Supreme Court Preview: October Term 2014

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Selected Cases

Comptroller v. Wynne, 431 Md. 147, 64 A.3d 453 (2013), *cert. granted*, 134 S.Ct. 2660 (2014). Whether the United States Constitution prohibits a state from taxing all the income of its residents -- wherever earned -- by mandating a credit for taxes paid on income earned in other states.

Dart Cherokee Basin Operating Company, LLC v. Owens,730 F.3d 1234, 10th Cir. (10th Cir. 2013), *cert. granted*, 134 S.Ct. 1788 (2014). Whether a defendant seeking removal to federal court is required to include evidence supporting federal jurisdiction in the notice of removal, or whether it is enough to allege the required "short and plain statement of the grounds for removal."

Department of Transportation v. Association of American Railroads, 721 F.3d 666 (D.C.Cir. 2013), *cert. granted*, 134 S.Ct. 2865 (2014). Whether Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which requires the Federal Railroad Administration (FRA) and Amtrak to "jointly . . . develop" the metrics and standards for Amtrak's performance that will be used in part to determine whether the Surface Transportation Board (STB) will investigate a freight railroad for failing to provide the preference for Amtrak's passenger trains that is required by federal law, and provides for the STB to appoint an arbitrator if the FRA and Amtrak cannot agree on the metrics and standards within 180 days, effects an unconstitutional delegation of legislative power to a private entity.

Elonis v. United States, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 2819 (2014). (1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and (2) whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

Heien v. North Carolina, 749 S.E.2d 278 (N.C. 2013), *cert. granted*, 134 S.Ct. 1872(2014). Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop.

Wellness Int'l Network, Limited v. Sharif, 727 F.3d 751 (7th Cir. 2013), *cert. granted*, 134 S.Ct. 2901 (2014). (1) Whether the presence of a subsidiary state property law issue in a 11 U.S.C. § 541 action brought against a debtor to determine whether property in the debtor's possession is property of the bankruptcy estate means that such action does not "stem[] from the bankruptcy itself" and therefore, that a bankruptcy court does not have the constitutional authority to enter a final order deciding that action; and (2) whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III.

Yates v. United States, 733 F.3d 1059 (11th Cir. 2013), *cert.* granted, 134 S.Ct. 1935 (2014). Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to impede or obstruct an investigation, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeping, documentary, or informational content or purpose.

Zivotofsky v. Kerry, 733 F.3d 1059 (D.C. Cir. 2013), *cert. granted*, 134 S.Ct. 1873 (2014). Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

Zivotofsky v. Kerry

A major separation of powers clash

By Alan B. Morrison

On Nov. 3, the U.S. Supreme Court will hear arguments on whether the president has the constitutional authority to refuse to abide by a duly enacted law of Congress on the ground that it interferes with his powers to conduct foreign affairs. *Zivotofsky v. Kerry*, 13-628. The court previously ruled that the case did not present a political question, 132 S. Ct. 1421 (2012), and the U.S. Court of Appeals for the D.C. Circuit upheld the president on the merits. 725 F.3d 197 (2013).

The case arises because Israel claims that Jerusalem belongs to it, but the Arabs in the Middle East disagree. The State Department and the president have attempted to remain neutral on that question in an effort to enhance the position of the United States as a broker of peace in the Middle East. The State Department has taken the view that neutrality include how to refer to Jerusalem on U.S. passports. If a child of U.S. citizens is born abroad, the child is entitled to American citizenship and an American passport. All U.S. passports include the place of birth (as an additional means of identification) and for most passports of persons born outside the U.S., the country is used. Each year many American Jews choose to have their children born in Jerusalem, but their passports identify their place of birth as Jerusalem, not Israel.

In 2002, Congress stepped in and directed the State Department to issue passports identifying the place of birth of individuals born in Jerusalem as Israel, if they so request. The president refused to comply with the law on the ground that the president has the sole power to recognize foreign governments, and that designating the place of birth on a U.S. passport in a manner different from what the president believes is proper infringes on his exclusive power of recognition, which is part of his duties to conduct foreign affairs. One of the children born in Jerusalem who was denied the choice of having his passport list his place of birth as Israel was Menachem Zivotofsky. His parents, on his behalf, sued the secretary of state, claiming that the president could not constitutionally refuse to follow the law, and the Supreme Court will decide whether the president is right.

