corp. v. United States*, 287 U.S. 1, 24 (1932) (same, a statute authorizing the consolidation of interstate carriers when “in the public interest”).

35 See, e.g., *Whitman*, 531 U.S. 457; *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *Lichter v. United States*, 334 U.S. 742 (1948); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *United States v. Grimaud*, 220 U.S. 506 (1911).

36 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

37 See, e.g., *Whitman*, 531 U.S. at 474 (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring ‘fair competition.’”) (citations omitted).

38 U.S. CONST. art. II, § 2, cl. 1.

39 U.S. CONST. art. I, § 8, cl. 13 (“The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

40 U.S. CONST. art. II, § 3 (“[The President he shall take Care that the Laws be faithfully executed[.]”).

41 U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

42 GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC*, 1776-1787, at 79, 143 (1998).

43 U.S. CONST. art. II, § 3, cl. 6.

44 See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”); see also *Edmond v. United States*, 520 U.S. 651, 662 (1997); *Weiss v. United States*, 510 U.S. 163, 168-70 (1994).

45 *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883-84 (1991); *id.* at 880 (“The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.”); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 483-84 &

n.4 (1989) (Kennedy, J., concurring) (quoting *THE FEDERALIST* NO. 76, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

46 See *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1233-39 (2015) (Alito, J., concurring) (*Amtrak*); *id.* at 1235 (“Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.”); *Buckley*, 424 U.S. at 126.

47 *Amtrak*, 135 S. Ct. at 1238 (Alito, J., concurring).

48 The Supreme Court decided a series of cases in the twentieth century that prohibit the legislature from delegating standardless law-making authority to parties over whom the public has no political or legal recourse. See, e.g., *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Those cases are still good law. See *Amtrak*, 135 S. Ct. at 1237-38 (Alito, J., concurring) (“When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with “legislative Powers.” Art. I, § 1. . . . By any measure, handing off regulatory power to a private entity is “legislative delegation in its most obnoxious form.” *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).”); Larkin, *supra* note 3, at 403-23.

49 J.C. HOLT, *MAGNA CARTA* 461 (2d ed. 1992).

50 C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914).

51 2 Edward Coke, *Institutes of the Lawes of England* 45 (1798).

52 Charles H. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 373 (1891).

53 A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 14-15 (Rev. ed. 1998).

54 5 U.S. (1 Cranch) 137, 163 (1803).

55 U.S. CONST. art. I,

56 U.S. CONST. art. I, § 7, cls. 2 & 3.

57 U.S. CONST. art. II, § 3.

58 U.S. CONST. art. III, cls. 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

59 U.S. CONST. art. II, § 2.

60 U.S. CONST. art. IV, § 4.

61 Larkin, *supra* note 3, at 417 (footnote omitted).

62 *Id.* at 419-20.

63 See Art. VI, cl. 3 (“[A]ll executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution”); *Amtrak*, 135 S. Ct. at 1235 (Alito, J., concurring).



IS THE LONG ARM OF THE LAW SHRINKING?: GEOGRAPHIC BOUNDARIES FOR THE APPROVAL OF WIRETAPS AND BUGS AND THE SHIFTING JURISDICTIONAL REACH OF FEDERAL JUDGES TO AUTHORIZE ELECTRONIC SURVEILLANCE

By Mike Hurst*

Recent court decisions from around the country are raising serious questions as to the potential jurisdictional limitations on law enforcement in conducting electronic surveillance on cellular telephones and with recording devices (i.e., “bugs”) in private places. Specifically, questions have arisen as to whether, for example, a federal judge in State A has the authority to approve a wiretap for the recording of a cellular telephone which, while sometimes within State A, is physically located in State B when the wiretap approval order is signed, and the government’s monitoring station of that particular cell phone is located State C. A related question concerns the authority of a federal judge in State A to authorize the installation of a bug in a vehicle or residence located in State B. Until recently, few restrictions were recognized as to a federal judge’s power to authorize multi-jurisdictional electronic surveillance orders. However, some federal appellate courts are beginning to find that such authority does not exist, sometimes suppressing evidence obtained from such surveillance when jurisdictional limits have been violated.

Supporters of these recent decisions would argue that such jurisdictional limitations are necessary in order to prevent forum shopping by industrious prosecutors and law enforcement officers. Otherwise, there would be no restriction on an overzealous prosecutor and a rubber stamping judge. On the other hand, opponents of these latest decisions would argue that such jurisdictional restrictions unnecessarily limit law enforcement’s ability to adequately fight crime, as criminals do not limit themselves to any specific judicial districts but rather are always on the cutting edge of technological innovations in order to stay one step ahead of the cops. Tying the hands of law enforcement by limiting access to certain judicial officers or causing confusion about the distribution of authority to approve wiretaps would allow criminals to arbitrage the system to their advantage, significantly hampering the ability of law enforcement to investigate and secure the necessary evidence to ultimately obtain convictions. The following article presents some background on the primary statute used to authorize electronic surveillance and the historical interpretation by some federal appellate courts, juxtaposed against recent federal appellate court decisions that turn the traditional thinking about territorial jurisdiction under the statute on its head.

I. BACKGROUND

The use of wiretaps and evidence obtained from them is governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (“Title III” or the “Wiretap Act”).¹ Pursuant

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* Mike Hurst is a lawyer in Mississippi and former federal prosecutor. He is known for his work targeting corrupt public officials as an Assistant U.S. Attorney in the Southern District of Mississippi.

to Section 2518(1), in order to obtain a wiretap authorization order, a law enforcement officer must file an application with a “judge of competent jurisdiction,” which is defined to include “(a) a judge of a United States district court or a United States court of appeals[.]”² Section 2518(3) authorizes a judge to approve a wiretap “within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction) [.]”³ Section 2515 states that “[w]henver any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding . . . if the disclosure of that information would be in violation of this chapter.”⁴ The statute further states that an:

[A]ggrieved person . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.⁵

The Seventh Circuit was apparently the first—and until recently was the only—court to address the issues of territorial jurisdiction and the definition of “mobile interception device.” In *United States v. Ramirez*, multiple individuals were convicted of conspiring to distribute drugs based on evidence obtained from a wiretap of cellular telephones.⁶ Two of the defendants moved to suppress evidence obtained from wiretaps of their phones. The government believed that one of the defendants, Paul Hotchkiss, who lived in Wisconsin but was dealing drugs in Minnesota, was using a cellular phone owned by another defendant, Patrick Flynn, in furtherance of the conspiracy, and that Hotchkiss carried the phone with him as he traveled between the two states dealing drugs. The government obtained a wiretap for the phone from a district judge in the Western District of Wisconsin, where the conspiracy was being investigated and would ultimately be prosecuted. The government set up a listening post for the tapped phone in Minnesota. A few days later, agents realized that the phone was not being used by Hotchkiss but rather by another co-conspirator who did not seem to travel outside of Minnesota but who was using the phone to further the conspiracy with Flynn. The government later applied to the same district judge in the Western District of Wisconsin for an extension of the wiretap, without disclosing that the cell phone and listening post were in Minnesota. The judge granted the extension.⁷

thereafter, police arrested North at his home in possession of cocaine and firearms.¹⁶

After he was indicted in the drug conspiracy, North moved to suppress the evidence against him, arguing among other things that the federal judge did not have authority under the Wiretap Act to authorize the tapping of his phone because neither his phone nor the government's listening post was in the Southern District of Mississippi where the authorizing judge sat. The government responded by acknowledging that this jurisdictional issue was one of first impression in the Fifth Circuit, and argued that the court should rely on the Seventh Circuit's decision in *United States v. Ramirez*, which found that a Wisconsin district court had jurisdiction to issue a wiretap where a cell phone was being used in Minnesota to conduct business of a conspiracy with ties to Wisconsin even though the listening post was also in Minnesota. The government further argued that the court had jurisdiction because (1) the interception was to be made of a mobile phone, not a land-line phone;¹⁷ (2) the mobile phone was being used to facilitate the distribution of narcotics into the Southern District of Mississippi; (3) on one occasion during this facilitation, North's phone was known to have been located and used in the Southern District of Mississippi; (4) although the monitoring post was located in Louisiana, a simultaneous feed and aural acquisition station was located in the wire room of the DEA's Jackson, Mississippi, office in the Southern District of Mississippi, so that aural acquisition was occurring in both jurisdictions simultaneously; and (5) the investigation began in the Southern District of Mississippi with the same district court judge reviewing and passing on the propriety of all four wiretap applications.

B. District Court

The district court began its opinion by setting forth the current state of the law in the Fifth Circuit, which held that jurisdiction for a wiretap order lies both (1) where the phone is then physically located and (2) where the communications will be overheard (i.e., the listening post).¹⁸

The district court continued by pointing out that the government's argument pertaining to certain factors that gave the court jurisdiction did not match up with the terms of the statute:

By its very terms, the statute only grants jurisdiction to authorize or approve 'interception' of wire, oral, or electronic communications *within the territorial jurisdiction of the court* in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).¹⁹

The district court stated that a court does not have jurisdiction to authorize interception simply because the wiretap is sought as part of an investigation of criminal activity within the district or because a judge in that district had previously issued wiretaps of co-conspirators' phones or because the phone the government is seeking to tap is being used to facilitate the distribution of drugs into the district.²⁰ Although it did not explicitly say so, the district court seems to have been worried about a slippery slope, and it preferred to clearly draw a line

on the slope by saying that "[t]erritorial jurisdiction is tied to the place of interception."²¹

The court declined to address what it deemed the government's best argument for finding territorial jurisdiction in this case—the mobility of cellular telephones. The government relied heavily on the Seventh Circuit's opinion in *Ramirez*, arguing that the federal judge in the Southern District of Mississippi who had authorized the wiretap in the *North* case was similarly situated to the federal judge from the Western District of Wisconsin in *Ramirez*. However, the court chose not to decide the issue of whether a district judge has jurisdictional authority to order a wiretap of a phone where neither the phone nor the listening post was in the judge's district.²² Instead, the district court decided that, since it was finding that the issue of territorial jurisdiction is not a basis for suppression, there was no need to parse the definition of "mobile interception device."

According to the district court, the United States Supreme Court has said that not every violation of Title III requires suppression.²³ Rather, suppression is required where law enforcement fails to satisfy a statutory requirement that directly and substantially implements the congressional intention of the Act. The court found that "territorial jurisdiction was not central to the purposes of Title III."²⁴ The court based its decision to a large degree on the fact that, under Fifth Circuit precedent, territorial jurisdiction could be vested in a district judge based solely upon the fortuitous location of a listening post which could theoretically have nothing whatsoever to do with the criminal investigation.²⁵ "Given this, it can hardly be said that territorial jurisdiction is intended to play a central role in the statutory scheme. . . . Therefore, suppression is not required on jurisdictional grounds, regardless of whether the listening post or tapped cell phone was located within the court's territorial jurisdiction."²⁶

C. Fifth Circuit's First Decision in North

North appealed the district court's decision and, on August 26, 2013, the Fifth Circuit issued its *per curiam* decision in *United States v. North*.²⁷ First, the court addressed the territorial jurisdiction question. The court held that:

[E]xcept in the case of a mobile interception device, a district court cannot authorize interception of cell phone calls when neither the phone nor the listening post is present within the court's territorial jurisdiction. This, however, is exactly what the district court did in this case. . . . In short, the district court, located in the Southern District of Mississippi, lacked the authority to permit interception of cell phone calls from Texas at a listening post in Louisiana.²⁸

The court expressly disagreed with the Seventh Circuit's holding in *Ramirez*, finding instead that the word "mobile" in "mobile interception device" from 18 U.S.C. § 2518(3) "appears to refer to the mobility of the *device used to intercept* communications, not the mobility of the tapped phone."²⁹ According to the Fifth Circuit, it was not the intent of Congress to enlarge the scope of a district court's authority to issue wiretap warrants in any jurisdiction in the United States when the device to be intercepted is a cell phone.

Next, the court turned to whether the lack of territorial jurisdiction requires suppression of evidence obtained from such a wiretap issued without jurisdictional authority. Referencing the remedy of suppression found in Section 2518(10)(a)(ii) for an authorization order which is “insufficient on its face[,]” the court recognized Supreme Court precedent limiting suppression to only a “failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.”³⁰ While the Eleventh and Second Circuits had found that territorial jurisdiction was not a “core concern” justifying suppression, the Fifth Circuit disagreed, holding that:

Title III’s territorial restrictions prevent forum manipulation by law enforcement, similarly preventing wiretap authorizations in cases where investigators would otherwise be able to obtain them. Limiting the number of district judges authorized to issue a wiretap warrant reduces the opportunity for the government to use forum manipulation to obtain a warrant that may not be approved elsewhere. We fail to see how this is not a significant protection of privacy. Territorial limitations on a district court directly implicate Congress’s intent to guard against the unwarranted use of wiretapping.³¹

The court pointed out in a footnote that its holding created a strange result in this case, since the district court that had the strongest investigative nexus—and therefore the ability to best balance privacy concerns with the appropriateness of the wiretap—lacked territorial jurisdiction to issue the wiretap. Recognizing its role as interpreter and not creator of laws, the court stated that “[i]t is for the United States Congress to determine whether, in light of technological advances, the statute should be amended.”³²

D. Fifth Circuit’s Sua Sponte Withdrawal of Its First North Decision and Its New Decision Avoiding the Jurisdiction Question

On October 24, 2013, almost two full months after its initial decision in *North*, the Fifth Circuit sua sponte withdrew its previous opinion and issued a new, superseding opinion.³³ Curiously, the court’s opinion was stripped of any direct holding on the issue of territorial jurisdiction or necessity. Instead, the court only ruled on the issue of minimization, finding that the government had failed to comply with the minimization requirements and that evidence from the wiretap should therefore be suppressed.

Judge DeMoss wrote a concurring opinion stating that he would have reached the territorial jurisdiction question and would have ruled as the Court had done previously. He then proceeded to retype the previous opinion on this question almost verbatim.³⁴ Judge DeMoss’s statement towards the end of his concurrence might give some insight into why the court withdrew and superseded its prior opinion: “Although application of the plain language may create a circuit split and potentially reduce the efficiency of the government to intercept communications from any available listening post, this is not a reason for our court to apply the law in contravention of the plain language of the statute.”³⁵

These recent opinions by the Fifth Circuit have raised questions anew in the minds of many as to whether there are in fact jurisdictional limitations on the authority of federal judges to issue wiretaps under Title III—questions that were previously presumed to have been answered by the Seventh Circuit in *Ramirez*. Shortly after the *North* decisions, the D.C. Circuit entered these murky waters and added further commentary to this percolating debate.

III. THE D.C. CIRCUIT’S DECISION CONCERNING JURISDICTIONAL LIMITATIONS ON PLANTING BUGS IN PRIVATE PLACES IN UNITED STATES V. GLOVER

The United States Court of Appeals for the District of Columbia Circuit recently addressed another part of Title III in *United States v. Glover*, a case involving the recording of oral communications via a bug installed in a defendant’s truck.³⁶ In *Glover*, the defendant was suspected of dealing drugs, so the FBI obtained a warrant to tap his cell phone. Because Glover was careful and spoke only in code while on his cell phone, the FBI secured a warrant from a district court judge in Washington, D.C. to install an audio recording device in Glover’s truck, which was parked at an airport in Baltimore, Maryland. In fact, the warrant specifically authorized the FBI to forcibly enter the truck, regardless of whether the vehicle was in D.C., Maryland, or Virginia. The bug was successful, capturing evidence of Glover’s drug dealing, whereby he was thereafter indicted and convicted for conspiracy to distribute cocaine.³⁷

The defendant appealed, arguing that the warrant was insufficient on its face because it was signed by a district court judge in D.C. authorizing the FBI to place an electronic bug in Glover’s truck parked in Maryland – outside the district court’s jurisdiction. The government countered by arguing that a district court judge was in fact authorized to approve the placement of such an electronic listening device on a vehicle anywhere in the United States.³⁸

The court began by reminding the parties that Section 2515 of Title 18, United States Code, states that “[w]henver any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding . . . if the disclosure of that information would be in violation of this chapter.” The statute further states that an:

[A]ggravated person . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is *insufficient on its face*; or
- (iii) the interception was not made in conformity with the order of authorization or approval.³⁹

The court held that the United States Supreme Court had “read paragraph (i) as requiring a broad inquiry into the government’s intercept procedures to determine whether the government’s actions transgressed the “core concerns” of the statute, whereas (ii) is a mechanical test; either the warrant is facially sufficient or

it is not.”⁴⁰ Without limiting paragraph (i) by applying a “core concerns” test to it, a broad, unlimited reading of paragraph (i) would make the other two paragraphs redundant, since an authorization which is “insufficient on its face” would necessarily be “unlawfully intercepted.”⁴¹

But the court disagreed with the interpretations of the Third, Fifth, and Sixth Circuits, all of which applied the “core concerns” test to paragraph (ii), stating that such interpretations were contrary to the plain text of the statute and elevated policy over text.⁴² According to the court, the Supreme Court had turned to congressional policies *only after* it had first applied traditional tools of statutory construction to paragraph (i), which indicated that a limiting construction was necessary in order to avoid rendering the other two paragraph “surplusage.”⁴³ The court went on to state that a facially invalid warrant should be mandatorily suppressed, as there was no room for judicial discretion in such a circumstance.⁴⁴

The court next turned to the jurisdictional language of Title III, which states that a judge may “authoriz[e] or approv[e] interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).”⁴⁵ The court nonetheless concluded that the language could apply either to the jurisdiction in which the judge was sitting (in this case D.C.) or to the jurisdiction in which the mobile interception device was installed (in this case Maryland). The court stated that:

Under either reading, the parenthetical makes clear that a judge cannot authorize the interception of communications if the mobile interception device was not validly authorized, and a device cannot be validly authorized if, at the time the warrant is issued, the property on which the device is to be installed is not located in the authorizing judge’s jurisdiction. A contrary reading would render the phrase “authorized by a Federal court within such jurisdiction” completely superfluous.⁴⁶

Next, the court recounted the government’s argument, based on cases from the Second, Fifth, and Seventh Circuits, that an “interception” under Title III takes place at both (1) the location of the listening post and (2) the location of a tapped phone.⁴⁷ According to the government, this language and its interpretation gives an issuing court “the power to authorize covert, trespassory entries onto private property, anywhere in the country, for purposes of placing surveillance equipment. The only jurisdictional limitation the government acknowledges is that the listening post must be located in the issuing court’s jurisdiction.”⁴⁸ The court noted, however, that the statute does not refer to a “listening post,” that the cases cited by the government all addressed phone taps (rather than installing bugs in places), and that none of the cases cited by the government addressed the jurisdictional issue of an issuing court authorizing law enforcement to covertly place a listening device on private property.⁴⁹

Finally, the court construed Rule 41 of the Federal Rules of Criminal Procedure in conjunction with the provisions of the Wiretap Act, which appears to be the first time a federal

appellate court has used Rule 41 to provide clarity and certainty to the provisions of the Act. Rule 41 states that “a magistrate judge with authority *in the district* has authority to issue a warrant for a person or property outside the district if the person or property is located *within the district when the warrant is issued* but might or be moved outside the district before the warrant is executed.”⁵⁰ Stating that Rule 41 partially implements the statute and that its language is crystal clear, the court held that the warrant issued in this case appears on its face to violate the rule and the statute.⁵¹

The government also argued the same holding from the district court in *United States v. North*—that territorial jurisdiction is not a “core concern” of Title III and that therefore suppression is not the appropriate remedy for a violation of such jurisdiction in this case. The court responded to the government’s argument by reiterating that the Supreme Court’s position that the “core concerns” test does not apply to paragraph (ii), and that even if it did, the court would agree with the Fifth Circuit’s recent decision in *North*, holding that territorial jurisdiction *is* a core concern of Title III.⁵² The court concluded that the jurisdictional problem with the warrant could not be excused as a “technical defect,” which some circuit courts have allowed to slide. Rather, the court held that “a blatant disregard of a district judge’s jurisdictional limitation” was more than just a technical violation.⁵³

Finally, the court shot down what it called the government’s “last refuge” argument—a request to import a “good faith” exception to Title III’s remedy of suppression.⁵⁴ The court held however that the government’s actions could not have been in good faith because they so blatantly violated Rule 41 and, in any event, Congress was clear in declaring that suppression is required when evidence has been gathered pursuant to a facially insufficient warrant.⁵⁵ Finding that the district court’s failure to preclude the truck bug evidence was plain error, the court reversed appellants’ convictions.

IV. FALLOUT FROM *NORTH* AND *GLOVER* AND THE FUTURE OF ELECTRONIC SURVEILLANCE

In light of these recent appellate decisions addressing jurisdictional questions pertaining to Title III, it is unclear whether there are jurisdictional boundaries on federal judges’ ability to authorize orders for electronic surveillance and whether evidence emanating from such orders is suppressible. It appears that law enforcement can usually avoid these issues by simply setting up listening posts in the jurisdictions where the issuing courts are located (although, judging from dicta in *Glover*, that may not work in the District of Columbia).⁵⁶ Of course, this tactic could be viewed as an opportunity for arbitrage, as it effectively allows the government to choose the districts and judges from whom they will seek authorization orders to conduct electronic surveillance, irrespective of their connection to the underlying criminal investigation. Ironically, while not the exact type of forum manipulation about which Judge DeMoss was concerned in his concurring opinion in *North*, it is effectively the same and could continue unabated even if Judge DeMoss’s concurring opinion had remained the majority in the Fifth Circuit.

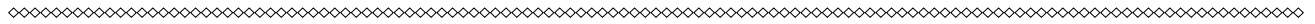
Hopefully, just as federal prosecutors did in the *North*

case, the government will continue to seek wiretaps from “the jurisdiction having the strongest investigative nexus to the object in which the monitoring device is installed.”⁵⁷ This seems to best serve the public interest, and it limits forum shopping and jurisdictional arbitrage, about which the appellate courts have recently been greatly concerned. However, to get to this point, Congress will need to step in and update Title III to catch up with today’s technology and challenges. That will be no easy task.

