

# THE COMMENT

Thomas M. Cooley Law Review

Volume XII, Issue II ◦ 300 S. Capitol Ave. ◦ Lansing, MI 48933

## THOMAS M. COOLEY LAW REVIEW Michaelmas Term 2009



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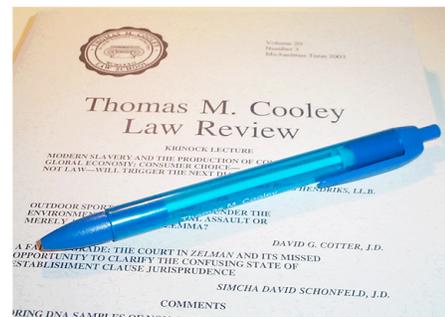
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*The Comment* is a publication of the Thomas M. Cooley Law Review.

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## THOMAS M. COOLEY LAW REVIEW



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## Supreme Court Overturns *Ricci*, but Leaves Many Questions Unanswered

Lauren Frederick

The Supreme Court's recently decided ruling in *Ricci v. DeStefano*<sup>1</sup> left many questions unanswered and provided no bright-line rules for employers.<sup>2</sup> In *Ricci v. DeStefano*,<sup>3</sup> the city of New Haven, Connecticut administered an exam in order to promote members of its fire department.<sup>4</sup> When New Haven officials reviewed exam results, "they found that the pass rate for black candidates was approximately half the pass rate of white candidates . . . [thus,] no black candidates could be awarded a promotion."<sup>5</sup> Because of this discrepancy, New Haven did not certify the exam. Ricci, a top scorer on the exam, and other firefighters (seventeen whites and one Hispanic) sued the city and its mayor, John DeStefano, claiming racial discrimination under the Equal Protection Clause and Title VII. U.S. District Court Judge Janet Bond Arterton threw the firefighters' case out, and the second circuit, including Supreme Court nominee Judge Sotomayor, affirmed the decision. The Supreme Court granted certiorari and reversed.

In its 5-4 decision, Justice Kennedy writing for the majority, the Court held "that race-based action like the City's in this case is impermissible under Title VII unless the

employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."<sup>6</sup> First, the Court ruled that New Haven's tests used for firefighter promotions were legally valid.<sup>7</sup> Second, the Court ruled that New Haven city officials had failed to show that there were other tests that could have had less of a negative impact on minorities taking the exam.<sup>8</sup> Third, the Court noted that the city had not shown that it had a genuine fear of being sued by minority firefighters if it gave most of the promotions to white candidates.<sup>9</sup> Finally, the Court stated that even if the city used the test results to promote whites to all available slots, "minority firefighters will have no legal complaint that they were victims of discrimination because the city can claim that it had to make promotions to avoid violating Title VII's protection for the whites who scored best."<sup>10</sup>

Justice Kennedy wrote, "Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions."<sup>11</sup> Kennedy also stated that the city's test correctly evaluated the candidates and the tests were equally applied to all races.<sup>12</sup> "The problem," Kennedy stated, "is that after the tests were completed, the raw racial results

<sup>1</sup> *Ricci v. DeStefano*, \_ S. Ct. \_\_, 2009 WL 1835138 (2009).

<sup>2</sup> See Steven Greenhouse, *Supreme Court Ruling Offers Little Guidance on Hiring*, N.Y. TIMES, June 30, 2009, at A13, available at [http://www.nytimes.com/2009/06/30/us/30impact.html?\\_r=1&hwp/](http://www.nytimes.com/2009/06/30/us/30impact.html?_r=1&hwp/).

<sup>3</sup> 530 F.3d 88 (2008).

<sup>4</sup> See *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (2006); see generally Warren Richey, *U.S. Supreme Court takes up 'reverse discrimination' case*, January 9, 2009, available at <http://www.esmonitor.com/2009/0109/p25s30-usju.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Ricci v. DeStefano*, \_ S. Ct. \_\_, 2009 WL 1835138 at \*4.

<sup>7</sup> Lyle Denniston, *Analysis: Ricci, without the rhetoric*, June 29, 2009, available at <http://www.scotusblog.com/wp/analysis-ricci-without-the-rhetoric/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Ricci v. DeStefano*, \_ S. Ct. \_\_, 2009 WL 1835138 at \*22.

