

Exxon Shipping Co. v. Baker **(07-219)**

Appealed from the U.S. Court of Appeals for the Ninth Circuit (May 23, 2007)

Oral Argument: Feb. 27, 2008

In the days following the *Exxon Valdez* oil spill, pictures of slick, oil-covered birds and otters filled newspapers, and television news broadcasts led with footage of black oil lapping Alaska's rocky shore. The public was outraged, and in 1994, a diverse group of Alaskan landowners, Native American groups, and commercial fishermen were granted an award of \$5 billion in punitive damages. At the time, it is unlikely that the court fully considered the far-reaching ramifications of granting such a large award. However, the outcome of this case before the Supreme Court will have a significant effect on the shipping and fishing industries, shipping insurers, and consumers, as well as the environment.

Facts and Procedural Posture

On March 24, 1989, the oil tanker Exxon Valdez ran aground on Bligh Reef in Prince William Sound, Alaska, splitting the tanker's hull and spilling 11 million gallons of oil—20 percent of its cargo—into the waters off Alaska's coast. Thousands of animals and hundreds of thousands of birds died in the days immediately after the spill. The fishing and tourism industries suffered estimated losses in the millions of dollars.

Most of the events leading to the crash are not in dispute: Icebergs were visible on the ship's radar: therefore, in accordance with industry custom, the ship informed the Coast Guard that the crew was going to navigate outside of normal shipping lanes—a course that took the ship toward Bligh Reef. The ship's captain, Joseph Hazelwood, instructed Third Mate Gregory Cousins when to turn the ship to avoid the reef. But then, in violation of Exxon's written policies, Hazelwood left the bridge. Cousins made the turn, but he made it too late.

In the wake of the spill, thousands

of people—including government employees, private citizens, and Exxon employees—worked to contain the oil spill and clean up the oil. The cleanup continued until 1992, when the state of Alaska and the U.S. Coast Guard declared that the cleanup had been completed. However, 18 years after the spill, the damage it caused continues to have a negative impact on the ecosystem of Prince William Sound.

Immediately after the spill, Exxon voluntarily paid \$2.2 billion toward the cleanup. The state of Alaska sued Exxon for compensatory and punitive damages, and the United States indicted Exxon for violating the Clean Water Act (CWA), 33 U.S.C. § 1311(a), and other statutes. As a result of this litigation, Exxon paid \$1 billion in settlements to the Alaskan and U.S. governments. That money is being used for environmental studies and conservation programs for Prince William Sound. Exxon also paid approximately \$300 million in voluntary settlements with private parties.

In addition, a large group of private parties—including Alaskan landowners, Native American groups, and commercial fishermen—filed a suit against Exxon for economic harm beyond what Exxon had paid through its voluntary claims program. In 1994, a jury in an Alaska district court awarded the plaintiffs \$287 million in compensatory damages; the court later reduced this amount to roughly \$20 million to reflect released claims and settlements Exxon had reached during the trial. The jury also found that both Capt. Hazelwood and Exxon had been reckless; therefore the plaintiffs were awarded punitive damages to punish Exxon and to deter similar reprehensible behavior. The jury awarded \$5,000 in punitive damages against Hazelwood and an unprecedented \$5 billion against Exxon.

Exxon appealed to the Ninth Circuit Court of Appeals, contesting both the award of punitive damages against the company and the amount awarded. The Ninth Circuit upheld the award of punitive damages but, in light of recent Supreme Court due process decisions, instructed the district court to reduce the amount. After the district court cut

the damages award to \$4 billion, Exxon appealed again, and the Ninth Circuit again sent the case back to the trial court to reconsider the amount in light of an additional Supreme Court ruling in a similar case. This time, the district judge increased the punitive damages to \$4.5 billion with interest. Exxon appealed a third time to the Ninth Circuit, which itself reduced the amount of punitive damages to \$2.5 billion. After unsuccessfully petitioning the Ninth Circuit for a rehearing—and later for a hearing en banc—Exxon petitioned the Supreme Court for a writ of certiorari, which the Court granted on Oct. 29, 2007.

Exxon's Liability for Punitive Damages

Most of the press coverage of this case focuses on the size of the punitive damages award leveled against Exxon, but the Court must resolve two underlying legal issues before addressing the size of the award. First, Exxon urges the U.S. Supreme Court to find that, under maritime law, a court may not award punitive damages against a shipowner for the ship master's acts, unless the owner authorized, ratified, or participated in those acts. Exxon further contends that the Alaska District Court jury's sole basis for awarding punitive damages against Exxon in this case was just such vicarious liability. The company bases the latter contention on the instructions given to the district court's jury, which stated that, as a matter of law, a company is deemed reckless if managerial agents, acting in the course and scope of employment, are reckless. Exxon argues that, according to the jury instructions, Capt. Hazelwood fit the definition of a managerial agent. Moreover, the instructions allowed the jury to find Exxon vicariously liable for Hazelwood's conduct even if Exxon had established policies prohibiting that conduct. Respondents argue that the proper standard for corporate punitive liability is the one stated in § 909(c) of Restatement (Second) of Torts, which says, in part, that the torts of a managerial agent acting within the scope of employment can be imputed

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to the agent's employer. This rule properly extended to Capt. Hazelwood and Exxon, because Exxon had given its ship masters management authority.