Endnotes

- 1 18 U.S.C. §§ 2510 *et seq* (2014).
- 2 18 U.S.C. § 2510(9)(a) (2014).
- 3 18 U.S.C. § 2518(3) (2014).
- 4 18 U.S.C. § 2515 (2014).
- 5 18 U.S.C. § 2518(10)(a)(2014).
- 6 112 F.3d 849 (7th Cir. 1997).
- 7 *Id.* at 851.
- 8 *Id.*
- 9 *Id.* at 852.
- 10 *Id.* (citing *United States v. Denman*, 100 F.3d 399, 403 (5th Cir. 1996); *United States v. Rodriguez*, 968 F.2d 130, 136 (2d Cir. 1992)).
- 11 *Id.*
- 12 *Id.* at 853 (emphasis added).
- 13 728 F.3d 429 (5th Cir. 2013), *withdrawn and superseded by*, 735 F.3d 212.
- 14 Brief of the United States, *United States v. Richard North*, Fifth Circuit Case No. 11-60763 (filed May 7, 2012).
- 15 Defendant Richard North’s Motion to Suppress Title III Intercept and Its Fruit, Criminal No. 3:09cr92TSL-FKB, Court Docket Number 147 at 5 (May 24, 2010).
- 16 *Id.* at 3-4.
- 17 This was important because prosecutors had to distinguish this case from the 5th Circuit’s *United States v. Denman* precedent. 100 F.3d 399, 403 (5th Cir. 1996)
- 18 *United States v. North*, Crim. No. 3:09cr92TSL-FKB (S.D. Miss. 2011) at 5-6 (on file with the author) (citing *United States v. Denman*, 100 F.3d at 403).
- 19 *Id.* at 9-10.
- 20 *Id.* at 10.
- 21 *Id.*
- 22 *Id.* at 11. Interestingly, although not directly addressing the statutory definitional issue in *Ramirez*, the district court in *North* stated that it was “dubious that Congress intended ‘mobile interception device’ to include cellular telephones.” *Id.*
- 23 *Id.* at 12 (citing *United States v. Chavez*, 416 U.S. 562, 575 (1974)).
- 24 *Id.* at 15 (citing *United States v. Giordano*, 416 U.S. 505, 527 (1974)).

- 25 *Id.* at 16 (citing *Ramirez*, 112 F.3d at 853).
- 26 *Id.* at 16-17.
- 27 728 F.3d 429 (5th Cir. 2013), *withdrawn and superseded by*, 735 F.3d 212. A copy of this decision is on file with the author and will be referred to herein as “*North*, Fifth Circuit Case No. 11-60763.” The sum and substance of the opinion relating to territorial jurisdiction is reprinted almost verbatim in Judge DeMoss’ concurring opinion in the superseding *North* opinion.
- 28 *North*, Fifth Circuit Case No. 11-60763 at 5.
- 29 *Id.* at 6.
- 30 *Id.* at 7 (citing *United States v. Donovan*, 429 U.S. 413, 433-34 (1977) (quoting *Giordano*, 416 U.S. at 527)).
- 31 *North*, Case No. 11-60763, at 8.
- 32 *Id.* at 6, n.1.
- 33 *United States v. North*, 735 F.3d 212 (5th Cir. 2013).
- 34 *Id.* at 216-219 (DeMoss, J., concurring).
- 35 *Id.* at 219.
- 36 736 F.3d 509 (D.C. Cir. 2013).
- 37 *Id.* at 510-511.
- 38 *Id.* at 511.
- 39 18 U.S.C. § 2518(10)(a) (2013) (emphasis added).
- 40 736 F.3d at 513.
- 41 *Id.*
- 42 *Id.* (citing *United States v. Traitz*, 871 F.2d 368, 379 (3d Cir. 1989); *United States v. Vigi*, 515 F.2d 290, 293 (6th Cir. 1975); *United States v. Robertson*, 504 F.2d 289, 292 (5th Cir. 1974)).
- 43 *Id.* at 513-14.
- 44 *Id.* at 513.
- 45 18 U.S.C. § 2518(3) (2013).
- 46 736 F.3d at 514. The court also points out the legislative history of the Act, which states that “the objective of the language was to ensure that warrants remain effective in the event of a target vehicle is moved out of the issuing judge’s jurisdiction *after* a warrant is issued, but before a surveillance device can be placed in the vehicle.” *Id.*
- 47 *Id.* at 514 (citing *United States v. Luong*, 471 F.3d 11097, 1109 (9th Cir. 2006); *Ramirez*, 112 F.3d at 852-53; *Denman*, 100 F.3d at 403; and *Rodriguez*, 968 F.2d at 136).
- 48 736 F.3d at 514.
- 49 *Id.* at 514-15.
- 50 Fed.R.Crim.P. Rule 41(b)(2) (2014) (emphasis added).
- 51 736 F.3d at 515.
- 52 *Id.* Interestingly, the original *North* decision was issued by the Fifth Circuit on August 26, 2013. *See* 728 F.3d 429 (5th Cir. 2013). On October 24, 2013, the Fifth Circuit withdraw its August decision in *North*, replacing it with a new decision as recounted above that avoided the jurisdictional issue (except in a concurring opinion), focusing instead on the issue of minimization. The



Glover decision, which purports to rely on the original *North* decision addressing the jurisdictional question, was decided on November 8, 2013, *after* the Fifth Circuit had withdrawn its previous opinion.

53 *Id.*

54 *Id.* at 515-16.

55 *Id.* at 516.

56 The opinion in *Glover* is a potential intellectual baton the D.C. Circuit has laid before the other appellate courts, from which they can scoop up and run with their own opinions, thus further limiting the jurisdictional reach of federal judges to issue wiretaps or bugs.

57 U.S. Department of Justice Electronic Surveillance Manual, DOJML Comment § 9-7.000.



STINGRAY TECHNOLOGY AND REASONABLE EXPECTATIONS OF PRIVACY IN THE INTERNET OF EVERYTHING

By Howard W. Cox*

Note from the Editor:

This article discusses cell site simulators, also known as StingRays, and the 4th Amendment issues they raise in light of changing technology. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- StingRay Tracking Devices, ACLU, available at https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices.
• Cell-Site Simulators, ELECTRONIC FRONTIER FOUNDATION, available at https://www.eff.org/sls/tech/cell-site-simulators.
• Joseph Lorenzo Hall, Previewing Tomorrow's Location Privacy Hearing: GPS vs. Cell Tower Tracking, CENTER FOR DEMOCRACY & TECHNOLOGY (April 24, 2013), available at https://cdt.org/blog/previewing-tomorrows-location-privacy-hearing-gps-vs-cell-tower-tracking/.
• Stephanie Pell & Christopher Soghoian, A Lot More than a Pen Register, and Less than a Wiretap, 16 YALE J.L. & TECH. 134 (2014), available at http://yjolt.org/lot-more-pen-register-and-less-wiretap.

As Americans become more attached to their electronic devices, they expect them to be available at all times and places, and to connect with each other seamlessly and continuously through the "Internet of Everything." Law enforcement is developing tools to take advantage of the technology enabling this omnipresent connectivity. Those tools, designed to find criminals and the devices they carry, present unique challenges in applying traditional Fourth Amendment concepts of reasonable expectations of privacy to twenty-first century electronic communications.

The case of Jones v. U.S., currently on appeal before the District of Columbia Court of Appeals, provides an appropriate context for the high technology struggle between the privacy bar and the needs of law enforcement.1 In 2014, Prince Jones was convicted of robbing three women and raping two of them. During the 2013 attacks, he also stole the cell phone of one victim. Guessing he would use the stolen phone, DC police used a portable cell-site simulator to track down the location of the phone. DC police believed there were exigent circumstances present (they assumed he would use the cell phone for a limited period of time then quickly discard it), and therefore did not

obtain a warrant to use the cell-site simulator. The cell-site simulator led DC police to a car in a parking lot, where they found and arrested Jones. His appeal directly challenges the warrantless use of cell-site simulator technology.2

This article will examine current issues regarding the government's use of cell-site simulators, commonly known as "StingRay" devices, to identify and track cell phones used in criminal activity. It will also examine the confusion faced by courts in applying traditional privacy principles to "self-connecting devices" such as cell phones, which automatically broadcast identification data with little or no user interface. Courts have not demonstrated an appropriate understanding of legitimate user expectations of privacy in self-connecting cell phone technology, specifically with respect to StingRays capturing information broadcast by this technology. This lack of understanding is, in part, the result of an unprecedented level of secrecy that the FBI has insisted upon regarding the use of this technology. This secrecy has been exploited by members of the privacy bar attempting to establish unreasonable standards for the expectation of privacy in self-connecting cell phone communications. The article concludes that, given the level of connectivity that is inherent in the use of modern smartphones, it is virtually impossible to establish a Fourth Amendment reasonable expectation of privacy in connectivity data, and that Congress is in the best position to establish statutory limits in this area.

I. WHAT IS A STINGRAY DEVICE?

A StingRay is a device used by law enforcement to identify information broadcasted by a cell phone during its normal operation.3 By the inherent design of cell phone technology, all cell phones constantly "self-connect" with cellular carriers via cell towers. This feature allows the device to identify and connect with the tower with the best local signal, and maintain the strongest possible signal. The presence and status of this

* Howard W. Cox is a former federal prosecutor and Senior Intelligence Service officer. After almost 40 years of federal service, he retired as the Assistant Inspector General for Investigations of the Central Intelligence Agency. Prior to his employment with the CIA, Mr. Cox was the Assistant Deputy Chief of the Computer Crime and Intellectual Property Section of the Department of Justice, where he was responsible for supervising criminal prosecutions of federal hacking and identity theft cases. While at the Department of Justice, Mr. Cox received the Attorney General's Distinguished Service Award. Mr. Cox is currently an adjunct professor at George Washington University, where he teaches graduate level courses in computer forensics. He received his AB degree from Seton Hall University, South Orange, NJ, and his law degree from Georgetown University Law Center, Washington, DC.

ongoing communication is displayed on the phone (the number of “bars” showing the strength of the signal). To establish and maintain connectivity, cell phone devices constantly provide cell towers and cell service providers with a variety of information, some of which is unique to a particular device.⁴ Furthermore, if a telephone call is made or received by the device, the device will provide additional information to the cell tower and service provider, including the phone number registered to the device, the number of the call dialed or received, and the date, time, and duration of the call.⁵ StingRays can mimic cell towers, and law enforcement employs them in ways that are designed to provide the target device with the strongest local cellular signal, thereby causing the device (and any other active cell phones within range) to establish connectivity with the law enforcement provided cell-site. Once this connectivity is established, the device provides the law enforcement cell-site with the connectivity data, known as cell-site location information (CSLI), which is normally provided to the local cell tower and ultimately to the cell service provider.

It is important to note that, when operated in this manner, the StingRay device does not capture the content of communications. As will be discussed below, law enforcement requests to the courts to use StingRays are based upon the authorities set forth in the Pen/Trap Statute⁶ and the Stored Communications Act (SCA)⁷ regarding court orders for non-content “electronic communications,”⁸ and Rule 41 of the Federal Rules of Criminal Procedure regarding search warrants. These requests have all sought connectivity data, not the content of communications (i.e. the words exchanged in a conversation held using the device). Interception of content in real time would indisputably require a wiretap order under Title III, but the issues surrounding collection of CSLI are more complicated.⁹

The growth in the general use of cell phones is mirrored by the growth in their use in the commission of crimes. StingRays have proven to be vital in assisting law enforcement in identifying the presence and use of cell phones used in crimes. They are particularly important when law enforcement is seeking to identify the presence of “burner” phones. These inexpensive devices are used once or for a limited time, and then disposed of and replaced by new burner phones. They are often bought by criminals using stolen identity or credit card information. StingRays devices can also be used by law enforcement to identify the location of “air cards.”¹⁰

Growing law enforcement use of StingRay technology reflects the growth of cell phone use. It has been reported that numerous federal law enforcement agencies in DOJ, the Department of Homeland Security (DHS), and the Department of the Treasury are currently using some form of StingRay technology.¹¹ It has also been reported that over 60 state and local law enforcement agencies have used StingRay technology in hundreds of cases.¹² StingRays can be mounted in vehicles and aircraft or used as hand held devices.¹³ This growth has fueled increasing alarm in the privacy bar regarding the law enforcement use of the technology, and the perceived lack of appropriate legal authority by which it is justified. For example, the American Civil Liberties Union (ACLU) has criticized both the use of the technology and the secrecy that surrounds its use.¹⁴ One chapter of the ACLU has even prepared a primer

for defense counsel on how to challenge the use of StingRay technology.¹⁵

II. CHALLENGES TO LAW ENFORCEMENT USE OF STINGRAY TECHNOLOGY

A. Legal Standard for Application

Traditionally, prosecutors have sought court authorization to deploy StingRay devices to locate telephones in criminal investigations.¹⁶ The traditional approach has been to seek a court order under the Pen/Trap Statute.¹⁷ This statute allows prosecutors to apply, *ex parte*, for an order authorizing the government to deploy a device that captures non-content information. Unlike search warrants or Title III wiretap orders, the Pen/Trap Statute merely requires that the government establish that the information likely to be obtained is relevant to an ongoing criminal investigation.¹⁸ (Some courts have ruled that this is the equivalent of the “reasonable suspicion” standard).¹⁹ The Pen/Trap Statute was passed following the holding of the Supreme Court in *Smith v. Maryland*, which held that telephone users have no reasonable expectation of privacy in the phone numbers which they dial.²⁰ In light of the Court’s holding that there were no Fourth Amendment restrictions on warrantless government access to this data, Congress created procedural protections designed to establish standards and accountability in the government’s use of this technology.²¹ At times, prosecutors have also sought a “hybrid” order, seeking authority under the Pen/Trap Statute and the SCA.²² The hybrid order is intended to address possible limitations of the scope of the Pen/Trap Statute, as it applies to the capabilities of the StingRay device.²³

The privacy bar and some academics have insisted that, at a minimum, applications for deployment of StingRay devices should be based on search warrants issued upon findings of probable cause.²⁴ Federal court reactions to this challenge has been mixed. While there are no federal appellate decisions regarding StingRay applications,²⁵ and relatively few lower federal court rulings,²⁶ litigation regarding StingRay is related to a larger fight over the legal standard to be used when the government seeks to obtain historic and prospective CSLI from carriers.²⁷ Once again, the government has historically relied upon the the court order authority of the Pen/Trap Statute and the SCA to obtain CSLI data from cell phone carriers.

In a number of recent decisions, federal appellate courts have provided unusually mixed signals on the legal standard needed to obtain CSLI from carriers. In a Solomonic decision, the Third Circuit ruled that the Pen/Trap Statute’s “reasonably related to a criminal investigation” standard was appropriate, but that issuing magistrates were free to impose a higher probable cause search warrant standard.²⁸ In *U.S. v. Graham*, a divided panel of the Fourth Circuit ruled that cell phone customers had a reasonable expectation of privacy in CSLI data provided to their carriers, and that a search warrant would be required to obtain it.²⁹ While the panel’s decision could have provided some certainty on the search warrant requirement, the holding’s precedential value is now in doubt because the Fourth Circuit recently agreed to rehear the matter *en banc*.³⁰ The Fifth Circuit has ruled that the SCA provides sufficient authority to obtain historic CSLI without a warrant.³¹ In *U.S. v. Skinner*, the Sixth Circuit clearly ruled that cell phone customers had

no reasonable expectation of privacy in information that they voluntarily provided to their service providers, and that a search warrant was not required.³² Lastly, the Eleventh Circuit recently reversed its position in *U.S. v. Davis*. As originally decided, a unanimous panel of the court ruled that customers had a reasonable expectation of privacy in historic CSLI provided to their carriers, and that a search warrant would be required to obtain this data.³³ However, upon *en banc* review, the full court rejected the panel's reasoning and concluded that the authority of a court order under the SCA was sufficient to obtain historic CSLI without a warrant.³⁴

In many of the reported decisions regarding StingRay applications, the government initiated the application process by conceding the need for a search warrant, or by arguing that the court's order under the Pen/Trap Statute or SCA should be based on a probable cause standard. For example, in *In the Matter of an Application of the U.S. for an Order Relating to Telephones Used by Suppressed*, the magistrate judge imposed extensive controls on the government's use of StingRay technology.³⁵ What the court's opinion does not really highlight is the fact that, from the outset of the case, the government was applying for a warrant.³⁶ Similarly, in *U.S. v. Rigmaiden*, the government's application was based on a DOJ concession that a warrant would be required.³⁷

Despite the fact that a clear majority of appellate courts have approved the government obtaining historic and prospective CSLI data without a warrant in cases not dealing with StingRay, DOJ has been reticent to use the lesser standard in its applications for StingRay devices. In recent practice and official policy, DOJ has instead chosen to seek StingRay authority under a search warrant standard. Its reticence may be a capitulation by DOJ to the privacy bar, or it may be a response to real or perceived pressure from Congress. Congress has created statutory rights of privacy and procedure following the Supreme Court's past determinations that such rights were not constitutionally required. When the Supreme Court ruled in *Smith v. Maryland* that persons had no reasonable expectation of privacy in dialed phone numbers,³⁸ Congress passed the Electronic Communications Privacy Act (ECPA)³⁹ and the Pen/Trap Statute to create non-constitutional statutory controls on the government's access to this data. When the Court ruled in *U.S. v. Miller*⁴⁰ that notice and an opportunity for a hearing were not constitutionally required when the government sought records in the hands of third parties, Congress created procedural requirements through the Right to Financial Privacy Act.⁴¹

B. The New DOJ Policy

Influential House and Senate members have also sought to pressure DOJ to adopt a policy of obtaining warrants when applying for StingRay authority. In 2014, following private meetings between DOJ representatives and staffers of Senators Charles Grassley and Patrick Leahy of the Senate Judiciary Committee, the FBI instituted an internal policy that most FBI StingRay applications would be based upon a search warrant standard.⁴² More recently, in response to similar pressure from the House Committee on Oversight and Government Reform, DOJ announced a policy seeking to submit most federal law enforcement StingRay applications to a warrant standard.⁴³

The recently issued *DOJ Policy Guidance* document commits DOJ prosecutors to basing their applications for cell site simulators on warrants issued under Rule 41 of the Federal Rules of Criminal Procedure (unless the applications are based on certain exigent and exceptional circumstances). The document also sets forth other controls regarding senior official approval, record keeping, and training.⁴⁴

Typically, policy statements like this do not apply to the operation of non-DOJ law enforcement agencies unless some other law or policy commits those agencies to follow the DOJ policy.⁴⁵ However, the cell-site simulator policy has a number of controls that ensure its uniform use throughout federal law enforcement. For example, the policy states that all federal applications for StingRay technology must comply with the policy. Since all federal agents must apply for warrants or orders through a federal prosecutor, the DOJ policy will ensure uniform application of the policy. Furthermore, in response to pressure from the same House and Senate committees, many federal law enforcement agencies outside of the DOJ have made separate commitments that mirror the DOJ policy guidance.⁴⁶

On the state and local levels, at least twelve states have passed laws mandating that law enforcement use of a cell-site simulator must be based upon a court issued search warrant based upon a finding of probable cause.⁴⁷

C. Secrecy Surrounding the Use of StingRay Devices

Despite the legislative scrutiny, federal use of StingRay devices has been shrouded in secrecy. While law enforcement has a right to and often does protect sources and methods, the FBI has imposed unusual controls over the extent to which StingRay technology can be described in applications for court orders or warrants, and in subsequent criminal proceedings. This secrecy has been noted by the privacy bar in support of its portrayal of StingRay as some sort of spy or military technology deserving special scrutiny by the courts. Privacy advocates have also alleged that the government has not been candid with the courts when describing the capabilities of the technology and its use by the government.⁴⁸ While most of these charges are without merit, the unusual level of secrecy has understandably increased judicial, legislative, and public scrutiny.

The FBI has, in numerous cases, forbidden local law enforcement agencies to purchase and use StingRay and related technology unless they agree to significant restrictions on publicly releasing information about it. The extent to which the FBI and Harris Corporation, the manufacturer of StingRay, have sought to restrict the discussion regarding the capability and use of the StingRay device is set forth in a remarkable non-disclosure agreement (NDA).⁴⁹ The NDA appears in a letter from the FBI to Baltimore police and prosecutors. In the letter, the Acting Director of the FBI's Operational Technology Division cites the need to protect sensitive law enforcement sources and methods, and insists that Baltimore officials agree not to mention the device, its capabilities, or any literature relating to it in any court proceeding (including warrant applications, grand jury proceedings, pre-trial discovery, trial, or appeal) without prior notice to the FBI. Baltimore officials also agreed that if the FBI determined that the use or description of the technology in a court proceeding would potentially or actually compro-

parties, including enhanced geolocation information.⁶⁶ None of this connectivity requires much in the way of user input. Smartphones that are Wi-Fi enabled also automatically seek out Wi-Fi hotspots and determine their availability to provide Internet connectivity. This dialogue results in the automatic sharing of additional data between these devices.⁶⁷ Similarly, when a person uses the Internet function on their smartphones to view web pages, a variety of additional, non-content, routing, and signaling information is provided to their carrier and Internet Service Provider (ISP), or to the Wi-Fi hotspot. The majority of courts that have examined this issue have concluded that because of the way in which computers share information to communicate over the Internet, there is no reasonable expectation of privacy in this connectivity data.⁶⁸

In addition, smartphone users often install applications (apps) which cause the device to automatically connect with and send data to app providers. For example, Google, which manufactures smartphones, and Android, a popular cell phone operating system, offers a service called “Google Now.” The app, pre-installed on certain Android devices and available for download on Apple devices, performs a variety of automatic functions.⁶⁹ It provides real time traffic information based on the user’s location, and provides reminders regarding travel and other calendar events. It performs these functions by automatically determining the device’s location, and by examining the content of the user’s Gmail, contacts and calendars, as well as web browsing history affiliated with the user’s Google account.⁷⁰ The user consents to this activity by acknowledging Google’s terms of service, which state, in part, that Google will collect:

Information you give us. For example, many of our services require you to sign up for a Google Account. When you do, we’ll ask for personal information, like your name, email address, telephone number or credit card. . . . [W]e might also ask you to create a publicly visible Google Profile, which may include your name and photo.

Information we get from your use of our services. We collect information about the services that you use and how you use them, like when you watch a video on YouTube, visit a website that uses our advertising services, or view and interact with our ads and content. This information includes:

Device information

We collect device specific information (such as your hardware model, operating system version, unique device identifiers, and mobile network information including phone number). Google may associate your device identifiers or phone number with your Google Account.

Log information

When you use our services or view content provided by Google, we automatically collect and store certain information in server logs. This includes:

- details of how you used our service, such as your search queries,
- telephony log information like your phone number, calling party number, forwarding numbers,

time and date of calls, duration of calls, SMS routing information and types of calls.

- Internet protocol address.
- device event information such as crashes, system activity, hardware settings, browser type, browser language, the date and time of your request and referral URL.
- cookies that may uniquely identify your browser or your Google Account.

Location information

. . . [W]e may collect and process information about your actual location. We use various technologies to determine location, including IP address, GPS, and other sensors that may, for example, provide Google with information on nearby devices, WiFi access points and cell towers.

