FEDERALISM & SEPARATION OF POWERS
2002 UPDATE: THIRD & FOURTH QUARTERS

EXECUTIVE & LEGISLATIVE ACTIONS

The Judicial Nomination Battle Continues

Following the November election, chairmanship of the judiciary committee will once again be in the hands of Republicans, a scenario that might lead one to believe that the judicial nomination battle between Senate and President is over. In all likelihood, however, the battle has simply changed venues. Rather than committee delay tactics, Democrats are reportedly planning to use parliamentary devices, such as the filibuster, to further delay the President's nominations. *See, e.g.*, Gary J. Andres, *A Road Twice Traveled; Bush's Judges Are on the Docket Again*, WASH. TIMES, Dec. 12, 2002, at A23. Several links are included below for those interested in reading more about the status of President Bush's judicial nominations. Each link is listed because it contains numerous resources that may be of interest.

- Federalist Society, Judicial Nominations, *at* http://www.fed-soc.org/judicialnominations.htm.
- U.S. Department of Justice, Office of Legal Policy, Judicial Nominations, *at* http://www.usdoj.gov/olp/judicialnominations.htm.
- The Committee for Justice, Top News, *at* http://www.committeeforjustice.org/index.html.
- American Bar Association, Independence of the Judiciary: Judicial Vacancies, *at* http://www.abanet.org/poladv/priorities/judvac.html.
- Center for Individual Freedom, Confirmation Watch, *at* http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/confirmation_watch/index.htm.
- Free Congress Foundation, Center for Law & Democracy, *at* http://www.freecongress.org/centers/ld/index.asp.

Federal Limits on Medical Malpractice Awards

Now that Republicans have regained control of Congress, a White House proposal to limit medical malpractice awards has been revived. The President has indicated his support for federal liability caps since the states have "failed to adopt 'reasonable' liability caps." Joseph Curl, *Bush Slams 'Junk and Frivolous' Suits*, WASH. TIMES, Aug. 8, 2002; *see also* Jim Drinkard, *Republican Control Gives Business Hope in Limiting Liability*, USA TODAY, Nov. 27, 2002, at 10A. However, this legislation seems at odds with the conservative commitment to federalism, a fact that is pointed out (ironically) in a *New York Times* article. *See* Adam Liptak, *Shot in the Arm for Tort Overhaul*, NY TIMES, Nov. 17, 2002 ("The Republicans must also try to reconcile support for legislation that would have its greatest impact in the state courts with their traditional philosophical commitment to federalism**,** which would leave most local matters to the states.").

Also of Interest

- In January, the Federalism and Separation of Powers Practice Group will host a panel entitled "Federalism, Preemption, and the Supreme Court." The panel will be held at the National Press Club on Tuesday, January 21st from 12:00 p.m. to 2:00 p.m. For details, please visit: http://www.fed-soc.org/events/Preemp/Promo.htm.
- *Bush Opinion Cites Terminated Kan. Reservation*, INDIANZ.COM, Nov. 1, 2002, *at* http://www.indianz.com/News/show.asp?ID=2002/11/01/miami (reporting that the Bush administration has rejected an Oklahoma tribe's assertion of sovereignty over 35 acres in Kansas and its attempts to open an out-of-state casino on the land).
- John C. Eastman, The Claremont Institute, The Principled Vice President Cheney: Thoughts on *GAO v. Cheney*, *at* http://www.claremont.org/projects/jurisprudence/020718eastman.html (July 18, 2002) (discussing the "troubling violation of the separation of powers" when congressional leaders seek access to executive branch deliberations).
- Robert A. Levy, *Citizen Padilla: Dangerous Precedents*, NAT'L REV. ONLINE, June 24, 2002, *at* http://www.nationalreview.com/comment/comment-levy062402.asp (discussing congressional versus presidential power in the War on Terror, as applied to the detention of enemy combatants).

SUPREME COURT 2002-2003 TERM

AEI's Federalism Project maintains a website that contains information on currently pending and recently decided federalism cases. Several of the cases discussed below are also discussed on AEI's website: http://www.federalismproject.org/masterpages/supremecourt.

