

**FEDERAL COURTS IN THE 21<sup>ST</sup> CENTURY:  
CASES AND MATERIALS  
FOURTH EDITION**

**2015 CUMULATIVE UPDATE**

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# FEDERAL COURTS IN THE 21<sup>ST</sup> CENTURY: CASES AND MATERIALS

## FOURTH EDITION

### 2015 CUMULATIVE UPDATE

#### Chapter 2

#### THE JUDICIAL ROLE: THE JUSTICIABILITY DOCTRINES

Page 50. Add at the end of Note 5:

On remand, the District of Columbia Circuit held the statute on which the plaintiffs relied to be unconstitutional as an infringement on the President's exclusive power over recognition of foreign nations. *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). In an opinion for five Justices by Justice Kennedy with Justice Thomas concurring in the judgment in part and dissenting in part, the Supreme Court affirmed. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. ---, 135 S. Ct. 2076 (2015).

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Page 108. Add at the end of Note 4:

See also the discussion of *United States v. Windsor*, 570 U.S. ---, 133 S. Ct. 2675 (2013), in the Special Alert (*supra* pp. v-vi).

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Page 108. Add new Notes 5 and 6:

**5. Threat of Enforcement Sufficiently Imminent for Standing.** *Susan B. Anthony List v. Driehaus*, 573 U.S. ---, 134 S. Ct. 2334 (2014): The Susan B. Anthony List is a “pro-life advocacy organization.” In 2010 it planned to display a billboard saying that Driehaus, a member of Congress, had “voted FOR taxpayer-funded abortion” when he voted in favor of the Affordable Care Act. Driehaus filed a complaint with the Ohio Elections Commission, which has authority under state law to investigate and if appropriate refer to criminal prosecution campaign statements that “[m]ake a false statement concerning the voting record of a candidate or public official.” The Commission conducted an expedited hearing and found, by a two-to-one vote, probable cause to believe that the SBA List had violated Ohio’s criminal law. Discovery began, and the List filed an action in federal court to enjoin the proceeding on the ground that the “false statement” statute violated the First Amendment. Citing *Younger*, the lower court stayed the action. Before any further proceedings took place, Driehaus lost his campaign for reelection, withdrew his complaint, and the Commission terminated its proceedings. The List then filed an amended complaint making the same constitutional claims, and stating that it “intends to engage in substantially similar activity in the future.” The district court held that the List’s complaint did not “present[] a sufficiently concrete injury for purposes of standing or ripeness,” and the court of appeals affirmed on ripeness grounds.

In an opinion by Justice Thomas, the Supreme Court unanimously reversed. Citing *Steffel v. Thompson* (*infra* pp. 143, 472) and *Babbitt v. United Farm Workers* (*infra* p. 475), the opinion said, “[W]e have permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent.” 134 S. Ct. at 2342. The List had “pleaded specific statements [it] intend[s] to make in future election cycles,” *id.* at 2343, and its “intended future conduct is ‘arguably ... proscribed by [the] statute’” it challenged; the Court observed that “a Commission panel here already found probable cause to believe” that the List violated the statute in its statement about Driehaus. “As long as petitioners continue to engage in comparable electoral speech regarding support for the ACA, that speech will remain arguably proscribed by Ohio’s false statement statute.” *Id.* at 2344. And “the threat of future enforcement ... is substantial. Most obviously, there is a history of past enforcement here,” and, again citing *Steffel*, “past enforcement against the same conduct is good evidence that the threat of enforcement is not ‘chimerical.’” Further, “[t]he credibility of that threat is bolstered by the fact that authority to file a complaint ... is not limited to a prosecutor or an agency. ... Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents.” “Moreover, [the Commission has] not disavowed enforcement if petitioners make similar statements in the future. ... On these facts, the prospect of future enforcement is far from ‘imaginary or speculative.’” *Id.* at 2345.

The Court focused on “the threatened Commission proceedings” rather than ultimate criminal enforcement “because administrative action, like arrest or prosecution, may give rise to harm sufficient to justify pre-enforcement review.” *Id.* Commission proceedings gave political opponents an opportunity “to gain a campaign advantage,” and “the target of a false statement complaint may be forced to divert significant time and resources to hire legal counsel and respond to discovery requests in the crucial days leading up to an election.” But, the Court observed, “we need not decide” whether the threat of Commission proceedings “standing alone gives rise to an Article III injury,” because the “burdensome Commission proceedings here are backed up by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.” *Id.* at 2346.

