The previews are contributed by the Legal Information Institute, a nonprofit activity of Cornell Law School. The previews include an in-depth look at two cases plus executive summaries of other cases before the Supreme Court. The executive summaries include a link to the full text of the preview.

Birchfield v. North Dakota (14-1468)

Court below: *North Dakota Supreme Court*
Oral argument: April 20, 2016

Issue

Does a state violate the Fourth Amendment by criminalizing a driver's refusal to take a chemical test to detect blood-alcohol levels without a warrant?

Question as framed for the court by the parties

In the absence of a warrant, may a state make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood?

Facts

On July 6 and 7, 2012, drivers driving under the influence of alcohol in North Dakota lost control of their vehicles and caused several tragic deaths. In response, North Dakota passed Brielle's Law, named after one of the victims. Brielle's Law criminalizes a driver's refusal to take a chemical test to determine blood-alcohol levels. Police officers cannot, however, require drivers to take chemical tests unless officers first place "the individual under arrest[,] inform him that he is being or will be charged with driving under the influence," and explain that North Dakota law considers refusal to participate in the test "a crime punishable in the same manner as driving under the influence."

On Oct. 10, 2013, Danny Ray Birchfield drove off a highway and into a ditch in North Dakota. State Trooper Tarek Chase arrived in time to observe Birchfield attempting to drive out of the ditch. Chase suspected that Birchfield was under the influence of alcohol; Birchfield agreed to submit to four field sobriety tests but failed or performed poorly on all four. Chase read the implied consent advisory to Birchfield, as required by state law, and Birchfield consented to an onsite breath test of his blood-alcohol content, which he failed. Chase arrested Birchfield, read him his *Miranda* rights, again read him the implied consent advisory, and asked Birchfield to take a chemical test of his blood. Birchfield refused to take the test. As a result, the state charged Birchfield "with driving under the influence of alcohol or drugs and/or refusing to submit to a chemical test after request by a law enforcement officer."

Birchfield moved to dismiss this charge, stating that the charge violated his Fourth Amendment right against unreasonable search and seizure. The trial court denied Birchfield's motion and found that there had not actually been a search because Birchfield had refused to allow the chemical test.

The Supreme Court of North Dakota agreed with the lower court, and held that Brielle's Law was reasonable and adhered to the state's strong interest in maintaining safe roads free from drunk drivers. The Court found that Birchfield had impliedly consented to such warrantless searches because Birchfield had elected to use North Dakota's highways.

Birchfield appealed; the U.S. Supreme Court granted the writ of certiorari and joined *Bernard v. Minnesota* and *Beylund v. North Dakota* with this case.

In *Beylund v. North Dakota*, Steve Michael Beylund's license was suspended after Beylund submitted to a warrantless chemical blood test of his blood alcohol content after a police officer told him that his refusal to submit would result in his receiving criminal penalties. The North Dakota Supreme Court affirmed Beylund's license suspension. The court held that consent to a blood test is an exception to the Fourth Amendment's warrant requirement for searches and that even if Beylund did have a constitutional right to refuse the test, North Dakota's interest in maintaining safe highways made imputing implied consent reasonable.

In *Bernard v. Minnesota,* police officers arrested William Bernard after he refused to take field sobriety tests. The officers read Bernard the Minnesota Implied Consent Advisory, but he refused to take a breath test. Bernard was charged with two counts of "First Degree Driving While Impaired—Test Refusal." The Minnesota Supreme Court upheld the charges and held that the warrantless breath test was permissible under the Fourth Amendment's search-incident-to-arrest exception.

These cases were consolidated for the convenience of the Court, and as a result the parties avoided making duplicitous arguments.

Discussion

The Supreme Court's decision may adjust state governments' police powers, consider the impact of technology on legal procedures, and redefine the legal understanding of driving.

