

Scott v. Harris (05-1631)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (Dec. 23, 2005)

Oral argument: Feb. 26, 2007

In 2001, police witnessed Victor Harris driving 73 miles per hour in a 55-mile-per-hour zone. When they tried to pull him over, Harris sped away. Officer Timothy Scott joined the chase, and, after approximately six minutes of pursuit at average speeds between 80 and 90 miles per hour and an unsuccessful attempt at stopping Harris, Officer Scott received authorization from his supervisor to stop Harris by force. Using his push bumper, Scott made direct contact with Harris's car, causing him to lose control and roll down an embankment. As a result of the incident, Harris suffered serious injuries. Harris argues that, under *Tennessee v. Garner*, which set forth circumstances in which deadly force is reasonable to prevent escape, Scott's use of force was unreasonable and unconstitutional. Scott argues, however, that his actions in this case should not be characterized as "deadly force," but that a simple reasonableness test should apply. Moreover, Scott argues that he should be entitled to qualified immunity. The Supreme Court, reviewing the Eleventh Circuit's opinion in favor of Harris, will determine the standard to be applied to uses of force in vehicular pursuits—a ruling that will affect police officers' discretion in such situations. The Court will also further define the reasonableness requirement inherent in the Fourth Amendment, contributing to an already expansive and complex body of law.

Facts

Note: Because this appeal is from a summary judgment motion before trial, there have been no findings of fact. Therefore, the lower courts are required to consider as true the facts presented in the pleadings and those that are most favorable to the opposing party when there is a discrepancy.

On March 29, 2001, two Coweta County law enforcement officers engaged in a high-speed pursuit of Victor Harris, which ended in the crash of

Harris's vehicle. Harris is claiming that Officer Timothy Scott used excessive force when he caused the accident, resulting in a violation of Harris's Fourth Amendment rights.

On the night of the accident, Officers Reynolds and Scott were parked about a mile apart, providing backup for officers involved in an undercover drug deal. Reynolds observed Harris driving 73 mph in a 55-mph zone and attempted to pull Harris over by flashing the lights on the police car; instead, Harris sped up, crossed over double yellow lines, and ran through a red light. Reynolds then called in that he was pursuing a vehicle but did not specify the reason. Upon hearing the call, Scott assumed that the pursuit was connected to the drug deal and began pursuing the vehicle along with other officers. After Harris drove his car into an empty parking lot, Scott drove directly into Harris's path in an attempt to end the pursuit by blocking the exit. Harris unsuccessfully attempted to avoid hitting Scott's car. After the minor collision, Harris again sped away and Scott again followed him. Meanwhile, law enforcement officers from a nearby town blocked off intersections in order to keep oncoming traffic out of Harris's path. Officer Scott, however, was unaware of this action and requested permission from his supervisor to perform a Precision Intervention Technique (PIT).

To do a PIT, an officer must hit a vehicle at a specific place, causing the vehicle to spin. Scott had not been trained in the maneuver, but Sergeant Fenninger granted him permission to perform the PIT anyway. Fenninger testified that he was authorizing the use of deadly force when he told Scott to "[t]ake him out." However, Scott realized that he would not be able to complete the maneuver and, instead, deliberately ran into the back of Harris's vehicle, sending him off the road and down an embankment. Harris was not wearing a seat belt and, as a consequence of his injuries, was rendered a quadriplegic.

Harris brought numerous claims in relation to the accident, all of which

were dismissed except for a claim against Scott in his individual capacity. Scott claims that, as a government official, he has a qualified immunity from suit in his individual capacity. In a pretrial motion, Scott asked the court to grant summary judgment in his favor on that basis. The court denied his motion, and Scott appealed. The 11th Circuit upheld the trial court's decision, finding that, when viewed in the light most favorable to Harris (as is required on a summary judgment motion), the facts demonstrated that Scott had violated Harris's Fourth Amendment right to be free from excessive force. The court also found that the case law at the time of the incident was sufficiently clear to put Scott on notice that ramming a vehicle in those circumstances would be unlawful. Therefore, the court found that Scott did not have qualified immunity and that the trial court's denial of the motion for summary judgment was appropriate. Scott then filed this appeal to the U.S. Supreme Court.