Unique application numbers

Certain services include a unique application number. This number and information about your installation . . . may be sent to Google when you install or uninstall that service or when that service periodically contacts our servers, such as for automatic updates.⁷¹

It should be noted that the above information is in addition to information provided by the device to the carrier or ISP, in order to connect with Google. Upon request, users can obtain a monthly activity report that categorizes all of the data Google has accumulated on their activity, including a complete tracking record of all phone movements. Google users can log onto their “Google Dashboard” and see a complete record of their movements over the years that Google has maintained data on the tracked device. Dashboard also provides information about browsing history, e-mail and contacts.⁷²

Additionally, both iPhone⁷³ and Android⁷⁴ operating systems offer “Find My Phone” features, which allow users to track, with a reasonable degree of precision, the exact geographic location of their phones. This function is enabled through the phone’s geolocation tracking capability as it shares location data with Apple and Google. The popularity of these functions is further evidence of the general population’s awareness of their devices’ automatic connectivity.⁷⁵

Furthermore, as part of the Internet of Everything, cellular devices use Bluetooth technology to communicate with other devices. Bluetooth is a short range radio-based technology that enables devices, such as cell phones, speakers, automobiles, fitness bands, and computers, to communicate.⁷⁶ For example, fitness trackers such as Fitbit track physical activity, sleep duration, geolocation of activity, and heart rate. This data is then sent, via Bluetooth, to the smartphone, which transmits the information to Fitbit servers via cellular or Wi-Fi connections. The Fitbit app queries the Fitbit servers and provides users real time reports on their daily physical activity, as well as a historical report on activity and health trends over a period of time. Fitbit also sends users a weekly report regarding trends in data collected.⁷⁷

In sum, modern cell phone users automatically provide a host of connectivity data to multiple third parties. (This

massive volume of shared data is in addition to the content of their phone calls, text messages, and web searching.) Starting with *U.S. v. Miller*,⁷⁸ and *Smith v. Maryland*,⁷⁹ courts have long recognized that users of communication services have lost any reasonable expectation of privacy in connectivity data shared with multiple service providers.⁸⁰ Courts have specifically held that the automated sharing of data over the Internet destroys any expectation of privacy. For example, the Fifth Circuit recently joined the Third, Fourth, Eighth and Tenth Circuits in holding that persons have no expectation of privacy in IP addresses that are shared in the normal course of Internet use.⁸¹ Additionally, courts have ruled that if persons install computer software, such as peer-to-peer file sharing programs, that disseminate child pornography, they have lost any expectation of privacy when they share content as well as connectivity data.⁸²

A number of federal courts have recognized that, given current levels of connectivity in our society, courts should not recognize a reasonable expectation of privacy in this cell phone data. In *In re Smartphone Geolocation Application Data*, federal authorities were searching for the target of a pill mill investigation.⁸³ An arrest warrant was issued and the subject refused to surrender, and authorities did not know where he was. Federal agents applied for an order under the Pen/Trap Statute and the SCA, and a warrant under Rule 41(c) to obtain prospective cell-site location data. In concluding that there was no reasonable expectation of privacy in the routine provision of geolocation data to cellular providers, the court also noted the inherent connectivity of cell phone devices and installed apps.⁸⁴ The court also noted that users acknowledge this data sharing in terms of service agreements.⁸⁵ The court noted that if users did not want and accept this automatic sharing of data, they could opt out by turning off their phones.⁸⁶ In *In re Application of the U.S. for Historical Cell Site Data*, the Fifth Circuit rejected the ACLU's argument that cell phone users retain some expectation of privacy in CSLI whenever they use their phones.⁸⁷

IV. THE WAY FORWARD

Until courts demonstrate a greater understanding of the level of connectivity of cell phones and other devices, and this connectivity's impact on legitimate expectations of privacy in the Internet of Everything, they will continue to struggle in applying traditional Fourth Amendment jurisprudence to existing and developing technology. Courts have struggled with the reasonable expectation standard in a variety of other related circumstances. Do persons have a greater expectation of privacy when the government surveillance is conducted in a home rather than a public place? Does the government's use of certain technologies constitute a trespass into a protected area?⁸⁸ Does someone who purchases a cell phone using a stolen credit card have any reasonable expectation of privacy in its subsequent use? Do persons have a reasonable expectation of privacy in connectivity data created by stolen phones? Does the right of privacy in historic CSLI differ from that in prospective CSLI? Are there limits to warrantless searches of electronic devices?⁸⁹ Are there limits to government's use of high technology devices not available to the general public?⁹⁰

These questions are harbingers of issues to come. As Justice Alito observed in *U.S. v. Jones*, "[t]he availability and

use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements."⁹¹ To the extent a person has any reasonable expectation of privacy in simple cellular communication connectivity, does that expectation become unreasonable when the user has an Internet enabled smartphone that is also constantly connecting to cell sites and Wi-Fi hotspots and, at a minimum, sharing location data with them? To the extent that this expectation is reasonable, does it become unreasonable when the smartphone also connects to apps that constantly track the user's location for commercial purposes, or to apps which share highly personal medical data with third parties? If each of these factors changes the degree to which society will recognize an expectation of privacy, how is law enforcement going to know the level of connectivity of the user when making an application for a court order or warrant to search for a particular device?⁹²

Finally, because of the growing unwillingness of service providers to provide assistance to law enforcement, even with court orders and search warrants, will the government engage in the greater development and use of self-help surveillance technology such as StingRay to obtain data directly from devices? Two recent cases demonstrate this growing tension.

In a recent case dealing with Microsoft,⁹³ law enforcement sought the contents of a Hotmail account maintained by Microsoft under the search warrant authority of the SCA.⁹⁴ (Microsoft reports that it processes thousands of such requests from federal, state and local authorities.)⁹⁵ Microsoft sought to avoid compliance with the search warrant on the novel theory that the servers housing the e-mail were located in Ireland, and that the federal government would have to go through diplomatic channels with the Irish government to obtain the data. The lower courts rejected this argument, and the matter is now awaiting a decision by the Second Circuit.⁹⁶ Microsoft seems to be playing a game of Three Card Monte with the data in a cloud computing environment in order to avoid meeting its obligations under the SCA. The essence of cloud computing is the flexibility it gives to storage providers by moving stored data to a variety of storage environments and locations, with the assurance to the customer that the data can be produced anywhere on demand. Microsoft is fully aware that requesting data through diplomatic channels will require months, if not years, of delay in responding to any request where a court has determined that there is probable cause to believe that a crime has been committed and evidence of the crime is in a Hotmail account.⁹⁷ There is a question whether Microsoft is truly motivated by a desire to adhere to diplomatic precedent, or merely trying to avoid the cost of compliance with legitimate law enforcement requests.⁹⁸ An additional concern is that, if Microsoft loses this case, they could further seek to avoid compliance by moving the data to another jurisdiction where the U.S. has no treaty relations. As noted by the lower court, major service providers are exploring the creation of "server farms at sea," beyond the jurisdiction of any nation.⁹⁹

The Microsoft fight has been eclipsed by the current struggle between the FBI and Apple over unlocking the iPhone used by ISIS adherents in the San Bernardino shooting. Under the authority of the All Writs Act,¹⁰⁰ the DOJ sought to compel Apple to assist in unlocking the phone. Citing First and Fifth

Amendment rights, Apple refused to comply with a court order directing their cooperation. (Apple has also refused to comply with other state and federal court orders for similar assistance.)¹⁰¹ Many of the service providers that are supporting Microsoft in its fight announced their intention to file amicus briefs supporting Apple.¹⁰² In its pleadings, the DOJ asserted that Apple's intransigence was driven less by a desire to protect privacy, and more by a desire to protect its commercial name.¹⁰³ While the DOJ has now sought the dismissal of the San Bernardino All Writs Act matter, because the FBI has been able to access the phone without Apple's help, the struggle to compel Apple to help in other cases is likely to go on.

The privacy bar has sought to portray the use of StingRay devices as an unreasonable encroachment by the government upon Fourth Amendment rights regarding electronic communications. As set forth above, this characterization is not consistent with recognized jurisprudence regarding reasonable expectations of privacy. Instead, the debate should be focused on whether or not there is a need to create a new statutory right of privacy in this area, along with appropriate controls on government access to this data. Some courts have suggested that these and other privacy issues relating to electronic communications in the twenty-first century are best resolved through legislative rather than judicial actions.¹⁰⁴ Through the passage of ECPA, the Pen/Trap Statute, and the Communications Assistance to Law Enforcement Act,¹⁰⁵ Congress has previously demonstrated that it can define non-constitutional rights and controls over government surveillance, and dictate actions which service providers must take to provide assistance to law enforcement. It remains to be seen if Congress is up to today's challenge.

Endnotes

1 No. 15-CF-322, DC Court of Appeals.

2 Spenser Hsu, *Constitutionality of StingRay use by DC police is challenged*, WASHINGTON POST (Feb. 24, 2016), available at https://www.washingtonpost.com/local/public-safety/constitutionality-of-stingray-use-by-dc-police-is-challenged/2016/02/23/d197cb52-d9b2-11e5-81ae-7491b9b9e7df_story.html.

3 "StingRay" is the most common name of the device manufactured by the Harris Corporation. Other versions of the technology are known as "TriggerFish," IMSI catcher, digital analyzer, "KingFish," "Hailstorm," and cell-site simulator.

4 Information provided includes International Mobile Subscriber Identity (IMSI) information, and Electronic Serial Numbers (ESN), embedded in the device by its manufacturer. Additionally, limited geolocation information is transmitted. This geolocation function is separate from any GPS-related communications.

5 Despite the FBI's attempts to maintain secrecy regarding the existence and capabilities of StingRay technology, one of the most frequently cited documents describing the capabilities of the device is the Department of Justice's (DOJ) 2005 Electronic Surveillance Manual, available at <http://www.justice.gov/criminal/foia/docs/elec-sur-manual.pdf>.

6 18 U.S.C. § 3121-3127.

7 18 U.S.C. § 2703(d).

8 18 U.S.C. § 2510(12).

9 18 U.S.C. § 2510-2522.

10 An "air card" is a mobile hot spot that allows a Wi-Fi enabled device, (e.g., laptop or smartphone) to establish Wi-Fi connectivity via a cell tower. See, e.g., *U.S. v. Rigmaiden*, 844 F. Supp.2d 982 (D. Ariz. 2012). With respect to smartphones, this connectivity is in addition to cellular technology.

11 See *Stingray Tracking Devices: Who's Got Them?*, ACLU, available at <https://www.aclu.org/map/stingray-tracking-devices-whos-got-them#agencies>.

12 *Id.*

13 See Henry Bernstein, *The Need for Fourth Amendment Protection from Government Use of Cell Site Simulators*, 56 SANTA CLARA L. REV. 177, 194 (2016).

14 See *StingRay Tracking Devices*, ACLU, available at <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices>.

15 See Linda Lye, *Stingrays: The Most Common Surveillance Tool the Government Won't Tell You About*, ACLU of Northern California (2014), available at <https://www.aclunc.org/publications/stingrays-most-common-surveillance-tool-government-wont-tell-you-about>.

16 See *In re Application of the United States for an Order Authorizing the Use of a Cellular Telephone Digital Analyzer*, 885 F. Supp. 197 (C.D. Cal. 1995).

17 18 U.S.C. § 3121-3127.

18 18 U.S.C. § 3122(b)(2).

19 See, e.g., *In re Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(d)*, 707 F.3d 283, 287 (4th Cir. 2013).

20 442 U.S. 735 (1979).

21 See William Curtis, *Triggering a Closer Review: Direct Acquisition of Cell Site Location Tracking Information and Argument for Across Statutory Regimes*, 45 COLUM. J.L. & SOC. PROBS., 139, 147 (2011).

22 18 U.S.C. § 2703(d).

23 See Bernstein, *supra* note 13, at 182-3.

24 See, e.g., Curtis, *supra* note 21; and Bernstein, *supra* note 13. See also Stephanie Pell & Christopher Soghoian, *A Lot More than a Pen Register, and Less than a Wiretap: What the Stingray Teaches Us About How Congress Should Approach the Reform of Law Enforcement Surveillance Authorities*, 16 YALE J.L. & TECH. 134 (2014).

25 See Bernstein, *supra* note 13, at 174.

26 See, e.g., *U.S. v. Rigmaiden*, 2013 WL 1932880 (D. Ariz. 2013); *In re Application of the U.S.*, 890 F. Supp. 3d 747 (S.D. Tex. 2012); *In the Matter of an Application of the U.S. for an Order Relating to Telephones Used by Suppressed*, No. 15-M-0021 (N.D. Ill. 2015) (unpublished opinion); *U.S. v. Espudo*, 954 F. Supp. 2d 1029, (S.D. Cal. 2013).

27 Historic data is CSLI previously captured and maintained by carriers for their business purposes related to billing and system efficiency. Prospective data is the carrier's real time capture and provision of CSLI to the government to allow the government to determine where the cell phone and its user are located and moving.

28 See *In re Application of the U.S. for an Order Directing a Provider of Electronic Communications Service to Disclose Records to the Government*, 620 F.3d 304 (3d Cir. 2010) (historic CSLI sought under the Pen/Trap Statute).

29 *U.S. v. Graham*, 796 F.3d 332 (4th Cir. 2015) (historic CSLI sought under the SCA).

30 *U.S. v. Graham*, 2015 WL 6531272 (4th Cir. 2015).

31 See *In re Application of the U.S. of America for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013).

- 32 See *U.S. v. Skinner*, 690 F. 3rd 772 (6th Cir. 2012) (prospective CSLI).
- 33 *U.S. v. Davis*, 754 F. 3d 1205 (11th Cir. 2014) (historic CSLI sought under the SCA).
- 34 *U.S. v. Davis*, 785 F. 3d 498 (11th Cir. 2015) (*en banc*).
- 35 See *supra* note 26, slip op. at pp. 8-10. These controls included steps to reduce overcollection, destruction of overcollected data, restrictions on subsequent use. These controls are already required by the Pen/Trap Statute. 18 U.S.C. §§ 3121(c), 3126.
- 36 See *id.* at p. 1.
- 37 844 F. Supp. 2d 982, 996 n.6 (D. Ariz. 2012).
- 38 442 U.S. 735 (1979).
- 39 18 U.S.C. § 2701-2712.
- 40 425 U.S. 735 (1976).
- 41 12 U.S.C. § 3401, *et. seq.*
- 42 See Letter from Senators Patrick Leahy and Charles Grassley to Attorney General Eric Holder and Secretary Jeh Johnson of the Department of Homeland Security, (Dec. 23, 2014), available at <http://www.grassley.senate.gov/sites/default/files/news/upload/2014-12-23%20PJL%20and%20CEG%20to%20DOJ%20and%20DHS%20%28cell-site%20simulators%29.pdf>.
- 43 See DOJ Policy Guidance: Use of Cell-Site Simulator Technology (2015), available at <http://www.justice.gov/opa/file/767321/download>.
- 44 *Id.* at 6-7.
- 45 For example, many federal Offices of Inspector General have law enforcement functions not directly governed by Attorney General Guidelines. In 2002, Congress authorized full law enforcement authority (*i.e.*, authority to make arrests, apply for search warrants, and carry firearms) for many of these organizations on the condition that they agreed to be bound by all Guidelines. See Attorney General Guidelines for Offices of Inspectors General with Statutory Law Enforcement Authority (2003), available at <https://www.ignet.gov/sites/default/files/files/agleguidelines.pdf>.
- 46 The Deputy Secretary of DHS issued a DHS policy statement which mirrors the DOJ policy. See DHS Policy Directive 047-02, Department Policy Regarding the Use of Cell-Site Simulator Technology (2015), available at <http://www.justice.gov/opa/pr/justice-department-announces-enhanced-policy-use-cell-site-simulators>. The policy directive is addressed to DHS law enforcement agents at Customs & Border Protection, U.S. Secret Service, Immigrations & Customs Enforcement, Transportation Security Administration, U.S. Coast Guard, and the Federal Protective Service. See also Letter from IRS Commissioner John H. Koskinen to Sen. Ron Wyden (2015) (agreeing that the IRS-Criminal Investigations Division will adhere to the DOJ policy), available at <http://www.wyden.senate.gov/download/?id=6c9cd25c-28d1-4cda-9199-04a15c0b5d33&download=1>.
- 47 See, *e.g.*, California Electronic Communications Privacy Act, S.B. 178, effective October 2015.
- 48 See Stephanie K. Pell & Christopher Soghoian, *Your Secret StingRay's No Secret Anymore: The Vanishing Government Monopoly over Cell Phone Surveillance and Its Impact on National Security and Consumer Privacy*, 28 HARV. J. L. & TECH. 1, 35 (2014).
- 49 See, *e.g.*, Letter from FBI Acting Assistant Director, Operational Technology Division to Police Commissioner, Baltimore Police Department and State's Attorney, Baltimore County, (July 13, 2011), available at <http://s3.documentcloud.org/documents/1808819/baltimore-police-stingray-non-disclosure-agreement.pdf>.
- 50 *Id.*
- 51 See Jason M. Weinstein, William L. Drake, Nicholas P. Silverman, *Privacy vs. Public Safety: Prosecuting and Defending Criminal Cases in the Post-Snowden Era*, 52 AM. CRIM. L. REV. 729, 742 (2015).
- 52 See In the Matter of an Application of the U.S. for an Order Relating to Telephones Used by Suppressed, *supra* note 26 at 2.
- 53 See, *e.g.*, Office of the Treasury Inspector General for Tax Administration Operations Manual, Chapter 400-Investigations, Section 170.10.2, October 1, 2009, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=54&ved=0ahUKewjanbuOJJPLAhWDRCYKHYYKOAig4MhAWCC4wAw&url=https%3A%2F%2Fwww.treasury.gov%2Ffrigta%2Ffoia%2Ffoia-imds%2Fchapter400-inv%2F400-170%2Fchapter400-170.doc&usq=AFQjCNF_rM2Jb5OjjCbb3nzrtJWvlfBftrw&sig2=hqdg-m9sqa5aW8I52EIXsg&bvm=bv.115277099.d.eWE.
- 54 18 U.S.C. § 3121(c).
- 55 18 U.S.C. § 3126.
- 56 See Memorandum of Deputy Attorney General (May 24, 2002), available at <http://www.justice.gov/sites/default/files/dag/legacy/2007/10/09/memo-05242002.pdf>.
- 57 See DOJ Guidance: Use of Cell-Site Simulator Technology, *supra* note 40, at p.6.
- 58 Court orders for historic cell tower dumps are usually sought under the SCA, 18 U.S.C. § 2703(d).
- 59 See Brian L. Owsley, *The Fourth Amendment Implications of the Government's Use of Cell Tower Dumps in Its Electronic Surveillance*, 16 U. PA. J. CONST. L. 1 (2013).
- 60 See, *e.g.*, In the Matter of the Application of the U.S. for an Order Pursuant to 18 U.S.C. § 2703(c) and 2703(d) Directing AT&T, Sprint/Nextel, T-Mobile, Metro PCS and Verizon Wireless to Disclose Cell Tower Log Information, 42 F. Supp.3d 511 (S.D.N.Y. 2014).
- 61 See In the Matter of Application for Cell Tower Records under 18 U.S.C. § 2703(d), 90 F. Supp. 3d 673, 678 (S.D. Tex. 2015).
- 62 389 U.S. 347, 361 (1967) (Harlan J. concurring). While Justice Harlan is given credit by scholars for enunciating the two-part test, the majority opinion contains similar guidance: "What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351-52 (citations omitted).
- 63 See *U.S. v. Jones*, 132 S. Ct. 945, 950 (2012).
- 64 See In re Smartphone Geolocation Data Application, 977 F. Supp. 2d 129, 141-142 (E.D.N.Y. 2013).
- 65 See 47 CFR §20.18(h).
- 66 In addition to geolocation data provided to carriers, such as Verizon and AT&T, smartphones may also provide significant location information to app service providers, such as Apple and Google, to enable enhanced mapping and location services provided by these devices. See Sean Gallagher, *Where've you been? Your smartphone's Wi-Fi is telling everyone*, ARSTECHNICA (Nov. 5, 2014), available at <http://arstechnica.com/information-technology/2014/11/where-have-you-been-your-smartphones-wi-fi-is-telling-everyone/>.
- 67 See Dan Goodin, *Loose-lipped iPhones top the list of smartphones exploited by hacker*, ARSTECHNICA (March 16, 2012), available at <http://arstechnica.com/apple/2012/03/loose-lipped-iphones-top-the-list-of-smartphones-exploited-by-hacker/>.
- 68 See, *e.g.*, *U.S. v. Forrester*, 512 F.2d 500, 510 (9th Cir. 2007) ("Internet users have no expectation of privacy in the . . . IP address of the websites they visit because they should know that this information is provided to and used

by Internet service providers for the specific purpose of directing the routing of information.”)

69 See, e.g., Whitson Gordon, *Top 10 Awesome Features of Google Now*, LIFE-HACKER (May 17, 2014), available at <http://lifelifehacker.com/top-10-awesome-features-of-google-now-1577427243>.

70 One researcher has estimated that, as of December 2015, 100-200 million of the estimated 1.4 billion Android users are currently using Google Now. See Shushant Shekar, *How Many People Are Currently Actively Using Google Now?*, QUORA (Dec. 25, 2015), available at <https://www.quora.com/How-many-people-are-currently-actively-using-Google-Now>.

71 See Google Privacy Policy (Aug. 19, 2015), available at <http://www.google.com/policies/privacy/> (privacy policy applies to all Google services, not just Google Now).

72 See *Your Timeline: Revisiting the world that you've explored*, GOOGLE MAPS BLOG (July 21, 2015), available at <https://maps.googleblog.com/2015/07/your-timeline-revisiting-world-that.html>; Google Dashboard, GOOGLE PRIVACY YOUTUBE CHANNEL (Nov. 4, 2009), available at https://www.youtube.com/watch?v=ZPaJPxhPq_g#t=48.

73 See Find My iPhone, iTunes App Store, available at <https://itunes.apple.com/us/app/find-my-iphone/id376101648?mt=8>.

74 See Find My Lost Phone!, Google Play App Store, available at <https://play.google.com/store/apps/details?id=com.fsp.android.phonetracker&hl=en>.

75 For example, according to the Google Play Store, over 220,000 users have reviewed the Android Find My Lost Phone! App, giving it an average of four stars out of five. *Id.*

76 See Bluetooth Technology Basics, available at <https://www.bluetooth.com/what-is-bluetooth-technology/bluetooth-technology-basics>.

77 See How do Fitbit trackers sync their data?, available at https://help.fitbit.com/articles/en_US/Help_article/How-do-Fitbit-trackers-sync-their-data.

78 425 U.S. 735 (1976).

79 442 U.S. 735 (1979).

80 See Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561 (2009).

81 See U.S. v. Weast, No. 14-11253, slip op. at 4 n.10. (5th Cir. 2016).

82 *Id.* at n.11.

83 *Supra* note 64.

84 *Id.* at 138-141.