Importance of driving and implying consent

On behalf of Birchfield, Downsize DC Foundation contends that "the modern notion that driving is a 'privilege' and not a 'right' is a legal fiction" because "driving is not a voluntary commercial enterprise but a necessary aspect of daily living … especially in heavily rural states like North Dakota." DC Foundation argues that asking drivers to choose either to accept warrantless searches via their "implied consent" or to refrain from driving does not provide two meaningful alternatives. Under this illusion of choice, drivers are unconstitutionally coerced into choosing "implied consent."

The Council of State Governments, on behalf of North Dakota, note that driving, although important, is not absolutely necessary: "no one is required to drive" and

millions of Americans affirmatively choose not to drive. The Council of State Governments also notes the improvement of public transportation nationwide and the existence of other alternatives, such as e-hailing services like Uber. The United States further notes that the Court "long ago foreclosed the ['driving is necessary'] approach" in *Hess v. Pawloski* and *South Dakota v. Opperman*, which acknowledged that cars' dangerousness subject them to "continuing governmental regulation and control."

Regulatory penalties versus criminalization

On behalf of Birchfield, the ACLU contends that regulatory penalties, such as suspending a driver's license, are very different from "criminalizing the assertion of one's Fourth Amendment right." The ACLU argues that the state's possibility of asserting regulatory penalties, rather than criminal penalties, for failure to submit to a chemical test renders "criminal penalties to enforce a system of all-purpose 'implied' consent" unconstitutional.

The Council of State Governments seeks to rebut that argument, asserting that drawing a line between "administrative and civil punishments" and criminalization is unpersuasive. Moreover, the criminal penalties enforce state laws whereas administrative and civil punishments would merely place drivers "in the same position they would have been in had they been forthcoming about their unwillingness to accept the condition in the first place."

The practicality of a required warrant system

Amici for Birchfield contend that requiring a warrant before a chemical test is no longer impractical because of technological advances. The National College for DUI Defense provides examples of the use of modern technology with warrants, including telephonic warrants, "Electronic On-Call Warrants" and "widespread electronic communication technology" using smartphones, iPads, email, and text messages.

The United States notes, however, that requiring a warrant system does not address the underlying problem of enforcement. The United States asserts that "breath tests cannot be performed on nonconsenting persons even if a warrant is obtained." According to the United States, a required warrant system may cause delay and additional work for judges but not provide any additional evidence or benefit.

Analysis

The Fourth Amendment and warrantless searches

Birchfield argues that, as a starting point, a state cannot administer a search absent a warrant or consent. Birchfield contends that, because of this restriction, a person cannot face criminal penalties for refusing to submit to a search not authorized by warrant or permissible under an exception to the warrant requirement. In *Missouri v. McNeely*, the Supreme Court held that blood tests for drunk driving constitute a search under the Fourth Amendment and that there was no per se or automatic exception that applied in those circumstances. In light of this holding, Birchfield argues that the state needs a warrant in order to perform a blood or breath test absent consent.

Furthermore, Birchfield contends that no exception applies to this case. Specifically, Birchfield and Bernard claim that the search incident to arrest is inapplicable because that exception is designed to ensure officer safety, which is not at issue during a sobriety stop. Birchfield also claims that the special needs exception only applies when the justification for the search is unrelated to the state's general interest in law enforcement and, because sobriety stops are part of the state's general interest in law enforcement, this exception is inapplicable in this case. North Dakota claims that no warrant is required here because this should be governed under the general standard of reasonableness and that these chemical tests are reasonable in light of the circumstances. Minnesota further argues that, even if no warrant is required, breath tests would be justified under the "search incident to arrest" exception, which allows officers to search suspects while making a lawful arrest.

May states obtain consent implicitly?

Birchfield contends that there was no consent in this case. Specifically, Birchfield contends that consent is only present when it is the product of free and unconstrained choice rather than duress and coercion. Here, Birchfield claims that there was no free or unconstrained choice because petitioners were faced with the option of either consenting to a chemical test or facing criminal misdemeanor penalties. Additionally, Birchfield claims that the actions of merely obtaining a license and using public roads do not produce implied consent to a chemical test because driving is a necessity to carry out basic functions.