Discussion and Analysis

The Fourth Amendment prohibits unreasonable seizures. When a seizure is accomplished by excessive force it is unreasonable. Scott concedes that his actions constituted a seizure, but the parties disagree as to what standard of reasonableness should be applied. Harris argues that Scott's ramming of his car was deadly force and should be governed by *Tennessee v. Garner*, which held that the use of deadly force to apprehend a suspect was justified only in limited circumstances, such as when (1) the officer reasonably believed that the suspect posed an immediate threat of harm to the officer or others, (2) the force was used to prevent escape, and (3) warning had been given if feasible. Nonetheless, Scott argues that this test should apply only in cases in which the force used by the officer was clearly deadly force.

"Deadly Force"

Scott has not conceded that he used deadly force. He claims that when contact between two vehicles is involved

it is difficult to determine if such contact was deadly force. He argues that *Garner* should be applied only when it is clear that deadly force was used. If that is not clear, then the general unreasonableness standard of the Fourth Amendment should apply. Scott argues that, in deciding whether the officer's actions were reasonable, the Court should examine the question from the perspective of a reasonable police officer at the time of the incident and balance the risks that would be caused by the vehicular contact against the risks that would be avoided without contact.

If the Court were to adopt Scott's limit on the interpretation of *Garner*, officers engaging in a vehicle pursuit would be able to avoid complicated inquiries that may be difficult to resolve in the heat of the moment and could, instead, act on instinct. This is because deadly force, as used in the *Garner* framework, is defined in terms of a "substantial risk" of bodily injury or death. Therefore, before acting to terminate a car chase, officers must first ask themselves whether contact is likely to cause death or serious injury, and, if it is, they must identify whether the factors of the *Garner* framework exist. This is a complicated process to undertake in the course of chasing a speeding vehicle, particularly because the outcome of vehicle contact is somewhat unpredictable. Any delay or second-guessing in such a situation could cause the officer to miss an opportunity to stop the vehicle or could allow the chase to escalate. Eliminating the need for this analysis would give officers greater discretion to act in a way that they deem safe and efficient.

But compelling officers to look for the factors that are needed to apply deadly force announced in *Garner* before initiating contact may also reduce unnecessary accidents. Although the outcome is hard to predict, contact initiated by a police officer during a car chase is often deadly. The requisite factors limit deadly force to situations when life or limb is actually in danger and prevent officers from making a forcible stop when there is no risk of injury or when other opportunities exist for capture, such as identifying the suspect through the license plate number on the vehicle involved and arrest-

ing the person later. *Garner* effectively guards against such a danger; therefore, keeping the *Garner* framework in place could potentially increase the safety of both officers and fleeing suspects involved in these dangerous situations.

The significance of the Court's decision depends on whether the Court takes a categorical approach or a fact-specific approach. If the Court agrees with Harris that Scott used deadly force when he bumped the car and justifies that holding by generalizing contact between two speeding vehicles as inherently deadly, then all future Fourth Amendment cases involving contact of any sort between police vehicles and other cars will be analyzed under the deadly force rules set forward in *Garner*. If, however, the Court agrees with Harris on this point only because of the specific circumstances that are present in this case, parties in future cases will have to argue whether or not such vehicle contact constituted deadly force in their particular circumstances.

If the Supreme Court agrees with Scott and finds that the *Garner* factors do not apply, the Court is likely to impose a standard of reasonableness for using vehicle contact in cases such as these. Officers would then be required only to weigh the interests of potentially causing harm against those of capturing a fleeing suspect. This, in turn, gives an officer greater discretion in split-second decisions. However, lessening the standards necessary before initiating potentially deadly force would challenge a well-established principle in Fourth Amendment jurisprudence: any use of force must be proportional to the threat.