The second issue to be considered before dealing with the size of the award is Exxon's argument that the company should not have been subjected to punitive damages for the oil spill under maritime law, because congressionally established penalties under the Clean Water Act were meant to be the exclusive punishment for such spills. Exxon maintains that, in cases in which Congress has established a coherent legal regime to cover a particular area—such as the Clean Water Act—this legislation may displace or preempt courts' authority to make law in that area. Exxon also claims that, even though federalism concerns raise a presumption against displacing *state* law with federal statutory law, separation of powers concerns create a presumption in favor of pre-emption when a congressional statute contends with federal common law, such as federal maritime law. Exxon argues that in the CWA, Congress established a comprehensive penalty regime that balances the need to punish polluters against the need to sustain economic interests, such as maritime commerce. Therefore, according to Exxon, allowing additional damages would upset this balance. Exxon acknowledges that the CWA contains a "savings" clause, which states that the act does not affect a shipowner's obligations when it comes to damage to any public or private property, but the company says that this clause was meant only to ensure that private parties could recoup actual losses and is not related to punitive damages. Exxon argues that punitive damages, in contrast, serve the *public* purpose of punishment and deterrence and that such a public purpose is fully served by the penalties imposed under the Clean Water Act.

Respondents first contend that Exxon waived its CWA argument by failing to raise it in a timely manner before the district court. Therefore, the Ninth Circuit should not have passed judgment on the merits of that question, and the Supreme Court should not consider it.

Respondents also argue that Exxon's

CWA claim is wrong on the merits. First, the respondents maintain that the Trans-Alaska Pipeline Authorization Act (TAPAA), not CWA, is the controlling statute in the case. In fact, Exxon had raised the same pre-emption issue concerning TAPAA that it now raises concerning the CWA. When the district court rejected the former claim, however, Exxon did not appeal that decision. Second, the respondents claim that the cases Exxon cites in support of statutory displacement really concern legal remedies that would conflict or interfere with the statute in question. According to the respondents, their suit for economic harm in no way interferes with the CWA's environmental standards. Finally, the respondents argue that the CWA does not purport to be—and has not functioned as—an exclusive legal remedy for oil spills. Instead, the act preserves pre-existing obligations for private harm in a savings clause and has shared its field of operation not only with private tort claims but also with other criminal statutes. Several of the latter were used to prosecute Exxon for the *Valdez* spill. The respondents say that Exxon's sole remaining argument is that the CWA displaces only the punitive damages portion of the respondents' claim and that this argument is meritless, because CWA's silence on the availability of punitive damages is not sufficient to eliminate a remedy that maritime law has traditionally provided.

It is important to note that the controlling statute in oil spill cases is now the Oil Pollution Act of 1990, not the Clean Water Act. Therefore, a ruling on CWA pre-emption would have little significance beyond this case.

Size of the Punitive Damages Award

Exxon argues that, if the Court allows punitive damages under general maritime law, the Court should at least use its position at the top of the federal court hierarchy to set standards for the size of such awards. These standards should reflect the goals of maritime law: protecting maritime commerce; limiting liability; and providing fair and predictable remedies. To address these policies adequately, the Court should

gauge the appropriateness of the award against a series of benchmarks, such as available statutory penalties and the incentives the award is likely to provide. Exxon says that, by any standard, the \$2.5 billion award is far too high and should be struck down.

The respondents counter that the size of the award is not excessive, because it reflects the scope of the harm caused by the spill. They dispute the argument that maritime law requires any special standards, beyond standards for land-based torts, to control the size of an award for punitive damages. Instead, the respondents argue that any guidance should reflect the Court's established due process standards and that, by these and other existing standards, the award was appropriate.

The parties' arguments concerning possible consequences of an adverse decision are explored and amplified in nearly 30 amicus briefs from shipping and oil interests on the one side and environmental groups on the other.

Conclusion

This case has been in the courts for nearly 15 years. Thus, the Ninth Circuit may have voiced a common sentiment when it wrote in its opinion that "[i]t is time for this protracted litigation to end." The U.S. Supreme Court may now make good on the Ninth Circuit's promise. In the process, the Court will address sensitive issues of risk and financial liability in the maritime transport of essential but potentially hazardous cargo. **TFL**

Prepared by Ellen Loeb and Ginger McCall; edited by Molly Curren Rowles.