Respondents counter that consent under this statutory scheme is voluntary because arrestees can revoke an implied consent and could therefore avoid a nonconsensual warrantless search. Respondents further claim that implied consent statutes are constitutional under both the Fifth and Fourth Amendments. Respondents claim that, under *McNeely*, it is constitutional to punish revocation of consent by suspending a driver's license or using the fact of refusing a chemical test as evidence against a defendant in a criminal proceeding.

Can states condition driving licensure on waiving consent to a warrantless chemical test?

Birchfield asserts that, because the North Dakota law compels consent to a chemical search as a requirement for driving within the state, the law violates the unconstitutional conditions doctrine. The doctrine of unconstitutional conditions prevents states or the federal government from selectively granting a benefit on the condition that the person receiving that benefit surrenders a constitutional right. Here, Birchfield asserts that, because North Dakota has conditioned drivers' privilege to retain their licenses on their submitting to a chemical test upon request by the police, North Dakota is granting a benefit on the condition that drivers give up their Fourth Amendment rights.

North Dakota, on the other hand, claims that, because the penalty here—which is a misdemeanor crime—does not exceed a certain threshold, the Court should weigh the importance of the state interest at issue against the rights of the individual and the nature of the condition. Here, North Dakota claims that the importance of keeping intoxicated drivers off the road weighs heavier than the minor infringement of a chemical test in upholding the condition at issue.

Conclusion

In this case, the Supreme Court will determine whether laws that either infer consent from possessing a driver's license or condition driving upon consenting to a chemical blood-alcohol content test violate the Fourth Amendment. Petitioners, three drivers pulled over for drunk driving, maintain that these state laws violate the Fourth Amendment's prohibition against warrantless searches. Respondents, North Dakota and Minnesota, argue that their compulsion of drivers to submit to chemical tests is

justified and reasonable and that it does not violate the Fourth Amendment because drivers impliedly consent to the tests by driving on the states' roads. The Court's ruling will affect countless drivers stopped by police and the safety regimes with respect to preventing drunk driving in all 50 states. The full text is available at https://www.law.cornell.edu/supct/cert/14-1468. ⊙

Written by Jessica Kim and Michael Levy. Edited by Nathan Koskella.

United States v. Texas (15-674)

Court below: *United States Court of Appeals for the Fifth Circuit*
Oral argument: April 18, 2016

Issue

Do states have standing to challenge federal programs that grant temporary deportation protection to some undocumented immigrants, if the programs increase the states' cost of providing voluntarily subsidized benefits? And is the deferred deportation program in this case lawful under the Administrative Procedure Act and Article II of the U.S. Constitution?

Questions as framed for the court by the parties

Does a state that voluntarily provides a subsidy to all aliens with deferred action have Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 et seq., to challenge the guidance policy because it will lead to more aliens having deferred action?

Is the guidance policy arbitrary and capricious or otherwise not in accordance with law?

Is the guidance policy invalid because it did not go through the APA's notice-and-comment rulemaking procedures?

Does the guidance policy violate the Take Care Clause of the Constitution, art. II, § 3?

Facts

In 2012, the Department of Homeland Security (DHS) implemented the Deferred Action for Childhood Arrivals (DACA) program, which provides temporary protection from deportation (deferred action) primarily for young undocumented immigrants. At launch, about 1.2 million undocumented immigrants qualified for the program. Beneficiaries of the DACA program can renew their deferred action status every three years. The DACA program is an exercise of DHS' prosecutorial discretion. DHS examines DACA applications on a case-by-case basis according to guidance issued by the DHS Secretary (the guidance policy).

In 2014, DHS expanded DACA by creating the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) program. DAPA widened DACA's eligibility criteria and covered certain undocumented immigrants who have children who are U.S. citizens or lawful residents. The DAPA program covered an additional 4.3 million undocumented immigrants.