The Court also briefly addressed what it described as “‘prudential ripeness’ factors” – the state of the factual record and hardship to the parties if relief were denied. After noting that the idea of “prudential” grounds was “in some tension” with *Sprint Communications, Inc. v. Jacobs* (*infra* p. 477, this Update), the Court found that there were no real prudential concerns anyway. The issues the List sought to present were purely legal, and did not need factual clarification, and denying review would in fact cause harm to the List by “forcing [it] to choose between refraining from core political speech on the one hand, or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other.” 134 S. Ct. at 2347.

**6. State Legislature’s Standing to Challenge Initiative Depriving It of Power over Congressional Redistricting.** In *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. ---, 135 S. Ct. 2652 (2015), the Supreme Court held that the Arizona Legislature had standing to bring a challenge, based on language in the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, to a state constitutional amendment that stripped it of power

over Congressional redistricting and vested it in an independent commission. Justice Ginsburg's opinion for five Justices viewed the Legislature (both of whose houses had authorized the challenge) as "an institutional plaintiff asserting an institutional injury." 135 S. Ct. at 2664. She distinguished *Raines v. Byrd*, *see infra* pp. 115-16, as involving an effort by *individual* Members of Congress – acting without having been authorized to represent their Houses – to challenge the constitutionality of the Line Item Veto Act. On the merits, the majority rejected the Legislature's challenge. Justice Scalia, joined by Justice Thomas, would have denied standing, viewing disputes "between governmental branches or departments regarding the allocation of political power" as not constituting an Article III "case" or "controversy." 135 S. Ct. at 2694 (Scalia, J., dissenting). But the majority having found standing, they joined Chief Justice Roberts's merits dissent for four Justices.

The Affordable Care Act was enacted after a process in which the Senate took a bill that originated in the House of Representatives, struck all but the words "Be it hereby enacted," and substituted the Affordable Care Act, which the Supreme Court later held imposed a "tax" in the form of the mandate to purchase insurance enforced by a "penalty/tax." Would the U.S. House of Representatives have standing to challenge legislation imposing taxes as a violation of the Origination Clause, which requires that "all Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills"? A similar question arises in connection with a pending suit by the House of Representatives asserting that, in connection with certain payments required by the Affordable Care Act for which funds were not specifically appropriated, the executive branch unlawfully diverted funds from an appropriation made for other purposes.

Page 117. Add at the end of Note 2:

*Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ---, 134 S. Ct. 1377 (2014): The Court, in a unanimous opinion by Justice Scalia, held that Static Control could sue Lexmark for false advertising under the Lanham Act even though it did not compete directly with Lexmark for the same customers. The opinion began with a section on "prudential standing," which it said was a "misleading" term. Citing *Sprint Communications, Inc. v. Jacobs* (*infra* p. 477, this Update), the Court stated that a request to decline to adjudicate a claim when there was Article III standing, as was true in this case, was "in some tension with our recent reaffirmation of the principle that 'a federal court's "obligation" to hear and decide' cases within its jurisdiction 'is "virtually unflagging."'" 134 S. Ct. at 1386. Repudiating the Court's previous placing of the "zone of interests" test under the rubric of prudential standing, Justice Scalia wrote that the "zone of interests" issue is "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim," to be answered by "using traditional tools of statutory interpretation." "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." *Id.* at 1387-88.

Page 122. Add at the end of Note 11:

See also the discussion of *Hollingsworth v. Perry*, 570 U.S. ---, 133 S. Ct. 2652 (2013), in the Special Alert (*supra* pp. vi-vii).