Sprietsma v. Mercury Marine, 123 S. Ct. 518, 537 U.S. ___ (2002), *available at* 2002 U.S. LEXIS 9067.
Cert. Granted: Jan. 22, 2002. Oral Argument: Oct. 15, 2002. Decided: Dec. 3, 2002.

In 1995, Jeanne Sprietsma was killed when she fell from a motor boat and was struck by its propeller blades—the boat had not been equipped with a propeller guard. Sprietsma's husband filed a wrongful death suit against the manufacturer of the boat, alleging that it was defectively designed because it did not include the guard. The Illinois Supreme Court affirmed a lower court dismissal of the case, holding that the Federal Boat Safety Act of 1971 (FBSA) preempted Sprietsma's state law claims. The Supreme Court unanimously reversed the decision.

The Court held that the FBSA's preemption clause is "is most naturally read as not encompassing common-law claims." *Id.* at *21. The clause provides that a state "may not establish . . . a law or regulation . . . that is not identical to a regulation prescribed under [the FBSA]." 46 U.S.C. § 4306 (2000). The wording of the pre-emption clause, the Court added, "indicate[s] that Congress pre-empted only positive enactments." *Sprietsma*, 2002 U.S. LEXIS 9067, at *21. The FBSA's savings clause reinforces this interpretation of the statute. It states that compliance with the FBSA "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (2000). The Court also rejected respondent's assertion that the common-law claims were preempted by a Coast Guard decision not to regulate propeller guards. Instead, the Court noted, the Coast Guard's actions (or lack thereof) merely emphasized "the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.'" *Sprietsma*, 2002 U.S. LEXIS 9067, at *28. Last, the Court held that the common-law claims are not "implicitly pre-empted by the entire statute." *Id.* at *24. In contrast to other statutes that have been held to preempt state law, the "the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies." *Id.* at *30.

For an article by Michael Greve regarding the conflict for conservatives in their approach to federalism versus preemption decisions, please see:
http://www.federalismproject.org/masterpages/publications/collision.html.

Eldred v. Ashcroft, No. 01-618
Cert. Granted Feb. 19, 2002. Oral Argument: Oct. 9, 2002.

In 1998, Congress passed the Copyright Term Extension Act (the CTEA), which extended the term of existing and future copyrights for an additional twenty years. Soon thereafter, petitioners filed a facial challenge to the CTEA, claiming that the retroactive aspects of the bill exceeded Congress' power under the Copyright Clause of the Constitution.[1] The District Court dismissed the complaint. Upon appeal, the D.C. Circuit affirmed the dismissal, ruling that "[w]hatever wisdom or folly the plaintiffs may see in the particular 'limited Times' for which the Congress has set the duration of copyrights, that decision is subject to judicial review only for rationality. This is no less true when the Congress modifies the term of an existing copyright than when it sets the term initially."[2] Judge Sentelle dissented, reasoning that "[*Lopez*'s] concept of 'outer limits' to enumerated powers applies not only to the Commerce Clause but to all the enumerated powers . . . . [T]he rationale offered by the government for the copyright extension . . . leads to such an unlimited view of the copyright power as the Supreme Court rejected with reference to the Commerce Clause in *Lopez*."[3] The Supreme Court granted certiorari on February 19, 2002, to review the decision. The questions presented are:

1. The Copyright Clause provides that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Petitioners also claimed that the the CTEA violated the Free Speech and Press Clauses of the First Amendment. The D.C. Circuit rejected the Petitioners' First Amendment claim.
2. Eldred v. Reno, 239 F.3d 372, 380 (D.C. Cir. 2001).
3. *Id.* at 381 (Sentelle, J., dissenting).

(1) Whether the 20-year extension of the terms of all unexpired copyrights, set forth in the Copyright Term Extension Act of 1998 (CTEA), Pub. L. No. 105-298, 112 Stat. 2827, violates the Copyright Clause of the Constitution insofar as it applies to works in existence when it took effect.