85 *Id.* at 147.

86 *Id.* at 146.

87 724 F. 3d 600, 613-614 (5th Cir. 2013). See also U.S. v. Guerrero, 769 F. 3d 351 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015).

88 See *Jones, supra* note 63 at 953 (government's physical intrusion to install surveillance technology may violate Fourth Amendment, but trespass is not the exclusive test to determine if there has been a search).

89 See *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473 (2014), where the Court ruled that a warrantless search incident to arrest of the contents of a cell phone was improper, when that search sought information not related to the cause of the arrest.

90 See *Kyllo v. U.S.*, 533 U.S. 27 (2001).

91 *Jones, supra* note 85 at 963 (Alito, J., concurring).

92 These questions differ from the cell phone issues recently confronted by the Court in *Riley*. There the court ruled that the government will need a warrant to search the content of a cell phone incident to arrest, when the search is targeted at information not related to the crime of arrest. In reaching this decision, the court noted that modern cell phones are ubiquitous, carry massive amounts of data, and carry much information related to the daily lives of users. This relates to the *content* on cell phones, not their *connectivity*. In creating a higher privacy standard requiring a warrant to obtain content, the Court did not examine the fact that these devices automatically share massive amounts of connectivity data. This sharing of data with third parties is a significant alteration of the *Riley* analysis and conclusion. Courts which have subsequently examined the issue have refused to extend *Riley's* holding to CSLI. See, e.g., U.S. v. Guerrero, *supra* note 87.

93 See *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, No. 14-2985 (2d Cir. 2015).

94 18 U.S.C. §2703(a).

95 See Law Enforcement Request Report 2015, at 2, available at <https://www.microsoft.com/about/business-corporate-responsibility/transparencyhub/letr/>.

96 See *In re Warrant to Search a Certain E-Mail Account*, 15 F. Supp. 3d 466 (S.D.N.Y. 2014).

97 See Statement of David Bitkower, Principle Deputy Assistant Attorney General, DOJ, Before House Judiciary Committee (Feb. 25, 2016), available at http://judiciary.house.gov/_cache/files/c8d735e5-c9ab-4197-ac76-2c6f5d4b03cd/doj-bitkower-testimony.pdf.

98 Microsoft is not alone in opposing this warrant. Other major online service providers, such as Amazon, Apple, AT&T, and Verizon have filed amicus briefs supporting Microsoft.

99 See *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by the Microsoft Corporation*, 15 F. Supp. 3d 466, 475 (S.D.N.Y. 2014).

100 28 U.S.C. § 2651.

101 See Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, ED No. CM-16-10 (Feb. 25, 2016), available at <http://www.nytimes.com/interactive/2016/02/25/technology/document-apple-motion-opposing-iphone-order.html>.

102 See Ellen Nakashima, *Google, Facebook and Other Powerful Tech Firms Filing Briefs to Support Apple*, WASHINGTON POST (Feb. 29, 2016), available at https://www.washingtonpost.com/world/national-security/google-facebook-and-other-powerful-tech-firms-filing-briefs-to-support-apple/2016/02/28/bcb05460-de48-11e5-846c-10191d1fc4ec_story.html?hpid=hp_rhp-more-top-stories_no-name%3Ahomepage%2Fstory.

103 See Government's Motion to Compel Apple Inc. to Comply with This Court's February 16, 2016 Order Compelling Assistance, ED No. CM-16-10 (Feb. 19, 2016), available at <http://apps.npr.org/documents/document.html?id=2716063-Apple-iPhone-Access-MOTION-to-COMPEL>.

104 See *In the Matter of an Application of the U.S. for an Order Authorizing Disclosure of Location Information of a Specific Wireless Telephone*, 849 F. Supp. 2d 526 (D. Md. 2011), in which a magistrate judge concluded that neither the Pen/Trap Statute, the SCA, Rule 41, nor the All Writs Act provided sufficient authority to require carriers to produce prospective CSLI when the government could not establish that the target was aware of his fugitive status on outstanding charges. The court concluded that such authority has not yet been provided by Congress.

105 47 U.S.C. § 1002(a)(2).



ENVIRONMENTAL LAW & PROPERTY RIGHTS

PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS V. U.S. FISH AND WILDLIFE SERVICE: DID GONZALEZ V. RAICH EVISCERATE ALL CONSTITUTIONAL LIMITS ON FEDERAL POWER?

By Jonathan Wood*

Note from the Editor:

This article discusses an ongoing case questioning the constitutionality of the Endangered Species Act, and favors the petitioners. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Jason Rylander, *Protecting Endangered Species Under the Commerce Clause: People for the Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Service*, ACS BLOG (September 25, 2015), available at <https://www.acslaw.org/acsblog/protecting-endangered-species-under-the-commerce-clause-people-for-the-ethical-treatment-of>.
- David Driesen, *Constitutional Law Professors' Brief Filed in Utah Prairie Dog Case*, ACS BLOG (April 22, 2015), available at <https://www.acslaw.org/acsblog/constitutional-law-professors%E2%80%99-brief-filed-in-utah-prairie-dog-case>.
- Brian Palmer, *Is The Endangered Species Act... Endangered?*, ON EARTH- EARTHWIRE (January 2015), available at <http://www.onearth.org/earthwire/endangered-species-act-endangered>.

On November 5, 2014, the District Court for the District of Utah struck down an Endangered Species Act regulation forbidding the “take” of any Utah prairie dog—a threatened species found only in Utah with no commercial use or market—as exceeding Congress’ power under the Commerce and Necessary and Proper Clauses.¹ This is the first time that a federal regulation of take has been struck down as unconstitutional and marks a sharp departure from the decisions of five Circuit Courts of Appeals, which upheld similar restrictions.² The decision squarely rejects the government’s argument, accepted by several circuits, that the Commerce Clause could be stretched to allow it “to regulate anything that *might* affect the ecosystem (to say nothing about its effect on commerce)” because, otherwise, “there would be no logical stopping point to congressional power under the Commerce Clause.”³ The government has appealed the decision to the Tenth Circuit, which held oral argument on September 28, 2015.⁴

I. BACKGROUND

The Endangered Species Act of 1973 provides for the listing of endangered and threatened species and mandates broad protections for those species.⁵ These protections include a prohibition against “take”—which is defined to encompass essentially any activity that adversely affects a single member of a species or its habitat⁶—that carries substantial civil and criminal penalties and can be enjoined by citizen suits.⁷ The statute also requires all federal agencies to exercise their discretionary powers to further the statute’s purposes and avoid taking any

action that could jeopardize a protected species.⁸

Though the statute was enacted nearly unanimously in 1973, it has been a continuous source of conflict, especially since the Supreme Court interpreted it in *TVA v. Hill*⁹ to require every species to be protected “whatever the cost.” As a consequence, the Endangered Species Act can impose harsh, punitive restrictions on private property owners whose lands provide needed habitat for species. Critics note that this creates a disincentive against maintaining suitable habitat, ultimately to the detriment of the species the statute is intended to protect.¹⁰ For these substantial costs, critics argue, we receive little measurable benefit. Only about one percent of species listed under the Endangered Species Act have ever recovered to the point that they could be delisted.¹¹

II. THE UTAH PRAIRIE DOG AND PEOPLE FOR THE ETHICAL TREATMENT OF PROPERTY OWNERS

The Utah prairie dog has been listed under the Endangered Species Act since its enactment.¹² In 1984, when the population was estimated at 23,753, its status was changed from endangered to threatened. Since then, the population has nearly doubled, with recent estimates placing the population at over 40,000 individual animals. All of these animals are found in southwestern Utah, with approximately 70% of them residing on private property.

There is no market for Utah prairie dogs, nor are they used in any economic activity. However, the species has garnered some academic interest and is advertised on federal government websites to promote tourism to national parks.

Pursuant to the Endangered Species Act, the Fish & Wildlife Service has adopted a regulation forbidding the “take” of any Utah prairie dog unless authorized by a federal permit.¹³ These permits are available to owners of only certain types of

* The author is counsel of record for People for the Ethical Treatment of Property Owners in their constitutional challenge to the Utah prairie dog regulation.

properties and restrict the number of Utah prairie dogs eligible property owners are allowed to take.

People for the Ethical Treatment of Property Owners (PETPO) was formed by several residents of southwestern Utah who felt that their concerns had been consistently ignored by the bureaucrats in Washington charged with setting federal regulations. The organization has over 200 members, largely consisting of affected residents, property owners, and local governments. It advocates protecting the species without imposing such onerous burdens on property owners and the community, primarily by encouraging the safe, humane capture of Utah prairie dogs in backyards and residential neighborhoods, so that they can be moved to public conservation areas where they can be permanently protected.

The Utah prairie dog regulation severely impacts the organization's members. Owners of undeveloped lots in residential subdivisions are barred from building homes for their families if Utah prairie dogs move in first. Some have lost their investments in land intended to develop small businesses. Many others are unable to protect their backyards and gardens from the rodents. The local government of Cedar City, itself a member of the organization, is unable to protect playgrounds and sports fields from the burrowing animals, instead it has to fence areas off from local children. It also must get federal permission to remove Utah prairie dogs from the municipal airport, where they tunnel beneath runways and in critical safety areas, and the local cemetery, where they disturb the grounds, bark during funerals, and eat flowers left by mourners.

After the U.S. Fish & Wildlife Service adopted the Utah prairie dog regulation, PETPO challenged it as exceeding the government's constitutional authority. The District Court for the District of Utah agreed.¹⁴ In the wake of the district court's decision, Utah—which filed an amicus brief on behalf of itself and eight other states supporting PETPO in the Tenth Circuit—adopted a plan to conserve the species without such onerous burdens by moving Utah prairie dogs from developed neighborhoods and backyards to public conservation areas.¹⁵

III. DOES THE COMMERCE CLAUSE ALLOW THE FEDERAL GOVERNMENT TO REGULATE ANY ACTIVITY THAT AFFECTS ANY SPECIES THAT AFFECTS THE ENVIRONMENT?

Modern Commerce Clause jurisprudence has significantly expanded the scope of federal power beyond what the Constitution originally contemplated.¹⁶ Yet the Supreme Court has continued to insist that the power is and must be subject to judicially-enforceable limits.¹⁷ As presently understood, the clause permits Congress to regulate economic activity that has a substantial effect on interstate commerce.¹⁸ Notably, the Court has never upheld federal regulation of *noneconomic* activity—*i.e.* activity that isn't the production, distribution, or consumption of a traded commodity—under the Commerce Clause.

Since the so-called New Deal revolution, the Supreme Court has only struck down two laws as exceeding Congress' Commerce Clause power. In *United States v. Lopez*, the Supreme Court declared that a federal statutory provision that criminalized the possession of a gun in a school zone exceeded Congress' Commerce Clause power.¹⁹ And, in *United States v. Morrison*, the Court struck down a federal cause of action for victims of

gender-based violence on the same grounds.²⁰

Although the Court has only rarely struck down laws as exceeding Congress' lawmaking power under the Commerce Clause, its reasoning in these cases is instructive. In each, the Court began by asking whether the activity regulated on the face of the statutory provision is economic.²¹ Since neither possession of a gun nor gender-based violence are economic activities, these provisions could not be characterized as regulations of economic activity. Next, the Court asked whether the proffered connections to interstate commerce were so insignificant and logically attenuated that, if accepted, similar reasoning would justify federal regulation of anything.²² In *Lopez*, for instance, the Court rejected arguments based on the generalized impacts of crime and education on commerce as too attenuated to withstand scrutiny.²³

Relying on these cases, the district court concluded that the Utah prairie dog regulation exceeds the authority that Congress may delegate to the Fish and Wildlife Service under the Commerce Clause. The Utah prairie dog regulation broadly forbids *any* activity, regardless of its nature, that results in any adverse effect on a single Utah prairie dog or its habitat.²⁴ On its face, this broad ban on "take" is not a regulation of economic activity.

On appeal, the government argues that the Utah prairie dog regulation is a regulation of economic activity because the plaintiff's members wish to engage in land development and a variety of economic activities are ensnared by the broad ban.²⁵ PETPO responds that the first argument takes a crabbed view of the impacts that the regulation has on residents of Southwestern Utah and conflicts with the Supreme Court's approach to reviewing the Commerce Clause challenge in *Lopez*.²⁶ The defendant in *Lopez* was engaged in economic activity; he was paid to carry the gun to school to deliver it to a classmate. Yet the Court judged whether the statute regulated economic activity on its face rather than looking to the particular party's activity.²⁷ PETPO argues that the government's second argument would go even further by allowing the federal government to regulate any noneconomic activity, so long as it's regulated under a broad regulation that also ensnares economic activity. At a minimum, this would require overruling *Lopez* and *Morrison* as both of the laws challenged in those cases could be violated by economic activity (as the facts in *Lopez* demonstrate).

The district court also held that *Lopez* and *Morrison*'s ban on attenuated reasoning dooms the Utah prairie dog regulation. The federal government's argument in chief is that all activities that affect a single Utah prairie dog are within its power because the species as a whole affects the environment and the environment affects interstate commerce.²⁸ PETPO responds that this argument would mean that federal power has no logical limit. To take just one example, the human species significantly impacts the environment.²⁹ Therefore, under the federal government's argument, it could regulate any activity that affects a single person, because our species affects the environment, which affects commerce. This is far more attenuated than even the "costs of crime" rationale pressed—and rejected—in *Lopez*.³⁰

In the alternative, the government argues that take of the Utah prairie dog can have a direct effect on interstate commerce because, though it is not currently traded or used in commercial

activity, the species *could* become an object of commerce in the future. In support of this argument, it refers to this oft-quoted language in the statute's legislative history:

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?³¹

PETPO argues that this too admits of no logical limit. Literally any substance *could* conceivably become a subject of commerce at some unknown point in the future.³² And just as any species may hold cancer's cure, anyone might be the person to discover it. Yet the federal government does not have the power to regulate any activity that affects any person—nor any substance—on that basis.³³

IV. DOES THE NECESSARY AND PROPER CLAUSE, AS INTERPRETED BY *RAICH*, ALLOW THE FEDERAL GOVERNMENT TO REGULATE ANYTHING FOR ANY REASON PURSUANT TO A "COMPREHENSIVE SCHEME"?

If the Commerce Clause cannot sustain the Utah prairie dog regulation, the government must instead rely on the Necessary and Proper Clause.³⁴ The standard explanation of this clause is that it is not intended to convey any significant independent power;³⁵ rather, its purpose is to make clear that the federal government has the means required to exercise its other powers.³⁶ In *McCulloch v. Maryland*, Chief Justice Marshall explained the clause this way:

Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.³⁷

Though this gives Congress wide latitude, it is not a blank check. The Necessary and Proper Clause does not authorize any regulation that is a rational means of accomplishing *some* government objective. Rather, the government must be able to show why the challenged regulation is reasonably necessary to implementing an enumerated power.³⁸

Consequently, the Necessary and Proper Clause supplements the Commerce Clause by allowing the federal government to regulate noneconomic activity if necessary for it to effectively regulate economic activity or the market for a commodity pursuant to a comprehensive regulatory scheme.³⁹ In *Gonzales v. Raich*, for instance, the Court sanctioned federal regulation of mere intrastate possession of marijuana for medical use under the Controlled Substances Act.⁴⁰ It explained that federal regulation of this activity was rational because marijuana grown and possessed solely in California for medical purposes is indistinguishable from marijuana traded in the illicit, interstate market. Exempting the former would frustrate the government's ability to regulate the latter pursuant to its comprehensive scheme to regulate the illicit interstate market and related economic activity.⁴¹

In the Utah prairie dog case, the government argues that the Utah prairie dog regulation must be upheld as a necessary part of the Endangered Species Act, which it explains is a comprehensive regulatory scheme to preserve species.⁴² PETPO

responds that this analysis fails to respect the limits of the Necessary and Proper Clause. The government is not arguing that, if it cannot regulate every activity that affects a single Utah prairie dog, it will not be able to regulate economic activity or the market for a commodity. As the district court noted in rejecting the government's argument, there is no market for Utah prairie dogs, nor are they used in any economic activity. Therefore, restrictions on the government's ability to regulate Utah prairie dog takes simply doesn't implicate its ability to regulate commerce.

Instead, the government argues that if it cannot regulate any activity that affects any Utah prairie dog (or any other species), the Endangered Species Act's ability to achieve its non-commercial, conservation goals would be undermined. Or, as the Fifth Circuit put it in upholding federal protection of cave bugs, the federal government must be able to regulate all life as part of its protection for the "interdependent web" of all species.⁴³

PETPO responds that this argument, if accepted, would cause any remaining difference between federal power and the states' police power to evaporate by subjecting both to the same meager limit. According to the government's argument, the Necessary and Proper Clause permits it to do anything, so long as it's rationally related to any policy objective. That is the same standard that constrains states' exercises of the police power under the Due Process Clause.⁴⁴ For instance, it would permit the federal government to regulate any criminal acts pursuant to a comprehensive scheme to regulate crime.

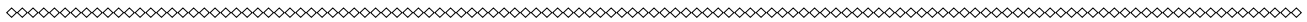
The Supreme Court has already implicitly rejected this argument in *Lopez* and *Morrison*, by striking down criminal provisions that were small parts of omnibus crime bills.⁴⁵ If the government's argument in the Utah prairie dog case were accepted, the opposite results should have been reached in both *Lopez* and *Morrison*. The challenged criminal provisions should have been upheld in order to effectuate the anti-crime goals animating those omnibus (*i.e.* comprehensive) crime bills.

V. CONCLUSION: WILL THE SUPREME COURT FINALLY SETTLE THIS CONFLICT?

Despite the number of previous constitutional challenges to federal regulation of take of intrastate, noncommercial species, the Supreme Court has never weighed in. This despite Chief Justice Roberts'—then on the D.C. Circuit—famous dissent from a denial of rehearing *en banc* that the grounds for upholding federal regulation of take are inconsistent with Supreme Court precedent.⁴⁶ The issue certainly presents an important question of federal law. The Endangered Species Act broadly forbids (in fact, criminalizes) *any* activity that adversely impacts a single member of a species or its habitat and applies this prohibition to approximately 1,500 species spread throughout the country.⁴⁷ With environmental groups seeking to add additional species to this list by the hundreds,⁴⁸ the consequences of getting this constitutional question right will only continue to grow. With a path breaking decision in the district court, and the possibility of a circuit split if it is affirmed, perhaps this will be the case where the Supreme Court finally resolves this question.

Endnotes

- 1 People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service, 57 F.Supp.3d 1337, 1342-46 (D. Utah 2014).
- 2 See San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011); Alabama-Tombigbee Rivers Coal. V. Kepthorne, 477 F.3d 1250 (11th Cir. 2007); GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003); Ranch Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).
- 3 People for the Ethical Treatment of Property Owners, 57 F.Supp.3d at 1344-45; see, e.g., GDF Realty, 326 F.3d at 640 (upholding regulation of take of Texas cave bugs because they are part of the "interdependent web" of all species).
- 4 See Steve Davies, *Tenth Circuit releases audio of arguments in prairie dog case*, ESWR.COM ENDANGERED SPECIES & WETLANDS REPORT (Sept. 30, 2015), available at <http://www.eswr.com/2015/09/tenth-circuit-releases-audio-of-oral-argument-in-utah-prairie-dog-case-to-eswr/>.
- 5 16 U.S.C. § 1531 *et seq.*; see 16 U.S.C. § 1533.
- 6 16 U.S.C. § 1532(19) (defining "take"); see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 696-704 (1994) (upholding broad interpretation of "take").
- 7 16 U.S.C. § 1538(a)(1)(B) (forbidding take); 16 U.S.C. §§ 1540(a), (b), (g) (authorizing civil and criminal penalties for violating the Endangered Species Act and citizen suits for injunctive relief).
- 8 16 U.S.C. § 1536.
- 9 Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).
- 10 See RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 356-57 (2014); REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (Adler, ed. 2011); Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).
- 11 See M. Lynne Corn & Kristina Alexander, *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues*, Cong. Res. Serv. Rep. 7-5700 at 6 (Jan. 13, 2014), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42945.pdf>.
- 12 See Final Rule Revising the Special Rule for the Utah Prairie Dog, 77 Fed. Reg. 46,158 (Aug. 2, 2012).
- 13 77 Fed. Reg. 46,158.
- 14 People for the Ethical Treatment of Property Owners, 57 F.Supp.3d at 1342-46.
- 15 See Br. of Utah, et al., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4165 (10th Cir. filed May 26, 2015) available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2015/05/States-AC.pdf>.
- 16 See, e.g., Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (Congress may regulate a farmer's growing of wheat to be consumed on his farm—without ever entering into any interstate market—under the Commerce Clause); *United States v. Wrightwood Dairy*, 315 U.S. 110, 120 (1942) (Congress' power to regulate interstate commerce allows it to set a minimum price for milk produced and consumed within a single state); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-30 (1937) (Commerce Clause reaches individual firm's hiring decisions); see also Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451 (1987) (describing the *Wickard* decision as standing the Commerce Clause upon its head).
- 17 See, e.g., *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) ("[W]e always have rejected readings of ... the scope of federal power that would permit Congress to exercise a police power" (quoting *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring))).
- 18 See *Lopez*, 514 U.S. at 567.
- 19 See *Lopez*, 514 U.S. at 556.
- 20 See *Morrison*, 529 U.S. at 601-02, 613-17.
- 21 See *Morrison*, 529 U.S. at 610, 613; *Lopez*, 514 U.S. at 560.
- 22 See *Morrison*, 529 U.S. at 615.
- 23 See *Lopez*, 514 U.S. at 563-64.
- 24 See 77 Fed. Reg. 46,158.
- 25 See Opening Br. for the U.S. Fish & Wildlife Serv., et al., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4154 (filed Apr. 14, 2015) available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2015/05/FWS-Opening-Brief.pdf>.
- 26 See Appellee's Br., People for the Ethical Treatment of Property Owners, Nos. 14-4151 & 14-4165 (filed May 18, 2015) available at <http://blog.pacificlegal.org/wp/wp-content/uploads/2015/05/FINAL-PETPO-RESPONSE-BRIEF.pdf>; see also *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc) ("Such an approach seems inconsistent with the Supreme Court's holdings...."). There is a circuit split on whether this is an appropriate way to analyze the constitutionality of the take prohibition. Compare *GDF Realty*, 326 F.3d at 634 (it isn't) with *Rancho Viejo*, 323 F.3d at 1072 (it is).
- 27 See *United States v. Lopez*, 2 F.3d 1342, 1345 (5th Cir. 1993).
- 28 See *GDF Realty*, 326 F.3d at 640 (accepting this argument); *Home Builders*, 130 F.3d at 1052-54 (same).
- 29 See H.R. REP. NO. 93-412, at 143 (1973) (the Endangered Species Act was adopted in recognition of the significant impacts human development has on the environment).
- 30 See *Lopez*, 514 U.S. at 563-64.
- 31 H.R. REP. NO. 93-412, at 4.
- 32 See *Home Builders*, 130 F.3d at 1058 (Henderson, J., concurring); see also *GDF Realty*, 326 F.3d at 638; *Home Builders*, 130 F.3d at 1065 (Sentelle, J., dissenting).
- 33 See *Morrison*, 529 U.S. at 613-19; *Lopez*, 514 U.S. at 560.
- 34 Cf. *Printz v. United States*, 521 U.S. 898, 922 (1997) (The Necessary and Proper Clause is the "last, best hope of those who defend ultra vires congressional action.>").
- 35 See *NFIB*, 132 S. Ct. at 2592.
- 36 U.S. CONST. ART. I, § 8, cl. 18.
- 37 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).
- 38 See *Reid v. Covert*, 354 U.S. 1, 66 (1957) (Harlan, J., concurring) ("[T]he constitutionality of the statute ... must be tested, not by abstract notions of what is reasonable 'in the large,' so to speak, but by whether the statute, as applied in these instances, is a reasonably necessary and proper means of implementing a power granted to Congress by the Constitution.>").
- 39 See *NFIB*, 132 S. Ct. at 2591-93.
- 40 See *Raich*, 545 U.S. at 22.
- 41 See *id.* (describing the Controlled Substances Act as "comprehensive legislation to regulate the interstate market in a fungible commodity" (emphasis added)); *id.* at 24-25 (an "essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut" (emphasis added)).