Alternatively, the Supreme Court could apply *Garner* but reverse the 11th Circuit, finding that there was probable cause for Scott to believe that Harris posed a threat of serious bodily harm. If the Court were to decide this way, it would seemingly give a green light for officers to end car chases in most situations forcibly, because, the facts of the case show that, if the police had been forced to use other means to stop or apprehend Harris, the threat of serious harm seems minimal.

Notice and Qualified Immunity

The Court will deal with the second issue in the case only if it first determines that Scott violated Harris's Fourth Amendment rights. If so, then the Court must determine whether Scott has a qualified immunity as a police officer that would bar Harris's claim.

When considering a claimed constitutional violation, the circuit court asks whether a reasonable officer, acting in his official capacity, would have realized that his act had violated clearly established law. If yes, then the officer is not entitled to qualified immunity. Harris argues that the law at the time of the incident clearly established that bumping his car from the rear under those circumstances would be a violation, and therefore Scott was on notice that his actions were unconstitutional. Even when the specific action in question has not been ruled upon before, if the unlawfulness of the action is apparent from prior law, then a government official still loses his or her qualified immunity. Harris argues that a trilogy of cases—*Garner*, *Graham*, and *Brower v. County of Inyo*—has established that deadly force can be used only when the person fleeing poses an immediate danger, and even nondeadly force must be proportional to the threat posed by the offender. Since Harris was being pursued for a mere traffic violation and posed no immediate danger to others, Scott should have known that his use of force was outside the legal limit.

Scott contends that the law is not so clearly established as to give him fair warning that his actions would violate Harris's rights. Also, relying on *Anderson*, he argues that the law had to establish that using the push bumper to stop Harris's flight would be unlawful. To support this argument, Scott points out that, at the time of the incident, no case had been decided holding that vehicle-to-vehicle contact was a violation of the Fourth Amendment, but that several cases had explicitly held that such contact did not constitute such a violation. Finally, Scott points to *Brosseau v. Haugen*, in which the Supreme Court held that *Graham* and *Garner* dealt in too high a level of generality to provide a basis for stripping an officer of qualified immunity.

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Harris and Scott's interpretations of the level of specificity required for a law to be "clearly established" in the context of the Fourth Amendment vary significantly. Consequently, if the Court considers this question, the ruling may clarify the standard to be applied in such cases. And, regardless of the outcome, the Supreme Court's decision in this case is likely to shed light on what it sees as the appropriate balance between law enforcement and safety—two interests commonly at odds in Fourth Amendment cases.

Essentially, police officers engaged in hot pursuit of a fleeing vehicle are forced to make important decisions in a short time. In this case, the Supreme Court will determine what kind of inquiry is necessary to make decisions that promote both the general interest of apprehending a suspected criminal and the specific interest of avoiding unnecessary harm to the suspect, officers, and surrounding community. Even though the decision will provide guidance to officers who are attempting to stay within the boundaries of the Fourth Amendment, its logic will not be tested until the ruling is put to practical use in the field. **TFL**

Prepared by Breanne Atzert and Cecelia Sander.

Hein v. Freedom from Religion Foundation (06-157)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (Jan. 13, 2006)

Oral argument: Feb. 28, 2007

In 2001, President George W. Bush announced the Faith-Based and Community Initiatives (FBCI) plan, which uses funds appropriated by Congress to establish a series of conferences designed to coordinate and support both religious and secular community organizations. The Freedom from Religion Foundation, represented by taxpayer plaintiffs, challenged this program on the basis that it violates the Establishment Clause of the First Amendment, but the suit was dismissed for lack of standing. The Seventh Circuit Court of Appeals reversed the district court,

holding that various Supreme Court precedents establish that the Freedom from Religion Foundation did have standing. The government has appealed the case to the Supreme Court, arguing that the Foundation's inability to identify a particular congressional appropriation removes the program from the Establishment Clause prohibition of congressional action supporting religion.

Facts

President Bush has been a proponent of faith-based initiatives since the earliest days of his presidency. Supporters of these initiatives say that they reverse a long trend of antireligious discrimination through the distribution of federal funds. Those supporters view such initiatives programs that release previously forbidden funds to organizations that are vital for community support.