Munaf v. Geren (06-1666); Geren v. Omar (07-394)

Appealed from the U.S. Court of Appeals for the District of Columbia Circuit (2007)

Oral Argument: March 25, 2008

Can American citizens who have been detained abroad by the U.S. armed forces working as part of a multinational force bring habeas corpus petitions in federal courts? What if these citizens have already been charged,

tried, and convicted in a foreign court? What are the possible repercussions for ignoring the final judgment of a sovereign nation? The cases of Shawqi Ahmad Omar and Mohammed Munaf have presented the Supreme Court with these questions, and the Court's decision will more clearly define the role of federal courts in the international war on terror in the post-9/11 world.

Facts

The first case of these two consolidated cases to have been decided, *Geren v. Omar*, involves Shawqi Ahmad Omar, a dual citizen of the United States and Jordan, who was captured and detained in Iraq in October 2004 by U.S. military forces operating as part of the Multinational Force-Iraq (MNF-I). *Omar v. Harvey*, 479 F.3d at 3. According to the government, Omar was an associate of an insurgent, Abu Musab al-Zarqawi, and helped Zarqawi plan terrorist activities within and outside of Iraq. Found by a military panel to be a security internee and an enemy combatant, Omar remains under control of U.S. forces, allegedly without formal charges and access to counsel. In August 2005, when MNF-I revealed plans to transfer Omar to the Central Criminal Court of Iraq (CCCI) for trial, his wife and son filed a petition for habeas corpus in the U.S. District Court for the District of Columbia. Eventually the habeas corpus petition and the preliminary injunction were granted, preventing Omar's transfer into Iraqi custody and ensuring the Court's continued jurisdiction over his claim. The Court of Appeals upheld the decision, finding that Omar is squarely within the bounds of the habeas corpus statute because he is an American citizen being detained without trial by military officials acting under the authority of the United States.

Munaf v. Geren, the companion case to *Omar*, is similar in factual circumstances, yet a world apart in legal posture. Mohammad Munaf, an American citizen since 2000, was born in Iraq but lived in Romania with his wife from 2001 to 2005. *Mohammad v. Harvey*, 456 F. Supp. 2d 115, 117 (D.D.C. 2006). The government claims that Munaf was part of an elaborate kidnapping-for-profit scheme designed to help the mastermind of the plot to kidnap journalists

and increase his own stature in Romania by negotiating the release of the journalists. Munaf denies any criminal activity or association with terrorists. Fifteen months after his capture by MNF-I forces, he too filed for a petition for writ of habeas corpus in D.C. District Court. But, unlike Omar, Munaf was transferred to Iraqi custody, tried and convicted by a CCCI judge, and sentenced to death for his alleged role in the kidnapping plot. *Munaf v. Geren*, 482 F.3d 582, 582 (D.C. Cir. 2007). U.S. officials claim that the Romanian Embassy authorized them to bring charges against Munaf in the Iraqi court, but proof of this authorization has not been produced. Munaf is currently still being held by U.S. forces acting as part of the MNF-I.

The D.C. District Court denied Munaf's petition on the basis of lack of jurisdiction. On appeal, the circuit court found that, because Munaf had been tried and convicted by a non-U.S. tribunal administered by Iraq's government, U.S. courts could not hear his petition. The court explained that, even though Omar and Munaf were both U.S. citizens being held by U.S. forces abroad, Omar's case presented one key difference: he, unlike Munaf, had never been tried and convicted by the CCCI and thus was still under the jurisdiction of U.S. courts. Because a foreign tribunal had already convicted Munaf, the D.C. Circuit ruled that the district court had been correct in finding that it could not exercise jurisdiction over his case.

Habeas Corpus and the War on Terror

The "great writ" of habeas corpus is a "fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-291 (1969). The combined case of *Munaf v. Geren* and *Geren v. Omar* is yet one more in a recent line of cases concerned with habeas corpus petitions brought by individuals who have been detained as a result of the war on terror. In one such case, *Rasul v. Bush*, the Supreme Court found that foreign nationals detained at the military base at Guantanamo Bay, Cuba, were entitled to habeas corpus rights. *Hamdi v. Rumsfeld*, decided on the same day that the *Rasul* ruling came down, confirmed that a U.S. citizen who is detained in the United

States as an enemy combatant must be given a meaningful opportunity to challenge his or her detention. Another case, *Hamdan v. Rumsfeld*, which involved a decision made by the government's executive branch to detain U.S. citizens during time of war, held that the military commissions established by the Bush administration at Guantanamo Bay to try enemy combatants violated both the Third Geneva Convention and the Uniform Code of Military Justice. Most recently, the Supreme Court heard oral arguments from yet another set of Guantanamo detainees in *Boumediene v. Bush* and *Al Odab v. United States*, a consolidated case questioning the constitutionality of the Military Commissions Act, which denies the right to habeas corpus to Guantanamo detainees who are not U.S. citizens.

The habeas corpus petitions brought by Munaf and Omar differ from the above cases because here both petitioners are U.S. citizens, but they are being detained in a foreign country by the Multinational Force-Iraq, an "internationally authorized entity consisting of military forces from approximately 27 nations." The Supreme Court's opinion will clarify whether either their citizenship status or the detention by a multinational force are determinative of federal court jurisdiction to entertain habeas corpus petitions.