42 The Fourth and Ninth Circuits have upheld federal regulation of take on this basis. See *San Luis & Delta-Mendota Water Auth.*, 638 F.3d at 1175-77; *Gibbs*, 214 F.3d at 498-99.

43 See *GDF Realty*, 326 F.3d at 640.

44 See *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) (Under the Due Process Clause, a state law need only be a rational means of advancing a legitimate legislative goal). As the Supreme Court has emphasized, federal power cannot be coextensive with the police power. See *Morrison*, 529 U.S. at 618-19.

45 See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (omnibus crime bill containing the Violence Against Women Act); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (omnibus crime bill containing the Gun Free School Zones Act).

46 See *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting).

47 See U.S. Fish & Wildlife Service, *ECOS: Environmental Conservation Online System*, <http://ecos.fws.gov/ecp/> (last visited Oct. 8, 2015) (online database of endangered and threatened species).

48 See Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. TIMES, Apr. 20, 2011, available at <http://www.nytimes.com/2011/04/21/science/earth/21species.html>.



U.S. ARMY CORPS OF ENGINEERS V. HAWKES CO., INC.: WETLANDS JURISDICTIONAL DETERMINATIONS AND THE RIGHT OF FEDERAL JUDICIAL REVIEW
By Damien M. Schiff & Mark Miller*

Note from the Editor:

This article discusses *U.S. Army Corps of Engineers v. Hawkes*, a case that is pending at the Supreme Court on certiorari to the U.S. Court of Appeals for the Eighth Circuit; the authors work for Pacific Legal Foundation, which represents the Respondents in the case. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

- Brief for the Petitioner, *U.S. Army Corps of Eng'rs v. Hawkes*, No. 15-290, available at <http://www.scotusblog.com/wp-content/uploads/2016/01/15-290-ts-United-States-Army-Corps-of-Engineers.pdf>.
- *Belle Co. v. U.S. Army Corps of Eng'rs*, 761 F.3d 383 (5th Cir. 2014), available at <https://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-30262-CV0.pdf>.

I. INTRODUCTION

In early December, 2015, the Supreme Court granted review of *United States Army Corps of Engineers v. Hawkes Co., Inc.*¹ The Court has set the case for argument on March 30, 2016. The case involves administrative law, environmental law, and the right of access to the courts.

In *Hawkes*, a panel of the Eighth Circuit Court of Appeals held that a jurisdictional determination (JD) constitutes final agency action that a landowner may challenge in federal court.² That decision conflicted with the Ninth Circuit's decision in *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*,³ and the Fifth Circuit's decision in *Belle Co., LLC v. U.S. Army Corps of Engineers*.⁴ The Court granted certiorari in *Hawkes* to resolve the conflict among these circuits.⁵

II. JURISDICTIONAL DETERMINATIONS⁶

Under regulations promulgated by the United States Army Corps of Engineers (Corps), a landowner may request from the Corps a JD in order to determine whether the Corps believes the landowner's property falls within federal jurisdiction pursuant to the Clean Water Act (CWA).⁷ The JD constitutes the Corps' official and written statement as to whether the federal government has regulatory wetland authority over the property.⁸ The Corps has also provided an administrative appeal process to challenge a JD.⁹ Through this process, the landowner receives one level of appeal, usually to the Corps division engineer.¹⁰ That determination is final, but the Corps can ignore the results of that appeal.¹¹

The JD process can help the regulated public and the Corps. A landowner learns early on in the development process

whether the Corps will claim jurisdiction and demand a CWA dredge-and-fill permit, and the Corps determines whether it needs to expend any of its limited funds and manpower on working with a landowner in the permit process. But what happens when the landowner disagrees with the JD? That question confronts the Court in *Hawkes*.

III. JUDICIAL REVIEW

The federal courts may review agency action under the Administrative Procedure Act (APA),¹² so long as that action is: (1) "final,"¹³ (2) not specifically made unreviewable by statute,¹⁴ and (3) not wholly committed to the agency's discretion.¹⁵

Until *Hawkes*, the circuit courts to address the question said that a JD did not meet the APA standard for judicial review.¹⁶ The Corps agrees, notwithstanding that the Corps' own regulations refer to a JD as "Corps final agency action."¹⁷ A number of district court decisions ruled the same way.¹⁸ These decisions generally concluded that the issuance of a JD did not change the legal rights or obligations of either the landowner or the Corps, and therefore a JD could not constitute final agency action.

The Supreme Court has interpreted the APA's authorization of judicial review of "final agency action" to mean agency action that both marks the consummation of the agency's decision-making process, and produces legal consequences.¹⁹ Hence, the district court decisions have concluded that JDs do not amount to final agency action on the asserted basis that "[t]he legal rights and obligations of the parties [are] precisely the same the day after the [JD is] issued as they were the day before."²⁰ In *Fairbanks*, the Ninth Circuit also held that although a JD does amount to the consummation of the agency decision-making process, it did not amount to final action by which obligations are determined or from which legal consequences flow.²¹ Likewise, in *Belle Company*, the Fifth Circuit held that no consequences flowed from the JD.²² Until *Hawkes*, the courts agreed that they could not review JDs. But the story does not end there.

The Supreme Court of the United States addressed a similar question—whether compliance orders (not JDs) are judicially reviewable—in 2012 in the *Sackett* case and its answer

* Damien M. Schiff is a Principal Attorney with and member of Pacific Legal Foundation's Environmental Law Practice Group, and successfully litigated *Sackett* in the Supreme Court, as well as litigated cases in federal district courts and circuit courts of appeals concerning the Endangered Species Act and Clean Water Act, and other state and federal environmental laws. Mark Miller, a Florida Bar board certified appellate attorney, is the Managing Attorney of Pacific Legal Foundation's Atlantic Center in Florida and is co-counsel for *Hawkes Co.* before the Supreme Court.

suggests that the *Fairbanks* and *Belle* courts answered the JD reviewability question incorrectly.²³ A review of *Sackett* and its logical application to JDs helps shed light on why the Eighth Circuit correctly decided *Hawkes* and why the Supreme Court will likely affirm.

IV. SACKETT

In *Sackett*, the Court unanimously held—contrary to the circuit courts that had previously addressed the question²⁴—that the federal courts can judicially review EPA compliance orders.²⁵

Mike and Chantell Sackett bought a small parcel of property in 2005 with the intent to build a three-bedroom family home on it. Their lot sat in a residential area, and neighbors built their own houses. The Sacketts obtained a county permit to build and started laying gravel. But then the EPA, without hearings or notice, claimed the property was federal “wetlands” and ordered them to return the property to its original state on pain of astronomical fines.²⁶

With good reason to believe the land did not meet the definition of wetlands within the meaning of the CWA (or, for that matter, at all), the Sacketts wished to contest EPA’s claim.²⁷ But the EPA denied their request for a hearing—and the Ninth Circuit ruled they had no right to immediate judicial review.²⁸ It held that the Sacketts would first have to go through a years-long permitting process, which could cost 12 times the value of their land.²⁹

The Supreme Court reversed the Ninth Circuit unanimously and overturned decades of uniform case law prohibiting judicial review of compliance orders issued pursuant to the CWA. The Court held that a JD issued through a compliance order is “final” and subject to judicial review under the Administrative Procedure Act. Relying on *Bennett*, the Court had no trouble finding that the compliance order “marks the ‘consummation’ of the agency’s decision-making process.”³⁰ The Court held the order marked the consummation of the agency’s decision-making process because “the ‘Findings and Conclusions’ that the compliance order contained were not subject to further agency review.” *Id.* This description of the compliance order applies with equal force to the JD in *Hawkes*.

The “Findings and Conclusions” in *Sackett* included a jurisdictional decision or determination not unlike the JD in *Hawkes*. In fact, the JD in *Sackett* served as the predicate finding of a violation. Justice Ginsburg’s concurring opinion makes this clear:

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued “to contest the *jurisdictional bases* for the order.” Brief for Petitioners 9. “As a logical prerequisite to the issuance of the challenged compliance order,” the Sacketts contend, “EPA had to determine that it has regulatory authority over [our] property.” *Id.* at 54-55. The Court holds that the Sacketts may immediately litigate their *jurisdictional challenge* in federal court. I agree, for the Agency has ruled definitively on that question.³¹

Justice Ginsburg’s conclusion applies with equal force in *Hawkes*, because the compliance order at issue in *Sackett* con-

tained no more indicia of finality than the JD did in *Hawkes*. That perceptive comment from Justice Ginsburg on finality is as good a place as any to turn to *Hawkes* and the EPA’s over-reaching sibling: the Army Corps of Engineers.

V. FACTUAL AND PROCEDURAL BACKGROUND OF HAWKES

In *Hawkes*, a Minnesota business sought permission to harvest 530 acres of swampland for peat moss used in landscaping. The owner conceded from the beginning that the swampland amounted to wetlands by definition. However, under the Supreme Court decision in *Rapanos*, only wetlands adjacent to a permanent water body, or which have a “significant nexus” with traditional navigable waters, are subject to federal jurisdiction under the CWA. Since the nearest river sat 120 miles away, and no water bodies connected the swampland to the river, *Hawkes* argued, nobody could reasonably find these wetlands subject to federal jurisdiction.

But the Corps nevertheless issued a Jurisdictional Determination asserting the swamp was covered by the Act, without demonstrating the requisite connection to traditional navigable waters, so *Hawkes* sought to challenge the determination in court.³² *Hawkes* argued that the *Sackett* decision requires judicial review of JDs.³³ *Hawkes*’ argument flowed from the logic of *Sackett*: (1) the JD represented the consummation of the Corps’ decision-making process, and (2) the JD had immediate legal consequences for *Hawkes*.³⁴

The trial court rejected the application of *Sackett*.³⁵ It ruled for the government and held that *Hawkes* had three options: (1) abandon the project and, perhaps, the business; (2) seek an arguably unnecessary federal permit at a devastating cost of over \$270,000; or (3) go forward without a permit risking civil fines of up to \$75,000 per day and/or criminal sanctions including imprisonment. Those did not amount to immediate legal consequences, in the court’s estimation—despite the *Sackett* decision.³⁶

Pacific Legal Foundation represented *Hawkes* as it appealed that decision to the Eighth Circuit. The court of appeals reversed.³⁷ The court held, relying on *Sackett*, that JDs are final agency actions subject to immediate challenge in court.³⁸ In discussing the three “alternatives” that the trial court held demonstrated a lack of immediate legal consequence, the court explained:

The prohibitive costs, risk, and delay of these alternatives to immediate judicial review evidence a transparently obvious litigation strategy: by leaving appellants with no immediate judicial review and no adequate alternative remedy, the Corps will achieve the result its local officers desire, abandonment of the peat mining project, without having to test whether its expansive assertion of jurisdiction—rejected by one of their own commanding officers on administrative appeal—is consistent with the Supreme Court’s limiting decision in *Rapanos*.

The Court’s decision in *Sackett* reflected concern that failing to permit immediate judicial review of assertions of CWA jurisdiction would leave regulated parties unable, as a practical matter, to challenge those assertions. The Court

concluded that was contrary to the APA's presumption of judicial review.³⁹

In holding for *Hawkes* on the question of legal consequences arising from the JD, the court explained why the Corps' arguments to the contrary held no water:

The Corps' assertion that the Revised JD is merely advisory and has no more effect than an environmental consultant's opinion ignores reality. "[I]n reality it has a powerful coercive effect." *Bennett*, 520 U.S. at 169, 117 S.Ct. 1154. Absent immediate judicial review, the impracticality of otherwise obtaining review, combined with 'the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case . . . leaves most property owners with little practical alternative but to dance to the EPA's [or to the Corps'] tune.'" "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Sackett*, 132 S.Ct. at 1375 (Alito, J., concurring).⁴⁰

In other words, due process requires nothing less than the opportunity to go to court when the government tramples one's constitutional rights—here, due process and property rights. The *Sackett* Court said so unanimously, and the *Hawkes* panel gave the same response.

Judge Kelly, in her concurrence, explicitly relied on Justice Ginsburg's explanation for her vote (as described above) in finding the JD reviewable. In *Sackett*, Ginsburg's vote turned on the EPA's determination of jurisdiction that set the dispute in motion; likewise, as Judge Kelly pointed out, the JD set the dispute in motion in *Hawkes*.⁴¹

VI. THE EIGHTH CIRCUIT PANEL DECIDED HAWKES CORRECTLY

There are at least three consequences arising from a JD that meet the *Bennett* test for agency action finality, and demonstrate that the Eighth Circuit got the finality question right. First, a JD finding jurisdiction makes it much more likely that any civil fine assessed against the landowner will be greater than if the JD found no jurisdiction.⁴² Second, a JD directly and immediately alters a landowner's course of conduct. A JD constitutes the Corps' authoritative determination that a given site is subject to CWA regulation and, therefore, that the site's owner thus must seek a permit prior to commencing any dredge or fill activity.⁴³ Third, a JD fulfills *Bennett's* legal consequences requirement because a JD can provide legal immunity, through an estoppel defense, to landowners.⁴⁴ *Hawkes* got it right.

The *Hawkes* decision is not only correct as a matter of law, but is also good judicial policy because it allows the public to avoid the dilemma for the regulated public that the *Fairbanks* and *Belle Company* courts did not allow. Once a landowner receives a JD finding jurisdiction, he can: (1) abandon his development plans; (2) seek a permit, expending considerable sums that cannot be refunded regardless of how jurisdiction is ultimately resolved; or (3) proceed with his development at the risk of serious civil and criminal penalties.⁴⁵ The law does not support forcing this choice upon landowners.

And this choice is abhorrent to sound environmental policy. Both the regulated public and the Corps have strong interests in ascertaining the extent of CWA jurisdiction as early

as possible. For the landowner, finding out whether jurisdiction exists helps to avoid the costs of litigating unnecessarily over jurisdiction. For the Corps, an early judicial determination regarding jurisdiction helps to focus the agency's enforcement efforts. There is no reason to expend manpower and resources in a prolonged permit or enforcement proceeding if CWA jurisdiction is absent. Agency resources could instead be directed to those cases where jurisdiction has been judicially determined to be present.⁴⁶

Moreover, because JDs are not typically issued within the context of an enforcement action, and are not a necessary prelude to such an action, judicial review would not hamper the Corps' administration of the CWA. Relatedly, judicial review of pre-enforcement activities would not effectively deny the Corps the power of election among enforcement mechanisms (e.g., a pre-enforcement order as opposed to immediate judicial action), because the issuance of a JD does not presuppose that the applicant has already or is continuing to violate the CWA.

VII. CONCLUSION

Like the jurisdictional decision in *Sackett*, the formal JD in this case has immediate and direct legal consequences. It is, in fact, an adjudicative decision that applies the law to the specific facts of this case and is legally binding on the agency and the landowner, thereby fixing a legal relationship; these are the elements of a "final agency action." Therefore, the Corps' Jurisdictional Determination or JD is justiciable.

Recent agency actions in this area of the law heighten the need for the Supreme Court to open the courthouse doors to landowners. On June 29, 2015, the Corps and EPA issued a controversial new rule redefining "waters of the United States" subject to federal control under the Clean Water Act.⁴⁷ Among other things, this rule expands the scope of the Act to cover tributaries and isolated waters this Court held could not be regulated in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*⁴⁸ and *Rapanos*. The new rule will affect millions of landowners nationwide.

Questions of reviewability of EPA and Corps actions under the CWA have been in the federal courts for decades. Much of the case law has focused on the reviewability of pre-enforcement actions. For a host of reasons, before *Sackett*, and now *Hawkes*, the courts had consistently held that APA review is unavailable for these types of actions. The Supreme Court in *Sackett* and the Eighth Circuit in *Hawkes* correctly changed the trajectory of administrative law and hemmed in agencies that had long ago left the bounds of reasonableness. That is why the Supreme Court of the United States should affirm the Eighth Circuit's wise decision in *Hawkes*—that case, like *Sackett* before it, recognized the need to protect due process and basic fairness, and to cabin the power of agencies that for too long have acted well beyond their constitutional limits.

Endnotes

1 782 F.3d 994 (8th Cir. 2015), *rev. granted*, 2015 WL 8486656 (Dec. 11, 2015).

2 *Id.* at 1002.

INTELLECTUAL PROPERTY

WHAT'S AT STAKE IN *CUOZZO V. LEE*: THE VIEW OF THE PETITIONER

By David L. Applegate*

Currently pending on the docket of the United States Supreme Court is the case of *Cuozzo Speed Technologies, LLC, v. Michelle K. Lee, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, No 15-446, on petition for writ of certiorari. At issue, first, is whether claims in patent cases arising from the Patent Trial and Appeal Board (PTAB) should be construed in the same manner as claims in cases arising from the district courts. A second issue, a matter of horizontal separation of powers, is whether the Federal Circuit correctly held that PTAB decisions to institute inter partes review (IPR) are judicially unreviewable even if the PTAB exceeds its statutory authority in instituting such proceedings. Because Congress intended IPR as a less expensive surrogate for litigation, this article, like petitioner, argues that the same standard should apply to claim construction regardless of forum. This article takes no position on the second issue, but summarizes the arguments of petitioner.

I. FACTS OF THE CASE

Petitioner Cuozzo Speed Technologies, LLC (Cuozzo) owns a patent on an invention that, by integrating a GPS device with a display system inside the vehicle, alerts drivers when they exceed the posted speed limit at any given location. Garmin, the maker of many in-vehicle GPS systems, filed an IPR, described more fully below, challenging, among others, claims 10, 14, and 17 of the Cuozzo patent.

An IPR Board of the PTAB denied all unpatentability grounds that Garmin had asserted with respect to claims 10 and 14, but then applied to those same claims the prior art that Garmin had cited against claim 17. Based on that claim 17 art, the PTAB instituted an IPR against all three claims. The PTAB ultimately determined that claims 10, 14, and 17 were all obvious in view of the prior art. Cuozzo appealed the decision to the Federal Circuit, at which point Garmin settled with Cuozzo. The U.S. Patent and Trademark Office (USPTO) then intervened to defend the Board's decision.

Nine groups have filed amicus briefs: the American Intellectual Property Law Association; the Biotechnology Industry Organization; the Intellectual Property Owners Association; the New York Intellectual Property Law Association; Pharmaceutical Research and Manufacturers of America; Trading Technologies International, Inc.; Interdigital, Inc., Tessera Technologies, Inc., and Fallbrook Technologies, Inc.; and the Intellectual Property Law Association of Chicago. This author was the primary author on the brief of The Intellectual Property

Law Association of Chicago, and draws on that brief in part with respect to the first issue in this case.

II. CONSTITUTIONAL AND STATUTORY BACKGROUND OF THE AMERICA INVENTS ACT

The purpose of U. S. patent law is “to promote the Progress of Science and the Useful Arts”¹ Valid patents provide an incentive for inventors to make their inventions and discoveries known to the world by enabling patent owners to exclude marketplace competitors for a term Congress deems sufficient to enable patent owners to earn a reasonable return on their investment. In contrast, by their very nature, patents invalid under Section 102 or Section 103 exclude from the marketplace competitors who merely practice known art (Section 102) or obvious improvements (Section 103). Using invalid patents to exclude qualified competitors from the market impedes the progress of the useful arts by permitting “owners” of invalid patents to monopolize technologies or to charge monopoly prices for practicing them, thus frustrating the purpose of the Constitution's patent clause.

In 1790 Congress enacted the first patent statute, and in 1954 the 83rd Congress enacted the statute's last major overhaul until recent years. In 1995 Congress made other improvements, including bringing the term of U.S. patents into harmony with those of many other Western nations. (Instead of seventeen years from issuance, for example, U.S. patents now expire twenty years from the application date, subject to certain adjustments due to delays within the USPTO.)

Dissatisfaction with the amount and expense of U.S. patent litigation has led to further reforms in the past five years. Part of the dissatisfaction has been with the perceived quality of the patents themselves. In response to early 2000s criticism that the USPTO was granting too many patents likely to be found invalid, for example, the 112th Congress in 2011 passed the Leahy-Smith America Invents Act (AIA).² At the same time, Congress had concluded that the existing patent litigation system itself unnecessarily imposes unneeded litigation and ancillary costs.³ This, too, frustrates the purpose of the Constitution's patent clause and undermines the value of the U.S. patent system.

III. THE PURPOSES OF INTER PARTES REVIEW

In keeping with its Constitutional charter, the AIA seeks to improve the climate for investment and industrial activity by improving the quality of patents and by reducing unnecessary litigation costs.⁴ The AIA attempts to achieve the former by removing invalid patents from enforceability. It attempts to accomplish the latter by shifting patent validity disputes from the courts to the USPTO, the expert agency charged with granting or denying patents in the first place.

To that end, the AIA has established a new post-grant adjudicatory process for challenging patent validity, limited to

* David Applegate is Chair of the Intellectual Property Practice Group at Williams Montgomery & John Ltd., a Firm of Trial Lawyers, headquartered in Chicago, Illinois, and an Executive Committee Member of the Federalist Society's Intellectual Property Practice Group. The views expressed here are his own.

issues that may be raised under Sections 102 and 103 of the Patent Act. Section 102 governs “anticipation”—i.e., whether an existing invention already includes all the salient features of the claimed invention. Section 103 governs obviousness—whether the invention would have been “obvious to one of ordinary skill in the field of art” to which the invention applies.