In 2004, the Freedom from Religion Foundation, represented by three taxpayer plaintiffs, filed suit in federal district court, challenging part of President Bush's Faith-Based and Community Initiatives plan. The particular initiative challenged provides for government-sponsored conferences designed to promote both secular and religious social service organizations. These programs are funded by general congressional appropriations, although no specific act of Congress authorizes the program or its funding. Both federal agencies and private organizations participate in the conferences.

Opponents of the plan, such as the Freedom from Religion Foundation, however, say that the programs impermissibly promote religious organizations at the expense of secular ones and point to problems such as the exclusion of nonreligious groups and potential hiring discrimination that can result from the initiatives. Finally, the initiatives are viewed as being counter to the constitutional value of disentangling government from religion.

The foundation also criticizes the Faith-Based and Community Initiatives plan on constitutional grounds. According to the foundation, the conferences are simply "propaganda vehi-

cles for religion" and therefore violate the Establishment Clause of the First Amendment of the Constitution, which prohibits Congress from making any law "respecting an establishment of religion." The Establishment Clause, by its terms, applies only to Congress, but the foundation points out that, even though the executive branch proposed the project, Congress appropriated the project's funds under the authority granted by Article I, Section 8, of the Constitution. Therefore, the foundation argues, the conferences violate the Establishment Clause.

The district judge dismissed the foundation's complaint on the grounds that the taxpayers lacked standing to bring the suit, because the foundation did not demonstrate that it or its members had suffered any injury as a result of the program. The Seventh Circuit Court of Appeals, however, held that the taxpayers did have standing. The Seventh Circuit then denied an appeal by the government for re-hearing of the case by the full panel, stating that further consideration by the whole panel would merely be inefficient and that the Supreme Court should investigate the case. After this denial, the government petitioned for, and was granted, a writ of certiorari to appeal the case to the Supreme Court.

Establishment Clause and Taxpayers' Standing

The standing requirements in federal courts perform an important gatekeeping function in preventing those courts from exceeding their constitutional authority under the Article III cases and controversies limitation. In the past, standing could only be granted when the injury to the plaintiff would have supported a common law suit in the eighteenth century. In fact, in 1952, the Supreme Court rejected taxpayer status, stating that it was insufficient for establishing standing to challenge the actions of the federal government in federal court. The Court found that injury done to taxpayers by illegal government actions was too attenuated (or was even nonexistent) to support their standing to challenge the action.

However, in 1968, the Supreme

Court upheld the standing of a group of taxpayers who had challenged the appropriation of federal funds to be used to purchase educational materials for parochial schools. The taxpayers argued that such an appropriation, conducted under Article I, Section 8, of the Constitution, violated the Establishment Clause of the First Amendment. According to the Court, the special interest of citizens provided for by the separation of church and state, the need for judicial scrutiny of congressional action, and the nexus between the appropriations of funds and the Establishment Clause violation provided a sufficient basis for standing.

Twenty years later, the Supreme Court revisited this issue in *Bowen v. Kendrick*, in which the Court also upheld the standing of the taxpayer plaintiffs. *Kendrick* involved the Adolescent Family Life Act, which provided grants to nonprofit organizations for the purpose of addressing the issue of teen-age pregnancy. Although the statute itself made no mention of supplying these funds to religious organizations, the executive branch had done so in applying the act. The taxpayer plaintiffs challenged these grants as violating the Establishment Clause. The Court, while remanding the case for further consideration on the merits, noted that, under *Flast v. Cohen* and other precedents, the plaintiffs did have standing to challenge the act as applied.

A further important case in this area of jurisprudence is *Valley Forge Christian College v. Americans United for the Separation of Church and State*, in which the taxpayer plaintiffs challenged the Department of Health, Education, and Welfare's donation of an abandoned U.S. Army hospital to a religious organization. The Court denied standing to the taxpayers, holding that, in order for taxpayers basing their standing on their taxpayer status to challenge a congressional action, that action must have been taken pursuant to Congress's power under Article I, Section 8, and not some other constitutional provision.