Soon thereafter, 26 states challenged the DAPA program in the U.S. District Court for the Southern District of Texas on three grounds. They alleged that the DAPA program violated the requirements of the APA because DHS failed to undergo the notice-and-comment rulemaking process, which requires agencies to notify the public of new rules and to allow the public to provide feedback. They also argued that DHS lacked the substantive authority to implement the DAPA program under the APA. Finally, the states argued that DAPA violated the president's duty to "take care that the laws be faithfully executed" under Article II of the U.S. Constitution.

Both the district court and the Fifth Circuit held that the states had standing to challenge the DAPA program because the states would suffer a financial injury. For example, lead plaintiff Texas passed laws to prevent unlawful immigrants from obtaining driver's licenses. Texas claimed that DACA would allow otherwise illegal immigrants to become "lawful" immigrants and thus obtain driver's licenses. Texas claimed that these newly lawful immigrants would also be eligible for unemployment benefits that they would not otherwise be eligible for. The district court temporarily enjoined DAPA's implementation because the states had proven a likelihood of success on their claims that DHS had failed to satisfy the notice-and-comment rulemaking requirements. The Fifth Circuit affirmed.

The United States petitioned the U.S. Supreme Court for writ of certiorari, which the Court granted on Jan. 19.

Discussion

The Court's resolution of this case could affect the legal status of undocumented immigrants, the benefits available to undocumented immigrants, and the president's discretionary powers.

What happens if DAPA is implemented?

Immigrant's rights organizations assert that the implementation of the DAPA program will benefit millions of undocumented immigrants who have close ties to the United States. DAPA will not only benefit undocumented immigrants who were brought to the United States as children, but also parents of U.S.-citizen children, family members, employers, and other community members. According to immigrants' rights organizations, deportation protection and the ability to work lawfully allows immigrants to enjoy increased earning potential that will benefit the U.S. economy. The organizations contend that eligible immigrants will have better job opportunities, and by some estimates, their total labor income will increase by $7.1 billion.

Members of Congress and the American Center for Law & Justice (the Center) argue, however, that creating a program that benefits millions does not render the action constitutional. According to the Center, there is a dramatic difference between setting enforcement priorities and creating programs that benefit millions of people, because the former requires the discretionary assessment of each case while the latter does not.

Does the executive branch have broad discretion to adopt immigration enforcement priorities?

Members of Congress contend that the executive branch needs broad discretion to address the complexities of immigration law because immigration's social and policy implications affect the entire nation. Former federal immigration and homeland security officials assert that granting deferred action has been a part of the executive's immigration enforcement power since the 1950s. Members of Congress suggest that DACA and DAPA are responses to the executive's limited resources to enforce the laws. In other words, members of Congress assert that because of limited resources, the executive branch cannot realistically deport all undocumented immigrants, so the executive branch must be able to make decisions about whom it chooses to remove.

But the Immigration Reform Law Institute (IRLI) argues that the Constitution vests plenary powers to control immigration in Congress, not the executive branch. IRLI

maintains that the executive branch cannot unilaterally enforce policies like DAPA without Congress' express authorization, and in this case Congress did not authorize the executive branch's action. IRLI asserts that petitioners' interpretation of the executive branch power would result in overly broad prosecutorial discretion by the executive.

Analysis

The United States argues that the states do not have standing because their claimed injury is a result of self-inflicted policies and does not satisfy the Court's zone of interest requirements. Assuming the Court finds standing, the United States argues that the power to deport undocumented immigrants lies exclusively with the federal government, and that by virtue of the Immigration and Nationality Act (INA), the secretary can take necessary actions to administer and enforce the INA. Therefore, the United States argues, DHS's guidance policy is a legitimate exercise of the secretary's power. Texas argues that the concerned states have standing because DAPA imposes substantial costs on the states' ability to issue driver's licenses as well as administer other social and economic programs. Furthermore, Texas argues that DAPA rewrites immigration law without input from Congress and in violation of Congress' legislative authority.

Does the increased cost of a state's economic program under DAPA grant standing?