The Court's decision could potentially also have wide-ranging effects on U.S. international relations. The D.C. Circuit Court found that it had jurisdiction to hear Omar's habeas corpus petition but not Munaf's. In distinguishing these two cases from each other, the court emphasized the fact that Munaf had already been tried and convicted in the Central Criminal Court of Iraq, whereas Omar had not yet been transferred to Iraqi custody, much less convicted by an Iraqi court. Distinguishing these cases on this ground acknowledges and abides by the conviction rendered by the foreign court. If the Supreme Court determines that U.S. courts should have habeas corpus jurisdiction in *both* situations, however, this decision could suggest that a federal judge may have the ability to attack a foreign court's conviction.

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Omar and Munaf argue that federal courts are able to hear their habeas corpus petitions, because the federal habeas statute grants jurisdiction to district courts when petitioners are held under the authority of the United States. Although the habeas petitioners were both detained under the Multinational Force-Iraq, they were in the actual physical custody of the U.S. Army, which they claim is enough for habeas jurisdiction. The U.S. government, on the other hand, argues that giving federal courts jurisdiction to hear habeas corpus petitions filed by individuals detained by a multinational force acting under international authority would interfere with a foreign nation's ability to prosecute criminal conduct on its own soil.

There are, however, parties who point out that more important than international rules of comity are the rights of American citizens who are currently in Iraq and constantly facing the dangers posed by Iraq's underdeveloped and arguably biased justice system. Human Rights Watch and the Center for Constitutional Rights, along with other nongovernmental organizations, argue that Omar and Munaf face a high risk of torture if they are released into Iraqi custody. The Associated Press and other news organizations claim that the Supreme Court must also consider the risk of erroneous detentions of journalists and other professionals in Iraq in deciding whether to limit the reach of federal habeas corpus jurisdiction there. In addition, the American Bar Association and international law professors from all over the country argue, respectively, that the Due Process Clause and the laws of extradition prevent the transfer of Omar and Munaf into Iraqi custody.

Conclusion

The Supreme Court's decision in the consolidated case of *Munaf v. Geren* and *Geren v. Omar* will determine whether American citizens detained in the international war on terror can bring habeas corpus petitions to federal courts to review their imprisonment by multinational forces. The decision will also clarify issues of international comity by determining whether federal courts can review the detention of an

American citizen who has already been tried and convicted by another nation. A decision for the habeas petitioners would possibly grant federal judges the authority to review convictions by foreign courts, whereas a decision for the government will create incentives for the U.S. military to transfer detainees to a tribunal to be tried quickly in order to deprive federal courts of the jurisdiction to hear the detainees' claims. If the Supreme Court affirms the D.C. Circuit Court's holdings in both cases, the decision will confirm that a pre-existing foreign conviction is the distinguishing factor between the cases of Mohammad Munaf and Shawqi Ahmad Omar. **TFL**

Prepared by Carrie Evans and Katie Higgins; edited by Cecelia Sander Cannon.

Allison Engine Co. v. United States (07-214)

Appealed from the U.S. Court of Appeals for the Sixth Circuit (Dec. 19, 2006)

Oral Argument: Feb. 26, 2008

The U.S. Navy contracted with two shipyards for the production of a new fleet of destroyers. Each destroyer required an electrical generator set to provide electricity. Several companies became involved in the project to build the generator sets. None of these companies billed the federal government directly but, instead, billed the company directly above them in the production chain. That company did not include these bills when submitting requests for payment from the government. This case began when two whistle-blowers sued their former employer and other government subcontractors under the False Claims Act. The District Court dismissed the claim, holding that no violation of the False Claims Act could occur unless the federal government actually relied on a fraudulent bill. On appeal, the U.S. Court of Appeals for the Sixth Circuit held that the False Claims Act does not require proof that the fraudulent bill had actually been presented to the federal government. The Supreme Court's ultimate decision could have important economic consequences for

taxpayers and government contractors. Full text is available at www.law.cornell.edu/supct/cert/07-214.html. **TFL**

Prepared by Allison Condon and Michael Litwin.

Burgess v. United States (06-11429)

Appealed from the U.S. Court of Appeals for the Fourth Circuit (March 12, 2007)

Oral Argument: March 24, 2008

In 2002, a South Carolina state court convicted Keith Burgess of misdemeanor drug possession, an offense punishable by up to two years' incarceration. In 2003, a federal court convicted Burgess of conspiring to distribute 50 or more grams of cocaine base in violation of the Controlled Substances Act (CSA). The court ruled that Burgess' prior conviction in state court constituted a "felony drug offense" under the CSA and thus qualified Burgess for sentence enhancement from 10 to 20 years' imprisonment. Burgess appealed, claiming that the sentence enhancement provision did not apply. Burgess argues that the court should have applied the CSA's definition of "felony," under which his conviction in state court merely constituted a misdemeanor instead of a "felony drug offense," under which the conviction made Burgess eligible for the sentence enhancement. This case highlights the role of judicial review in the application of mandatory minimum sentences. Full text is available at www.law.cornell.edu/supct/cert/06-11429.html.