(2) Whether the CTEA's 20-year extension of the terms of all unexpired copyrights violates the First Amendment.[4]

A brief summary of the facts of the litigation in *Eldred* and its procedural history can be found at: http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&-response=/docket/detail.srch&-search&docket=01-0618

Pierce County v. Guillen, No. 01-1229.
Cert. Granted: Apr. 29, 2002. Oral Argument: Nov. 4, 2002.

The Hazard Elimination Program was established by Congress to provide states with funds for road hazard improvement projects. In order to qualify for the program, a state must conduct surveys of public roads, identify hazardous conditions, and assign priorities to each of the needed repairs. To encourage an honest evaluation of road conditions, the federal law ("Section 409") made various provisions to restrict the release of this information to the public. The issues in *Guillen* arise from litigation surrounding two car accidents, one fatal, at dangerous intersections in Pierce County, Washington, and the plaintiffs' attempts to obtain materials and data related to the intersections through Washington's Public Disclosure Act. The Washington Supreme Court found that (1) private respondents have standing to challenge the constitutionality of a federal law on federalism grounds, even when state officials oppose such a challenge; and (2) Section 409 violates the federalist principles in the Constitution to the extent that it is applied to data collected and used both for federal and for state purposes.[5] The Supreme Court granted certiorari on April 29, 2002, to review the decision. The questions presented are:

(1) Whether 23 U.S.C. § 409, which protects certain documents "compiled or collected" in connection with certain federal highway safety programs from being discovered or admitted in federal or state trials "for damages arising from any occurrence at a location mentioned or addressed" in those documents, is a valid exercise of Congress' power under the Supremacy, Spending, Commerce or Necessary and Proper Clauses of the United States Constitution.

(2) Whether private plaintiffs have standing to assert "states' rights" under the Tenth Amendment where their State's Legislative and Executive branches expressly approve and accept the benefits and terms of the federal statute in question.[6]

A brief summary of the facts of the litigation in *Guillen* and its procedural history can be found at: http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&-response=/docket/detail.srch&-search&docket=01-1229

Scheidler v. NOW, No. 01-1118; Operation Rescue v. NOW, No. 01-1119.
Cert. Granted: Apr. 22, 2002. Oral Argument: Dec. 4, 2002.

The litigation in *Scheidler* has been ongoing for over fifteen years. It involves multiple claims by two classes (one class of NOW members and another of abortion clinics) against several pro-life defendants. The Supreme Court granted certiorari on April 22, 2002, to review the decision. The questions presented are:

(1) Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c).

(2) Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion"—and which defines "extortion" as "the *obtaining of property* from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U.S.C. § 1951(b)(2) (emphasis added))—criminalizes the activities

4. Brief for the Respondent at i, *Eldred* (No. 01-618).

5. Data collected or created for federal purposes only is protected by the federal privilege in Section 409. *See* Guillen v. Pierce County, 31 P.3d 628, 702-03 (Wash. 2001).

6. Brief on the Merits for Petitioner at i, *Guillen* (No. 01-1229).

of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.[7]

In their brief, the petitioners describe the danger in expansively reading the Hobbs Act as creating the "potential to federalize all manner of traditional state offenses . . . into Hobbs Act violations punishable by 20-year sentences. But courts must not be 'quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."[8] Similarly, an *amicus* brief filed by several states argued that the "expansion of the definition of 'extortion' under the Hobbs Act . . . raises the specter of unwarranted civil RICO litigation against State officials."[9] The *amici* States argued that implying a private cause of action in *Scheidler* would directly contradict the Court's recent holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

A brief summary of the facts of the litigation in *Scheidler* and its procedural history can be found at: http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&-response=/docket/detail.srch&-search&docket=01-1118.

Cook County v. United States, No. 01-1572.
Cert. Granted June 28, 2002. Oral Argument: Jan. 14, 2003.