Two facts are of some significance. First, Congress did not compel the State Department to use Israel in every case, but only upon request, and even then, only to use Israel, and not "Jerusalem, Israel." As such, the designation of the place of birth reflects a personal preference of the citizen, rather than an official statement by the U.S. government that Jerusalem is a part of Israel. Second, the statute does not prevent the State Department or the president from insisting publicly and privately that their official position on Jerusalem remains as it always has been: Its status is to be decided by the parties as part of an overall settlement of issues in the Middle East. Indeed, the State Department issued just such a disclaimer when Congress made a similar accommodation for U.S. citizens born in Taiwan, which the U.S. did not recognize, with no known adverse effects on our relations with China.

The separation of powers analysis begins with Justice Robert Jackson's famous and broadly accepted three categories of inter-branch conflicts, with this case falling into the third: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown Sheet & Tube Co., v. Sawyer*, 343 U.S. 579, 637 (1952). There are relatively few cases in which there is a direct clash between a statute and a president's claim that the statute interferes with his constitutional authority, but the court has set forth a high hurdle for the president to overcome in those cases: "the proper inquiry focuses on the extent to which [an act of Congress] prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Nixon v. Administrator of General Services*, 433 U.S. 425, 440 (1977). The court also followed that approach in *Morrison v. Olson*, 487 U.S. 654 (1988), and in both cases - the first involving access to presidential tapes and papers, the other involving the independent counsel law - the court upheld the statute.

Under that test, it is necessary to determine which "constitutionally assigned function" of the president the statute is allegedly disrupting. The Constitution does not make any specific reference to passports, recognition of foreign governments, or even foreign affairs, but no one doubts that these are functions of the federal government. Nor does anyone doubt that both Congress and the president have powers to act in the field of passports, absent some contrary act by the other branch. But the fact these powers are implied, not express, does matter because that makes it much harder for the president to argue that his authority to determine the contents of identification information on passports is "constitutionally assigned" to him. Similarly, given the modest impact that would flow from citizen-requested changes of their birth place from Jerusalem to Israel on their passports, it is equally difficult to make the case that the statute prevents him from carrying any of his functions or disrupts his conduct of foreign affairs.

Both the lower court and the president have defended his refusal based on the statute's interference with his recognition power, as well as his claimed sole authority to conduct foreign affairs. For the latter proposition, the executive branch always cites *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), but that was a case in which the president was carrying out a law passed by Congress, not objecting to it as is the case here. Therefore, the language from Justice George Sutherland's opinion regularly relied on is pure dicta, and his assertion of exclusive power of the president over foreign affairs is almost certainly overstated, if not plainly incorrect. As for the president's powers over recognition, there is no textual basis for excluding Congress, but more significantly for this case, the designation of place of birth on a passport is not an act of recognition of any country over any place, and hence that power is not at issue here.

This change in passport practices *may* have *some* impact on *some* people in the Middle East, but that does not mean that the law exceeds the authority of Congress, let alone that it seriously interferes with the power of the president to conduct foreign affairs or to recognize foreign states. Congress is, after all, the body that represents the people, and it is normally the body to which we look when policy choices are to be made, as they were here. Because there is no express provision in the Constitution disabling Congress from making the choice that it did on the contents of passports of U.S. citizens born in Jerusalem, the court should reject the president's claim that he and he alone can decide what goes on a U.S. passport.

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Monday, September 8, 2014

Yates v. United States

In the Supreme Court, plain text means context

By Michael J. Raphael

In the ordinary criminal case, if an accused's conduct is prohibited by the plain text of a statutory provision, the person is guilty of a crime. The text, after all, is the best indication of what the legislature intended to criminalize.

Yet in both the immediate past and upcoming U.S. Supreme Court terms, the court has elected to hear four cases that present the claim that the most straightforward meaning of a particular statutory provision does *not* control. In each of these cases, the federal Court of Appeals, after little analysis, had found the text's meaning clear and the defendant guilty. Yet, in the Supreme Court, the analysis in each case has grown considerably more complex.

It may be useful to place these cases in two categories. First are cases in which prosecutors have taken a statutory provision and (arguably) applied it to a type of conduct that Congress never intended to be within the law's ambit. Second are cases in which the type of conduct is what concerned Congress, but the text is so sweeping that Congress (arguably) intended there to be a de minimis limitation placed on its scope.

A case from each term falls into each category. In the first ("unintended context") category is the June decision in *Bond v. United States*, where the court held that the Chemical Weapons Convention Implementation Act does not prohibit a jilted wife's attempt to inflict a rash upon her husband's lover.

The act imposes prison time for using a "chemical weapon," and it defines "chemical weapon" to include "any chemical" that can cause "death, temporary incapacitation or permanent harm to humans or animals."