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Page 133. Add at the end of Note 2:

In *Lexmark* (*supra* p. 117, this Update), the Court raised some doubt about whether limits on third-party standing are properly labeled an aspect of “prudential standing.” In a footnote to the discussion in which it framed the zone-of-interests tests as a matter of statutory construction rather than prudential standing, the Court’s opinion noted that it had previously clarified that “generalized grievance” suits, once viewed as declined on prudential grounds, failed to present a constitutional case or controversy. *See, e.g., Lujan v. Defenders of Wildlife* (*supra* p. 89). “The limitations on third-party standing are harder to classify.” The opinion said that in some cases the Court had “observed that third-party standing is “closely related to the question whether a person in the litigant’s position will have a right of action on the claim,”” while conceding that “most of our cases have not framed the inquiry in that way.” But the footnote concluded, “This case does not present any issue of third-party standing, and consideration of the doctrine’s place in the standing firmament can await another day.” *Lexmark*, 134 S. Ct. at 1387 n.3. Note that the Court did not seem to be questioning whether there should be a doctrine limiting third-party standing – just whether the doctrine should be classified as one of prudential standing or something else.

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Page 157. Add at the end of Note 4:

In *Susan B. Anthony List v. Driehaus* (*supra* p. 108, this Update), the Court seemed to refer to “whether the factual record was sufficiently developed, and whether hardship to the parties would result if judicial relief is denied at this stage of the proceedings,” as “‘prudential ripeness’ factors.” The opinion observed that an argument for nonjusticiability “‘on grounds that are “prudential,” rather than constitutional,’ ... ‘is in some tension with our recent reaffirmation of the principle that “a federal court’s obligation to hear and decide” cases within its jurisdiction “is virtually unflagging,”’” citing and quoting *Lexmark* (*supra* p. 117, this Update) and *Sprint Communications* (*infra* p. 477, this Update). But the Court said that it did not have to “resolve the continuing validity of the prudential ripeness doctrine ... because the ‘fitness’ and ‘hardship’ factors are easily satisfied here.” 134 S. Ct. at 2347.

**Chapter 5**

**USING THE FEDERAL COURTS TO REGULATE  
STATE GOVERNMENT: THE BASIC CONCEPTS**

Page 254. Add at the end of Note 2:

For a brief defense of the “diversity” interpretation, seeking to deal with some of the possible problems mentioned in this Note, see Thomas D. Rowe, Jr., *Exhuming the “Diversity Explanation” of the Eleventh Amendment*, 65 ALA. L. REV. 457 (2013).

## Chapter 6

### IMPLIED RIGHTS OF ACTION: “CONSTITUTIONAL” AND STATUTORY

Page 317. Add at the end of Note 4:

Most recently, the Court has held that Congress’s having provided for fund cutoffs by the Secretary of Health and Human Services as the sole remedy for state failures to comply with Medicaid requirements supported a finding of legislative intent to foreclose equitable relief. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. ---, 135 S. Ct. 1378, 1385-86 (2015).

## Chapter 7

### THE STATUTORY FEDERAL-QUESTION JURISDICTION

Page 347. Add at the end of the carryover paragraph:

The Court, citing *Franchise Tax Board* and not mentioning *Textron*, has since unanimously upheld arising-under jurisdiction over a plaintiff’s declaratory-judgment action seeking a ruling that its products did not infringe the defendant’s patent, because in the absence of a declaratory action the declaratory-suit defendant’s “coercive” action would have been an ordinary patent-infringement suit. Such a case would come within the federal district courts’ original jurisdiction under 28 U.S.C. § 1338(a) over actions “arising under an act of Congress relating to patents.” See *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. ---, 134 S. Ct. 843 (2014).

## Chapter 8

### DIVERSITY AND ALIENAGE JURISDICTION

Page 365. Add at the end of the first paragraph of Note 1:

See the discussion of *Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337 (3d Cir. 2013), in the Special Alert (*supra* p. vii).

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Page 396. Add before the last two text sentences in the last full paragraph:

CAFA’s requirement for federal mass-action jurisdiction that there be “monetary relief claims of 100 or more persons ... proposed to be tried jointly” is not met when a state as sole named plaintiff seeks monetary relief for loss allegedly suffered by 100 or more of its citizens. See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. ---, 134 S. Ct. 736 (2014).

**Chapter 9**

**SUPPLEMENTAL JURISDICTION**

Page 416. Add after “*But see*” in the last sentence of the second paragraph of Note 2:

*Ramirez v. Amazing Home Contractors, Inc.*, 2014 U.S. Dist. LEXIS 164739 (D. Md. Nov. 25, 2014) (holding that *Painter v. Harvey, supra*, forbids district courts in the Fourth Circuit to exercise supplemental jurisdiction over permissive counterclaims);

## Chapter 10

### REMOVAL

Page 439. Add at the end of Note 8:

The split has widened, with the Eleventh Circuit agreeing with *Meyers*. See *Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013).