The United States contends that Texas lacks Article III standing to challenge the DHS's guidance policy because Texas is not the object of the challenged governmental action, and is merely claiming to be injured by the incidental effects of federal policy. Furthermore, the United States asserts that Texas cannot claim standing on the basis of the increased cost of its voluntary driver's license subsidy and that basing standing on self-generated injuries would result in a slippery slope of litigation against many federal policies. Finally, the United States argues that Texas' voluntary subsidy for driver's licenses is not within the zone of interests of any provision of the INA. The United States argues that the Court, under its zone of interest analysis, looks to whether the issues at hand are protected or regulated by the statute in question. The United States argues that Texas' alleged injury is not within the INA's zone of interests, because the INA carefully preserves a cause of action only for plaintiffs that are adversely affected by agency action, not the incidental effects of federal policy.

Texas maintains that the increased cost of administering its driver's license subsidy and other government programs such as Medicaid and Social Security benefits—for which the undocumented immigrants granted deferred action status are eligible—creates standing. Texas maintains that the United States cannot defeat standing by asserting that Texas could avoid its allegedly self-inflicted injury by changing its policies. Texas argues that fears of a slippery slope of litigation are unfounded because the injury and causation requirements for standing are generally difficult to meet. Therefore, Texas contends, fears of lawsuits by concerned states on issues of federal policy are purely speculative.

Does the secretary have the power to issue the guidance policy?

The United States contends that Congress has given the secretary broad discretion to administer and enforce immigration laws. As such, the United States argues, the issuance of the DAPA guidance policy was a lawful exercise of the secretary's authority. According to the United States, the guidance policy accords with Congress' delegation of power to the secretary by focusing on undocumented immigrants who may have abused the immigration system and committed crimes and by establishing a priority system to remove these identified persons. The United States notes that for over 50 years DHS and the now-defunct Immigration and Naturalization Service implemented policies similar to the DAPA guidance policy and that Congress consistently ratified these policies. Finally, the United States argues that § 1103(a) of the vesting clause of the INA gives the secretary authority to permit immigrants to be lawfully employed as a part of his discretion.

Texas counters, however, that no statute gives the executive branch power to confer lawful presence to undocumented immigrants and suggests that if Congress intends to give that authority to the executive, it would do so explicitly. Furthermore, Texas argues that Congress has specifically made certain categories of immigrants ineligible to work in the United States, and, as such, the executive cannot claim to have a broad, unreviewable authority to issue work permits under the INA.

Is the guidance policy valid and constitutional?

The United States maintains that when a policy meets the requirements for classification under the APA's "general statements of policy," the DHS is not required to follow agency notice-and-comment procedures. The United States argues that because the DHS's guidance policy is a general statement of policy on how the executive would enforce its discretion under the INA, DHS was not required to follow the APA's notice-and-comment procedures. Unlike rules that require notice-and-comment, the guidance policy is not impermissibly binding and does not prevent individual agents from rejecting the application for deferred action status from undocumented immigrants.

Texas argues that the guidance policy establishes a major change in the country's immigration law and should therefore be considered a substantive rule. Additionally, Texas argues that in order to be considered a "general statement of policy," the guidance must be voluntary. Texas asserts, however, that the guidance policy here contains mandatory language and is subject to immediate implementation by immigration officials. Texas remarks that DAPA eliminates agency discretion and that even the president noted that DAPA is binding.

Conclusion

The Supreme Court's decision in this case will determine whether states have standing to challenge the DAPA program and, if so, whether DAPA is constitutional and lawful under APA. The United States argues that DAPA and the guidance policy issued by the DHS to implement the action are within the DHS secretary's constitutional and congressionally ratified powers. Texas and the concerned states argue that the secretary overstepped his constitutional and congressionally directed authority by issuing the guidance policy for the implementation of DAPA. The Court's decision could affect the status of millions of undocumented immigrants and the president's discretionary power. The full text is available at https://www.law.cornell.edu/supct/cert/15-674. ⦿

Written by Maame Esi Austin and Krsna N. Avila. Edited by Chris Milazzo.