Carol Anne Bond, a Pennsylvanian, was convicted of that crime due to her scheme to cause her friend, Myrlinda Haynes, to get a rash. After discovering that Haynes had been impregnated by Bond's husband, Bond obtained a readily available chemical, potassium dichromate, which can, in large enough quantities, cause people serious harm or death. Bond spread the chemical on surfaces Haynes was likely to touch, intending only that she get a rash.

Noticing the chemical and mostly avoiding it, Haynes suffered just a minor thumb burn. Yet federal prosecutors charged Bond with two counts of possessing and using a chemical weapon.

The 3rd U.S. Circuit Court of Appeals upheld Bond's conviction upon a simple analysis of the statutory text. To the 3rd Circuit, it did not matter that its reading of the statutory text was "striking" in its "breadth" and turned every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Congress simply chose to enact a broad prohibition.

In an opinion by Chief Justice John Roberts, the Supreme Court reversed. The court held that the law was ambiguous, but the opinion did not argue that the words of that provision, taken on their own, were unclear. Rather, the court stated, "the ambiguity derives from the improbably broad reach of the key statutory definition given the term - 'chemical weapon' - being defined." The court found that three broader concerns demonstrated this ambiguity.

First, the court relied on the context in which the law arose. The opinion began with a discussion of the "horrors of chemical warfare," the ratification by most countries of the Convention on Chemical Weapons, and Congress's enactment of the law to implement that convention in our country. In that context, even though the

law contained "broadly worded definitions," the court had "doubts that a treaty about *chemical weapons* has anything to do with Bond's conduct."

Second, the court relied on the ordinary usage of the term "chemical weapon." Despite the sweeping statutory definition of that term, the court believed that "an educated user of English would not describe Bond's crime as involving a 'chemical weapon.'" Allowing Bond's conviction would "transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish."

Third, applying "principles of federalism inherent in our constitutional structure," the court held that it was reluctant to conclude that "Congress meant the statute to reach local criminal conduct." The court noted that Pennsylvania had statutes that covered Bond's conduct, and it cited to newspaper accounts of two poisoning prosecutions from that state to demonstrate that the state regularly enforced those laws.

Disagreeing with the majority in a concurring opinion, Justice Antonin Scalia argued that the court improperly took clear statutory text and found it ambiguous in light of extra-textual factors. "[I]t is clear beyond doubt that [the law] covers what Bond did; and we have no authority to amend it," Scalia wrote. (His opinion was a concurrence, rather than a dissent, because he would have invalidated Bond's conviction on the separate ground that Congress lacks an independent power to pass legislation to implement treaties.)

Thus, *Bond* presented a case where statutory text facially prohibited a defendant's conduct, yet a divided court held that the statute did not extend to the unintended context to which prosecutors applied that text.

This fall, a similar battle between plain text and (arguably) unintended context will return to the Court in *Yates v. United States*, which concerns whether the "anti-shredding" provision of the Sarbanes-Oxley Act criminalizes the destruction of fish.

John L. Yates, a commercial fisherman, was operating his vessel, the Miss Katie, in the Gulf of Mexico when a Florida wildlife official (deputized as a federal agent) boarded his boat and determined that 72 red grouper that Yates had caught were under the 20-inch minimum size allowed. The officer issued Yates a citation, sealed the probative fish in a crate on board, and instructed Yates not to disturb the fish, as they would be seized at port.

At the dock, however, most of the fish in the crate turned out to be around the legal size. This caused the agent to investigate, leading to Yates's conviction for destroying evidence. At trial, a Miss Katie crew member testified that Yates instructed him to throw the undersized fish overboard, replace them in the crate with larger fish, and deny that obstructive conduct to law enforcement.

The law prohibits the destruction of "any record, document, or tangible object" with the intent to obstruct any federal investigation. Yates contended that a fish was not a "tangible object" under that provision.

Much as the 3rd Circuit had rejected Bond's argument as contrary to the plain text the statute, the 11th U.S. Circuit Court of Appeals made short work of Yates's contention. With a single paragraph of analysis, the 11th Circuit held that the term "'tangible object' ... unambiguously applies to fish." Citing Black's Law Dictionary, the court pointed out that "tangible" means having or possessing a physical form, which a fish surely does. Since the statute was clear, Yates's conviction was proper.

The Supreme Court has granted certiorari, so some justices likely see Yates's claim as worthy of more complex analysis.

What is Yates argument against the truism that a fish is a "tangible object"? It is entirely based on the term's meaning in context, rather than merely upon the term itself.

The provision at issue was enacted as part of the Sarbanes-Oxley Act of 2002, precipitated by the Enron Corporation debacle, where that company's financial prosperity was largely an accounting ruse concocted by it and its auditor, Arthur Andersen LLP.