<sup>12</sup> Robert Barnes, *Justices Rule for White Firemen in Bias Lawsuit*, WASH. POST, June 30, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/29/AR2009062901608.html>.

became the predominant rationale for the city's refusal to certify the results."<sup>13</sup>

Legal experts and commentators have said that the Court, instead of setting forth bright-line rules, has assured much more litigation concerning employment discrimination.<sup>14</sup> In turn, one commentator has said, "[t]his is going to be good for employment lawyers."<sup>15</sup> Civil rights groups said the decision would create obstacles for employers who are seeking to create a more diverse workforce without violating the law.<sup>16</sup> In addition, critics of newly nominated Supreme Court Justice Sotomayor have used this decision as evidence that she allowed her personal beliefs to influence her rulings.<sup>17</sup> Sotomayor supporters, however, have said that Sotomayor merely adhered to Court precedents.<sup>18</sup>

In summary, the Court stated that employers generally had to accept the results of a hiring or promotion exam unless the employer had sufficient evidence the exam was defective and impermissibly favored a specific group.<sup>19</sup> Consequently, "employers will want to try to establish bulletproof selection criteria."<sup>20</sup> One of the most significant questions that was not addressed by the Supreme Court was whether government employers, even if they think that they have a "strong basis in evidence" to justify making a race-based job selection, will be able to avoid liability under the

Constitution.<sup>21</sup> The new standards the Court has announced concerning Title VII are not very precise, so it is extremely likely that it will take future lawsuits to define what the new requirements mean.<sup>22</sup>

### **Obama's A.G. Could Hire Independent Prosecutor to Investigate Bush-era Abuses**

Lauren Frederick

After many claims that he would not be investigating Bush-era abuses, Attorney General Eric Holder is now seriously considering appointing an independent prosecutor to investigate the harsh, and possibly unlawful, interrogation techniques employed by the Bush administration.<sup>23</sup> Investigation of a past administration's actions is extremely rare, probably even unprecedented.<sup>24</sup> President Obama has expressed his concern and dislike of investigating the Bush administration by saying, "we should be looking forward and not backwards" when it comes to the prior administration's abuses.<sup>25</sup>

The attorney general is a partisan appointee expected to overcome any sense of partisanship.<sup>26</sup> Very few, however, actually succeed in finding a happy medium

<sup>13</sup> Ricci v. DeStefano, \_ S. Ct. \_, 2009 WL 1835138 at \*22.

<sup>14</sup> Greenhouse, *supra* note 2, at A13.

<sup>15</sup> *Id.* (quoting Lars Etzkorn, a program director with the National League of Cities).

<sup>16</sup> Barnes, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Greenhouse, *supra* note 2.

<sup>20</sup> *Id.* (quoting Katharine Parker, a lawyer with Proskauer Rose who is chairwoman of the Labor and Employment Committee of the New York City Bar Association).

<sup>21</sup> Denniston, *supra* note 7. See also Walter Olson, *Sued If You Do, Sued If You Don't*, June 29, 2009, available at <http://www.forbes.com/2009/06/29/affirmative-action-firefighters-opinions-contributors-walter-olson.html>.

<sup>22</sup> Denniston, *supra* note 7.

<sup>23</sup> Nedra Pickler, *Holder Torture Investigation Likely*, HUFFINGTON POST, July 14, 2009, [http://www.huffingtonpost.com/2009/07/11/holder-now-leaning-toward\\_n\\_230057.html](http://www.huffingtonpost.com/2009/07/11/holder-now-leaning-toward_n_230057.html).

<sup>24</sup> Daniel Klaidman, *Independent's Day*, NEWSWEEK, July 20, 2009, available at <http://www.newsweek.com/id/206300/page/3>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

between independence and loyalty.<sup>27</sup> While keeping history in mind, Attorney General Holder is trying to achieve the correct balance.<sup>28</sup> Holder stated that, “[I] have the responsibility of enforcing the nation’s laws, and [I] have to be seen as neutral, detached, and nonpartisan in that effort.”<sup>29</sup> Holder added, “the reality of being A.G. is that I’m also part of the president’s team. I want the president to succeed; I campaigned for him. I share his world view and values.”<sup>30</sup>

Because of the adverse effects it could have on the current administration, Holder has been wrestling with the decision of whether to investigate Bush-era abuses for months.<sup>31</sup> For example, it could create a new partisan war, and possibly place Obama’s domestic priorities on hold, which include health care and energy reform.<sup>32</sup> However, in the wake of investigative reports, Holder became more and more concerned over what he had discovered.<sup>33</sup> Those Justice Department reports concentrated on alleged ethical violations by Bush administration lawyers who approved waterboarding and other forms of torture on terrorism suspects.<sup>34</sup> In those reports were strong indications that the Bush administration’s interrogation techniques had gone far beyond lawful conduct.<sup>35</sup> Also extremely controversial are memos that

were passed from Bush’s executive branch lawyers to the President himself allegedly authorizing the use of torture.<sup>36</sup> Holder went so far as to say that what he saw “turned his stomach.”<sup>37</sup>

Holder will not pursue prosecution of those who acted within the government’s legal guidance.<sup>38</sup> However, those who went beyond that guidance and broke the law could possibly face prosecution.<sup>39</sup> Any criminal investigation will most likely be challenged, particularly by CIA employees who could argue that Bush-era Justice Department attorneys had authorized a broad range of brutal conduct.<sup>40</sup> Sources have stated that any investigation would apply only to the actions of those interrogators who acted in bad faith and such actions that fell outside the “four corners” of the legal memos.<sup>41</sup>

Those in opposition of Holder’s possible investigation, including CIA Director Leon Panetta, argue that complete disclosure concerning matters of the prior administration “would damage the government’s ability to recruit spies and harm national security.”<sup>42</sup> As previously mentioned, it would take the current administration’s focus off of current and important issues.<sup>43</sup> On the other hand, proponents of the Bush probe, including Human Rights First, stated “[t]he American people have a right to know how the U.S. Justice Department came to issue legal opinions approving acts of cruelty that shocked the world, damaged U.S. moral authority and harmed efforts to combat

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Carrie Johnson, *Probe of Alleged Torture Weighed*, WASH. POST, July 12, 2009, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071102787.html?nav=rss\\_email/components/](http://www.washingtonpost.com/wp-dyn/content/article/2009/07/11/AR2009071102787.html?nav=rss_email/components/).