A former employee of Cook County, Illinois, sued the county under the federal False Claims Act (FCA). The suit was filed as a *qui tam* action in which the plaintiff, Chandler, sued on behalf of the United States to recover funds that she claimed were obtained fraudulently by the County in the administration of a drug treatment program. In its decision, the Seventh Circuit found that the county is a "person" under the FCA and "subject to the same penalties as other defendants," including treble damages.[10] The Supreme Court granted certiorari on June 28, 2002, to review the decision. The question presented is:

> Whether local government entities are subject to *qui tam* actions under the False Claims Act, 31 U.S.C. 3729?[11]

In *Vermont v. Stevens*, 529 U.S. 765 (2000), the Court held that the States are not subject to *qui tam* actions under the FCA. The outcome of *Cook County* is equally important, as the Court determines whether local governments enjoy the same immunity.

For a commentary on the case by the National Conference of State Legislatures, please see: http://www.ncsl.org/statefed/chandler.htm. A brief summary of the facts of the litigation in *Cook County* and its procedural history can be found at: http://www.medill.northwestern.edu/docket/action.lasso?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33098&-search.

Kentucky Ass'n of Health Plans v. Miller, No. 00-1471.
Cert. Granted June 28, 2002. Oral Argument: Jan. 14, 2003.

In 1994, the Kentucky state legislature enacted the Kentucky Health Care Reform Act, which contained an "any willing provider" provision in § 304.17A-110(3).[12] Later, in 1996, an "any willing provider" provision was also added for chiropractors in § 304.17A-171(2).[13] Plaintiffs, seven HMOs, filed a suit for injunctive relief, claiming that both provisions are preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). The district court granted defendant's motion for summary judgment, concluding that the provisions are saved from preemption because

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7. Petition for a Writ of Certiorari at i, NOW v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (No. 01-1118).
8. Petition for a Writ of Certiorari at 24, *Scheidler* (No. 01-1118) (citation omitted).
9. Brief for the States of Alabama, Nebraska, North Dakota, and South Dakota, and the Commonwealth of the Northern Mariana Islands, As *Amici Curiae*, in Support of Petitioners at 2, *Scheidler* (Nos. 01-1118, 01-1119).
10. *See* United States ex rel. Chandler v. Cook County, 277 F.3d 969 (7th Cir. 2002).
11. Brief for the United States as *Amicus Curiae* Supporting Respondent at i, *Cook County* (No. 01-1572).
12. Section 304.17A-110(3) provides: "Health care benefit plans shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan." KY. REV. STAT. ANN. § 304.17A-110(3) (Banks-Baldwin 1995).
13. Section 304.17A-171(2) states: "A health benefit plan that includes chiropractic benefits shall: (2) Permit any licensed chiropractor who agrees to abide by the terms, conditions, reimbursement rates, and standards of quality of the health benefit plan to serve as a participating primary chiropractic provider to any person covered by the plan." KY. REV. STAT. ANN. § 304.17A-171(2) (Banks-Baldwin 1999).

they "regulate insurance" under ERISA's savings clause."[14] The Sixth Circuit affirmed. The Supreme Court granted certiorari on June 28, 2002, to review the decision. The question presented is:

> Whether Kentucky's "any willing provider" law, which requires each insurer (including each health maintenance organization) in the State to make available to its insureds the services of any medical provider in its geographical region that agrees to the terms and conditions offered by the insurer, is saved from preemption as a law that "regulates insurance" under Section 514(b)(2)(A) of the Employee Retirement Security Act of 1974, 29 U.S.C. 1144(b)(2)(A).[15]

The Court agreed to hear *Kentucky Ass'n. of Health Plans* eight days after it decided last term's ERISA preemption case, *Rush Prudential HMO, Inc. v. Moran*. For the American Medical Association's summary of ERISA preemption cases currently pending in various courts, please see http://www.ama-assn.org/ama/pub/category/8107.html.

A brief summary of the facts of the litigation in *Kentucky Ass'n. of Health Plans* and its procedural history can be found at: http://www.medill.northwestern.edu/docket/action.lasso?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33088&-search.