As part of their unsavory conduct, Enron and Andersen created a policy in which the company's records and documents would be routinely purged. Yates claims Congress passed the anti-shredding provision because federal obstruction laws did not criminalize such pre-investigation destruction of information. In context, Yates argues, the law merely precludes the destruction of records, documents, or other objects *that store information*.

Yates relies on various other provisions of Sarbanes-Oxley to support his argument. And just as *Bond* construed the term "chemical weapon" based in part upon the treaty-implementation context in which Congress acted, Yates relies heavily on the post-Enron context in which Congress passed Sarbanes-Oxley. The nine amicus briefs in support of Yates include one from former U.S. Representative Michael Oxley himself.

The United States, on the other hand, relies principally upon the plain meaning of "tangible object." Once again, as in *Bond*, the Supreme Court will be confronting a criminal provision with language that, read in isolation, prohibits the defendant's conduct. And once again, the defendant will argue that the text was never intended to apply in the context in which it has been deployed, and the government will argue that Congress intended the broad meaning that it enacted.

How the *Yates* fish story ends in the Supreme Court may reveal more about how the justices view a tension between the import of the plain words of text and the meaning derived from its context. The case will be argued Nov. 5.

Wednesday, I will look at the second category of criminal cases in which parties in the Supreme Court are battling over the meaning of the plain text of a statute.

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Yates v. United States

Justices consider statutory text limits

By Michael J. Raphael

Can a person be guilty of federal bank fraud even where his scheme contemplates no deception of a bank? Can a person be guilty of "forced accompaniment" during a bank robbery where, hiding from the police, he directs a person into a room of her own home?

These questions are raised in U.S. Supreme Court cases in the immediate past and upcoming terms, and they have something in common. In each, the plain meaning of a statute's text arguably compels a conviction. Yet in each the defendant argues that that text sweeps in some conduct that Congress never intended to criminalize.

Monday's column explored two Supreme Court cases in which the text of a criminal statute arguably has been applied in a wholly different *context* than Congress contemplated. Today's cases involve the crime's anticipated context yet facts that are (arguably) so remote or minimal that Congress did not intend to cover them.

First, consider bank fraud without deception of a bank. In its June opinion in *Loughrin v. United States*, the court dealt with one of the two prongs of the federal bank fraud statute, 18 U.S.C. Section 1344(2), which makes it a crime to obtain a bank's funds "by means of false or fraudulent pretenses, representations, or promises."

Kevin Loughrin was convicted by a jury under that statute after he executed a scheme wherein he stole checks from the mail, altered them, and then used them at Target. He thus did not directly make false representations to a bank, but, under the language of the statute, he appeared to commit federal bank fraud because Target cashed the checks.

Loughrin argued for an instruction requiring the jury find that he intended to defraud a bank, even though that requirement is nowhere in the statute. Without such an instruction, he claimed, all manner of run-of-the-mill fraud would constitute federal bank fraud if a check was involved.

For instance, if a seller represented to a check-paying buyer that she was purchasing a designer purse, yet the item was actually a knock-off, the seller would be committing bank fraud - even though the check was itself not fraudulent. Loughrin claimed that Congress could not possibly have meant for this remote conduct to be federal bank fraud.

The 10th U.S. Circuit Court of Appeal disagreed, holding that the breadth of the law was "dictated by the plain language of the statute." In the Supreme Court, the government likewise acknowledged the unsettling statutory breadth, yet argued that this was simply the statute Congress passed.

In an opinion for seven justices, Justice Elena Kagan upheld the conviction yet limited the statute. She found that the statute contained a *textual* limitation that avoided the cases that "Loughrin hopes will unnerve us."

Kagan wrote that the statutory requirement that the bank property be taken "by means of" the fraud excluded crimes where no false or fraudulent pretense was presented to the bank. In such a case, while the fraud might be a "but-for" cause of the defendant's ultimately obtaining the bank's funds, the false statements would not be the "means" of obtaining the funds. Thus, under *Loughrin*, the knock-off purse crime does not constitute federal bank fraud, whereas since Loughrin's bad checks were actually to be presented to the bank by Target, they were the "means" of obtaining bank funds.

Justice Antonin Scalia disagreed with the majority's approach, authoring a concurring opinion for himself and Justice Clarence Thomas. Scalia was skeptical of Kagan's construction of the "by means of" language. He would have affirmed Loughrin's conviction based on the plain text of the statute, leaving questions about whether the statutory text limits other prosecutions for the future.

In all, *Loughrin* took seriously a claim that the meaning of the text of the bank fraud statute swept in conduct that Congress did not intend to be included, yet the court rescued the statute by finding limiting language. That limitation was neither applied by lower courts nor proposed in the briefing.