<sup>32</sup> Klaidman, *supra* note 2.

<sup>33</sup> *See id.*

<sup>34</sup> Carrie Johnson, *Report on Bush Policy May Come in ‘Weeks’*, WASH. POST, June 18, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/17/AR2009061701512.html>.

<sup>35</sup> Klaidman, *supra* note 2.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Pickler, *supra* note 1.

<sup>39</sup> *Id.*

<sup>40</sup> Johnson, *supra* note 9.

<sup>41</sup> *Id.*

<sup>42</sup> Klaidman, *supra* note 2.

<sup>43</sup> Johnson, *supra* note 9.

terrorism effectively.”<sup>44</sup> Although there has not been a final decision on the matter, an announcement could come in a few weeks.<sup>45</sup>

### Will *Slaughter-House* be Overruled?

Lauren Frederick

Recently, it was declared the United States Supreme Court may have the opportunity to overrule the controversial five-to-four decision in the 1873 *Slaughter-House Cases*.<sup>46</sup> In that ruling, the dissenters argued, and it is still claimed today, that the Court turned the Privileges or Immunities Clause of the Fourteenth Amendment into “a vain and idle enactment.”<sup>47</sup> The Privileges or Immunities Clause of the U. S. Constitution states that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>48</sup> For the most part, this section of the Fourteenth Amendment “has remained close to a constitutional dead letter.”<sup>49</sup>

In the *Slaughter-House Cases*, the Court upheld a Louisiana law granting a monopoly to operate slaughterhouses in the New Orleans area.<sup>50</sup> The Court regarded this as an “appropriate, stringent, and effectual” means to “remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive

collections of animals. . . .”<sup>51</sup> The butchers who challenged the law claimed that it created an involuntary servitude as prohibited by the Thirteenth Amendment, violated the Fourteenth Amendment by abridging the privileges and immunities of citizens of the United States, and denied them of their property without due process of law.<sup>52</sup> The Supreme Court ruled that the Clause only limited state laws affecting rights of national citizenship, not those affecting state citizens’ rights.<sup>53</sup>

One of the most prominent opponents of the *Slaughter-House* decision is Supreme Court Justice Clarence Thomas.<sup>54</sup> He advocated his stance in his dissenting opinion in *Saenz v. Roe*,<sup>55</sup> stating that he would be open to reexamining the meaning of the Privileges or Immunities Clause.<sup>56</sup> For Justice Thomas, that time has come.

Sometime within the next few months, the Court will evaluate three cases that will provide an opportunity to reexamine the Clause and the *Slaughter-House* precedent.<sup>57</sup> Those three cases are *Maloney v. Cuomo*,<sup>58</sup> a U.S. Court of Appeals for the Second Circuit case, *National Rifle Association v. Chicago*<sup>59</sup> and *McDonald v. City of Chicago*,<sup>60</sup> both from the U.S. Court of the Appeals for the Seventh Circuit.<sup>61</sup> “The core issue, in all three, is whether the Court will expand the Second Amendment personal right to have a gun for self-defense, so that it restricts state and local government laws, not just those at

<sup>44</sup> Johnson, *supra* note 12 (quoting Press Release, Human Rights First (June 17, 2009), available at <http://www.humanrightsfirst.org/media/usls/2009/ale rt/470/>).

<sup>45</sup> Klaidman, *supra* note 2.

<sup>46</sup> 83 U.S. 36 (1873).

<sup>47</sup> Lyle Denniston, *Might It Happen? Slaughterhouse Overruled?*, SCOTUSBLOG, July 20, 2009, <http://www.scotusblog.com/wp/might-it-happen-slaughterhouse-overruled/#more-10182> (quoting *Slaughter-House Cases*, 83 U.S. 36, 96 (1873) (Field, J. dissenting)).

<sup>48</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>49</sup> Denniston, *supra* note 2.

<sup>50</sup> *Slaughter-House Cases*, 83 U.S. at 83.

<sup>51</sup> *Id.* at 64.

<sup>52</sup> *Id.* at 66.

<sup>53</sup> Denniston, *supra* note 2.

<sup>54</sup> *Id.*

<sup>55</sup> 526 U.S. 489 (1999) (Thomas, J. dissenting).

<sup>56</sup> Denniston, *supra* note 2.