United States v. Bryant (15-420)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 19, 2016

This case provides the Supreme Court with the opportunity to determine whether the U.S. government (the government) can use uncounseled tribal court convictions to satisfy the predicate offense requirement outlined in 18 U.S.C. § 117(a). Section 117(a) is a domestic assault statute under which the government may prosecute a person who has committed sexual assault within the United States or Indian country and who has already been twice convicted in state, federal, or Indian court of assault against a spouse or intimate partner. The government argues that it may use Michael Bryant Jr.'s prior convictions in his § 117 prosecution because the convictions did not violate the U.S. Constitution but were instead obtained on tribal lands where the Constitution is inapplicable. The government further argues that using the convictions would not violate due process because the statute passes the rational-basis standard of review and is consistent with the principles of comity. Bryant counters by arguing that the Court's precedent establishes a bright-line rule that invalidates convictions obtained in a manner that violates the Constitution, including Bryant's convictions here, and that the government's reading of Court precedent is overly broad. Bryant further contends that allowing these convictions would lead to either admittance of an abundance of suspect convictions or a complex process requiring courts to determine the validity of each conviction. The Supreme Court's resolution of this case will significantly impact the validity of tribal court judgments for purposes of predicate-offense crimes as well as the ability of prosecutors to prevent domestic abuse crimes in Indian country. The full text is available at https://www.law.cornell.edu/supct/cert/15-420. ⊙

Universal Health Services Inc. v. Escobar (15-7)

Court below: *U.S. Court of Appeals for the First Circuit*
Oral argument: April 19, 2016

The U.S. Supreme Court will consider whether the False Claims Act (FCA) applies to fraudulent misrepresentation in payment claims due to violations of staffing regulations for medical centers. Petitioner Universal Health Services (UHS) argues that the basis for liability stemming from the FCA does not allow for the implied certification theory, under which liability may be based on merely filing for payment, and thus should merit reversal of the judgment below. On the other hand, respondent Escobar contends that UHS knowingly and materially committed fraud under the FCA provisions notwithstanding the absence of an express fraudulent statement. This case will determine whether businesses that provide services to the government will be subject to FCA liability and will establish the range of remedies available to qui tam litigants under the FCA. The full text is available at https://www.law.cornell.edu/supct/cert/15-7. ⊙

Encino Motorcars LLC v. Navarro et al. (15-415)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 20, 2016

This case asks the Supreme Court to clarify whether automotive "service advisers" qualify for the Fair Labor Standards Act's (FLSA) mandatory overtime pay requirements. Encino Motorcars LLC, a Mercedes-Benz dealership in California, contends that these employees are primarily "servicem[e]n … engaged in … servicing automobiles" and thus they are clearly captured within the law's exceptions. Similarly, Encino argues that even if the statute is sufficiently ambiguous on the matter, the Department of Labor's interpretation of the statute is unreasonable and not entitled to judicial deference. Hector Navarro and other employees assert that construing the statute's exception to include service advisers would violate the text, spirit, and purpose of the FLSA. Relatedly, they maintain that the Department's interpretation is entirely reasonable and thereby warrants deference from the Court. The Supreme Court's resolution of this case could affect the terms of employment between America's 45,000 service advisers and their employers. The full text is available at https://www.law.cornell.edu/supct/cert/15-415. ⊙

Kirtsaeng v. John Wiley & Sons Inc. (15-375)

Court below: *U.S. Court of Appeals for the Second Circuit*
Oral argument: April 25, 2016