Nev. Dep't of Human Res. v. Hibbs, No. 01-1368.
Cert. Granted: June 24, 2002. Oral Argument: Jan. 15, 2003.

Hibbs brought suit against the Nevada Department of Human Resources and others alleging violations of the Family and Medical Leave Act of 1993 (FMLA). The district court granted summary judgment to the defendants, based partially upon a finding that the claim was barred by Nevada's Eleventh Amendment Sovereign Immunity.[16] The Ninth Circuit reversed the district court holding, finding that, although Nevada had not waived its sovereign immunity, FMLA contains a "sufficiently clear expression of congressional intent to abrogate state sovereign immunity" and that this congressional exercise of power is valid under Section 5 of the Fourteenth Amendment.[17] The Supreme Court granted certiorari on June 24, 2002, to review the decision. The question presented is:

> Whether 29 U.S.C. 2612(a)(1)(C), the family medical care provision of the Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq., is a proper exercise of Congress's power under § 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' Eleventh Amendment immunity from suit by individuals.[18]

Hibbs is the latest in a line of cases assessing the boundaries of how far congressional power may extend over the States as Congress tests a tool other than its power to regulate interstate commerce. In these cases, the congressional tool is Congress' power to enforce the Fourteenth Amendment.[19] In recent years, similarly justified statutes have failed by a 5-4 majority. [20]

A brief summary of the facts of the litigation in *Hibbs* and its procedural history can be found at: http://www.medill.northwestern.edu/docket/cases.srch?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33087&-search.

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14. Ky. Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352, 363-72 (6th Cir. 2000). The sections were repealed by the Kentucky legislature effective July 1, 1999; however, the Sixth Circuit determined that the appeal was not moot as the repealed provisions had been replaced with the same requirements in a new statute. The new "any willing provider" provision is located at KY. REV. STAT. ANN. § 304.17A-270 (Banks-Baldwin 1999).

15. Brief for the United States as *Amicus Curiae* Supporting Respondent at i, *Kentucky Ass'n. of Health Plans* (No. 00-1471).

16. The district court also found that Hibbs' Fourteenth Amendment rights had not been violated. The court declined to exercise supplemental jurisdiction over the remaining state law claims, which were dismissed without prejudice. Hibbs v. Dep't of Human Res., 273 F.3d 844, 849 (9th Cir. 2001).

17. *See id.* at 853.

18. Brief for the United States in Opposition at i, *Hibbs* (No. 01-1368).

19. Professor Michael Dorf discusses this idea in a column on Findlaw.com. *See* Michael C. Dorf, *Supreme Court October 2002 Term Preview—Part One*, FINDLAW'S WRIT, Oct. 2, 2002, *at* http://writ.news.findlaw.com/dorf/20021002.html.

20. *Id.*

Pharmaceutical Research & Mfrs. of Am. v. Concannon, No. 01-188.
Cert. Granted June 28, 2002. Oral Argument: Jan. 22, 2003.

In May 2000, Maine enacted its Maine Rx Program in an effort to combat high prescription prices. Under the program, residents of Maine may purchase drugs at a discount. This discount is subsidized from a "rebate" account maintained by the State. Funds in the rebate account are obtained from drug manufacturers, who are required to make payments into the fund. Enforcement tools employed by the State include use of Medicaid's "prior authorization" provisions, potential charges under Maine's Unfair Trade Practices Act, and the threat of price controls. Pharmaceutical Research and Manufacturers of America (PRMA) filed suit to have the law declared invalid on the grounds that it violates the dormant Commerce Clause and is preempted by the Medicaid statute. The First Circuit, however, found no Commerce Clause violation. The Supreme Court granted certiorari on June 28, 2002, to review the decision. The questions presented are:

> (1) Whether the federal Medicaid statute, 42 U.S.C. § 1396 et seq., precludes Maine from limiting Medicaid patients' access to prescription drugs as a means of compelling drug manufacturers to subsidize price discounts for non-Medicaid populations?
>
> (2) Whether Maine violates the Commerce Clause by requiring an out-of-state manufacturer that sells its products to wholesalers outside the state to remit a payment to the state each time one of the manufacturer's products is subsequently sold by a retailer within the state? Whether the federal Medicaid statute, 42 U.S.C. § 1396 et seq. prohibits a state from using authority under that statute to compel drug manufacturers to provide rebates for drugs sold to uninsured Maine residents?[21]

In his concurring opinion, Judge Keeton stated that upholding Maine's prescription drug program supports federalist principles because it shows "respect for a state's sovereignty," encourages states to compete with each other, and allows states to "experiment."[22] In contrast, several *amicus* briefs filed on behalf of petitioners argued that the Founders' purpose in adopting the Commerce Clause was to create and maintain an area of free trade among the states. Maine's program violates the dormant Commerce Clause because the State is attempting to obtain benefits for its residents while undercutting the free market and harming citizens of other states—who will end up subsidizing Maine residents.

The briefs and opinions filed in this case are available on the website of the Maine Attorney General: http://www.state.me.us/ag/interest/interestint.html. A brief summary of the facts of the litigation in *Concannon* and its procedural history can be found at: http://www.medill.northwestern.edu/docket/action.lasso?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33089&-search.

Franchise Tax Bd. of Cal. v. Hyatt, No. 02-42.
Cert. Granted Oct. 15, 2002. Oral Argument: Feb. 24, 2002.

Gilbert Hyatt moved from California to Clark County, Nevada. After his move, California's Franchise Tax Board commenced an audit against him for 1991-92 state income taxes. The Tax Board's audit determined that Hyatt had underpaid state income taxes, and it assessed additional taxes and penalties against him. Hyatt protested the assessments formally in California, but also sued the Tax Board in Clark County District Court for intentional torts and negligence allegedly committed during the audit. The Tax Board claimed that sovereign immunity, as well as the Full Faith & Credit Clause, entitled it to dismissal of the case, as it is immune from tort liability under California law. Both the district court and the Supreme Court of Nevada denied the Tax Board's motion for dismissal with respect to the intentional torts.[23] The Supreme Court granted certiorari on Oct. 15, 2002, to review the decision. The question presented is:

> Did the Nevada Supreme Court impermissibly interfere with California's capacity to fulfill its sovereign responsibilities, in derogation of Article IV, section 1, by refusing to give full faith and credit to California Government Code section 860.2, in a suit brought against California for the torts of invasion of

21. Brief of Petitioner at i, Pharmaceutical Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001) (No. 01-188).

22. *See Concannon*, 249 F.3d at 97 (Keeton, J., concurring).

23. The district court would also have heard the negligence claim; however, the Supreme Court of Nevada held that the negligence claim should be dismissed on comity principles.

privacy, outrage, abuse of process, and fraud alleged to have occurred in the course of California's administrative efforts to determine a former resident's liability for California personal income tax?[24]

The last Supreme Court case on point was *Nevada v. Hall*, 440 U.S. 410 (1979), a case in which Stevens wrote the majority opinion holding that California courts could not only assume jurisdiction over a Nevada employee, but could also reject Nevada's tort-claim limits. Rehnquist wrote the dissent arguing that such action violated the Full Faith and Credit Clause. In an amicus brief before the court in *Hyatt*, several states argue that "[I]n light of the profound concern that this Court has articulated since *Nevada v. Hall* for the sovereignty of states *vis a vis* the federal government. . . . it is appropriate for this Court to revisit *Nevada v. Hall* . . . [and examine] whether in light of the renewed emphasis on state sovereignty the Full Faith and Credit Clause, under some circumstances at least, mandates that a foreign State give full credit to a sister state's retention of its sovereign immunity."[25]

A brief summary of the facts of the litigation in *Hyatt* and its procedural history can be found at: http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&-response=/docket/detail.srch&-search&docket=02-0042.

Med. Bd. of Cal. v. Hason, No. 02-479.
Cert. Granted Nov. 18, 2002. Oral Argument: Unscheduled.