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Page 442. Add at the end of Note 2:

But several courts of appeals agree that a defendant who knows of an action without yet having been served may remove before being served, even though under *Murphy Bros.* the 30-day clock has not started running. See, e.g., *Novak v. Bank of N.Y. Mellon Trust Co.*, 783 F.3d 910 (1st Cir. 2015) (per curiam).

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Page 442. Add a new Note 2a:

**2a. No Requirement of Evidence Supporting Removal in Notice of Removal.** In *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. ---, 135 S. Ct. 547 (2014), the Supreme Court construed § 1446(a)'s requirement that a notice of removal shall "contain[] a short and plain statement of the grounds for removal" in a case involving the over-\$5,000,000 amount-in-controversy requirement of the Class Action Fairness Act (CAFA) (*supra* pp. 394-99). The Court's opinion noted the presumption in § 1446(c)(2) that "the sum demanded by the plaintiff in good faith shall be deemed to be the amount in controversy" and frowned on a presumption against removal in cases involving CAFA – "which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. at 554. An ideologically diverse five-Justice majority held that a removal notice need only plausibly allege, not include evidence of, the amount in controversy. "A statement 'short and plain' need not contain evidentiary submissions." *Id.* at 551. The four dissenters did not disagree on the merits but saw jurisdictional problems with entertaining the case and would have dismissed it as involving an improvident grant of certiorari or for lack of jurisdiction.

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Page 442. Add after the citation to the House report in the first paragraph of Note 4:

All circuits to have addressed the point agree that the one-year limit is procedural rather than jurisdictional. It is therefore waivable, and district courts are not to raise it on their own. See, e.g., *Smith v. Mylan, Inc.*, 761 F.3d 1042, 1044-46 (9th Cir. 2014).

## Chapter 11

### DOCTRINAL AND STATUTORY RESTRICTIONS ON FEDERAL JURISDICTION RELATED TO STATE-COURT LITIGATION

Page 477. Add at the end of Note 7:

*Sprint Communications, Inc. v. Jacobs*, 571 U.S. ---, 134 S. Ct. 584 (2013): Sprint filed two lawsuits dealing with efforts by Iowa’s utility-regulation board to regulate the fees for intrastate “voice over Internet” service. In state court it appealed the board’s decision holding that the state did have the power to regulate those fees. In federal court it sued members of the board, seeking a declaration that federal law preempted the state’s power to regulate the fees. The district court and the court of appeals held that, given the existence of the state-court proceeding, Sprint’s suit was barred by *Younger*. The Supreme Court reversed, in a unanimous opinion by Justice Ginsburg.

Citing *Colorado River*’s reference to the federal courts’ “virtually unflagging” obligation to hear cases within their jurisdiction, Justice Ginsburg described cases “fitting within the *Younger* doctrine” as “exceptional.” Citing *NOPSI*, she wrote, “Abstention is not in order simply because a pending state-court proceeding involves the same subject matter.” 134 S. Ct. at 588. Sprint’s federal lawsuit did not fall within any of *Younger*’s categories. The utility board’s order did not “rank as an act of civil enforcement of the kind to which *Younger* has been extended.” It was not “akin to a criminal prosecution,” “initiated to sanction the federal plaintiff ... for some wrongful act.” *Id.* at 592. Sprint initiated the state-court proceeding, and there had been no investigation of Sprint’s activities. The opinion concluded, “we today clarify and affirm that *Younger* extends to the three ‘exceptional circumstances’ identified in *NOPSI*, but no further.” *Id.* at 593-94. Those “exceptional circumstances” involve “ongoing state criminal prosecutions,” certain “civil enforcement proceedings,” and “civil proceedings involving certain orders ... uniquely in furtherance of the state courts’ ability to perform their judicial functions.” *Id.* at 591.