In the upcoming term, the question of whether limitations should be placed upon a broad-sweeping provision will return in *Whitfield v. United States*.

Whitfield concerns the "forced accompaniment" offense in the federal bank robbery statute, 18 U.S.C. Section 2113(e). Generally, a bank robber faces a maximum sentence of 20 years, though most robbers receive well below that. If, however, a robber "forces any person to accompany him" in the course of the robbery or while in flight, he faces an additional 10-year mandatory sentence. An example of such a defendant is a robber who takes a hostage at gunpoint.

In September 2008, 20-year-old Larry Whitfield and an accomplice attempted to rob a credit union in North Carolina armed with guns. But they never made it past the lobby. A metal detector triggered an automatic lock on the inner door, barring their entry. They fled, discarding their firearms.

To hide, Whitfield entered the unlocked home of an infirm 79-year-old woman, Mary Parnell. He directed her to a room where they would be out of view of the police. He then fled the home. Parnell later was found dead of a heart attack in the room.

A jury convicted Whitfield of not just bank robbery and attempted bank robbery, but also forced accompaniment.

Whitfield argued that merely guiding an elderly woman to another room was not substantial enough conduct to support the forced accompaniment conviction. The 4th U.S. Circuit Court of Appeals disagreed: "Although Whitfield required Mrs. Parnell to accompany him for only a short distance ... and for a brief period ... no more is required to prove that a forced accompaniment occurred." Because the Supreme Court granted certiorari, however, it is likely that some justices think otherwise.

The only appellate case to have held that accompaniment was so minor as to be insufficient was decided over 40 years ago. *United States v. Marx*, 485 F.2d 1179 (10th Cir. 1973). Yet the most robust judicial defense of the concept came in a more recent dissent by the late Judge Betty Fletcher of the 9th U.S. Circuit Court of Appeals. In *United States v. Strobehn*, 421 F.3d 1017 (2005), the bank robber was convicted with evidence that he ordered a security guard to walk into the bank and lie down on the floor. The majority upheld the conviction, stating that the plain text of the statute contained no exception for accompaniment of short duration or distance.

Fletcher's dissent argued that the meaning of the statute was not in fact "plain" because it was silent as to the degree of forced accompaniment necessary, as it did not state that "any" forced accompaniment would do. In context of the entire statute, Fletcher reasoned, Congress intended to require "substantial" forced accompaniment. The statute enhanced the punishment for a basic bank robbery for a forced accompaniment by more than it did for an assault or use of a dangerous weapon, and it applied the same punishment for forced accompaniment as it did for homicide. Further, Fletcher argued that the legislative history showed that Congress was concerned with kidnapping or hostage-taking - and the initial draft of the legislation even imposed the death penalty for forced accompaniment.

Fletcher's dissent, of course, did not carry the day. Just last month the 9th Circuit relied on *Strobehn* in affirming a forced accompaniment conviction where the robber of a credit union trailer pushed a teller who opened the door for him back into the trailer while the robbery occurred. *United States v. Carr*, 2014 DJDAR 10259 (Aug. 4, 2014).

Whitfield will be argued Dec. 2. The justices may have one of three views toward the language in the statute. First, they may see a textual limitation in the term "forces any person to accompany him," so that Whitfield did not "force" Parnell to "accompany" him. This is the type of textual limitation Kagan found in interpreting the "means" requirement in *Loughrin*. Secondly, justices may apply a context-based limitation that requires substantial forced accompaniment, as Fletcher suggested. This is the type of limitation that the court applied this June in *Bond v. United States*, discussed Monday. Finally, justices may simply conclude that the plain text sweeps as broadly as the appellate courts have concluded.

In each of these four Supreme Court cases discussed in this series, the Court of Appeals saw the statutory issue as a simple one worthy of little discussion: The plain meaning of the statutory text criminalized the defendant's conduct, so he was guilty. In contrast, in each case, some Supreme Court justices appear to be finding gaps between the meaning of the unadorned text and what Congress actually intended. This dynamic brings to mind an observation by Justice Felix Frankfurter over 70 years ago: "the notion that because the words of a statute are plain the meaning is also plain, is merely pernicious over-simplification." *United States v. Monia* (dissenting opinion).

The construction of the plain text of criminal statutes currently is fertile ground in the Supreme Court, and lawyers and judges interested in statutory interpretation may wish to watch Larry Whitfield's fate.

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Elonis v. United States

High court to consider what constitutes a true threat

By Michael J. Raphael

Does the First Amendment permit the government to prosecute a person for making a threat if the person did not intend the statement to be one?