<sup>57</sup> *Id.*

<sup>58</sup> 554 F.3d 56 (2d Cir. 2009).

<sup>59</sup> 567 F.3d 856 (7th Cir. 2009).

<sup>60</sup> 2008 WL 5111112 (N.D. Ill. 2008).

<sup>61</sup> Denniston, *supra* note 2.

the federal level.”<sup>62</sup> However, the real question is whether “the Second Amendment [can be incorporated] into the Fourteenth Amendment so that it reaches states—[which] is not an attractive option to constitutional conservatives.”<sup>63</sup> Consequently, there is the looming challenge to the *Slaughter-House* precedent.<sup>64</sup>

“Under constitutional theory, there are only three ways that the Court could interpret the Second Amendment as applying to the states.”<sup>65</sup> The text of the Constitution itself rules out one of the ways the Second Amendment is applied and the *Slaughter-House decision* rules out the second.<sup>66</sup> Incorporation of the Second Amendment into the Fourteenth Amendment, so that it reaches states, is the only remaining option.<sup>67</sup>

Applying the incorporation theory under the Due Process Clause of the Fourteenth Amendment, the U.S. Court of Appeals for the Ninth circuit has ruled that “the Second Amendment protects personal gun rights against state, county, and city laws.”<sup>68</sup> The Constitution’s text itself makes the Second Amendment apply only to federal laws, which has been a longstanding principle since the 1833 Supreme Court decision in *Barron v. City of Baltimore*.<sup>69</sup> Furthermore, it follows from the *Slaughter-House Cases*, “that the Privileges or Immunities Clause did not protect the right to keep and bear arms because it was not a right of citizens of the United States.”<sup>70</sup> The Ninth Circuit added this and it still remains sound law even after the Court’s 2008

decision in *District of Columbia v. Heller*,<sup>71</sup> where the Court acknowledged that the Second Amendment conferred a constitutional right to possess a gun.<sup>72</sup>

In a joint amicus brief submitted by the Institute for Justice and the Cato Institute in support of petitioners, there are two main arguments set forth.<sup>73</sup> First, because of the plethora of various state and local gun laws, “the need for guidance from Court to ensure a uniform understanding of the federal right to keep and bear arms is self-evident and urgent.”<sup>74</sup> Also, the brief argued, although some issues benefit from going through lower courts, this is not one of them.<sup>75</sup> Second, there is national agreement that the *Slaughter-House* decision misinterpreted the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>76</sup>

The fate of *Slaughter-House* and its precedent seems uncertain, but we will likely know the outcome sometime this fall.

### Can Alabama A.G. Help Local Family Get Retribution?

Michael R. Zamora

In any justice system, when a family tragedy occurs where someone may be culpable, sometimes all that people want is their day in court. This is what Tommy Thomas of Helena, Alabama, seeks.<sup>77</sup> But

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* citing 32 U.S. 243 (1833).

<sup>70</sup> Denniston, *supra* note 2.

<sup>71</sup> 128 S.Ct. 2783 (2008).

<sup>72</sup> Denniston, *supra* note 2, see *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

<sup>73</sup> Brief of the Institute for Justice and Cato Institute as Amici Curiae Supporting Petitioners, Nat’l Rifle Ass’n of Am., Inc. v. City of Chi., 77 USLW 3679 (2009) (No. 08-1497), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/amicus-ij-and-cato-on-slaughterhouse.pdf>.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 6.

<sup>77</sup> See Marlene Thomas-Ogle, *Australian court mulls increased sentence for Hoover man in wife’s*

can Alabama Attorney General Troy King deliver?

On October 22, 2003, Tommy Thomas's daughter, Christina Thomas Watson, went scuba diving off the coast of Queensland, Australia with her new husband.<sup>78</sup> The young Alabama couple was on their honeymoon and had been married only eleven days.<sup>79</sup> Tragically, during that scuba expedition, Christina drowned to death.<sup>80</sup> Immediately, suspicions arose because Christina's new husband, Gabe Watson, was a certified rescue diver<sup>81</sup> and supposed to be trained in situations of peril. He gave numerous accounts of what happened,<sup>82</sup> though the main question remained—why did Gabe not save his wife's life?

Not surprisingly, after a five-year investigation, Australian authorities charged Gabe with murdering his wife.<sup>83</sup> On May 12, 2009, Gabe voluntarily flew from the United States back to Australia to face the music.<sup>84</sup> Despite the coroner recommending a murder charge,<sup>85</sup> on June 5, 2009, prosecutors

agreed to accept a guilty plea of manslaughter.<sup>86</sup> Australian prosecutors must have felt that they did not have enough evidence for a plausible murder charge. Knowing that they would get heat for the plea deal, prosecutors went to the United States to meet with the Thomas family and “encouraged them not to leak a word of the bargain to the media.”<sup>87</sup> As part of the plea deal, Gabe received a sentence of four years, reduced to twelve months and admitted to “not fulfill[ing] his obligation as his wife's diving buddy.”<sup>88</sup> Basically, he admitted to negligent homicide and received a slap on the wrist for it. Outraged about the light sentence, Christina's father, Tommy, met with Queensland Attorney General, Cameron Dick, to seek a more severe punishment.<sup>89</sup> Dick heeded Tommy's request and appealed the sentence to the Queensland Court of Appeals where a decision is pending.<sup>90</sup>