TFL

Prepared by Carrie Payne and Suzanne Cook.

CBOCS West Inc. v. Humphries (06-1431)

Appealed from the U.S. Court of Appeals for the Seventh Circuit (Jan. 10, 2007)

Oral Argument: Feb. 20, 2008

This case involves the protection afforded by 42 U.S.C. § 1981, which

provides that any “person within the jurisdiction of the United States” has the same right to “make and enforce” contracts, regardless of their skin color. Section 1981 applies to many aspects of the employment relationship, because that relationship is considered contractual; however, the extent of this protection is unclear. This case addresses the question of whether an employee can bring a claim for retaliation under § 1981, which contains no express provision covering retaliation. However, retaliation claims often overlap with claims of discrimination and are difficult to separate from such claims. If the Supreme Court decides that § 1981 protects an employee from race-based retaliation, the ruling will give employees greater flexibility in filing claims of retaliation, because they will not be subject to the filing deadlines and limits on damages found in Title VII of the Civil Rights Act of 1964, an alternative provision that does encompass retaliation claims. Full text is available at www.law.cornell.edu/supct/cert/06-1431.html. **TFL**

Prepared by Fritz Ernemann and Lauren Buechner.

Chamber of Commerce v. Brown (06-939)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Sept. 21, 2006)
Oral Argument: March 19, 2008

The California state legislature passed an act, AB 1889, that bars private employers who receive state funds from using the funds to assist, promote, or deter union organizing. AB 1889 also prohibits private employers who participate in state programs and receive state funds from using those funds for the purpose of promoting or hindering union organization. The U.S. Chamber of Commerce claims that this statute is pre-empted by the National Labor Relations Act. A finding for the Chamber of Commerce would protect employers’ right to free speech from states’ attempts to define neutrality between management and labor. Conversely, a finding for California would provide unions with potential safeguards in their struggle against

employers seeking to stave off union organizing while furthering California’s overall policy of remaining neutral in the struggle between management and labor. Full text is available at www.law.cornell.edu/supct/cert/06-939.html. **TFL**

Prepared by Valerie Robart and John Busby.

Cuellar v. United States (06-1456)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (Feb. 2, 2007)

Oral Argument: Feb. 25, 2008

Humberto Cuellar was convicted of international money laundering after officers found large sums of money hidden in a vehicle Cuellar intended to drive across the U.S. border into Mexico. A jury found Cuellar guilty under 18 U.S.C. § 1956(a)(2)(B)(i), which makes money laundering a federal crime. An en banc panel of the U.S. Court of Appeals for the Fifth Circuit affirmed Cuellar’s conviction. In this case, U.S. Supreme Court will determine whether an attempt to create the appearance of legitimate wealth is necessary to support a money laundering conviction. Cuellar argues that his conviction cannot stand, because he did not attempt to create the appearance of being in possession of legitimate funds. The United States argues that a money laundering conviction is appropriate if a criminal defendant physically concealed illegal funds when crossing the border. The Court’s decision will resolve the current split among the circuits and will clarify the scope of the federal money laundering statute. Full text is available at www.law.cornell.edu/supct/cert/06-1456.html. **TFL**

Prepared by Victoria Bourke and Tiffany Sepulveda.

District of Columbia v. Heller (07-290)

Appealed from the U.S. Court of Appeals for the District of Columbia Circuit (Nov. 20, 2007)

Oral Argument: March 18, 2008

The District of Columbia has some of the most restrictive gun laws

in the nation. D.C. law prohibits possession of handguns and bans anyone from carrying a handgun or other deadly or dangerous weapon without a license within its borders. The District of Columbia also requires that any firearms that may be kept within the district, such as rifles, be kept either disassembled or with a trigger lock. Respondent Heller claims that these laws violate his Second Amendment right to keep and bear arms. The Supreme Court has not heard a case involving the Second Amendment since 1939 and has never decided whether the Second Amendment confers a right to bear arms upon individuals or only upon the militias to whom the amendment refers in its opening clause. In the intervening 69 years, federal and state governments have passed many laws regulating and restricting the ownership and use of guns. Should the Supreme Court uphold the D.C. Circuit’s invalidation of the handgun ban, the decision could have a substantial impact on these gun laws and will almost certainly lead to more litigation, as gun rights advocates challenge those laws as violations of the Second Amendment. If the Court finds that D.C.’s ban on handguns is constitutional, the ruling will strengthen the ability of the government to regulate gun ownership and may result in more restrictive gun laws across the country. Full text is available at www.law.cornell.edu/supct/cert/07-290.html. **TFL**

Prepared by Lauren Buechner and Fritz Ernemann.