To administer this adjudicative process, the AIA has created a new body called the Patent Trial and Appeal Board, or PTAB, staffed with administrative law judges. Located within the existing Patent and Trademark Office, the PTAB employs an adjudicative proceeding known as inter partes review, or IPR. IPR has no relationship to a previously-existing practice of patent re-examination within the USPTO—an extension of the prosecution process—and is intended instead as a less expensive surrogate for litigation, complete with limited discovery and briefing opportunities.

IV. THE PROCESS OF INTER PARTES REVIEW

IPR differs substantially from the USPTO patent examination process as well as from pre-AIA re-examinations. Under pre-existing law, a party could challenge an issued patent’s validity through inter partes re-examination. But that process, unlike IPR, was examinational in nature. Patent re-examination necessarily considered patentable subject matter under Section 101, in addition to anticipation under Section 102 and obviousness under Section 103. Re-examination allowed patent examiners to search for potentially invalidating prior art. Re-examination also freely permitted amendments by the patent owner as part of the iterative process between the USPTO and the patentee.

By enacting the AIA, Congress created IPRs as a streamlined adjudicatory process. Central to the AIA’s scheme is having a reliable early indicator of a patent’s quality. Thus, after a patent issues, the AIA provides for the possibility of an IPR by technology-trained patent-savvy adjudicators.⁵ This new type of review is distinct from pre-AIA patent re-examination procedures in several ways. Unlike prior examinations and re-examinations, the IPR process is adversarial, not examinational. Unlike in USPTO patent prosecutions, the IPR Board is not authorized to conduct its own prior art searches. Unlike in examinations and re-examinations, the patentee’s ability to amend claims is extremely limited.⁶ Indeed, in practice, the ability to amend a claim during an IPR is all but illusory.

Thus, IPRs lack the back-and-forth of patent prosecution or re-examination. Rather, IPRs are adversarial and adjudicatory, as is district court litigation—merely streamlined. An IPR’s exclusive central features are (1) “non-notice” (fact-specific) pleading by challengers; (2) fact-specific responsive pleading by patent owners; (3) cross-examination of experts employed by affidavit, limited to seven hours, following the challenge and response; (4) a reply; and (5) a one hour lawyers’ oral argument with exclusion of a “full” record. More fundamentally, unlike patent examinations, IPRs involve only patents already granted. As such, the patent holder already owns a recognized property right with established metes and bounds. Respect for that property right demands a fundamentally different kind of review from patent examination.

Like district court litigation, IPRs are adjudicatory; unlike district court litigation, they are limited to Section 102

novelty and Section 103 obviousness. Prior art is limited to patents and printed publications. The USPTO Director serves as gate-keeper, while the parties present the arguments and art. A challenger to validity of an existing patent files a petition with the PTO,⁷ limited to Section 102 (novelty) or 103 (obviousness) on the basis of prior art patents or printed publications.⁸ The petition must identify with particularity both the grounds and the evidence that challenge each claim.⁹ The patentee may then file a preliminary response setting forth why the PTO should not institute IPR.¹⁰

The IPR process streamlines and stages discovery and, absent good cause shown, requires a final written decision within twelve months.¹¹ If the PTAB institutes IPR, the patentee may conduct limited discovery, including depositions of petitioner’s declarants.¹² The patentee may also respond with particularity to the petition and file supporting affidavits or declarations.¹³ If the patentee responds, petitioner may conduct limited discovery, including depositions of the patentee’s declarants, and may file a reply.¹⁴ Either party may request an oral hearing.¹⁵ A panel of at least three administrative patent judges conducts the hearing, which the AIA considers to be a trial.¹⁶ (Unlike a district court trial, the proceeding excludes live witnesses and relies instead on the parties’ paper submissions and attorney argument.¹⁷) Like district court decisions in patent cases, IPR decisions of the PTAB are directly reviewable by the U.S. Court of Appeals for the Federal Circuit.¹⁸

Absent good cause shown, motions to amend are limited to one per patent, only after conferring with the Board.¹⁹ As in *Cuozzo*, IPR Boards routinely deny such motions.²⁰ Since the AIA took effect in September 2012, parties have filed over 3,400 IPR petitions.²¹ As of June 15, 2015, the PTAB had allowed motions to amend in only four IPR proceedings.²² In practice, then, the right to amend has been largely illusory.

In sum, to improve patent quality and to reduce litigation costs, the AIA created IPRs as “an inexpensive and speedy alternative to litigation.”²³ The process bears little, if any, resemblance to any previous proceedings within the USPTO.²⁴

A. *The Problem with Inter Partes Review*

As Petitioners’ opening cert petition shows, IPRs filed since the AIA’s effective date have yielded an unexpectedly high rate of patent claim cancellation. Of the over 3,400 IPR petitions filed since the AIA’s inception, as of October 6, 2015, nearly 85% have resulted in cancellation of some or all the claims under review.²⁵ One reason, petitioners believe, is that the PTAB applies a broader standard of claim construction than the federal courts.²⁶ By construing claims more broadly than the courts, the PTAB necessarily considers a larger universe of prior art and heightens the potential impact of a given piece of art. Concomitantly, this increases the likelihood of finding a patent either anticipated under Section 102 or obvious under Section 103.

Promoting the progress of the useful arts requires not only awarding valid patents but also administering a non-arbitrary system for challenging or upholding them. A non-arbitrary system requires that the standards for challenging or upholding validity be the same regardless of the forum. To achieve its constitutional purpose, the patent system must also strike an

appropriate balance between patent rights holders and other innovators. It cannot, and should not, attempt to tilt the playing field based on popular perceptions or political winds. The Supreme Court should therefore clarify that the proper standard for claim construction in assessing validity of an issued patent does not depend on whether the initial forum is a district court or the PTAB.

Yet the PTAB's claim construction standard for IPR is decidedly inconsistent with the standard used by federal courts. When construing claims in accordance with applicable law, federal courts must construe claims according to the "plain and ordinary meaning" of the language of the claim.²⁷ An IPR Board, however, applies the "broadest reasonable construction" consistent with the specification. To achieve consistency and coherence in recognizing the property rights of patent owners, the Supreme Court should grant cert in *Cuozzo* to clarify that the litigation standard—"plain and ordinary meaning"—applies in IPRs as well.

Nothing in the AIA itself requires that IPR Boards employ a "broadest reasonable" claim construction. To the contrary, such construction is an anachronistic holdover from the USPTO's examination and re-examination processes. In those proceedings, the USPTO examines prior art and raises potential arguments against patentability using the "broadest reasonable interpretation" of the claims consistent with the patent's specification. The applicant then has the opportunity to amend its claims in view of the prior art to point out more particularly the invention claimed. In this give-and-take examinational process, a "broadest reasonable interpretation" makes perfect sense. In the context of the AIA's IPRs it does not.

B. Promoting A Single Standard for Judicial Review

To achieve the AIA's aims, two adjudicative bodies reviewing the same patent's validity over the same prior art should reach the same result. Indeed, it would frustrate the intent of Congress and the purpose of the Constitution's patent clause to do otherwise. All adjudications should therefore require a clear, single standard applicable to all such reviews, irrespective of the reviewing body.

As with patent infringement, the prerequisite for determining patent validity is claim construction.²⁸ A patent's claims determine its metes and bounds and therefore what distinguishes it from the prior art. This establishes novelty; that is, what makes the patent neither anticipated under Section 102 nor obvious under Section 103.

Without guidance from the Congress or the Supreme Court, the PTAB has been construing patent claims in IPRs using the same standard that PTO examiners use in examining patents prior to issue. That scope is the "broadest reasonable interpretation consistent with the specification."²⁹ In patent examinations and re-examinations that standard makes sense because the process is iterative: the applicant and the examiner effectively work in give and take fashion to refine the scope of the proposed claims.³⁰

But district courts, in contrast, are bound by the Supreme Court's and Federal Circuit law to give claims their "plain and ordinary meaning."³¹ And, since *Markman*, it has been the duty of the court, as a matter of law, to determine the meaning of

the claims.³² The difference between these two standards—"broadest possible interpretation" on the one hand, "plain and ordinary meaning" on the other—is believed to be the reason for the unexpectedly high rate—nearly 85%—of IPR claims cancellation to date.³³

At best, the application of two different standards invites confusion and forum-shopping. Because the IPR Board is a surrogate for the district court, the two standards should be the same.

V. PROMOTING COST-EFFECTIVENESS THROUGH A SINGLE STANDARD

Congress could not have been clearer that IPRs should be cost-effective surrogates for litigation.³⁴ Both administrative adjudication under the AIA and district court adjudication are reviewable by the same court, namely the United States Court of Appeals for the Federal Circuit. And although factual determinations underpinning the district court's claim construction may be entitled to deference,³⁵ the Federal Circuit reviews all legal aspects of the claim construction de novo. Like the district court's construction, that de novo review, requires giving claim language its plain and ordinary meaning.³⁶

A valid patent must "distinctly claim" the inventor's invention.³⁷ A proper claim construction is therefore an essential element of promoting the progress of the useful arts. Specifically, a proper claim construction is central not only to an infringement analysis but also to a patent's validity.³⁸ While the former determines the scope of the patent holder's right to exclude, the latter determines the right to exclude at all.

Applying differing standards to a claim construction reached under an IPR from one reached by a district court would quickly lead to incoherence. In and of itself, that would mean that the patent challenger's choice of forum—i.e., whether to file IPR petition or a federal lawsuit—could be dispositive, up to and including the level of Federal Circuit review. More important, it would unacceptably permit differing tribunals charged by the same Congress to reach differing results on the same evidence.³⁹

A coherent approach consistent with the language and intent of the AIA would apply the same claim construction standard with which district courts and the Federal Circuit are already familiar. That standard is the "plain and ordinary meaning" of the claim language to one of ordinary skill in the art.⁴⁰ The "plain and ordinary meaning" standard is particularly appropriate under the AIA because of the limited opportunity for claim amendment. As the majority below recognized in both its original and amended opinions, even the USPTO does not employ the "broadest reasonable interpretation" when re-examining the claims of an expired patent because the patentee is unable to amend the claims.⁴¹

Nothing in the AIA, moreover, requires the IPR Board to employ the "broadest reasonable interpretation" for claim construction. To the contrary, a simple panel majority of two judges below decided that Congress "impliedly approved" the rule merely by creating the new IPR proceedings.⁴²

As the Supreme Court has long recognized, however, "Congress' silence is just that—silence."⁴³ Here, the purpose of Congress was to create a streamlined alternative to district

court litigation. As with district court litigation, the process is adjudicative, reviewable by the Federal Circuit. If the goal is to reach the same result on claim constructions, then the standard should be the same.

Indeed, if the standard is not the same, then the law directed to claim construction will become increasingly muddled. Inevitably, law developed and refined by the Federal Circuit when addressing district court claim constructions under the “plain and ordinary meaning” standard will diverge from that arising when the Federal Circuit reviews decisions based on the “broadest reasonable construction” standard. This would be a disservice to patentees that has no place in patent law and no grounding in the AIA.

VI. CUOZZO’S SECOND ISSUE

Of less importance, perhaps, from the standpoint of intellectual property law but of great importance from a structural separation of powers point of view is whether the PTAB’s decision to institute an IPR is even judicially reviewable. On its face, 35 U.S.C. § 314(d) provides that “whether to institute an inter partes review under this section shall be final and nonappealable.” But does that mean the law merely prohibits interlocutory appeals of the PTO’s decision to institute such a proceeding, or that an aggrieved party may not ultimately appeal on the grounds that the Board improperly instituted a proceeding?

In normal patent litigation, of course, nothing prohibits a party from appealing a district court’s decision on the grounds that the court lacked jurisdiction in the first place or that it erred in failing to grant a motion to dismiss. But does a party’s choice to challenge a patent’s validity in an IPR accomplish exactly the opposite result?

The issue arises in *Cuozzo* because of the narrow language of the AIA’s jurisdictional grant of IPR authority to the PTAB. Under the AIA, the petition for IPR must identify with particularity “the grounds on which the challenge to *each* claim is based, and the evidence that supports the grounds for the challenge to *each* claim.”⁴⁴ The PTO may then institute IPR only if “the Director determines that the information presented *in the petition ... and any response ...* shows that there is a reasonable likelihood that the petitioner would prevail.”⁴⁵

Yet in *Cuozzo*, Garmin as the petitioner had raised certain prior art only against claims 10 and 14, and the Director found that this art did not raise questions of Section 102 or 103 unpatentability against either one of those claims. Instead, the Director applied against claims 10 and 14 prior art that Garmin had cited only against claim 17, and invalidated all three claims. *Cuozzo* claims that this exceeds the PTAB’s granted authority because, in essence, neither the petition nor the response⁴⁶ presented any evidence of the cited prior art with respect to either claim 10 or claim 14.

In support of its argument, *Cuozzo* notes that IPR is but one of three new adversarial administrative proceedings that the AIA has created for challenging validity of issued patents. In addition to the IPR at issue in *Cuozzo*, the AIA also created “post-grant review,” which is available for patents during the first nine months after issuance,⁴⁷ and “covered business method,” or “CBM,” review.⁴⁸ The difference in how the Federal Circuit has treated IPRs from CBMs at least lends support to petitioners’

position that the PTAB’s decision to institute an IPR should be judicially reviewable.

All three types of adjudication are procedurally similar in that the PTAB decides in response to a challenger’s petition whether to instate the proceeding, then conducts a trial-like proceeding and issues a final written decision regarding patentability. Despite acknowledging in the CBM context that reviewability of the Board’s decisions is “a question of tremendous prospective importance” that may affect “countless future appeals,”⁴⁹ the PTO argues that such findings are nonreviewable in both cases.

Yet just one day after a divided panel of the Federal Circuit held in *Cuozzo* that the Board’s decision to institute IPR is not reviewable because of 35 U.S.C. 314(d), another divided Federal Circuit panel held in *Versata* that the Board’s decision to institute a CBM proceedings *is* reviewable, even though the governing statutory language is identical.⁵⁰ A later Federal Circuit panel tried unconvincingly to distinguish *Versata* as “limited to the unique circumstance of [CBM review]” but was forced to acknowledge in *Achates Reference Publ’g, Inc. v. Apple Inc.*,⁵¹ that the statutory provisions governing IPR and CBM review are “identically worded.”⁵²

Accordingly, petitioners in *Cuozzo* argue, the Supreme Court of the United States should accept this opportunity to provide its guidance to the highest lower court of review on the question, which has already aired the merits of both sides of the argument in their respective opinions in two separate cases. Whether the High Court will do so we don’t yet know; as of December 11, 2015, no conference had yet been set to vote on whether to grant the petition for certiorari in *Cuozzo*.

Endnotes

- 1 U.S. CONST., Art I, Sec, 8, cl. 8.
- 2 Pub. L. No. 112-29, 125 Stat. 284.
- 3 See H.R. Rep. No. 112-98, Pt. 1, at 39-40 (2011).
- 4 See H. R. Rep. No. 112-98, pt. 1, at 39-40 (2011); *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268, 1285 (Fed. Cir. 2015) (Newman, J., dissenting); Changes to Implement Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 7080, 7081 (Feb. 10, 2012).
- 5 See 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith).
- 6 See 37 C.F.R. 42.121 (new claims limited to one-for-one replacement of existing claims; burden on patentee to demonstrate patentability of claims affirmatively before amendment allowed).
- 7 See 35 U.S.C. 311(a).
- 8 35 U.S.C. 311(b).
- 9 35 U.S.C. 312(a)(3).
- 10 35 U.S.C. 313.
- 11 35 U.S.C. 316(a)(11).
- 12 See, e.g., 35 U.S.C. 316(a)(5); 37 C.F.R. 42.51.
- 13 See 35 U.S.C. 316(a)(8); 37 C.F.R. 42.120.
- 14 See 35 U.S.C. 316(a)(5), (13); 37 C.F.R. 42.51.

- 15 See 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70.
- 16 See 35 U.S.C. 6(c), 316(c).
- 17 See 35 U.S.C. 316(a)(10); 37 C.F.R. 42.70.
- 18 35 U.S.C. 141(c).
- 19 37 C.F.R. 42.121(a), (c).
- 20 See, e.g., *Idle Free Systems, Inc. v. Bergstrom, Inc.*, Case IPR2012-00027 (JL), 2013 WL 5947697, at *7 (June 11, 2013).
- 21 U.S. Patent and Trademark Office, Patent Trial and Appeal Board Statistics 8/31/2015, available at <http://www.uspto.gov/sites/default/files/documents/2015-08-31%20PTAB.pdf>.
- 22 See “PTAB Allows Motion to Amend in IPR Challenging Neste Oil Patent,” MANAGING INTELLECTUAL PROPERTY, June 15, 2015, available at <http://www.finnegan.com/news/newsdetail.aspx?news=d0d18aee-10e8-4511-bfa5-3b2962da1a39>.
- 23 157 Cong. Rec. S7413 (Nov. 14, 2011) (Statement of Rep. Smith).
- 24 Cf. *Belden Inc. v. Berk-Tek LLC*, Nos. 2014-1574, -1576 (Fed. Cir. Nov. 5, 2015), slip. op. at 8-9 (description of process).
- 25 Pet. Br. (I).
- 26 See Paul R. Michel, *Why Rush Patent Reform?*, 7 LANDSLIDE 49, 51 (2015); Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. Rev. 881, 916 (2015).
- 27 *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc); see generally Sarnoff & Manzo, An Introduction to, Premises of, and Problems with Patent Claim Construction, in PATENT CLAIM CONSTRUCTION IN THE FEDERAL CIRCUIT 9 (E. Manzo ed. 2014).
- 28 *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 996 n. 7 (Fed. Cir. 1995) (Mayer, J., concurring) (“A claim must be construed before determining its validity just as it is first construed before deciding infringement.”), *aff’d*, 517 U.S. 370 (1996); see generally Sarnoff & Manzo, *supra*, (“Patent claims ... should be construed from an objective perspective of a [skilled artisan], based on what the applicant actually claimed, disclosed, and stated during the application process.”).
- 29 See, e.g., *In Re Prater*, 415 F.2d 1393, 1405 (Ct. Cust. App. 1969) (“[C]laims yet unpatented are to be given the broadest reasonable interpretation consistent with the specification during the examination of a patent application since the applicant may then amend his claims, the thought being to reduce the possibility that, after the patent is granted, the claims may be interpreted as giving broader coverage than is justified.”).
- 30 *In re Buszard*, 504 F.3d 1364, 1366–67 (Fed. Cir. 2007) (“[T]he patent examiner and the applicant, in the give and take of rejection and response, work toward defining the metes and bounds of the invention to be patented.”); *In re Zletz*, 893 F.2d 319, 322 (Fed. Cir. 1989) (“During patent prosecution is when claims can be amended, ambiguities should be recognized, scope and breadth of language explored, and clarification imposed.”); see generally U.S. Patent and Trademark Office, Manual of Patent Examining Procedure (9th ed., Mar. 2014) § 2111 (requiring application of the “broadest reasonable interpretation” to pending claims).
- 31 *Phillips*, 415 F.3d at 1312.
- 32 *Supra* note 29.
- 33 Pet. Br. (I).
- 34 *In re Cuozzo Speed Technologies*, 793 F.3d at 1285 (Newman, J., dissenting).
- 35 *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 574 U.S. ____ , 135 S. Ct. 831, 836 (2015).
- 36 *Phillips*, 415 F.3d at 1312; *Markman*, 517 U.S. 370.
- 37 35 U.S.C. § 112(b).
- 38 *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. ____, 134 S.Ct. 2120, 2128 (2014) (citing Sarnoff & Manzo, *supra*).
- 39 *In re Cuozzo Speed Technologies, LLC*, 793 F.3d at 1285 (Newman, J., dissenting).
- 40 *Phillips*, 415 F.3d at 1312.
- 41 *In re Cuozzo*, 793 F.3d at 1276 n.6 (citing *In re Rambus, Inc.*, 753 F.3d 1253, 1256 (Fed. Cir. 2014)).
- 42 *Id.* at 1277.
- 43 *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989).
- 44 35 U.S.C. § 312(a)(3).
- 45 35 U.S.C. § 314.
- 46 See 35 U.S.C. § 314.
- 47 See 35 U.S.C. § 321(c).
- 48 CBM review is a temporary program, sunseting in 2020, that allows those who’ve been sued or charged with infringement to challenge patents of a financial product or service. See AIA 18(a)-(d), 125 Stat. at 329-331.
- 49 PTO Petition for Rehearing En Banc at 5 & n.1, *Versata Dev. Grp., Inc. v. SAP, Inc.*, 793 F.3d 1306 (Fed. Cir. 2015) (No. 2014-1194) (PTO Reh’g Pet.).
- 50 *Versata*, 793 F.3d at 1323.
- 51 No 2014-1767, 2015 WL 5711943, at * 1 (Fed. Cir. Sept. 30, 2015).
- 52 *Id.* at *5, *3.



BOOK REVIEWS

THE RIGHT TO TRY

BY DARCY OLSEN

*Reviewed by Evan Bernick**

Note from the Editor:

This book review discusses the controversial concept of the constitutional “right to try” experimental drugs to save one’s own life. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- Elizabeth Weeks Leonard, *Right to Experimental Treatment: FDA New Drug Approval, Constitutional Rights, and the Public’s Health*, 37 JOURNAL OF LAW, MEDICINE AND ETHICS 2009 (April 18, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1208428.
 - Sam Adriance, *Fighting for the ‘Right to Try’ Unapproved Drugs: Law as Persuasion*, 124 YALE L.J. F. 148 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698239.
 - Y. Tony Yang, Brian Chen, and Charles Bennett, “Right-to-Try” Legislation: Progress or Peril?, JOURNAL OF CLINICAL ONCOLOGY (2015), available at <http://jco.ascopubs.org/content/early/2015/07/14/JCO.2015.62.8057.full>.
 - Roger Pilon, M. Edward Whelan, Jonathan H. Adler, Curt Levey, *Abigail Alliance v. von Eschenbach Online Debate*, Federalist Society (2007), available at <http://www.fed-soc.org/publications/detail/abigail-alliance-v-von-eschenbach>.
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Do dying Americans have the right to try to save their own lives and the lives of their children? The question seems absurd because the answer is—or seems as if it should be—obvious. But every year millions of Americans suffering from fatal diseases are denied access to safe, potentially life-saving medicines by the federal government. Darcy Olsen’s *The Right to Try* is a shocking, sometimes heartbreaking, yet ultimately hopeful account of an ongoing tragedy and the growing campaign to put an end to it.