In the interim, Troy King, the Attorney General for the State of Alabama caught wind of the injustice, and made a bold statement of his own. King said that “[i]n Alabama this would be a capital case, and if we don't get justice in Australia we're going to pursue the death penalty here.”<sup>91</sup> King intends to charge Gabe Watson with Christina's death in Alabama. Whether this is a sincere move or a politically motivated one is not the real issue. The real issue is can he do it despite major impediments of jurisdiction and double jeopardy?

The first hurdle that the Alabama Attorney General must jump is how to get jurisdiction over Gabe Watson for the death of Christina. Alabama state law says that “[w]hen the commission of an offense

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*honeymoon death*, THE BIRMINGHAM NEWS, July 17, 2009, available at

[http://blog.al.com/spotnews/2009/07/australian\\_court\\_mulls\\_increas.html](http://blog.al.com/spotnews/2009/07/australian_court_mulls_increas.html).

<sup>78</sup> *Id.*

<sup>79</sup> Marlene Thomas-Ogle, *Hoover, Alabama man pleads guilty to manslaughter in death of wife on honeymoon*, THE BIRMINGHAM NEWS, June 5, 2009, available at

<http://www.al.com/news/birminghamnews/metro.ssf?/base/news/124418973131600.xml&coll=2>.

<sup>80</sup> See Marlene Thomas-Ogle, *supra* note 1.

<sup>81</sup> See Marlene Thomas-Ogle, *supra* note 3.

<sup>82</sup> ‘*Extradite dead diver's husband*’, THE COURIER-MAIL, June 19, 2008, available at <http://www.news.com.au/couriermail/story/0,,23888181-5003402,00.html>.

<sup>83</sup> See Marlene Thomas-Ogle, *supra* note 3.

<sup>84</sup> See Marlene Thomas-Ogle, *supra* note 3.

<sup>85</sup> Carly Crawford, *Dive victim Tina Watson's family warns on plea deals*, THE COURIER-MAIL, Aug. 17, 2009, available at <http://www.news.com.au/adelaidenow/story/0,,25944893-911,00.html>.

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<sup>86</sup> Marlene Thomas-Ogle, *supra* note 1.

<sup>87</sup> Crawford, *supra* note 8.

<sup>88</sup> See Marlene Thomas-Ogle, *supra* note 3.

<sup>89</sup> Carly Crawford, *supra* note 8.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor[e] in Alabama . . . .”<sup>92</sup> That means if a crime is started in Alabama but completed outside of the state, then Alabama’s long arm of the law has jurisdiction. In Christina’s case, that means Alabama authorities would have to prove that Gabe started planning to kill his wife while they were in Alabama, even if the crime was completed in Australia. While one’s state of mind is one of the hardest things to prove, it can be proven by circumstantial evidence. Furthermore, Alabama law states that “venue may be established by circumstantial evidence.”<sup>93</sup> For example, prosecutors would have to come forth with evidence such as internet searches, or a change in life insurance before the honeymoon. Prosecutors can also look into the scuba training Gabe received. Anything that tends to show that Gabe started thinking about going scuba diving with his wife, knew that her oxygen tank was not full, and intended not to save her is all fair game.

If Alabama can get jurisdiction over Gabe Watson, the next hurdle for the prosecution is double jeopardy. Can Gabe Watson be charged for murdering his wife in Alabama after being charged and pleading-out in Australia? Recall that double jeopardy prevents authorities from trying a suspect for the same crime twice. The United States Constitution states, “[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .”<sup>94</sup> Similarly, the Alabama Constitution states, “That no person shall, for the same offense, be twice put in jeopardy of life or limb . . .

<sup>92</sup> ALA. CODE § 15-2-3 (1975) (emphasis added).

<sup>93</sup> *Dolvin v. State*, 391 So. 2d 666, 673 (Ala. Crim. App. 1979), *aff’d*, 391 So. 2d 677 (Ala. 1980).

<sup>94</sup> U.S. CONST. amend. V.

.”<sup>95</sup> Alabama even has a statute regarding double jeopardy.<sup>96</sup> However, Alabama case law does recognize the dual sovereign exception, as outlined by the United States Supreme Court.<sup>97</sup> Under the dual sovereign doctrine “successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.”<sup>98</sup> In applying the exception, the main question is “whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns.”<sup>99</sup> Therefore, using this test, if two states are deemed separate sovereigns, it should be indisputable that the Commonwealth of Australia and the State of Alabama are also separate sovereigns.

In theory, Alabama authorities might be able to charge Gabe Watson and successfully try him for the untimely death of Christina. While this does not bring Christina back to life, it does give her family what they truly desire—their day in court.