Florida Dept. of Revenue v. Piccadilly Cafeterias (07-312)

Appealed from the U.S. Court of Appeals for the Eleventh Circuit (April 18, 2007)

Oral Argument: March 26, 2008

Soon after Piccadilly Cafeterias Inc. filed for bankruptcy under Chapter 11, it sought and received authorization from the Bankruptcy Court to sell most of its assets. Piccadilly Cafeterias also received an exemption from Florida state tax on this sale, pursuant to § 1146(c) of the Bankruptcy Code. The Florida Department of Revenue

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objected to this exemption, because the sale took place before the bankruptcy plan was confirmed. On appeal, the U.S. District Court for the Southern District of Florida and the U.S. Court of Appeals for the Eleventh Circuit affirmed the Bankruptcy Court's decision to exempt the sale of the assets prior to confirmation of a bankruptcy plan. The Florida Department of Revenue argues that the Eleventh Circuit's interpretation of the statute is not justified and claims that the lower court's decision will create much unnecessary litigation and ambiguity. Piccadilly Cafeterias argues that the text is ambiguous and that legislative history supports the Bankruptcy Court's decision. This case will have a profound impact on state and local revenue collection in bankruptcy proceedings. Full text is available at www.law.cornell.edu/supct/cert/07-312.html. **TFL**

Prepared by Eric Finkelstein and Michael Zuckerman.

Gomez-Perez v. Potter (06-1321)

Appealed from the U.S. Court of Appeals for the First Circuit (Feb. 9, 2007)
Oral Argument: Feb. 19, 2008

Myrna Gomez-Perez worked full time for the U.S. Postal Service (USPS). When the USPS denied her request to transfer to another location. Gomez-Perez, then 45 years old, filed an equal employment opportunity complaint alleging age discrimination. Gomez-Perez claims that, after she filed the complaint, her supervisors retaliated by reducing her work hours and lodging false complaints against her in violation of § 633a of the Age Discrimination in Employment Act (ADEA). The District Court granted summary judgment for the USPS. On appeal, the U.S. Court of Appeals for the First Circuit affirmed the summary judgment. Gomez-Perez argues that an implicit right of action for retaliation should be read into the ADEA in order to avoid giving the government a blank check to discriminate after an initial complaint has been filed with the Equal Employment Opportunity Commission. The USPS argues for

a strict reading of § 633a, which does not explicitly include a right of action for retaliation. The outcome of this case will affect the right of federal government employees to be free of age discrimination in the workplace. Full text is available at www.law.cornell.edu/supct/cert/06-1321.html. **TFL**

Prepared by Debra Faulkner.

Indiana v. Edwards (07-208)

Appealed from the Supreme Court of Indiana (May 17, 2007)
Oral Argument: March 26, 2008

Ahmad Edwards stole a pair of shoes from a department store in Indiana and then shot at the store security guard who chased after him, wounding the guard and a passerby. The state of Indiana charged Edwards with theft, criminal recklessness, battery, and attempted murder. An Indiana trial judge declared Edwards competent to stand trial but later denied Edwards' request to serve as his own lawyer, saying that Edwards, a diagnosed schizophrenic, was not competent to represent himself. Edwards then went to trial with counsel, a jury found him guilty, and he was sentenced to 30 years in prison. Edwards appealed, arguing that the court had deprived him of his Sixth Amendment right to represent himself at trial. The Indiana Court of Appeals agreed with Edwards and called for a new trial. The appeals court held that, once the trial court had found Edwards competent to stand trial, the court could not impose a higher competency standard to determine whether he could act as his own lawyer. The Indiana Supreme Court affirmed the appellate court's decision. The U.S. Supreme Court will consider whether states may impose greater competency standards on defendants who wish to represent themselves than they impose on ordinary defendants. Full text is available at www.law.cornell.edu/supct/cert/07-208.html. **TFL**

Prepared by Ellen Loeb.

Morgan Stanley Capital Group v. Public Utility Dist. 1 (06-1457); Calpine Energy Svcs. v. Public Utility Dist. 1 (06-1462)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Dec. 19, 2006)
Oral Argument: Feb. 19, 2008

During the energy crisis in California in 2000 and 2001, a combination of factors drastically increased the cost of energy. This situation caused one electrical utility company, Public Utility Dist. 1, and the other respondents in this case to enter into forward contracts with energy suppliers. After the crisis abated, the local utility companies claimed that artificially inflated prices at the time forward contracts were signed had affected the rates set in those contracts, and they asked the Federal Energy Regulatory Commission (FERC) to declare the contracts void. FERC declined to do so, stating that it would defer to rates set through a valid contractual process. The local utilities appealed and the Ninth Circuit ruled in their favor, holding that FERC's decision was based on an incorrect standard of review, because it failed to consider the possible effect of spot market price manipulation on the forward contracts. The Supreme Court granted the suppliers' petition for certiorari. The decision in this case will affect energy suppliers, distributors, and consumers. Full text is available at www.law.cornell.edu/supct/cert/06-1457.html. **TFL**

Prepared by Deepa Sarkar and Joe Hashmall.