Federal law—specifically, the Food, Drug & Cosmetic Act¹ (FDCA)—generally prohibits marketing and distributing drugs that have not yet been approved by the Food and Drug Administration (FDA). It takes an average of fifteen years to bring a new drug to market (Olsen, 215). Americans suffering from fatal diseases for which there is no FDA-approved treatment have limited options. For all but the very few terminally-ill Americans who are qualified for and able to participate in clinical trials of unapproved drugs, or receive unapproved drugs through the FDA’s “compassionate use” programs (which provide terminally-ill patients with access to drugs on a case-by-case basis), the delay is deadly. As President of the Goldwater Institute, Olsen champions “Right to Try” (RTT) laws—state laws that are designed to expand access to “investigational”

drugs that have passed basic safety trials required by the FDA but have not yet been fully approved.

RTT laws have proven extraordinarily popular. As of this date, they have been approved in 24 states; in 14 of those states, they were enacted by the state legislature without a single dissenting vote in either house (25). Their popularity evinces a widely-held conviction among Americans that we have a right to try to save our own lives from deadly diseases or other fatal conditions. But because federal law trumps conflicting state laws, RTT laws are vulnerable to legal challenges by the FDA, and drug manufacturers face fines and even imprisonment for FDCA violations.² If the right to try is to be secured, federal courts must be prepared to recognize and enforce the constitutional right of self-preservation. Thus far, they have abdicated their responsibility to do so in cases involving investigational drugs.

In this essay, I will summarize Olsen’s book, argue that the Constitution protects the right of terminally-ill patients to try to save their own lives, and sketch the contours of a judicial approach that will ensure that the right to try is consistently enforced in our courts.

I. TRAGEDY AND TRIUMPH: THE RIGHT TO TRY MOVEMENT

Like the movement it chronicles, *The Right to Try* is a story of tragedies and triumphs—tragedies brought about by federally-imposed roadblocks to accessing promising new drugs and triumphs achieved by courageous and determined Americans who are working hard to remove those roadblocks.

Consider Jenn McNary. McNary’s sons, Austin and Max, are both afflicted with Duchenne muscular dystrophy, a fatal disorder for which no FDA-approved treatment was available when McNary received her sons’ diagnoses (30). Only through assiduous research and tireless efforts to identify a clinical trial

* *Evan Bernick is the Assistant Director of IJ’s Center for Judicial Engagement. He joined the Institute in July 2014, and he works to educate the public and persuade judges about the need for a properly engaged judiciary that enforces all of the Constitution’s limits on government in every case.*

THE RIGHT TO TRY is available for order at <http://www.amazon.com/The-Right-Try-Government-Lifesaving/dp/006240752Xdp/0700619968>.

for a promising drug was McNary able to get her younger son, Max, access to a drug that worked, called eteplirsen (34). But by that time Austin's condition had deteriorated to the point where he could not participate in the eteplirsen trial. Three years later, the FDA allowed the company that developed eteplirsen to expand its trials to include some older, sicker children, and Austin was finally able to get into a trial (261). The drug seems to be helping him—but, owing to the delay, Austin will not walk again (262). “None of this,” Olsen explains, “was to ensure the safety of the drug; it was all to get as close as possible to absolute certainty about the drug’s efficacy before the FDA approved its release” (263).

Understanding the plight of McNary and her sons requires a brief summary of the FDA’s drug approval process. Before any new drug is eligible for full approval and marketing, the Secretary of the U.S. Department of Health and Human Services must find “substantial evidence that the drug will have the effect it purports or is represented to have.”³ Under the authority conferred upon it by the FDCA, the FDA has promulgated regulations that require three phases of government testing on people. In Phase I, drugs are tested on 20 to 80 people to determine “the side effects associated with increasing doses, and, if possible, to gain early evidence on effectiveness.”⁴ Phase II involves targeted, controlled clinical studies of up to several hundred people “to evaluate the effectiveness of the . . . drug . . . and to determine the common short-term side effects and risks associated with the drug.”⁵ Phase III expanded trials, which can include several thousand people, are “are intended to gather the additional information about effectiveness and safety that is needed to evaluate the overall benefit-risk relationship of the drug.”⁶

Olsen describes the struggles of dying Americans and those who seek to aid them as they navigate a slow, cruel, costly, confounding regulatory process. The process is slow—as noted above, it can take years to bring a new drug to market. The process can seem cruel—the FDA continues to require “double-blind placebo controlled trials,” which means that parents of terminally-ill children must decide whether to enroll them in a trial that may provide them only with sugar water rather than a life-saving drug—even when it is well-understood what happens to those who do not get treated (223-226). The process is costly—drug manufacturers may not make a profit from emerging drugs and it costs millions of dollars to develop new drugs (206). The process is confounding—the FDA will approve a drug designed to treat a particular disorder on the basis of a short, small-scale study and then require far more complex, lengthier clinical study for follow-on drugs (222-225). And the FDA can, in Olsen’s words, “pull the football back” just when it seems as if approval is near—the FDA will inform companies that it is open to a new drug application after numerous trials demonstrating that the drug is safe and effective, then turn around and demand more data, delaying access for years (55-59).

Few alternatives are available to terminally-ill Americans suffering from diseases for which there is no FDA-approved treatment. They can enter into clinical trials for promising new drugs, but doing so can be very difficult. 40 percent of cancer patients try to get into trials—only 3 percent succeed (184). The

criteria for participants are strict, and they are getting stricter, with eligibility criteria doubling over the past decade (185). As noted above, Austin McNary initially did not qualify because he was too sick; others are rejected because they are too healthy (52). Still others simply live too far away from institutions at which trials are conducted to make the trip.

The FDA and Congress have created “compassionate use” programs to provide early access to unapproved drugs outside of clinical trials. The FDA may approve use of an unapproved drug for the treatment of “serious or immediately life-threatening disease[s]” if there exists “no comparable or satisfactory alternative drug or other therapy;”⁷ if “[t]he drug is under investigation in a controlled clinical trial,”⁸ and if the drug manufacturer “is actively pursuing marketing approval of the investigational drug with due diligence.”⁹ Drug manufacturers may not profit from any approved compassionate use program—they may only “recover costs of manufacture, research, development, and handling of the investigational drug.”¹⁰

These compassionate use programs are wholly insufficient to meet the need for access to emerging drugs. Although about 1,658,370 Americans were diagnosed with cancer in 2015 and 589,430 will die of it, the FDA receives only an average of 1,200 compassionate use requests per year (184). Why? An application for compassionate use requires a willing patient, a willing physician, and a willing drug manufacturer. Doctors rarely bother to apply for compassionate use for their patients because the barriers are overwhelming. The paperwork alone may take up to 100 hours to complete; that amounts to over two work weeks per patient,¹¹ which means, in effect, two weeks off from treating *other* patients. Drug manufacturers cannot be forced to provide drugs and they are reluctant to do so. Expanded use programs are very expensive, and, again, drug manufacturers cannot profit from them. Manufacturers also cite the risk that compassionate use could cause the FDA to delay approval of their new drugs if an adverse event occurs with a patient, and express concern that it will be harder to recruit patients for the large, randomized placebo trials the FDA requires if they make drugs available through a compassionate access program (189).¹² FDA officials contend that they are not standing in the way of access, and argue instead that the drug manufacturers are being overly conservative (190). As Olsen summarizes the situation, “The drug companies blame the FDA. The FDA blames the drug companies. Meanwhile, patients are dying—and no one is doing much of anything to help patients access promising drugs and treatments” (192).

Olsen makes a powerful case that the FDA is in the grip of an “often irrational quest for certainty” and is blind to the reality confronting terminally-ill patients (227). Thus, Dr. Janet Woodcock, director of the FDA Center for Drug Evaluation and Research, defends the FDA’s restriction on access to drugs that have passed Phase-I safety trials by saying that it “would not be good” “if people who build bridges . . . or skyscrapers” built them and they fell down eight out of ten times, and that eight of ten drugs that pass Phase-I trials do not prove effective (227). But, to draw upon that rather flippant metaphor, terminally-ill Americans are standing on bridges that are rapidly collapsing, and they must scramble to safety somehow. As Olsen puts it, “[w]hen someone has a terminal illness and has no other op-

tions, he will gladly take a drug with a 50 percent chance of 20 percent effectiveness, over the 100 percent chance that he will die without the drug” (227).

Olsen’s efforts to fix this broken system began in 2012, when a group of oncologists from the Cancer Treatment Centers of America (CTCA), one of the nation’s leading networks of cancer-treatment hospitals and outpatient centers, approached the Goldwater Institute. CTCA had been following Goldwater’s campaign to pass state constitutional amendments that protect the rights of workers to vote by secret ballot in choosing whether their workforce will be represented by a union. Frustrated by Congress’s failure to address a national medical emergency, the CTCA sought advice about whether states could do anything to expand access to investigational drugs that might save cancer patients’ lives (18-19).

In the subsequent months, Olsen and her colleagues created a blueprint for state legislation designed to expand access to investigational drugs and began a campaign to persuade legislators to enact “Right to Try” laws. These laws share several features. All permit drug manufacturers to supply investigational drugs that have passed Phase-I testing to terminally-ill patients who have exhausted all conventional treatment options, but only under certain conditions. The patient’s doctor must have recommended the drug; the drug must remain part of the FDA’s ongoing evaluation and approval process, and the patient must have given informed consent. Finally, all RTT laws bar state licensing boards from taking disciplinary action against physicians for recommending or prescribing drugs under the above conditions (24).¹³

Today, 24 RTT laws have been approved, thanks to a growing coalition of conservatives and liberals, moms and dads, pioneering researchers and former FDA officials—anyone and everyone who has been galvanized by the call to help their fellow Americans save their own lives (24). But, as we will see below, there is a very real question as to whether these laws are, in effect, “placebo legislation” that cannot produce meaningful changes in access to investigational medicine—at least, not unless the courts are prepared to recognize and enforce a constitutional right to try to preserve one’s life.

II. JUDICIAL ABDICATION: DENYING THE RIGHT TO TRY

Olsen depicts the Right to Try movement as a series of “political miracles” (26) and a vindication of federalism—the constitutional distribution of power between the federal government and the states, which guards against the concentration of power in any one governmental entity. And so it is. It is rare to find an issue that is capable of uniting Americans of all ideological persuasions in the service of a common end, and it is inspiring to see politicians setting partisanship aside to address a desperate need. The Right to Try movement offers vivid illustration of how, as Alexander Hamilton put it in Federalist 28, “If [the peoples’] rights are invaded by either [states or the federal government], they can make use of the other as the instruments of redress.”

But the FDA’s authority to regulate investigational drugs is conferred by federal law, and it is well-established that federal law (and regulations passed pursuant to federal law) preempts conflicting state laws, rendering them invalid under

the Constitution’s Supremacy Clause.¹⁴ If the FDA decides that the FDCA preempts RTT laws, it could seek to enjoin the states from thwarting its regulatory efforts and subject drug manufacturers who market and distribute unapproved drugs to enforcement actions. While it is true that, as Olsen puts it, “[f]ederal regulations that violate our constitutional liberties can never trump state laws protecting those liberties” (224), that begs the question: Does the Constitution protect the right to try to preserve one’s own life? The answer is yes, yet the courts have disavowed any responsibility to enforce what Olsen calls “the most personal, intimate right of all” (245) in cases involving access to investigational drugs.

It is beyond reasonable dispute that the people who wrote and adopted our Constitution believed that the essential function of any legitimate government was the protection of natural rights—rights that people possess in virtue of being born.¹⁵ For the Framers, the need to secure natural, “unalienable” rights both justified government and limited the scope of its “just powers.”¹⁶ As James Wilson, arguably the leading political theorist among the Framers, put it, government “should be formed to secure and enlarge the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind.”¹⁷

This understanding of the function and limits of government is embodied in numerous constitutional provisions that refer to preexisting rights and safeguard people against governmental deprivations of those rights.¹⁸ The most important constitutional provision for our purposes is the Due Process of Law Clause of the Fifth Amendment, which guarantees, in relevant part, that “No person shall be... deprived of life, liberty, or property, without due process of law.” The concept of “due process of law” is drawn from Magna Carta’s “law of the land” clause,¹⁹ which Founding-era lawyers, influenced by seventeenth-century jurist Sir Edward Coke, understood to be a prohibition against arbitrary government actions—unjustified deprivations of natural or common law rights.²⁰ Understood in historical context, the phrase “due process of law” connotes a normative conception of law, according to which government actions that lack certain characteristics are *not law at all*.²¹

One can see this normative conception of law at work in many late eighteenth-century judicial decisions, perhaps most clearly in Justice Samuel Chase’s opinion in *Calder v. Bull*.²² In *Calder*, the Supreme Court considered whether a state statute that vacated a probate court’s invalidation of a will and ordered a new trial of the will, despite the statute of limitations for appeals having run, violated the Constitution’s prohibition of *ex post facto* legislation by the states. Although the Court concluded that the statute was *not ex post facto* legislation, Justice Chase opined that states had no power to pass *ex post facto* legislation even if the Constitution did not specifically prohibit them from doing so: “There are certain vital principles in our free Republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.”²³ Chase went on to explain that a government action inconsistent with the primary purposes for which “government [is] established”

is not *law*: “An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”²⁴ Justice James Iredell famously disagreed, contending that the only limits on government power were those written into the Constitution’s text: “If... a government... were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”²⁵ Although Iredell’s positivist understanding of “law” has been embraced by some conservative originalists (perhaps most famously by Judge Robert Bork²⁶), his understanding appears to have been an outlier.²⁷

It is difficult to think of a government action more hostile to the purposes for which government is established than one that prevents people from preserving their own lives and thus makes the exercise of any other rights impossible.²⁸ James Wilson called the right to self-preservation “the primary law of nature.”²⁹ Alexander Hamilton stated that it was “paramount to all positive forms of government.”³⁰ In a series of decisions spanning the late nineteenth and early twentieth centuries, the Supreme Court consistently acknowledged the existence of a right to self-defense from violent attack, often without citing any constitutional provision.³¹ The Court has held in several cases that the Fourteenth Amendment’s Due Process of Law Clause protects the right to terminate a pregnancy in order to preserve life or health.³² Most recently, the Court in *District of Columbia v. Heller*³³ held that the Second Amendment protects an individual right to bear arms that is rooted in an “inherent right of self-defense.”³⁴

Notwithstanding the above history and case law, the FDA’s restrictions on access to investigational drugs have never been the subject of a successful constitutional challenge. The leading Supreme Court decision in this area remains *United States v. Rutherford*, in which the Court held that the government has an interest in regulating unsafe drugs.³⁵ But the Court in *Rutherford* did not consider whether terminally-ill patients have a right to try investigational drugs. Further, as Olsen notes, the case involved a “highly toxic product” called laetrile that the FDA had identified as a “public health menace” and could cause mental confusion, comas, and even death (246).

The most substantial treatment of the constitutional status of the right to try arose from a suit by the Abigail Alliance for Better Access to Developmental Drugs, an organization of terminally-ill patients and their supporters. The organization was founded by Frank Burroughs, whose daughter, Abigail, died of cancer before the FDA approved a drug that might have saved her life. The Alliance sought to enjoin the FDA from enforcing its policy of barring the sale of post-Phase I investigational drugs to terminally-ill patients. The Alliance argued that the Fifth Amendment’s Due Process of Law Clause protects the right of terminally-ill patients who have no government-approved treatment options, acting on their doctor’s advice, to procure those medicines (247).

In *Abigail Alliance v. Von Eschenbach*,³⁶ a three-judge panel of the U.S. Circuit Court of Appeals for the District of Columbia initially ruled in the Alliance’s favor. Judge Judith

Rogers, writing for the majority, applied the two-step test set forth by the Supreme Court in *Washington v. Glucksberg*³⁷ for identifying unenumerated “fundamental” rights—rights not expressly listed in the Constitution’s text but nonetheless entitled to heightened judicial scrutiny rather than the highly deferential “rational-basis test” applied to all other unenumerated rights. The *Glucksberg* test requires that the right being asserted 1) be given a “careful description” and 2) be “deeply rooted in this Nation’s history and tradition” to qualify as a fundamental right.³⁸ The majority described the claimed right as “the right of terminally-ill patients, acting on a doctor’s advice, to obtain potentially life-saving medication when no alternative treatment approved by the government is available.”³⁹ Turning to history, the majority found that the right of control over one’s body, including the “right to self-defense and the right to self-preservation” was recognized throughout Anglo-American history and law, whereas regulation of access to new drugs is relatively recent, and requirements that drug manufacturers provide evidence of effectiveness as distinct from mere safety are more recent still.⁴⁰ The majority also drew upon *Cruzan v. Director, Missouri Department of Health*,⁴¹ in which the Supreme Court held that the Fourteenth Amendment’s Due Process of Law Clause protects a terminally-ill patient’s right to *refuse* life-sustaining treatment. In *Cruzan*, the Court stated that “the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.”⁴² “The logical corollary,” wrote Judge Rogers, “is that an individual must also be free to decide for herself whether to assume any known or unknown risks of taking a medication that might prolong her life.”⁴³ The majority concluded that the FDA’s policy burdened a fundamental right and thus was subject to strict scrutiny—the most demanding standard of judicial review.⁴⁴ It remanded the case to the district court to determine whether the FDA’s policy was narrowly tailored to serve a compelling government interest.

This victory proved short-lived. The FDA petitioned the court for a rehearing, and the full circuit court reversed. Judge Thomas Griffith, writing for the court, stressed that the Supreme Court has directed lower courts to “exercise the utmost care” when identifying unenumerated fundamental rights, “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [courts’ members].”⁴⁵ Accepting at face value the FDA’s assertions that the drugs were potentially unsafe because post-Phase I tests are also concerned with safety, the court denied that any right of self-preservation was implicated, reasoning that “terminally-ill patients cannot fairly be characterized as using reasonable force to defend themselves when they take unproven and possibly unsafe drugs.”⁴⁶ Thus, the court defined the claimed right as the right to “be free to assume the risk of investigational drugs” “with no proven therapeutic benefit.”⁴⁷ The court, drawing upon drug regulations dating back to the colonial period, found that “[o]ur Nation’s history and traditions have consistently demonstrated that the democratic branches are better certainly suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so.”⁴⁸ Thus, the court determined that no fundamental right was implicated by the FDA’s policy. Applying the rational-basis test, the court easily concluded that the FDA’s policy was constitutional, cit-

ing the Supreme Court's decision in *Rutherford*, and urged the plaintiffs to seek recourse "through the democratic process."⁴⁹

In a vigorous dissent, Judge Rogers, writing for herself and Chief Judge Douglas Ginsburg, took the majority to task for its "flawed conception" of the right claimed by the Alliance and its "stunning misunderstanding of the stakes."⁵⁰ She drew extensively upon the common law doctrines of necessity and self-defense, as well as common law prohibitions against interference with rescue, explaining these doctrines' roots in an underlying right of self-preservation.⁵¹ To the majority's argument that the sought-after drugs *might* not save anyone's life, Judge Rogers responded that although one cannot be certain that the "driver of a car that is hurtling towards a cliff" will "press the brake" in time to save his life, he will *certainly* die if he does not.⁵² "No doubt the deceased members of the Alliance who were denied access to investigational drugs that were subsequently approved by the FDA would have been surprised to learn that these drugs... were unnecessary," she observed.⁵³ Judge Rogers noted that the Supreme Court had recently reaffirmed that the government may not ban abortion procedures if doing so subjects women to significant health risks,⁵⁴ adding as well that "[n]owhere in the Supreme Court's jurisprudence has it intimated that the government may ban procedures that represent a patient's only chance of survival because they might not be successful."⁵⁵ Judge Rogers went on to emphasize the recent lineage of restrictions on access to drugs based upon efficacy and observed that doctors are not prohibited from and often do prescribe drugs for purposes that the FDA has not approved "even if the drug is not deemed safe and effective for that use, such as when a drug studied only for adults is prescribed for a child."⁵⁶ Judge Rogers accused the majority of engaging in "tragic wordplay" in concluding that "the right to save one's life is unprotected notwithstanding the specific protection afforded life in the Fifth Amendment,"⁵⁷ and of neglecting prior decisions recognizing a "right to be free from unwarranted government intrusion."⁵⁸ Judge Rogers wrote, "It is difficult to imagine any context in which this liberty interest would be stronger than in trying to save one's own life."⁵⁹

As Olsen notes, the D.C. Circuit is only one of twelve circuits, and no other circuit courts are bound by *Abigail Alliance* (247). Nonetheless, the decision reveals a broken jurisprudence. The right to self-preservation is not merely a fundamental right but *the* fundamental right.⁶⁰ There is no sensible principle that justifies recognizing (as the Supreme Court has) a right to save one's own life by killing an attacker or undergoing a procedure that kills a viable fetus—but *not* a right to save one's own life by using a medical procedure that does not involve killing.⁶¹ And yet, the *Abigail Alliance* court failed to either grasp the right at stake or offer meaningful protection to it.

III. JUDICIAL ENGAGEMENT: SECURING THE RIGHT TO TRY

Abigail Alliance both discloses the need for effective judicial enforcement of the right to try and demonstrates that our prevailing approach to judicial review cannot fulfill that need. The D.C. Circuit's decision was the product of a deeply flawed approach to identifying "fundamental" rights and a default standard of judicial review—the rational-basis test—that is, as former Justice John Paul Stevens once put it, "tantamount to

no review at all."⁶² Fortunately, a treatment for what ails our jurisprudence is readily available.

How did we get to *Abigail Alliance*? Following the Civil War, state courts and, later, the Supreme Court used the Due Process of Law Clauses of the Fifth and Fourteenth Amendments to protect both enumerated rights, like freedoms of speech and of the press,⁶³ and unenumerated natural and common law rights, like the right to earn a living⁶⁴ and the right to raise and guide the upbringing of children.⁶⁵ But in the seminal case of *United States v. Carolene Products*,⁶⁶ a Court that had come to accept longstanding Progressive criticism of its use of the Due Process of Law Clauses to protect economic liberty set forth a new framework for judicial review. This framework was designed to preserve judicial protection for some individual rights deemed particularly important while allowing the government a wide berth to regulate "ordinary commercial transactions."⁶⁷ Justice Harlan Fiske Stone, writing for the Court, stated that regulatory legislation ought to be upheld "unless in the light of facts made known or generally assumed it is of such a character to preclude the assumption that it rests upon some rational basis."⁶⁸ But in a famous footnote (today known simply as "Footnote Four") the Court left open the possibility that "more searching judicial inquiry" might be called for when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, "interferes with the political process, or targets "discrete and insular minorities."⁶⁹

The "more searching scrutiny" contemplated by Footnote Four anticipated the development of "heightened scrutiny," which (in both its intermediate and strict forms) places the burden on the government to demonstrate, with reliable evidence, that its actions are calculated to achieve a proper governmental end. By contrast, the rational-basis test requires challengers to demonstrate the *unconstitutionality* of the government's actions and does not require the government to either offer any evidence or establish a factual nexus between its choice of means and its purported ends. Lower courts following the Supreme Court's lead have understood the rational-basis test to require judges *not* to seek out the government's true ends, disregard evidence concerning those ends, and even invent justifications for the government's actions that have no support in the record.⁷⁰ Often, the difference between heightened scrutiny and rational-basis review is the difference between meaningful judicial review and a charade with a predetermined outcome.