### **U.S. Travelers Carrying Electronic Info Should be Wary of Arbitrary Searches**

Michael R. Zamora

The Obama Administration is poised to continue a controversial policy of searching the laptops of international travelers arriving in the United States.<sup>100</sup>

<sup>95</sup> ALA. CONST. of 1901, art. I, § 9.

<sup>96</sup> See ALA. CODE § 15-3-8 1975 (“Any act of omission declared criminal and punishable in different ways by different provisions of law shall be punished only under one of such provisions, and a conviction or acquittal under any one shall bar a prosecution for the same act or omission under any other provision.”).

<sup>97</sup> *Clemons v. State*, 720 So. 2d 961, 966-67 (Ala. Crim. App. 1996), *aff’d*, 720 So. 2d 985 (Ala. 1998) (citing *Heath v. Alabama*, 474 U.S. 82 (1985)).

<sup>98</sup> *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

<sup>99</sup> *Clemons*, 720 So. 2d at 967.

<sup>100</sup> Cam Simpson, *Laptop Searches to Continue, Though Officials Pledge More Transparency*, WALL

While this policy applies to U.S. and non-U.S. citizens alike,<sup>101</sup> what most people do not know is that these arbitrary searches also include everyday items such as “cell phones, Blackberrys, PDAs, and iPods . . . .”<sup>102</sup>

On August 26, 2009, the American Civil Liberties Union filed for injunctive relief seeking a release of information pursuant to a Freedom of Information Act request.<sup>103</sup> The suit “demand[s] access to documents related to the US Customs and Border Protections’ policy of searching travelers’ laptop computers.”<sup>104</sup> Under the current policy, “[B]order agents [can] seize and search electronic devices of travelers arriving in the U.S. without permission of the traveler or probable cause.”<sup>105</sup> A day later, on August 27th, the Department of Homeland Security (DHS) “pledged to review the program”<sup>106</sup> and “announced new checks;”<sup>107</sup> however, the guidelines for searching “remain largely unchanged.”<sup>108</sup>

The Fourth Amendment protects individuals “against unreasonable searches and seizures.”<sup>109</sup> The general rule is that a warrant supported by probable cause is required in order for authorities to “properly conduct a search or seizure of computers or

computer equipment . . . .”<sup>110</sup> However, the Supreme Court has carved out what is now called the border exception. Under the border exception, “So long as the search is considered routine,” it is constitutional despite any suspicion of wrongdoing.<sup>111</sup> In 2008, the Ninth Circuit declared that border searches of electronic storage devices are “routine”<sup>112</sup>—meaning that no suspicion to search them is required. As always, Fourth Amendment reasonableness requires pitting the individual’s privacy interest up against the government’s interest. In this situation, it is the individual’s “lessened expectation to privacy at the border”<sup>113</sup> that gets flattened by the government’s “axiomatic . . . authority to protect”<sup>114</sup> its territory and at the international border, the government’s interest is said to be “at its zenith.”<sup>115</sup>

Numerous attempts to pass legislation that would require—at the very least—a standard of reasonable suspicion before authorities can seize and search electronic storage devices have failed.<sup>116</sup> Even if such legislation were to pass, one problem remains: How are authorities going to get the requisite suspicion? Furthermore, what type of suspicion is required? The DHS has stated that it has an interest in keeping terrorist information and child pornography out of the U.S.<sup>117</sup> Again, the

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St. J., Aug. 27, 2009, available at [http://online.wsj.com/article/SB125141107996464955.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB125141107996464955.html?mod=googlenews_wsj).

<sup>101</sup> See *id.*

<sup>102</sup> Saul M. Pilchen, Stephanie F. Cherny, and Eric Miller, *What International Travelers Should Know About Border and Airport Electronic Equipment Searches*, 27 No. 5 ACC DOCKET 126, 127 (2009).

<sup>103</sup> See Jaclyn Belczyk, *ACLU lawsuit demands information on US border laptop search policy*, JURIST, Aug. 27, 2009, available at <http://jurist.law.pitt.edu/paperchase/2009/08/aclu-demands-information-on-us-border.php>.

<sup>104</sup> *Id.*

<sup>105</sup> Simpson, *supra* note 1.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> U.S. CONST. amend. IV.

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<sup>110</sup> NTS AM. JUR. 2D *Computers and the Internet* § 20 (2009).

<sup>111</sup> Pilchen, et al., *supra* note 3, at 128.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *United States v. Arnold*, 533 F.3d 1003, 1006 (9th Cir. 2008) (citing *United States v. Flores-Montano*, 541 U.S. 149, 152 (2009)).

<sup>115</sup> *Id.* at 1007.

<sup>116</sup> Pilchen, et al., *supra* note 3, at 130-32 (stating that Congressmen Eliot Engel and Ronald Paul introduced H.R. 239 called Securing Our Border Act of 2009 and Senator Russell Feingold, Senator Maria Cantwell, and Representative Adam Smith have introduced similar legislation called the Travelers’ Privacy Protection Act of 2008).