Last week, the U.S. Supreme Court granted review in *Elonis v. United States*, 13-983, where the petition for certiorari raised this question. The issue turns upon the scope of what is known as the "true threats" exception to speech protected by the First Amendment. For California lawyers, the case may resolve a split between the 9th U.S. Circuit Court of Appeals and the California Supreme Court as to whether proof of subjective intent always is essential to prosecuting a threat.

Anthony Elonis was convicted in federal court in Pennsylvania of violating 18 U.S.C. Section 875(c) based upon extensive Facebook posts that contained threats to kill his wife and that threatened harm to the police, an FBI agent, and a kindergarten class. Section 875(c) makes it a federal crime to transmit in interstate commerce threats of bodily injury.

At his trial, Elonis argued that the First Amendment requires proof that he subjectively intended to threaten others in posting his Facebook discourses. If he intended to post them for another purpose and did not intend harm, he argued, they would be protected speech.

The trial court rejected this claim, concluding that it did not matter whether Elonis had the subjective intent to threaten anyone. The court instructed the jury that it must find that Elonis intended to *make* the statements, but that it was to use an objective test to determine whether each statement was a threat. Specifically, the court told the jury that a statement is a threat when a "reasonable person would foresee that the statement would be interpreted" as a "serious expression of an intention to inflict bodily injury or take the life of an individual."

Elonis, who testified at trial, apparently wished to argue that he posted the items as a form of therapy after he suffered a job loss and his wife's departure with their children, and that he intended the writings to be merely "fictitious rap lyrics" rather than true threats. Under the jury instructions, however, his subjective intent was irrelevant to whether the statements were true threats. All that mattered was how a reasonable person would perceive them.

Now, Elonis will be asking the Supreme Court to hold that the trial court should have found that, in order for threatening speech to be criminalized, the First Amendment requires that a speaker subjectively intended a threat. The starting point for analysis likely will be the only two cases in which the court has applied the true threats doctrine.

The first case involved a statement at a Vietnam War protest rally. In *Watts v. United States*, 394 U.S. 705 (1969), the defendant told a crowd, "I am not going. If they ever make me carry a rifle, the first man I want to get in my sights is LBJ." The Supreme Court reversed his conviction for threatening to harm the president, holding that the statement was "political hyperbole" rather than a "true" threat.

The underlying rationale in *Watts* may be that a statement which facially appears to be a violent threat may nevertheless merit First Amendment protection if, in context, it was metaphorical rather than literal. The court, however, did not define what a true threat is, and did not address whether the analysis should be subjective, objective, or both.

More recently, in *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court considered a Virginia statute that banned cross burning with the "intent of intimidating." The court held that, consistent with the First Amendment, states could proscribe as a true threat cross burning done with intent to intimidate. If not intimidating, the court noted, cross burning potentially could be protected speech, as it could be done dramatically (as in the movie "Mississippi Burning") or as political speech that indicates group solidarity. (Less important to *Elonis*, the court struck down the particular cross burning statute at issue because it violated due process by stating that cross burning is by itself prima facie evidence of intent to intimidate.)

In construing the scope of *Black*'s holding, the 9th Circuit and the California Supreme Court have sharply diverged.

Finding that "the subjective test set forth in *Black* must be read into all threat statutes," the 9th Circuit in *United States v. Bagdasarian*, 652 F.3d 1113 (2011), reversed the conviction of a defendant who, in message-board posts, threatened to kill and inflict bodily harm upon a presidential candidate (Barack Obama in 2008), in violation of 18 U.S.C. Section 879(a)(3). The court articulated the broad rule that "[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." In the 9th Circuit's analysis, the Constitution requires the prosecution to prove that a statement was both objectively a threat and subjectively intended as one.

In contrast, in *People v. Lowery*, 52 Cal. 4th 419 (2011), our state Supreme Court reasoned that *Black* held only that the category of true threats includes cross burning with the subjective intent to threaten, but it did not hold that subjective intent was a necessary requirement of a threat prosecution. In the California case, Eddie Lowery had threatened to kill an elderly victim who had testified that Lowery robbed him. At his trial for violating California Penal Code Section 140(a) by threatening violence against a crime victim, Lowery admitted making the statements but claimed that he did not intend to threaten the victim and was simply expressing anger at what he thought was a false crime accusation.

Post-conviction, Lowery argued on appeal that Section 140(a) was unconstitutional because it permitted his conviction even if he did not intend a threat. The state Supreme Court construed Section 140(a) as applying an objective test that asks whether a reasonable listener would understand the statements at issue as a serious expression of intent to commit violence. Rejecting *Bagdasarian* in a brief footnote, the court held that this objective test ensured that the statute criminalized only true threats and thus did not reach speech protected by the First Amendment.