Although the Court initially applied heightened scrutiny only to burdens on textually enumerated rights, it later conferred "fundamental" status upon certain unenumerated rights on an *ad hoc* basis, including the right to bodily integrity, the right to associate, the right to private sexual intimacy, and the right to marry.⁷¹ It distinguished these "personal" rights from "economic" rights that were associated with a discredited line of precedent—and one might add, were simply regarded as less important.⁷² The "restrained methodology" articulated in *Glucksberg* and applied in *Abigail Alliance* was devised to prevent the "liberty" protected by the Court's Due Process of Law from being "subtly transformed into... [judges'] policy preferences."⁷³

As the result in *Abigail Alliance* demonstrates, *Glucksberg* has been interpreted to oblige judges to avoid recognizing

any new unenumerated rights, lest they engage in judicial policymaking. Courts have read *Glucksberg's* requirement of a "careful description" to mean a *narrow* description, and it is more difficult to argue that narrowly described rights are deeply rooted in our nation's history and traditions.⁷⁴ Thus, a "right to procure and use investigational drugs" fares more poorly than the right to self-preservation.

Together, the *Glucksberg* framework and the rational-basis test have produced a jurisprudence of unenumerated rights that is constitutionally unjustifiable and fundamentally unprincipled.⁷⁵ There is no constitutional basis for distinguishing between "fundamental" rights and other exercises of constitutionally protected freedoms and subjecting burdens on the latter to a less rigorous (indeed, often toothless) standard of review.⁷⁶ Further, an approach that encourages narrow rather than accurate descriptions of rights claims and gives judges cover to fail to vindicate genuine rights is no less an invitation to judicial policymaking than an *ad hoc* approach that (according to critics) gives judges cover to vindicate counterfeit rights.

Instead of marking out "fundamental" rights for special treatment and reflexively deferring to the government in the vast majority of constitutional settings, judges should consistently seek to determine whether restrictions on constitutionally protected freedoms are justified by a proper governmental end. Doing so requires consistent judicial engagement—genuinely impartial judicial review in which judges require the government to affirmatively demonstrate the constitutionality of its actions with reliable evidence.⁷⁷

What would this approach look like in the context of a constitutional challenge to the FDA's restrictions on investigational drugs? Certainly, protecting people from potentially unsafe drugs and ensuring that they are not duped by quacks are proper ends. We have seen, however, that the FDA's restrictions on drug access prevent terminally-ill patients from exercising the right of self-preservation. The government must therefore be required to demonstrate with reliable evidence that this burden is necessary to achieve concededly proper ends. Such judicial engagement is the rule in heightened scrutiny cases involving burdens on "fundamental" rights. It ought to be the rule in every constitutional case.

How would engaged review of the FDA's policies differ from the rational-basis review applied by the *Abigail Alliance* court? An engaged judge would not simply defer to the FDA's policy choices without making any effort to evaluate whether medicine that passed Phase-I testing is in fact unsafe or whether there is any credible evidence of fraud, but would conduct a factual review of the record. She would be cognizant of the fact that patients are acting on the advice of licensed physicians who have knowledge of their specific needs. She would distinguish medicine that has been identified as highly toxic from medicine that has passed basic safety tests. She would consider whether there is a public safety interest that counsels against denying access to medicine, as well as in favor of its regulation. Olsen recounts the horrific story of a clinic called "Oasis of Hope" that continues to offer laetrile—the "highly toxic product" at issue in *Rutherford*—to American patients across the border in Mexico (246). Instead of protecting terminally-ill patients from quack cures, the FDA's policies may be driving them to seek

out treatments that are not only ineffective but dangerous, for lack of other options. In summary, judicial engagement would ensure that the FDA makes a compelling showing of necessity when it denies people access to drugs that could save their lives.

IV. CONCLUSION

The Right to Try is at heart an optimistic book. It is optimistic about the American people; it is optimistic about the future of medicine; it is optimistic about the success of the Right to Try movement. But the right to try will never be secure if federal courts are unwilling to act as the "bulwarks of a limited Constitution" that the Framers envisioned.⁷⁸ The judiciary has a responsibility to ensure that the most fundamental of all rights "retained by the people"⁷⁹ is not extinguished by their servants in Washington or in their state capitals (245).

Olsen concludes her book with a comparison first suggested by Tracy Seckler, whose son Charley suffers from Duchenne and who has raised millions of dollars for Duchenne research. Seckler compares the plight of terminally-ill children to that of passengers on the *Titanic*. "We know it's going down with 100% certainty," Seckler says. "Let's work together to get more lifeboats in the water" (58). For Olsen, this comparison captures not only the urgency of her cause but the reason it will ultimately triumph: "On the one hand, Americans see drowning kids. On the other, they see the government and the pharmaceutical industry making excuses for why we can't rescue them" (276).

Judges, too, have been making excuses when it comes to recognizing and protecting our natural rights. *Abigail Alliance* lays bare the human costs of doing so. The choice between judicial engagement and judicial abdication is not a mere academic debate—it can be a matter of life and death. It is time for judges to choose life.

Endnotes

1 21 U.S.C. §§ 301 *et seq.*

2 *See* 21 U.S.C. § 333.

3 21 U.S.C. §355(d).

4 21 C.F.R. § 312.21(a).

5 *See* § 312.21(b).

6 *See* §312.22 (a).

7 21 C.F.R. § 312.34(a), (b)(1)(i)-(ii).

8 *Id.*, § 312.34(b)(1)(iii).

9 § 312.34(b)(1)(iv).

10 § 312.7(d)(3).

11 Brittany La Couture, *Right to Try*, AMERICAN ACTION FORUM (August 11, 2014), available at <http://americanactionforum.org/insights/right-to-try>.

12 Drug manufacturers are required to notify the FDA of "[a]ny adverse experience associated with the use of the drug that is both serious and unexpected," 21 C.F.R. § 312.32(c)(1)(A), and the FDA may order a "clinical hold" halting the trials if it determines that safety concerns so warrant, *id.* § 312.42.

- 13 See, e.g., ARIZ. REV. STAT. ANN. § 36-1313 (West Supp. 2014). Some RTT laws also limit clinicians' and manufacturers' civil liability for providing drugs to patients. See, e.g., COLO. REV. STAT. ANN. § 25-45-107 (West Supp. 2014).
- 14 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. See *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190, 203 (1983) ("Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.").
- 15 Even scholars who deny that natural rights are a source of enforceable legal claims acknowledge this. See, e.g., Phillip A. Hamburger, *Natural Rights, Natural Law, and American Constitutionalism*, 102 YALE L.J. 907 (1993).
- 16 See THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776). See also TIMOTHY SANDEFUR, *THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY* 7 (2013) (in the view of the Founders, "[f]reedom is more basic than government power, and it sets the terms that rulers must respect").
- 17 James Wilson, "Of the Natural Rights of Individuals," in *THE WORKS OF JAMES WILSON* 307 (1896).
- 18 See Sandefur, *supra* note 17 at 10 ("The Constitution promises to 'secure' liberty—not create it. It provides that no laws shall be passed 'impairing' contractual agreements; that Congress shall have no power to 'abridge the freedom of speech or to 'violate' the people's 'right' against unreasonable searches"); Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV 1, 82 (2006) (amassing evidence that the Ninth Amendment is properly read to protect "unenumerated, natural, and individual rights").
- 19 See MAGNA CARTA (1215 & 1225), reprinted in RALPH V. TURNER, *MAGNA CARTA THROUGH THE AGES* app. at 226, 231 (2003). ("No free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers and by the law of the land.").
- 20 See generally Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).
- 21 See Sandefur, *supra* note 17 at 72 ("[F]or a government act to qualify as law, it must comply with certain preexisting principles.").
- 22 3 U.S. (3 Dall.) 386 (1798).
- 23 *Id.* at 388.
- 24 *Id.*
- 25 *Id.* at 398.
- 26 See ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (criticizing Chase for "claiming a power beyond any written law," and crediting Iredell with having "resisted" "the impulse to judicial authoritarianism").
- 27 See Gedicks, *supra* note 22 at 651 (finding that "Iredell's position... was largely rejected by state constitutional decisions of the period, which generally held that the "law of the land" signified natural and customary rights that constrained legislative action and could not be altered by the exercise of ordinary legislative power.").
- 28 John Locke derived *all* natural rights from the right to self-preservation. See John Locke, "The Second Treatise," in *TWO TREATISES OF GOVERNMENT* § 6 (Peter Laslett ed., Cambridge Univ. Press 1960) (1698) ("Every one ... is bound to preserve himself, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what tends to the Preservation of the Life, the Liberty, Health, Limb or Goods of another."). See also Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting*, 7 OLD SOUTH LEAFLETS 417 (No. 173) (Burt Franklin 1970) (1772) ("Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of, rather than deductions from, the duty of self-preservation, commonly called the first law of nature.").
- 29 Wilson, *supra* note 18 at 336.
- 30 THE FEDERALIST No. 28 (Alexander Hamilton).
- 31 See, e.g., *Gourko v. United States*, 153 U.S. 183 (1893); *Thompson v. United States*, 155 U.S. 271 (1894); *Allison v. United States*, 160 U.S. 203 (1895); *Brown v. United States*, 256 U.S. 335 (1921). Surveying these cases, Professor Nicholas Johnson observes that the Court has acknowledged a right to self-defense "in the same straightforward way it would acknowledge that crops need rain." Nicholas Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y 187, 204 (2006).
- 32 See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *Casey v. Planned Parenthood*, 505 U.S. 833, 846 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 931 (2000). It is worth noting that Justice William Rehnquist, dissenting in *Roe*, stated that "[i]f the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective" and thus fail the rational-basis test. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).
- 33 128 S. Ct. 2783 (2008).
- 34 *Id.* at 2817. See David Kopel, *The Natural Right of Self-Defense: Heller's Lesson for the World*, 59 SYRACUSE L. REV. 999, 1012 (2008) (arguing that "Heller has made it clear that self-defense is part of the Constitution").
- 35 *United States v. Rutherford*, 442 U.S. 544 (1979).
- 36 445 F.3d 470 (D.C. Cir. 2006).
- 37 521 U.S. 702 (1997).
- 38 *Id.* at 720-21.
- 39 *Abigail Alliance*, 445 F. 3d at 478.
- 40 *Id.* at 482.
- 41 497 U.S. 261 (1990).
- 42 *Abigail Alliance*, 445 F. 3d at 484 (citing *Cruzan*, 497 U.S. at 281).
- 43 *Id.*
- 44 *Id.* at 486.
- 45 *Abigail Alliance v. Eschenbach*, 495 F.3d 695 (2007).
- 46 *Id.* at 710.
- 47 *Id.*
- 48 *Id.* at 703.
- 49 *Id.* at 714.
- 50 *Id.* at 714 (Rogers and Ginsburg, JJ., dissenting).
- 51 *Id.* at 717-720.
- 52 *Id.* at 720.

53 *Id.*

54 See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1635 (2004) (quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328 (2006)) (stating that a congressional ban on certain procedures used to perform abortions “would be unconstitutional... if it [subject[ed] [women] to significant health risks.”).

55 *Abigail Alliance*, 495 F.3d. at 721.

56 *Id.* at 726.

57 *Id.* at 728.

58 *Id.*

59 *Id.* at 727.

60 Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self Preservation*, 39 ALA. L. REV. 103, 117 (1987). (“[I]n liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial and due process of law.”).

61 See Eugene Volokh, *Medical Self-Defense, Prohibited Investigational Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813 (2007) (“American legal traditions properly recognize people’s right to protect their lives, even when that protection involves killing. The law ought to do the same when a dying person simply seeks an opportunity to risk shortening her already short remaining life in order to have the chance of lengthening it.”).

62 *FCC v. Beach Communications, Inc.*, 508 US 307, 323 n.3 (1993) (Stevens, J., dissenting).

63 See *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota ex. rel. Olson*, 283 U.S. 697 (1931).

64 See *Lochner v. New York* (1905); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

65 See *Pierce v. Society of Sisters*, 268 U.S. 510 (1923).

66 304 U.S. 144 (1938).

67 *Id.* at 152.

68 *Id.*

69 *Id.* at 152 n. 4.

70 See, e.g., *Bruinooge v. United States*, 550 F. 2d 624, 625 (Ct. Cl. 1977) (claiming the court is obliged to “resort to our own talents and those of counsel to discern what legitimate purpose Congress assigned to this statute”); *Shaw v. Or. Pub. Emps.’ Ret. Bd.*, 887 F.2d 947, 948 (9th Cir. 1989) (explaining that “[a] court may even hypothesize the motivations of the state legislature to find a legitimate objective”); *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 146 (1st Cir. 2001) (“Even if Soto’s stated justification for enforcing Market Regulation No. 13 is insufficient... this Court is obligated to seek out other conceivable reasons.”); *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) (“[W]e are not bound by the parties’ arguments as to what legitimate state interests the statute seeks to further.”).

71 See *Rochin v. California*, 342 U.S. 165 (1952); *NAACP v. Button*, 371 U.S. 415 (1963); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967).

72 See *United States v. Carlton*, 512 U.S. 26, 41-42 (Scalia and Thomas, J.J., concurring) (observing that “[t]he picking and choosing among various rights,” together with the “categorical and inexplicable exclusion of so-called ‘economic rights’... unquestionably involves policymaking rather than neutral legal analysis”).

73 *Glucksberg*, 521 U.S. at 720.

74 See Randy Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479 (2008) (discussing this problem in the context of *Raich v. Gonzalez*, 500 F.3d 850 (2007)).

75 Importantly, *Glucksberg* may no longer be good law. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (acknowledging and pointedly declining to apply the *Glucksberg* framework in determining whether same-sex couples have a right to marry). Dissenting in *Obergefell*, Chief Justice John Roberts stated that “the majority’s position requires it to effectively overrule *Glucksberg*.” *Id.* at 2621 (Roberts, C.J., dissenting). Some scholars have interpreted *Obergefell* as greatly diminishing *Glucksberg*’s strength and perhaps paving the way for its demise. See, e.g., Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162 (2015) (“After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent.”); Jack Balkin, *Bye Bye Glucksberg*, BALKINIZATION (June 27, 2015) <http://balkin.blogspot.com/2015/06/bye-bye-glucksberg.html> (“*Glucksberg* is clearly no longer the leading case on substantive due process, if it ever was.”).

76 Professor Randy Barnett has pointed out that Court’s substantive due process jurisprudence contradicts the express command of the Ninth Amendment by “disparaging” unenumerated rights. See RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 253 (2004).

77 See generally CLARK NEILY, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION’S PROMISE OF LIMITED GOVERNMENT* (2013) (defining judicial engagement).

78 See *FEDERALIST* No. 78 (Hamilton).

79 See U.S. CONST. amend. IX.



THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY

By RANDOLPH J. MAY & SETH L. COOPER

Reviewed by Richard A. Epstein*

THE NATURAL LAW APPROACH TO COPYRIGHTS AND PATENTS

One of the major unmarked developments in the past century of American law has been the decline of natural law thinking. Read any older treatment of, for example, property rights, marriage, or contract, and the unquestioned approach looks to natural law principles to set out the basic parameters of these social arrangements. Individuals by nature had the right to own and acquire property, and that gave them the full right to the exclusive possession, use, and disposition of their things. Marriage was a union between a man and woman to carry out nature's purpose of reproduction. Contract was the body of rules that allowed individuals to cooperate with each other in accordance with natural law. Until relatively recently, it was always understood that any system of property, marriage, or contract required formalities to verify that the appropriate rights were properly observed. Similarly, no one ever thought that these rights were so absolute in their inception that they could not be limited for good reason in particular cases. Indeed, the entire structure of the pleading laws, which built in ample room for excuses and justifications, built high levels of flexibility into the basic system.

The legal structures that grew up under the natural law banner powered virtually every legal achievement prior to, roughly speaking, the beginning of the twentieth century and the rise of the Progressive Era, at which point many legal doctrines moved in reverse. The criticisms of natural law theory predate that time; most famously, Jeremy Bentham quipped, with William Blackstone as his major target, that "natural rights are nonsense upon stilts."¹ Bentham, however, fell short in his attack, because his own preferred rules for the acquisition of property track to the letter the same conclusions that were earlier reached by natural law thinkers. Thus, in the *Theory of Legislation*, Bentham famously notes, "Property and law are born together, and die together."² He posited a utilitarian rationale for maintaining property rules to make good on his claim about the nonexistence of any natural rights. He used the example of a hunter who slays a deer, who has only the most precarious possession if he must physically hold onto the animal in order to preserve his claim of right. It is better if he may go about his business secure in the knowledge that others cannot take it away from him. Surely the state is needed to protect his expectation of future use; but the state must also use its power

to defend his possession of the deer even when he grasps it firmly in his own hands, lest someone seek to wrest it from him.

The conceptual work on broadening the definition of property comes from the thinking of the Roman scholars on possession. These scholars well understood that the law had to preserve possession even when actual physical control was not present; otherwise, no one could seek a remedy for things taken from his home while he was away. Blackstone wrote within this Roman law tradition when he, in Chapter I, Book II of his *Commentaries*, invokes natural law principles to conclude that:

[N]o man would be at the trouble to provide either [shelter or raiments], so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other.³

This connection is understood to this very day, for both natural law thinkers and utilitarians unite in concluding that unless individual labor is protected, no one will seek to accumulate or improve property in the first place. The old agricultural proverb that "no one should reap where he has not sown" covers far more than farming.

In their new book, Randy May and Seth Cooper work within this strong natural law tradition to defend the basic structure of intellectual property law. When a person makes an invention, it is not sufficient to protect the prototype (the physical property) if others are free to build replicas at will. When a person writes a novel, it is not sufficient to give him control of the original manuscript but allow others to freely copy. In both cases, the intangible nature of the property—which is the idea, not its physical instantiation—requires that protection extend against others who would copy the exemplar, lest the labor of the inventor or writer allow less creative rivals to produce a perfect substitute to the original invention or writing at a lower cost. In this sense, the protection that one gives to these two forms of intellectual property follow, as May and Cooper argue at great length, from the Lockean theory of labor whereby one individual acquires ownership of land or some particular thing by "mixing" his labor with it.

In assembling the impressive and continuous historical authority for the labor theory of value, May and Cooper successfully show how this natural law theory of property heavily influenced founding-era thinking about intellectual property, both at the state and the national level, even when the Articles of Confederation were still in force. It is perfectly permissible, even if ill-advised, for modern scholars to deride natural law principles. But it is far riskier to deny that these theories had any traction at the time that the United States Constitution—which offers explicit protection to intellectual property—was drafted.

On this matter, it is sometimes said that the Constitution displays only an ambivalent commitment to protecting

* Richard Epstein is the Laurence A. Tisch Professor of Law at New York University School of Law, the Peter and Kirsten Bedford Senior Fellow at The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer at The University of Chicago. Thanks go to Rachel Cohn, Julia Haynes and Madeline Lansky of the University of Chicago Law School for their valuable research assistance.

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provide for what will happen at the expiration of the initial term. In some cases, there may be renewal as of right; in other cases, there may be a purchase of the residual interest; in still others, any improvements may be removed or sold. All these permutations, and others still more complex, are within the capacity of the parties to specify at the outset, leaving the law with the unenviable task of guessing the proper resolution in cases where the parties have not made sufficient provision for what happens at termination.

The end-period problem gets a very different analysis for both patents and copyrights. The limiting of the patent or copyright does not require renegotiation over specific assets, as the assets in question slip into the public domain, available to all on equal terms, at the termination of the interest. That can happen because intellectual property is nonrivalrous, so anyone else can use the same invention or writing along with the owner. The Constitution specifies limited terms because of this unique feature of intellectual property. Terms have to be long enough to induce invention and authorship, but they should not be so long as to block imitative use down the road. Modern extensions through, for example, the Copyright Term Extension Act of 1998,⁶ lose sight of the original trade-off and thus represent a political regression from sound earlier policy by making terms far too long.

Given all this, May and Cooper's defense of the basic rights in the natural law tradition is warranted. But the question then arises: can these natural law principles deliver the remainder of a workable patent or copyright system? In my view, natural law tends to run out of gas when it comes to particular policy judgments. At this point, an explicit reckoning of the utilitarian trade-offs probably offers the better path of doctrinal coherence. On this score, I think that May and Cooper do themselves a disservice by limiting their focus to showing, as they surely do, how natural law principles explain our intellectual property system. In so doing, they only show that the older language should not be regarded as alien or suspect. But they could have strengthened their argument by critically examining the many subordinate doctrines that make both patent and copyright law tick. It is fine to explain that Joseph Story, the greatest nineteenth-century expositor of the system, was a firm believer in the protection of patents; but they might have fruitfully discussed how he and other writers dealt with particular questions, such as patentable subject matter, nonobviousness, best mode, or equivalents. A close look at originality, derivative works, and fair use could have rounded out the discussion of copyright. These key areas need discussion so that modern readers can be confident that their devotion to natural law principles does not drive patent law off the rails. If they had taken that approach, they would have had to explain why certain ideas must be left in the commons (as with air and water in the realm of physical property) in order for the system to work more accurately. At that point, the utilitarian justifications for *any* property system work themselves back into the equation. In my own view, the utilitarian foundations for natural law are deep, both historically and analytically. May and Cooper have done a fine job on the historical side. But in this age of widespread skepticism about both patent and copyright, more has to be done to defend the economic and moral foundations of two systems of intellectual

property that have done so much good for the advancement of human happiness, prosperity, and welfare.

Endnotes

- 1 2 JEREMY BENTHAM, *Anarchical Fallacies*, in *THE WORKS OF JEREMY BENTHAM* 489, 491 (JOHN BOWRING ED., 1843).
- 2 JEREMY BENTHAM & ETIENNE DUMONT, *THEORY OF LEGISLATION* 139 (R. Hildreth trans., 1840).
- 3 2 WILLIAM BLACKSTONE, *COMMENTARIES* 4, available at <http://oll.libertyfund.org/pages/blackstone-on-property-1753>.
- 4 U.S. CONST. art I, § 8, cl. 8.
- 5 See John Locke, *Of Property* § 28, in *JOHN LOCKE, TWO TREATISES OF GOVERNMENT* 306 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).
- 6 Sonny Bono Copyright Term Extension Act of 1998, Pub. L. 105-298, 112 Stat. 2827, codified at 17 U.S.C. § 303 et seq. (1998)