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Page 504. Add after the end of the carryover paragraph:

Another case dealing with the coverage of the TIA is *Direct Marketing Ass’n v. Brohl*, 575 U.S. ---, 135 S. Ct. 1124 (2015). The case involved a challenge to a Colorado requirement that on-line retailers who did not collect state sales or use taxes notify buyers of their state sales- or use-tax liability and to report tax-related information to the buyers and the state revenue department. The Court unanimously held that the challenge to the state’s enforcement of its notice and reporting requirements did not come within the TIA’s ban on federal-court interference with “the assessment, levy or collection of any tax under State law.” The Court took no position on whether the doctrine of comity applied in *Levin, supra*, might counsel against federal-court exercise of jurisdiction, leaving that issue open for consideration on remand.

## Chapter 12

### THE PLACE OF TRIAL, THE LAW APPLIED, AND CHOICE OF LAW IN THE FEDERAL TRIAL COURTS

Page 573. Add at the end of the first full paragraph:

The Court again visited the subject of *Goodyear Dunlop in Daimler AG v. Bauman*, 571 U.S. ---, 134 S. Ct. 746 (2014), holding that Daimler, a German public-stock company, was not amenable to personal jurisdiction in a suit brought in California by a group of Argentine citizens for an action that took place entirely outside the United States, involving arrest and torture in Argentina’s “dirty war.” The existence of an American distributor of its cars in California was not enough contact to sustain general jurisdiction over the defendant. Justice Ginsburg’s opinion for eight Justices emphasized that “continuous and systematic” contacts are not the test for general personal jurisdiction; such jurisdiction over an out-of-state corporation is appropriate “only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’” 134 S. Ct. at 751. She further clarified that the consideration of several factors to determine whether the exercise of personal jurisdiction over a defendant who has minimum contacts with a state is reasonable, a second step in specific-jurisdiction analysis, has no place when the issue is general personal jurisdiction: “When a corporation is genuinely at home in the forum State ... any second-step inquiry would be superfluous.” *Id.* at 762 n.20.

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Page 577. Add at the end of the second full paragraph:

The Ninth Circuit, however, while recognizing some uncertainty and division in the federal courts over whether the local-action doctrine goes to venue or subject-matter jurisdiction, has held that it is jurisdictional. Consequently, the new venue subsection does not abolish the distinction. *Eldee-K Rental Props., LLC v. DirecTV, Inc.*, 748 F.3d 943, 946-49 (9th Cir. 2014).

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Page 590. Add to Note 5:

In *Atlantic Marine Construction Co. v. United States District Court*, 571 U.S. ---, 134 S. Ct. 568 (2013), the Court unanimously held that when a plaintiff files an action in defiance of a forum-selection clause, but in an otherwise proper venue, and the defendant moves to transfer the action to the forum selected by contract, the transferor court should transfer the action unless the plaintiff can show that there are public-interest factors that outweigh trial in the forum selected by contract. Factors of convenience are not to be considered. The burden is on the plaintiff opposing the transfer, not on the defendant, to show this public interest, which will rarely be found. Upon transfer, the law of the transferee forum should be applied, including its choice-of-law rules, since the case should have been brought there originally.

## Chapter 14

### **ALLOCATION OF AUTHORITY BETWEEN LIFE-TENURED FEDERAL JUDGES AND OTHER ADJUDICATORS, AND BETWEEN COURTS OF EXCLUSIVE AND COURTS OF CONCURRENT JURISDICTION**

Page 650. Add after the last full paragraph:

It is sometimes difficult to draw a line between core and non-core proceedings in a bankruptcy case – in the former, under *Stern*, the Bankruptcy Court may enter a “final judgment,” subject to review by the district court; in the latter, the Bankruptcy Court may constitutionally make only “proposed findings of fact,” subject to review by the district court, absent a waiver by the parties. In *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. ---, 134 S. Ct. 2165 (2014), the Court unanimously held that when a *Stern* claim is made with regard to a judgment by the Bankruptcy Court, claiming that it involved a non-core issue, the “judgment” may be treated as proposed findings of fact, with de novo review by the district court and entry of its own judgment, rather than having to be dismissed for lack of jurisdiction.

In *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. ---, 135 S. Ct. 1932 (2015), the Supreme Court held that there may be a knowing consent to waive a *Stern* objection to jurisdiction by a bankruptcy court to issue a final judgment on an issue that should have been tried by an Article III district court. The consent need not be explicitly stated so long as it was knowing. The Court remanded the case to determine whether the consent for waiver was knowing even though not explicit.