Justice Marvin Baxter penned a concurring opinion in *Lowery*, joined by a majority of justices, for the purpose of explaining that the 9th Circuit's opinion in *Bagdasarian* was wrong. Surveying the law in other states and federal circuits, Baxter argued that "[t]he relevant intent remains the intent to *communicate*, not the intent to threaten." (The majority of federal circuits have disagreed with the 9th Circuit's view that the Constitution requires the subjective intent to threaten, yet some state Supreme Courts have agreed with the 9th Circuit.)

Much of the dispute between the 9th Circuit and the California Supreme Court depends on the meaning of a single sentence in *Black* that defines "true threats." The U.S. Supreme Court stated, "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

In *Bagdasarian*, the 9th Circuit relied on that statement in concluding that a speaker must have the intent to threaten. In *Lowery*, the California Supreme Court read that statement as simply requiring that the speaker intended to make a statement that was objectively threatening.

When it decides *Elonis*, the U.S. Supreme Court will not be limited to merely discerning the meaning of that sentence in *Black*, and surely will consider broader concerns about balancing the need to prosecute violent threats with constitutional protection of speech. Perhaps a central question for the court will be whether the

objective test is sufficient to protect First Amendment interests. That is, are there in fact realistic situations where a reasonable observer would understand speech to constitute a serious threat of violence, but the speech should be protected because the speaker did not intend as much?

But there also is a possibility that the court may not reach the constitutional issue at all. If a statute contains a requirement of subjective intent to threaten, then it criminalizes only true threats under either rule, and there is no need to decide whether the First Amendment requires that element. In what must have been a surprise to the parties, when the court granted certiorari in *Elonis*, it ordered the parties to brief not only the First Amendment issue that Elonis raised, but also the question of whether, as a matter of statutory interpretation, Section 875(c) requires proof of the defendant's subjective intent to threaten. Although the parties' briefs may elucidate this issue, there does not appear to be caselaw in which courts have found that the statute itself requires the subjective intent to threaten.

Regardless, until the scope of the true threats exception to the First Amendment is settled in *Elonis* or in a future case, California criminal practitioners are left with federal law mandating that in any threats case the prosecution prove subjective intent to threaten, while in state cases the prosecution has that burden only if imposed by the particular charging statute.

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Heien v. North Carolina

When cops make good faith mistakes

By Michael J. Raphael

Last week, the U.S. Supreme Court granted review in *Heien v. North Carolina*, No. 13-604, which concerns whether a traffic stop that was based on a reasonable mistake of law by a police officer violates the Fourth Amendment. The case promises to either confirm or unsettle the long-standing law in California federal and state courts that renders such a stop unconstitutional. It also may shed light upon the Supreme Court's evolving understanding of the exclusionary rule.

Under long-standing precedent, *Terry v. Ohio*, 392 U.S. 1 (1968), an officer may stop a driver for a traffic violation, so long as the officer has reasonable suspicion to conclude that the driver has violated a traffic law. If the traffic stop later is held invalid because the officer lacked objective reasonable suspicion, then evidence seized during the stop typically must be suppressed under the exclusionary rule.

But what happens if the officer was mistaken about the facts or the law such that, with the proper information considered, the officer lacked reasonable suspicion for a traffic violation at the time of the stop?

In the 9th U.S. Circuit Court of Appeals, the distinction between mistakes of fact and mistakes of law is "crucial to determining whether reasonable suspicion exists to search a vehicle." *United States v. Twilley*, 222 F.3d 1092, 1096 n.1 (9th Cir. 2000). An officer's reasonable mistake of fact does not render a stop unconstitutional. In contrast, a stop is unconstitutional in this circuit if an officer makes a reasonable mistake of law.

For example, where officers stopped a vehicle because they believed it to be in violation of a Hawaii law that criminalized the possession of a rental car more than 48 hours beyond its return time, the stop was not unconstitutional because the officers merely had made a reasonable mistake of fact by relying on rental car company information erroneously indicating that the full 48 hours had elapsed. *United States v. Dorais*, 241 F.3d 1124, 1131 (9th Cir. 2001).

On the other hand, when a California officer stopped a car because it had only one Michigan license plate, making a mistake of law by believing that two plates were required by that state, the circuit held that the stop violated the Fourth Amendment even though the officer's belief was objectively reasonable because most states require two plates. *Twilley*, 222 F.3d at 1096; see *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000) (evidence suppressed where officer made reasonable mistake of law about registration sticker placement); *United States v. King*, 244 F.3d 736, 741 (9th Cir. 2001) (evidence suppressed where officer made good-faith mistake about handicap placard placement).