<sup>117</sup> Simpson, *supra* note 1.

question remains of how border agents will be able ascertain that an individual entering the U.S. may possess this type of material on his laptop. Would a shirt that says “I’m a terrorist” or “I’m a pedophile” tip them off? This is a difficult task because, after all, reasonable suspicion of these things is essentially probable cause anyway.

Proponents of liberty analogize the laptop with the human mind. Their argument is that laptops contain ideas, thoughts, passwords, and other critical and private information. Lawyers traveling overseas for meetings or depositions also carry protected client information. Those in support of the current policy would argue that suspicion is too high of a burden. It can even be argued that international travelers should know about this well-publicized policy; therefore, they consent to a search merely by reentering the U.S.

With the limitless variety of technology available, certain distinctions should be made within classes of electronic devices. For example, compare and contrast a laptop and a password-protected file. Items placed on a desktop are in plain view for all to see and therefore should be afforded less privacy. This can be analogous to the plain-view doctrine which states that an officer may make a warrantless seizure of criminal evidence that is in plain view.<sup>118</sup> A laptop owner that puts items out of plain view, off of the desktop, and protects such files or folders with a password, has manifested a higher expectation of privacy in such items. It may be only a matter of time before some judge, somewhere, starts to make these distinctions.

<sup>118</sup> BLACK’S LAW DICTIONARY 538 (3rd pocket ed. 2006) (defining the plain-view doctrine as a “rule permitting a police officer’s warrantless seizure and use as evidence of an item seen in plain view from a lawful position or during a legal search when the officer has probable cause to believe that the item is evidence of a crime.”).

Though it is understandable that the U.S. wants to protect its citizens from terrorism and child pornography, the Fourth Amendment, designed to protect against arbitrary searches and seizures, must be respected. Further, travelers must be made aware that these searches extend to other electronic devices, not just laptops.

### **Will The Supreme Court Recognize a New Category of Unprotected Speech?**

Michael R. Zamora

According to a recent poll, 35% of Americans favor Michael Vick’s return to the NFL, while 39% oppose it.<sup>119</sup> What if he had been convicted of possessing a video of dog fighting instead? The public’s disapproval for what he did might not be as bad. However, given those facts, he could have received up to a five-year prison sentence<sup>120</sup> instead of receiving the eighteen-month term he did.<sup>121</sup>

On October 6, 2009, the Supreme Court heard oral arguments on the constitutionality of a 1999 federal statute that criminalizes depictions of animal cruelty.<sup>122</sup> Under the statute, it is a crime to “knowingly create[], sell[], or possess[] a depiction of animal cruelty with the intent[] of placing that depiction in interstate or foreign commerce for commercial gain.”<sup>123</sup>

<sup>119</sup> Rasmussen Reports, *35% Favor Vick’s Return To NFL, 39% Oppose*, July 30, 2009, available at [http://www.rasmussenreports.com/public\\_content/life\\_style/sports/july\\_2009/35\\_favor\\_vick\\_s\\_return\\_to\\_nfl\\_39\\_oppose](http://www.rasmussenreports.com/public_content/life_style/sports/july_2009/35_favor_vick_s_return_to_nfl_39_oppose) (last visited Oct. 3, 2009).

<sup>120</sup> 18 U.S.C. § 48(a) (imposing a fine, imprisonment not more than five years, or both).

<sup>121</sup> See Rasmussen Reports, *supra* note 1 (stating that Michael Vick served an eighteen month prison term).

<sup>122</sup> Adam Liptak, *Free Speech Battle Arises From Dog Fighting Videos*, N.Y. TIMES, Sept. 18, 2009, at A1, available at [http://www.nytimes.com/2009/09/19/us/19scotus.html?\\_r=1](http://www.nytimes.com/2009/09/19/us/19scotus.html?_r=1) (referring to 18 U.S.C. § 48(a)).

<sup>123</sup> § 48(a).

At issue in *United States v. Stevens*<sup>124</sup> is whether the statute runs afoul to the First Amendment's free speech protection or if the Court is willing to create a new category of speech that "deserves no protection under the First Amendment."<sup>125</sup>

On January 13, 2005, a jury convicted Robert Stevens and sentenced him to "37 months of imprisonment and three years of supervised release" for violations of the aforementioned federal statute.<sup>126</sup>

Stevens ran a business selling merchandise and pit-bull videos in the underground market.<sup>127</sup> At issue were three tapes sold to undercover federal agents.<sup>128</sup> These tapes showed old footage of dogfights in the U.S. and Japan, as well as video showing pit-bulls hunting wild boars.<sup>129</sup> Even though Stevens did not participate in the illegal dogfights, he did provide "introductions, narration and commentary" in all three videos.<sup>130</sup> Stevens appealed his conviction, and on July 18, 2008, the Third Circuit vacated it and declared the statute unconstitutional.<sup>131</sup> But will the Supreme Court agree?