Despite these decisions, the district court determined that the foundation lacked standing to challenge the Faith-Based Community Initiatives program. The Seventh Circuit Court of Appeals,

however, reversed the district court's decision on standing, holding that, under *Flast* and *Kendrick*, the taxpayers clearly had standing to challenge the program. According to the court of appeals, the primary difference between the foundation's challenge and the previous cases is simply that there was no specific statutory program relating to the initiatives, because only generally appropriated funds were used. The circuit court held that this difference was not controlling because, they reasoned, all that is necessary to create standing is for Congress to appropriate the funds that are used by the executive branch.

The Arguments

The government bases its argument on the "first principle" of standing doctrine, which requires that the plaintiff demonstrate some injury as a result of the challenged action. According to the government, the Supreme Court has traditionally denied standing as a result of taxpayer status. The injury caused to taxpayers as a result of unconstitutional appropriations is "comparatively minute and indeterminable." Taxpayer status, therefore, is not a sufficient independent source of standing.

The government further argues that *Flast*, the case upon which the reasoning of the foundation and the court of appeals rests, does not serve to give the foundation members standing. The *Flast* rule, according to the government, is only a narrow exception to traditional standing doctrine and not a fundamental change in the doctrine. Expanding the holding of that case to cover the foundation's challenge would "loose[n] taxpayer standing from its constitutional and historical moorings." Unlike the congressional action at issue in *Flast*, the initiatives have not cost the taxpayers any additional money in taxes, nor have any funds been disbursed directly to religious organizations. Therefore, the foundation's complaint is not the specific type of "historical evil" that was at the heart of *Flast*.

In addition to this historical argument, the government makes two more formalistic arguments as to why *Flast* should not apply. First, the government contends that *Flast* is applicable only when the challenge is directed at congressional power under Article I,

Section 8. The Freedom from Religion Foundation's complaint, however, challenges a purely executive action that is not the result of any particular congressional action. The mere fact that these actions of executive branch officials are funded by general appropriations does not transform an action taken by the executive branch into one that was taken by Congress; therefore, the *Flast* expansion to traditional standing requirements does not apply.

The second argument revolves around a factual distinction between the FBCI and the programs in *Flast* and *Kendrick*. Both of the latter cases involved disbursements of government funds—and therefore taxpayer money—to religious organizations. The FBCI, however, uses federal funds only for creating conferences. Therefore, the supposed injury to the taxpayers is arguably insufficient to support the foundation's standing, because there is no "concrete congressional extraction and disbursement of funds that [gave] rise to Article III standing under *Flast*."

The foundation's argument regarding standing is based on what are, according to the foundation, straightforward applications of *Flast* and *Kendrick* to the present case. The foundation essentially agrees with the Seventh Circuit's reading of these cases, which places the foundation's challenge squarely within their holdings. According to the foundation, *Flast* grants standing to taxpayers based on taxpayer status to challenge any congressional appropriation that violates the Establishment Clause. The foundation contends that the interest of taxpayers in not having their tax money used in violation of the Establishment Clause is sufficient to generate the injury required for standing. Standing under *Flast*, therefore, requires only that the funding for the alleged violation originated from Congress and was later used for a "constitutionally proscribed activity."

Furthermore, the foundation challenges the government's claim that the party challenging a government action must be able to point to a specific appropriation by Congress. Under *Flast* and *Kendrick*, the foundation points out, even if the original appropriation

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was facially valid under the Constitution, taxpayers have standing to challenge an executive branch action that violates the Establishment Clause; Congress need not be directly responsible for the violation. The Establishment Clause, therefore, acts as a restriction not only on Congress directly but also on the federal government as a whole. Thus, the fact that the foundation cannot identify a particular congressional action that violated the Establishment Clause arguably does not preclude the foundation from having standing.

Conclusion

The Court's decision in this case will have a significant effect on the ability of taxpayers to challenge federal programs administered by the executive branch. If the Freedom from Religion Foundation wins, other opponents of programs like the Faith-Based and Community Initiative will be able to bring suit against the government more easily. If the government prevails, those same opponents will be hampered in bringing suit because of the difficulty in establishing the required standing to challenge the programs in court. **TFL**

Prepared by Richard Beaulieu.