The state Court of Appeal has expressly followed the 9th Circuit case law and held that an officer's mistaken understanding of the law cannot constitute reasonable suspicion for a traffic stop. *People v. White*, 107 Cal. App. 4th 636, 644 (2003); *People v. Williams*, 2014 WL 212183 at *4 (Jan. 21, 2014). Indeed, this approach is the majority rule in both the federal circuits and the states.

The 9th Circuit's justification for its distinction between reasonable mistakes of fact and those of law is intertwined with a conception of the Fourth Amendment exclusionary rule as a tool that encourages proper police conduct. That is, the 9th Circuit has stated that stops based on reasonable mistakes of fact do not violate the Constitution, as officers in the field have "leeway" to make factual determinations quickly and exercise discretionary judgment based on them. *King*, 244 F.3d at 739. In contrast, a police officer's knowledge of the law is not based on snap judgments and arguably can be encouraged if courts exclude evidence when officers make mistakes of law. As Judge William A. Fletcher explained:

"[T]here is no good-faith exception to the exclusionary rule for police who do not act in accordance with governing law. To create an exception here would defeat the purpose of the exclusionary rule, for it would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *Lopez-Soto*, 205 F.3d at 1106.

The Supreme Court's new case, *Heien*, arises from a jurisdiction that follows the minority rule and finds no Fourth Amendment violation where officers make a reasonable mistake of law. Officers stopped Nicholas Heinen after observing that his right rear brake right did not illuminate, even though his left one did. After questioning Heinen and his passenger, the officers obtained consent to search the vehicle and found cocaine, which led Heinen's North Carolina conviction for trafficking in the substance.

On appeal, the North Carolina Supreme Court assumed that the officer made a mistake of law in stopping Heien, as North Carolina statutes appeared to require only one working brake light, not two. Nevertheless, that court found the officer's mistake to be reasonable, because the state's appellate courts had never interpreted the law to require only one working brake light. On a 4-3 vote, the court affirmed the conviction, holding that "so long as an officer's mistake is reasonable, it may give rise to reasonable suspicion."

California's federal and state courts therefore differ with North Carolina as to whether an officer can have reasonable suspicion for a traffic stop if the officer has made a reasonable mistake of law in concluding that a traffic offense was committed. Because the ground for suppression based on mistake of law turns on the incentive-based reasoning offered by Fletcher that is quoted above, some justices may see this case as calling for the court's view on whether the exclusionary rule applies, an area that has been in flux for a generation.

Until the mid-1970s, "the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Arizona v. Evans*, 514 U.S. 1, 13 (1995). In several more recent cases, however, the court has weighed the benefits of excluding evidence and found several categories of cases where a Fourth Amendment violation will not warrant suppression of evidence, which typically comes at the cost of allowing a criminal defendant to go free. In its two most recent cases concerning the exclusionary rule, the court has created such categories, emphasizing that suppression was unwarranted where police officers lacked bad faith in the particular case, rather than focusing on broader notions of encouraging proper police conduct.

First, in *Herring v. United States*, 555 U.S. 135, 144 (2009), the court stated that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." Applying this principle, the court held that the rule did not require the suppression of evidence found after the defendant was arrested erroneously, because the police error was merely negligent: officers failed to remove from a database a warrant for the defendant that should have been recalled. The *Herring* dissenters argued that the exclusionary rule instead should apply to "strongly encourage[] police compliance with the Fourth Amendment in the future." *Id.* at 705 (Ginsburg, J., dissenting).

More recently, in *Davis v. United States*, 131 S. Ct. 2419 (2012), the court held that the exclusionary rule did not apply to police errors in relying upon binding precedent that is later reversed. Citing *Herring*, the court stated that there was little basis for the exclusionary rule "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Id.* at 2427. The dissent argued that the court should instead conceive of the exclusionary rule "as an effective way to secure enforcement of the Fourth Amendment's commands." *Id.* at 2439 (Breyer, J., dissenting).

Herring and *Davis* raise the possibility that some justices may see suppression as unwarranted in Heien if the officer made a mistake in good faith - regardless of whether the mistake is one of law or of fact. Others may agree with Fletcher's view that the exclusionary rule is necessary to provide an "incentive for police to make certain that they properly understand the law."

California criminal practitioners may wish to watch *Heien* to see whether it affects our law holding that reasonable mistakes of law cannot constitute reasonable suspicion for a stop. And it is possible as well that *Heien* could be the next case to elucidate the court's view as to the role of the Fourth Amendment exclusionary rule in creating incentives for the police.

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