Philippines v. Pimentel (06-1204)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Sep. 12, 2006)
Oral Argument: March 17, 2008

Federal Rule of Civil Procedure 19(b) requires a federal court to dismiss a civil action if an indispensable party is unavailable for trial. Foreign sovereigns can make themselves unavailable by asserting their sovereign immunity from the suit. The Supreme Court will consider the interaction between these two

doctrines in this interpleader action to resolve the ownership of property claimed by the Republic of the Philippines and by Mariano Pimentel. The Philippines successfully asserted its sovereign immunity and now argues that the action cannot proceed in its absence. Pimentel responds that foreign sovereigns cannot stop an interpleader action merely by claiming an interest in the property at issue and then asserting sovereign immunity. The Court's decision in this case will affect the ability of lower courts to adjudicate titles to assets claimed by foreign sovereigns. This issue is likely to become increasingly important as sovereigns make ever greater investments in assets owned by the private sector. Full text is available at www.law.cornell.edu/supct/cert/06-1204.html. **TFL**

Prepared by Bryan Hall.

Richlin Security Service Co. v. Chertoff (06-1717)

Appealed from the U.S. Court of Appeals for the Federal Circuit (April 3, 2007)

Oral Argument: March 19, 2008

Richlin Security Service Company contracted with the former Immigration and Naturalization Service to provide security guard services. As a result of a mutual mistake, Richlin's employees were underpaid for their work. Richlin litigated this case four times before the Department of Transportation Contract Appeals Board, which awarded Richlin payment for workers' compensation premiums, payroll taxes, and wages. Richlin, pursuant to the Equal Access to Justice Act, then applied for reimbursement of attorneys' fees, expenses, and costs. Although Richlin was fully compensated for attorneys' fees, the board only awarded Richlin reimbursement of paralegal services at cost rather than the amount billed. The U.S. Court of Appeals for the Federal Circuit affirmed the board's decision. Richlin argues that paralegal services should be reimbursed as "attorneys' fees" because paralegals perform substantive work that contributes to the attorney's work product. The United States contends that Congress intended for paralegal services to be considered "expenses," which are reimbursed at cost. The out-

come of this case will have an impact on citizens and organizations that rely on the Equal Access to Justice Act to bring claims against the government. Full text is available at www.law.cornell.edu/supct/cert/06-1717.html. **TFL**

Prepared by Debra Faulkner.

Riley v. Kennedy (07-77)

Appealed from the U.S. District Court for the Middle District of Alabama (May 1, 2007)

Oral Argument: March 24, 2008

Throughout the early and mid-1900s, states such as Alabama discriminated against minorities by effectively denying them the right to vote. In response, Congress passed the Voting Rights Act, which required states to receive approval from the federal government before changing their voting laws. In 1985 and again in 2004, the U.S. Department of Justice approved Alabama laws providing for special elections rather than appointments to the Mobile County Commission, which governs Mobile County, Ala. The Supreme Court of Alabama found the 1985 law unconstitutional and the 2004 law inapplicable; therefore, the governor of Alabama continued to appoint Mobile County commissioners. The U.S. Supreme Court will consider whether the Alabama court's decisions changed state voting rules and thus required approval by the federal government. This case could affect the future of the Voting Rights Act and determine the proper level of oversight by the U.S. Department of Justice over state court decisions regarding voting. Full text is available at www.law.cornell.edu/supct/cert/07-77.html. **TFL**

Prepared by Allison Condon and Michael Litvin.

Rothgery v. Gillespie County, Texas (07-440)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (June 29, 2007)

Oral Argument: March 17, 2008

Walter Allen Rothgery was arrested without a warrant and appeared before a local magistrate as required

by Texas law. Following his release on bond, Rothgery made several written requests for appointed counsel to Gillespie County officials, but county officials failed to appoint defense counsel until after a grand jury indicted Rothgery six months later. Rothgery sued Gillespie County under 42 U.S.C. § 1983, claiming that the county's failure to grant his request until after his indictment violated his Sixth Amendment right to counsel. Rothgery contended that his initial appearance before the magistrate constituted the commencement of "adversary judicial proceedings," which triggers an accused person's Sixth Amendment right to appointed counsel. The Fifth Circuit held that Rothgery's right to counsel did not attach until after Rothgery's indictment because, until that time, the state had not committed itself to prosecute Rothgery. The decision in this case will determine when the right to counsel vests and will affect the administration of criminal proceedings and law enforcement. Full text is available at www.law.cornell.edu/supct/cert/07-440.html. **TFL**

Prepared by William Grimsbaw and Stephen Markus.

United States v. Clintwood Elkhorn Mining Co. (07-308)

Appealed from the U.S. Court of Appeals for the Federal Circuit (Apr. 27, 2007)

Oral Argument: March 24, 2008

The Clintwood Elkhorn Mining Company sought to recover tax payments it had made for exports after a federal court found the 1978 tax unconstitutional. Clintwood filed timely administrative refund claims under the IRS Tax Code within its three-year statute of limitations and received repayments with interest for 1997 to 1999. Clintwood also filed an Export Clause damages claim for tax payments from 1994 to 1996 under the Tucker Act, which has a longer statute of limitations—six years. The government argues that the tax code provides the exclusive remedy for such refunds; Clintwood argues that the Tucker Act alternative offers the best remedy for the government's unconstitutional taxation.