## Chapter 17

### FEDERAL HABEAS CORPUS FOR STATE PRISONERS

Page 735. Add at the end of the first full paragraph:

Well, yes. An appellate panel “may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct.” *Marshall v. Rodgers*, 569 U.S. ---, 133 S. Ct. 1446, 1451 (2013) (per curiam).

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Page 738. Insert before the beginning of the text sentence on the last line of the page:

Further, several circuits have held that the state-law obligation of a sex offender who has completed his sentence to register with local authorities does not satisfy the custody requirement. *See, e.g., Calhoun v. Attorney General*, 745 F.3d 1070, 1074 (10th Cir. 2014).

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Page 754. Add at the end of Note 5:

And the Court has extended the *Martinez* collateral-review qualification to a situation in which state law makes it “virtually impossible” to present an ineffective-assistance claim on direct review. *Trevino v. Thaler*, 569 U.S. ---, 133 S. Ct. 1911 (2013).

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Page 779. Add a new Note 2a:

**2a. Further Refinements.** The Court has held that when a petitioner presents more than one federal claim in state court, and the state court rejects some claims while not expressly addressing others, there is a rebuttable presumption that the unaddressed claims have been “adjudicated on the merits” for purposes of AEDPA deference when the petitioner later raises those claims in federal court. *Johnson v. Williams*, 568 U.S. ---, 133 S. Ct. 1088 (2013). In connection with claims of ineffective assistance of counsel, it has emphasized that federal courts must “use a ‘doubly deferential’ standard of review that gives both the state court and the defense attorney the benefit of the doubt.” *Burt v. Titlow*, 571 U.S. ---, 134 S. Ct. 10, 13 (2013). And it has rejected an argument, previously accepted by some lower federal courts, “that a state-court ‘determination may be set aside ... if under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled.’” Rather, as stated in *Williams v. Taylor* and repeated in later cases, “a state-court decision is an unreasonable application of our clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner’s case.” *White v. Woodall*, 572 U.S. ---, 134 S. Ct. 1697, 1705-06 (2014).

Page 781. Add after the *Felkner* citation near the end of the carryover paragraph:

; *Nevada v. Jackson*, 569 U.S. ---, 133 S. Ct. 1990 (2013) (per curiam) (summarily and unanimously reversing Ninth Circuit habeas grant because no Supreme Court decision “clearly establishe[d]” that exclusion of evidence defendant sought to introduce at trial violated his federal constitutional rights); *Lopez v. Smith*, 574 U.S. ---, 135 S. Ct. 1 (2014) (per curiam) (summarily and unanimously reversing Ninth Circuit habeas grant for relying on circuit, rather than Supreme Court, precedent for “clearly established law”); *Glebe v. Frost*, 574 U.S. ---, 135 S. Ct. 429 (2014) (per curiam) (summarily and unanimously reversing Ninth Circuit habeas grant for failing to give deference required by 28 U.S.C. § 2254(d))

Page 781. Add after the carryover paragraph:

Should that somebody be the Supreme Court or Congress? Recently, two Ninth Circuit judges have strongly criticized AEDPA and the Court’s interpretations of the statute. According to liberal Stephen Reinhardt, a Carter appointee and victim of some of the Supreme Court’s reversals of Ninth Circuit habeas grants, “Through a series of decisions that are highly questionable as a matter of statutory interpretation and have troubling constitutional implications, the Court has deliberately exacerbated the worst aspects of AEDPA. Specifically, the Court has in many instances forbidden federal courts to exercise meaningful review over legitimate constitutional claims, and has instead allowed erroneous constitutional decisions by state courts to stand in the name of comity.” Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1224-25 (2015) (footnote omitted). Perhaps surprisingly, often conservative Alex Kozinski, a Reagan appointee, has gone so far as to call for AEDPA § 2254(d)’s repeal. “We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. ... AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.” Alex Kozinski, *Preface: Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xli, xlii (2015) (footnotes omitted).