In 2013, the Supreme Court decided in favor of Supap Kirtsaeng in a copyright infringement action brought by publisher John Wiley & Sons (Wiley), reversing the lower courts and remanding for an order in compliance with the opinion. On remand in the district court, Kirtsaeng petitioned for costs and attorneys' fees. Although 17 U.S.C. § 505 empowers a district court in its discretion to award costs and attorneys' fees, the court denied the petition and reaffirmed the circuit precedent assigning more weight to one factor in the equitable discretion analysis over all others. Here, the Supreme Court will provide a nonexclusive list of factors a district court should consider in a § 505 equitable discretion analysis and determine whether any of those factors, such as the objective reasonableness of the losing party's position, should be assigned substantial weight. Kirtsaeng argues that placing substantial weight on any one factor risks compromising the discretion granted to the district court by the statute. Alternatively, Wiley argues that a district court in its discretion can assign more weight to the objective reasonableness of the defeated party's position without defying § 505. This case will clarify the approach a district court should take in a § 505 equitable discretion analysis. The full text is available at https://www.law.cornell.edu/supct/cert/15-375. ⊙

Cuozzo Speed Technologies LLC v. Lee (15-446)

Court below: *U.S. Court of Appeals for the Federal Circuit*
Oral argument: April 25, 2016

The Supreme Court will decide the standard that the U.S. Patent Trial and Appeal Board (PTAB) should use when construing claims in an issued patent and whether the PTAB's decision to institute an inter partes review (IPR) proceeding is judicially reviewable. Cuozzo Speed Technologies argues that claims should be given their ordinary meaning and that the PTAB's decision to institute an IPR should be judicially reviewable. Meanwhile, the Patent and Trademark Office (PTO) argues that when the PTAB institutes an IPR, the PTAB should construe claims with their broadest-reasonable construction standard.

Furthermore, the PTO argues that the PTAB's decision to institute an IPR is final and nonreviewable by the courts. The Supreme Court's decision may help resolve inconsistent standards used between district courts and IPR proceedings while affecting innovator's rights. The full text is available at https://www.law.cornell.edu/supct/cert/15-446. ⦿

Dietz v. Bouldin (15-458)

Court below: *U.S. Court of Appeals for the Ninth Circuit*
Oral argument: April 26, 2016

This case stems from a vehicle collision lawsuit and comes to the Supreme Court on appeal from the Ninth Circuit. Respondent Hillary Bouldin collided with petitioner Rocky Dietz who subsequently sued Bouldin in Montana state court for injuries sustained during the accident. Bouldin removed the case to federal court and the jury found in favor of Dietz but erroneously awarded $0 in damages, which was legally impossible because Bouldin had admitted to causing at least $10,000 in medical expenses. The Supreme Court will clarify under which circumstances, if any, federal courts may recall jurors dismissed after having rendered a final verdict. Dietz contends that the Court should establish a bright-line rule clearly forbidding such re-empaneling of jurors, asserting instead that the appropriate remedy for an invalid verdict is a new trial. Bouldin counters that federal courts should be allowed to exercise discretion to determine when it is appropriate to recall a jury after its dismissal. This case will affect how federal courts interpret rules and procedures for recalling jurors and will also impact the fairness and finality of jury verdicts and judicial efficiency in federal court proceedings. The full text is available at https://www.law.cornell.edu/supct/cert/15-458. ⦿

Mathis v. United States (15-6092)

Court below: *U.S. Court of Appeals for the Eighth Circuit*
Oral argument: April 26, 2016

The Supreme Court will decide how a sentencing court using the "modified categorical approach" should determine if a defendant felon has satisfied the predicate felonies necessary to mandate a higher minimum sentence under the Armed Career Criminal Act (ACCA). Richard Mathis argues that

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When the Civil War began in 1861, Meagher encouraged the Irish to enlist in the Union Army, and he did so himself. Following numerous acts of bravery as the leader of the Irish Brigade from New York, he was promoted to a general in the Union Army. When Lincoln issued the Emancipation Proclamation in 1863, the loyalties of the Irish-Americans became more complex. Initially, they had rallied to the Union's side because of fierce loyalty to the land that had saved them from the potato famine. But not all Irish were willing to die for the cause of abolition. Egan quotes Frederick Douglass:

> Perhaps no class of our fellow citizens has carried this prejudice against color to a point more extreme and dangerous than have our Catholic Irish fellow citizens, and yet no people on the face of the earth have been more relentlessly persecuted and oppressed on account of race and religion than these same Irish people. The Irish who, at home, readily sympathize with the oppressed everywhere, are instantly taught when they step upon our soil to hate and despise the Negro. They are taught that he eats the bread that belongs to them.