Winkelman v. Parma City School District (05-983)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Jan. 25, 2006)

Oral argument: Feb. 27, 2007

Jeff and Sandee Winkelman contested the adequacy of their eight-year-old autistic son's Individual Education Plan, designed by the Parma City School District, under the Individuals with Disabilities Education Act (IDEA). Both the administrative hearing board and the federal district court that heard the Winkelmans' claim approved the plan. The Winkelmans appealed the decision without a lawyer. The court of appeals dismissed the Winkelmans' claim, holding that parents are barred from litigating IDEA claims pro se on behalf of their children. The Winkelmans argue that IDEA permits pro

se litigation, whereas the Parma City School District claims that educational policy and precedent suggest otherwise. The circuits are split on whether parents can litigate pro se their own procedural IDEA claims and/or their children's substantive IDEA claims. This case should settle the split.

The reality may be that low-income parents like the Winkelmans face substantial financial hurdles in gaining access to courts to protect their children's rights. Of all the disabled children educated by IDEA grants, one-quarter live below the poverty line and two-thirds live in households with an income of \$50,000 or less. Therefore, for many parents of disabled children, legal services are simply not affordable, and limited resources restrict free legal aid to a lucky few.

Nonetheless, a prohibition on pro se representation by parents may actually serve a child's needs better than costly litigation does, because parents may be encouraged to reach informal resolutions. Thus, the primary focus, the child's educational needs, would not be overshadowed by litigation that imposes high costs on school districts that have limited budgets.

Faced with such different arguments, the Supreme Court is likely to consider the interests of the disabled child to tip the scale. The Court must consider the possibility that inexperienced parents will make a mistake that causes serious and irreversible harm to the child's interests or the possibility that school boards will be immune from culpability for failing to deliver adequate education to America's neediest children.

TFL

Prepared by Ferve Ozturk and Jamie Rogers.

Claiborne v. United States (06-5618)

Appealed from the U.S. Court of Appeals for the Eighth Circuit (Feb. 27, 2006)

Oral argument: Feb. 20, 2007

The Federal Sentencing Guidelines were designed to integrate the various purposes of sentencing by allowing both stability and flexibility in the sentencing process. The guidelines were mandatory until 2005, when the Supreme Court held, in *United States v. Booker*, that the mandatory nature of the guidelines violated a person's Sixth Amendment right to a jury trial.

In 2003, Claiborne was arrested and charged with possession of crack cocaine; he pled guilty to the charge. Because Claiborne's sentencing hearing took place after the *Booker* ruling, the guidelines were no longer mandatory. Even after *Booker*, however, the use of the guidelines as a sentencing factor is still required, and, relying on those guidelines, the sentencing judge determined the range of Claiborne's sentence to be between 37 and 46 months. The judge acknowledged that range but suggested that sentencing Claiborne to as many as 37 months was contrary to the rehabilitative purposes of sentencing and unwarranted in light of Claiborne's circumstances and the sentences handed down to others in comparable situations. The judge instead sentenced Claiborne to only 15 months in prison, and the United States appealed to the Court of Appeals for the Eighth Circuit, which reversed the sentencing decision on the grounds that it was unreasonable to deviate so significantly from the guidelines in the absence of extraordinary circumstances.

Claiborne is now appealing the Eighth Circuit's decision, arguing that the requirement of exceptional circumstances renews the mandatory character of the guidelines that *Booker* eliminated as violative of the Sixth Amendment. The United States, however, insists not only that *Booker* permits such a proportionality requirement, but also that requiring proportionality in sentencing beyond the guidelines is the only way to maintain any sense of consistency in sentencing. The outcome of the case will influence federal sentencing across the country by reassessing the delicate equilibrium between the consistency of sentencing and flexibility. **TFL**

Prepared by Kelly Cooke.