Page 781. Add after the *Metrish* citation at the end of the first full paragraph:

; *Woods v. Donald*, 575 U.S. ---, 135 S. Ct. 1372 (2015) (per curiam) (summarily and unanimously reversing Sixth Circuit habeas grant, relying in part on *Harrington*)

Page 781. Add after the first full paragraph:

For a discussion of the Court's summary-reversal practice in habeas corpus and elsewhere, expressing concerns about procedural regularity and transparency in its selection of cases for such treatment, see William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

## Chapter 18

### FEDERAL JURISDICTION IN TIME OF WAR AND IN AN AGE OF TERRORISM

Page 812. Add after first paragraph of Note 5:

Subsequently, sitting en banc, the D.C. Circuit reviewed another conviction under the 2006 Military Commissions Act and partly overruled the panel decision in *Hamdan v. United States*, *supra*. Ali Hamza Ahmad Suliman al Bahlul had been a personal assistant to Osama bin Laden in Afghanistan, produced propaganda videos for al Qaeda, and helped with preparations for the September 11 attacks. He was charged with conspiracy to commit war crimes, providing material support for terrorism, and soliciting others to commit war crimes. The military commission convicted him on all three counts and sentenced him to life imprisonment. A three-judge panel of the D.C. Circuit vacated his convictions in light of that court's retroactivity decision in *Hamdan* and government concessions, *Al Bahlul v. United States*, 2013 U.S. App. LEXIS 1820 (D.C. Cir. Jan. 25, 2013) (per curiam), but the court then heard the case en banc. A four-judge majority of the seven sitting judges vacated his material-support and solicitation convictions but rejected his ex post facto challenge to the conspiracy conviction, remanding it to the original three-judge panel for disposition of remaining issues as to that conviction. *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc). A key aspect of the majority's opinion overruled the *Hamdan* non-retroactivity holding, finding the 2006 Military Commissions Act "unambiguous in its intent to authorize retroactive prosecution for the crimes enumerated in the statute – regardless of their pre-existing law-of-war status." Thus having to face the ex post facto issue avoided by the *Hamdan* panel, the en banc court rejected it as to the conspiracy conviction because of prior criminalization by federal statute, prior military-commission practices, and deferential plain-error review, which the court employed because Bahlul had not raised the challenge in timely fashion below. It did, however, find plain error in the rejection below of the ex post facto challenges to the material-support and solicitation convictions.

On remand the original three-judge panel split 2-1, with the majority vacating the conspiracy conviction on the ground that Congress violated Article III by vesting in the non-Article III military commissions power to try crimes that are not offenses under the international law of war. *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015). *See generally* §§ 14.01-.02 *supra*.

In this latest decision the court of appeals held that the prisoner did not, by failing to raise at trial his defense that the military commissions lacked jurisdiction over charges of inchoate conspiracy (*i.e.*, plans that were never consummated), forfeit that defense. The defense, which raises Article III limits on military commissions, was not subject to forfeiture because the issue goes to the Constitution's protection of Article III federal courts' power. The court held that such conspiracies were domestic crimes, triable only in Article III federal courts, and that military commissions could try only offenses under the international law of war.

What is that law? The court of appeals cited *Ex parte Quirin*, 317 U.S. 1 (1942), in which the Supreme Court held that alleged German saboteurs, landed by submarine on the

east coast after America entered World War II, could be tried by a military commission and sentenced to death. *See supra* pp. 782-83. That case held “offenders against the law of war subject to trial and punishment by military tribunals,” 317 U.S. at 31, as distinct from the domestic law of crimes. United States courts, the panel majority observed, “may recognize fewer law of war offenses than other countries’ courts,” and noted that the Supreme Court in *Hamdan v. Rumsfeld*, *see supra* p. 786, had “treated ‘the American common law of war’ as a source of constraint, not expansion.” Thus conspiracies to commit acts of sabotage or assassination that were not consummated could be tried as crimes in Article III courts, the majority held, but not by military commissions.

Unless the D.C. Circuit en banc or the Supreme Court reverses this panel decision, the case may essentially end military-commission trials at Guantánamo, since as of mid-2015 those accused of war crimes have largely or completely been tried.

One can ask whether it was worth the some five billion dollars that have been spent on Guantánamo and the military commissions, which have resulted in only a handful of convictions. Only three convicted prisoners remain at Guantánamo, out of the approximately seven hundred fifty persons who were ever incarcerated there. Six hundred twenty-two have been released, transferred, or repatriated. Others have been deemed too dangerous to release or have not been released since as yet no country will accept them, although they have not been tried or convicted.