Michael Hason applied for a California medical license in 1995. In 1996, based upon the assessment of an independent medical examiner that Hason suffered from drug dependency and depression, the Medical Board of California denied his application for licensure. Hason filed suit, claiming that the denial violated Title II of the American with Disabilities Act. The district court dismissed his case on grounds of sovereign immunity, but the Ninth Circuit reversed, holding that Title II of the ADA is a valid abrogation of state sovereign immunity under section 5 of the Fourteenth Amendment. The Supreme Court granted certiorari on Nov. 18, 2002, to review the decision. The question presented is:

> Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?[26]

In 2001, the Court handed down its decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). In *Garrett*, the Court analyzed Eleventh Amendment immunity with respect to Title I of the ADA, and it articulated a framework for analyzing whether a state's sovereign immunity has been abrogated. In its petition for writ of certiorari, the petitioner asserted that the Ninth Circuit should have taken the *Garrett* framework into account in determining whether its pre-*Garrett* rulings were still good precedent.[27] Instead, the Ninth Circuit's analysis of *Garrett* was limited to a few sentences.

A brief summary of the facts of the litigation in *Hason* and its procedural history can be found at: http://www.medill.northwestern.edu/docket/cases.srch?-database=docket&-layout=lasso&-response=%2fdocket%2fdetail.srch&-recordID=33117&-search.

Inyo County v. Paiute-Shoshone Indians, No. 02-281
Cert. Granted Dec. 2, 2002. Oral Argument: Unscheduled.

Bishop Paiute Tribe is a federally-recognized tribe that owns a reservation in eastern California and operates the Bishop Paiute Gaming Corporation. The Corporation operates the Paiute Palace Casino on the Reservation. Early in 2000, as part of a welfare fraud investigation, Inyo County officials submitted a request to the Tribe for the release of the payroll records of three casino employees. When the tribe would not release the records, the County obtained and executed a search warrant. Later in the year, when faced with the possibility of a

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24. Brief of the States of Oregon, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, Commonwealths of N. Mariana Islands and Puerto Rico, *Amici Curiae* in Support of Petitioner at i, Franchise Tax Bd. of Cal. v. Eighth Judicial Dist. Court of Nev., 2002 Nev. LEXIS 57 (Nev. Sup. Ct. 2002) (No. 02-42).
25. *Id.* at 9-10 (citations omitted).
26. Petition for a Writ of Certiorari at i, Hason v. Med. Bd. of Cal., 279 F.3d. 1167 (9th Cir. 2002) (No. 02-479).
27. *Id.* at 6-9.

second search warrant for additional payroll records, the tribe filed suit for injunctive relief. The District court granted Defendants' motion to dismiss, but the Ninth Circuit reversed in part, holding that the County violated the Tribe's sovereign immunity when it obtained and executed the search warrant on tribal property. The Supreme Court granted certiorari on June 28, 2002, to review the decision. The questions presented are:

> (1) Whether the doctrine of tribal sovereign immunity enables Indian tribes, their gambling casinos and other commercial businesses to prohibit the searching of their property by law enforcement officers for criminal evidence pertaining to the commission of off-reservation state crimes, when the search is pursuant to a search warrant issued upon probable cause.
>
> (2) Whether such a search by state law enforcement officers constitutes a violation of the tribe's civil rights that is actionable under 42 U.S.C. § 1983.
>
> (3) Whether, if such a search is actionable under 42 U.S.C. § 1983, the State law enforcement officers who conducted the search pursuant to the warrant are nonetheless entitled to the defense of qualified immunity.[28]

A brief summary of the facts of the litigation in *Inyo County* and its procedural history can be found at: http://www.medill.nwu.edu/cases.srch?-database=docket&-layout=lasso&-response=/docket/detail.srch&-search&docket=02-0281.

Also of Interest:

Michael C. Dorf, *Supreme Court October 2002 Term Preview—Part One*, FINDLAW'S WRIT, Oct. 2, 2002, *at* http://writ.news.findlaw.com/dorf/20021002.html.