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side of the decision as “the rosy cheek coalition.” Once, when Chief Justice Rehnquist read a draft opinion featuring one of Scalia’s attacks on O’Connor, Rehnquist said, “Nino, you’re pissing off Sandra again. Stop it!”

If *The Nine* has a main character, it is Justice Sandra Day O’Connor. As a state senator from Arizona and an elected judge on that state’s court of appeals, O’Connor was, in one sense, the most political of the nine justices; she was always sensitive to societal attitudes and to the need for bridging divergent viewpoints, most notably on abortion. Although she was a Republican appointed by a Republican president, O’Connor was a moderate and took umbrage at her party’s shift to the far right; she was not impressed with

George W. Bush. For years, she was the crucial swing vote on the Court—the one to whom attorneys targeted their briefs and oral arguments. But her last months on the Court became saddened by conservatives’ demand that justices pass political litmus tests as well as by her husband’s descent into the ravages of Alzheimer’s disease.

As Toobin’s narrative opens on the steps to the Supreme Court Building, it also closes with the steps. Because of renovation plans as well as post-Sept. 11 security concerns, the magnificent front entrance is no longer used. Toobin’s conclusion is clear-eyed and sobering:

Cass Gilbert’s steps represent at some level a magnificent illu-

sion—that the Supreme Court operates at a higher plane than the mortals who toil on the ground. But the Court is a product of a democracy and represents, with sometimes chilling precision, the best and worst of the people. We can expect nothing more, and nothing less, than the Court we deserve. **TFL**

Elizabeth Kelley is a criminal defense attorney in Ohio. She has a special commitment to representing individuals suffering from mental illness and mental retardation. She frequently provides legal commentary for Court TV and can be contacted at ZealousAdvocacy@aol.com.

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The Federal Circuit awarded Clintwood both damages and interest for its 1994 to 1996 payments. The Supreme Court will determine whether Clintwood can file claims for repayment of unconstitutional taxes under the Tucker Act and whether these alternative claims include interest awards. In addition to affecting the outcome of similar pending cases, the Court’s decision is likely to affect all taxpayers by determining the amount of reimbursement for taxes later found to be unconstitutional. Full text is available at www.law.cornell.edu/supct/cert/07-308.html. **TFL**

Prepared by Hana Bae and Courtney Zanicco.

United States v. Ressam (07-455)

Appealed from the U.S. Court of Appeals for the Ninth Circuit (Jan. 16, 2007)

Oral Argument: March 26, 2008

Ahmed Ressam was convicted of numerous crimes connected with his participation in an al Qaeda plot to bomb Los Angeles International Airport. He challenges one of the laws under which he was convicted, 18 U.S.C. § 844(h)(2), which provides for a mandatory minimum 10-year sentence for anyone who “carries an explosive

during the commission of any felony which may be prosecuted in a court of the United States.” Ressam was carrying explosives in his car when he signed a customs declaration with a false name, which is a felonious act. The question in this case is whether the language of the statute requires the defendant merely to be carrying the explosives during the commission of a federal felony or whether the explosives must have some relation to the underlying felony. The Ninth Circuit held that there must be a relation between the felony and the explosives, and it vacated the portion of Ressam’s sentence linked to this issue. The Supreme Court granted certiorari to review that determination. Full text is available at www.law.cornell.edu/supct/cert/07-455.html. **TFL**

Prepared by Deepa Sarkar and Joe Hashmall.

Warner-Lambert Co. v. Kent (06-1498)

Appealed from the U.S. Court of Appeals for the Second Circuit (Oct. 5, 2006)

Oral Argument: Feb. 25, 2008

Under Michigan law, individuals may bring personal injury suits against manufacturers of prescription drugs ap-

proved by the Food and Drug Administration (FDA) only if the plaintiffs can show that FDA approval depended on fraudulent submission or withholding of information. In this case, 27 Michigan residents sued Warner-Lambert Co., claiming personal injury arising from using Rezulin, Warner-Lambert’s FDA-approved drug used for treating diabetes. Warner-Lambert argues that Michigan law is pre-empted by federal law, because permitting state courts to second-guess the FDA’s product approval and fraud detection processes interferes with the agency’s essential functions and promotes regulatory uncertainty. The Michigan plaintiffs respond that federal preemption does not apply to traditional state tort claims. The decision in this case will clarify the scope of FDA autonomy in policing the drug approval process and plaintiffs’ freedom to assert state tort claims in areas regulated by federal entities. Full text is available at www.law.cornell.edu/supct/cert/06-1498.html. **TFL**

Prepared by William Grimsbaw and Stephen Markus.