In any statutory analysis, it is important to look into the legislative history to decipher the drafters' intent. The 1999 statute was signed into law on the basis that it would help rid the country of so-called "crush videos."<sup>132</sup> "Crush videos, also known as squish or trampling videos, cater to fetishists who gain sexual gratification

from watching women torture and kill small animals by stepping on them."<sup>133</sup> To that end, Congress added an exception to the statute. The statute "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."<sup>134</sup>

Amid fear that the law was overbroad and violated free speech protections, supporters of the law argued, "[T]he allowance of depictions with serious value, and the condition that at least an intent be found to place the depiction in interstate commerce, narrowly tailored the statute and sufficed to overcome any First Amendment barriers."<sup>135</sup> When President Clinton signed the law into effect, he issued a signing statement which stated that prosecutions would broadly construe the exception so as to only focus on depictions that appeal to the "prurient interest in sex."<sup>136</sup> However, for Stevens, "the first person tried and convicted under the law,"<sup>137</sup> this did not hold true.

After delving into the legislative intent of the statute, the freedom of speech analysis lends itself to easier explanation. As Justice Kennedy eloquently opined, "[T]he First Amendment bars the government from dictating what we see or read or speak or hear."<sup>138</sup> It does have its limits and does not protect "certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real

<sup>124</sup> *United States v. Stevens*, 533 F.3d 218, 221 (3d Cir. 2008).

<sup>125</sup> Liptak, *supra* note 4.

<sup>126</sup> *Stevens*, 533 F.3d at 221.

<sup>127</sup> *Id.* at 220-21.

<sup>128</sup> *Id.* at 221.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 235.

<sup>132</sup> See Adam Ezra Schulman, *History of Animal Cruelty Law at Issue in Stevens Poses Incongruity*, firstamendmentcenter.org, Aug. 4, 2009, available at <http://www.firstamendmentcenter.org/analysis.aspx?id=21912>.

<sup>133</sup> Pet-Abuse.com, *Stopping Crush Videos*, [http://www.pet-abuse.com/pages/animal\\_cruelty/crush\\_videos.php](http://www.pet-abuse.com/pages/animal_cruelty/crush_videos.php)

(last visited Oct. 5, 2009).

<sup>134</sup> 18 U.S.C. § 48(b).

<sup>135</sup> Schulman, *supra* note 14.

<sup>136</sup> *See Id.*

<sup>137</sup> Joan Biskupic, *Animal Abuse Videos Are Test of Free Speech*, USA TODAY, Oct. 5, 2009, at 1A, available at

[http://www.usatoday.com/printedition/news/20091005/1avideos05\\_cv.art.htm](http://www.usatoday.com/printedition/news/20091005/1avideos05_cv.art.htm).

<sup>138</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

children.”<sup>139</sup> The statute at hand is undoubtedly a regulation of speech, so the concern now is whether the regulation fits within one of these delineated categories. If it does not fit into one of these categories, the Court must decide whether it passes the test of strict scrutiny or create a new category.

The last time the Court created a category “so vile that it deserves no protection” was in 1982 and the subject was child pornography.<sup>140</sup> Despite the government attempting to analogize depictions of animal cruelty to child pornography,<sup>141</sup> it is highly unlikely that the Court will consider creating a new category. Of course there is always the argument that the statute is overbroad. In 2002, the Court struck down, as overbroad, a statute that criminalized computerized virtual images of child pornography, stating that regulation must only criminalize images of real children.<sup>142</sup> As with the animal depiction statute, the Court is likely to go that route once again. Recall the intent of criminalizing animal cruelty depictions that appeal to the prurient sexual interest and what the language of the statute actually criminalizes—all depictions. The argument that the exception tailors the law to the intent does not hold water. The language of the exception is similar to the test for the category of obscenity. The “third prong of the *Miller* obscenity test . . . asks ‘whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.’”<sup>143</sup> But as the Third Circuit noted in *Stevens*, “The role of the clause in *Miller* cannot be divorced . . . .”<sup>144</sup> In other words,

the Government cannot mix and match tests between the delineated categories. Since the Government wants to argue that the 1999 animal depiction law is similar to the child pornography statute, it cannot also argue that the exception to the law tailors it to pass constitutional muster.

Again, if the government is allowed to cross-pollinate laws to fit them into different delineated categories of speech, then there is no end to what can be regulated. And finally, under the test of strict scrutiny, the Third Circuit stated that the 1999 law “fails . . . because it serves no compelling government interest, [it] is not narrowly tailored to achieve such an interest, and [it] does not provide the least restrictive means to achieve that interest.”<sup>145</sup> Taking into account the interest in stopping “crush videos,” the law should be tailored to criminalize those videos that appeal to the prurient interest.

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<sup>139</sup> *Id.* at 245-46.

<sup>140</sup> Liptak, *supra* note 4.

<sup>141</sup> *United States v. Stevens*, 533 F.3d 218, 224 (3d Cir. 2008).

<sup>142</sup> *See Ashcroft*, 535 U.S. 234.

<sup>143</sup> *Stevens*, 533 F.3d at 231 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

<sup>144</sup> *Id.*

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<sup>145</sup> *Id.* at 232.