Rita v. United States (06-5754)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (May 1, 2006)

Oral argument: Feb. 20, 2007

Victor Rita, a 25-year military veteran, was convicted of making false statements to a grand jury. At sentencing, Rita argued that his distinguished military service, his likelihood of being targeted in prison, and his physical ailments justified a more lenient sentence than those set out in the Federal Sentencing Guidelines. A district judge determined that Rita should receive the minimum sentence set forth in the Federal Sentencing Guidelines for his conviction. Upon appeal, the Fourth Circuit Court of Appeals expressed its view that a within-guidelines sentence was presumptively reasonable and upheld Rita's sentence. The Supreme Court decided to hear the case at hand, in part, because some of the nation's appellate courts have afforded a presumption of reasonableness to sentences that are within the range set forth in the guidelines. Other courts have refused to find such sentences presumptively reasonable. Because an offender who must overcome a presumption of reasonableness is faced with the "nearly impossible task of proving a negative," the difference in approaches can be extremely burdensome. The resolution of this case will clarify the advisory nature of the Federal Sentencing Guidelines and will determine the burden faced by offenders who appeal their sentences.

TFL

Prepared by Elizabeth Cusack.

EC Term of Years Trust v. United States (05-1541)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Jan. 3, 2006)

Oral argument: Feb. 26, 2007

Elmer and Dorothy Cullers created the EC Term of Years Trust to reduce the impact of federal taxes on their estate. When the Internal Revenue Service claimed that the Cullers had transferred property to the trust in an effort to avoid paying taxes, the trust opened a bank account to pay the back taxes that the IRS had levied on the trust. Later, the trust sought to recover the funds under 26 U.S.C. § 7426 (wrongful levy statute) and 28 U.S.C. § 1346 (tax refund statute). At issue in this case is whether 26 U.S.C. § 7426, with its shorter statute of limitations, is the exclusive remedy for wrongful levy actions by third parties, or whether third parties may alternatively seek relief under the more general tax refund provisions of 28 U.S.C. § 1346.

A decision in favor of the trust will make it easier for third-party claimants to bring claims of wrongful levies. Parties will be free to file claims even after the nine-month statute of limitations expires under 26 U.S.C. § 7426 by seeking a refund under the two-year statute of limitations set forth in 28 U.S.C. § 1346. In addition, a decision in favor of the trust has the potential to affect other actions involving a question of the exclusivity of remedies. If the statute itself or the *Congressional Record* makes no mention of exclusivity, the claimants will be free to assume that they can seek relief under a more liberal statute that provides a less specific remedy. This outcome has the potential to expand the types of actions claimants can bring and to affect the way Congress writes new statutes, compelling Congress to be very specific in expressing its intent. A decision for the trust could also undermine Congress's efforts to secure expeditious resolutions of tax liability by imposing the shortened limitations period. **TFL**

Prepared by Miguel Loza.

Microsoft v. AT&T (05-1056)

Appealed from the U.S. Court of Appeals for the Federal Circuit (July 13, 2005)

Oral argument: Feb. 21, 2007

AT&T sued Microsoft over the defendant's code in its Microsoft

Windows operating system. Microsoft stipulated that it had infringed upon AT&T's patent with regard to domestically produced computers but contested liability under 35 U.S.C. § 271(f) with regard to foreign-produced computers that did not enter the U.S. market. Specifically, Microsoft claims that copies of Microsoft Windows, which were copied from its U.S. master disks, were not "supplied" from the United States, as required by 35 U.S.C. § 271(f). Microsoft bases its argument on the history of § 271(f); its relation to *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972); and the presumption against extraterritoriality, which prohibits the courts from applying U.S. law to foreign conduct unless Congress clearly expressed its intention to do so. The federal circuit disagreed with Microsoft and held for AT&T. The Supreme Court's decision in this case could reveal the Court's fundamental approach to software-related patents, with the potential of drastically altering the software industry worldwide. And one thing is for sure about the outcome: big money is at stake. Under the settlement agreement between Microsoft and AT&T, the amounts are already set. Some experts estimate that, if Microsoft loses, it could cost the company more than \$1 billion, because Microsoft would owe royalties on every relevant foreign copy of MS Windows sold up to 2001. **TFL**

Prepared by Dylan Letrich.