At the end of the Civil War, Meagher looked to the West. Although he yearned for his native land, the wide open spaces of the Northwest presented a welcome contrast to the crowded, dirty conditions of Northeastern cities. He was made the acting governor of Montana Territory and embarked on what were to be the final adventures of an already colorful life.

Montana in the 1860s was truly the Wild West. It was unofficially ruled by the Vigilance Committee, a group of men who enforced what they saw as law and order. Malefactors were hanged for every type of suspected offense, even pickpocketing or the "crime" of being Mexican and not leaving town when told. No one was immune from this type of "justice." Egan describes the scene when the outgoing governor, Sidney Edgerton, greeted Meagher:

> A radical Republican, with a long face whiskered to an arrowhead below his chin, Edgerton looked like a Gothic preacher with a toothache.... When Meagher asked a few perfunctory questions, he discovered that his "richest territory" had its own way of dispatching people on the wrong side of right-thinking citizens. The sheriff, for example. What of him? That would be the *late* sheriff, a Mr. Henry Plummer. *Late*? Considerably so. He'd been hanged. Oh. Was there a trial? No. A specific charge? Not really. But as one of the early leaders of these upstanding gentlemen had written in his diary, Edgerton could "recognize a bad man when he saw one." Wait—they'd killed the lawfully appointed sheriff without a trial or due process? *He had it coming*.

The Vigilance Committee never liked Meagher, and he wrote his own death warrant by granting a reprieve to a citizen who was scheduled for hanging. The Vigilance Committee took umbrage and worked behind as well as in front of the scenes to undermine Meagher. It asked the U.S. Congress to declare all the laws passed by the Montana legislature null and void.

Meagher died under suspicious circumstances. His death appeared to be suicide caused by a drunken plunge into a river at night. This fed squarely into the stereotypes about the Irish and drinking. Egan does a good job of debunking the myth of suicide and of showing how later generations have been kinder to Meagher's memory.

You can tell that writing this book was a labor of love for Egan, whose family hailed from County Waterford. Reading *The Immortal Irishman* was pure pleasure. ⊙

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the "modified categorical approach" can be based only on the text of the state criminal statute as well as state court analysis of its elements, without regard to the court record or the means necessary to accomplish an element. The United States contends that the standard is simply that criminal statutes phrased in the disjunctive are divisible and that courts may then use court documents under the "modified categorical approach" to determine if the defendant was convicted of the generic crime. This decision will impact the severity of prison terms for many prior felons and has great repercussions for noncitizen felons. The full text is available at https://www.law.cornell.edu/supct/cert/15-6092. ⊙

McDonnell v. United States (15-474)

Court below: *U.S. Court of Appeals for the Fourth Circuit*

Oral argument: April 27, 2016

In this case, the Supreme Court will decide whether an "official action" is limited to exercise of actual government power. In light of this determination, the court will then decide whether the honest-services statute and Hobbs Act sufficiently define official actions to comply with the Constitution. Robert McDonnell argues that official actions should be limited to the actual exercise of government power and that his conduct as governor was never an exercise of actual government power. Thus, McDonnell argues that his conviction should be overturned on the merits, but he also argues that the trial court's jury instructions were erroneous based on a flawed definition of "official action" given to the jury. In addition, McDonnell argues that the honest-services statute and Hobbs Act are unconstitutionally vague. The United States argues that McDonnell construes the definition of official action too narrowly, and that a proper interpretation encompasses McDonnell's conduct in this case. The United States rejects McDonnell's jury instruction arguments by noting that these instructions included a precise definition of "official action" from the statute, with additional information to clarify the definition. Finally, the United States rejects McDonnell's constitutional challenges by citing a recent and similar Supreme Court challenge to these statutes that failed. The full text is available at https://www.law.cornell.edu/supct/cert/15-474. ⊙