Michael C. Dorf, *Supreme Court October 2002 Term Preview—Part Two*, FINDLAW'S WRIT, Oct. 16, 2002, *at* http://writ.news.findlaw.com/dorf/20021016.html.

Michael S. Greve, *The Supreme Court Term That Was and the One That Will Be*, AEI FEDERALIST OUTLOOK, July/Aug. 2002, *at* http://www.aei.org/fo/fo14236.htm.

CIRCUIT COURTS

U.S. v. Ballinger, 2002 U.S. App. LEXIS 23916 (Nov. 21, 2002).

Appellant, Ballinger, set fire to five churches in Georgia in violation of 18 U.S.C. § 247(a)(1), (d)(1)-(2).[29] He pled guilty to the counts of arson, but conditioned his plea upon a judicial determination that the federal statute did not violate the Commerce Clause, either on its face or as applied to him. The Eleventh Circuit found the statute constitutional on its face, as it "contains a jurisdictional element that 'ensures, through case-by-case inquiry, that the activity in question affects interstate commerce.'" *Id.* at *9 (quoting United States v. Cunningham, 161 F.3d 1343, 1346 (11th Cir. 1998) (quoting United States v. Lopez, 514 U.S. 549, 562 (1995))). Section 247(b), the court observed, "extends federal jurisdiction to the arson of religious real property when the 'offense is in or affects interstate commerce.'" *Id.* at *10-11 (citation omitted). However, the court continued, since the

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28. Reply to Brief in Opposition at i, Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549 (9th Cir. 2002) (No. 02-281).

29. The statute provides:

> (a) "Whoever, in any of the circumstances referred to in subsection (b) of this section—
>
> (1) intentionally defaces, damages, or destroys any religious real property, because of the religious character of that property, or attempts to do so . . .
>
> . . .
>
> shall be punished as provided in subsection (d).
>
> . . .
>
> (d) The punishment for a violation of subsection (a) of this section shall be—
>
> (1) if death results from acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, a fine in accordance with this title and imprisonment for any term of years or for life, or both, or may be sentenced to death;
>
> (2) if bodily injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this section, and the violation is by means of fire or an explosive, a fine under this title or imprisonment for not more that 40 years, or both;

18 U.S.C. § 247(a)(1), (d)(1), (2) (2000).

connection between Ballinger's arsons and interstate commerce is insufficient, the statute may not constitutionally be applied to him.

Section 247's jurisdictional element requires the government to prove that a defendant's actions had a substantial effect on interstate commerce. Arson, the court noted, is an *intrastate activity*, not an *instrumentality* or *channel* of interstate commerce. The Supreme Court has acknowledged "the necessity [of protecting] interstate commerce from the burdens and obstructions that might be imposed by intrastate activities"; however, "the 'great weight' of its decisions make clear that a 'substantial effect' on interstate commerce is constitutionally required." *Id.* at *12-13. While "Congress may regulate any instrumentality or channel of interstate commerce, the Constitution permits Congress to regulate only those intrastate activities which have a substantial effect on interstate commerce, and such regulation of purely intrastate activity reaches the outer limits of Congress' commerce power." *Id.* at *13-14. Furthermore, an aggregation of local effects is "not constitutionally permissible in reviewing congressional regulation of intrastate, non-economic activity." *Id.* at *16. The court noted, "allow[ing] Congress to regulate local crime on a theory of its aggregate effect on the national economy would give Congress a free hand to regulate any activity, since, in the modern world, virtually all crimes have at least some attenuated impact on the national economy. . . . [I]t would transfer to Congress a general police power that the Constitution denies the federal government and reposes in the states. *Id.* at *18-19 (citations omitted). Therefore, Section 247 can only be said to regulate such arson "which, by itself, substantially affects interstate commerce." *Id.* at *19. Since the government can not show that "each of Ballinger's church arsons had a substantial effect on interstate commerce," the statute may not constitutionally be applied to him. *Id.* at *24.