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## Constitutional Law

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## Constitutional Law

## CONSTITUTIONAL LAW

*American Booksellers Association v. Schiff*, 868 F.2d 1199

Author: Judge Seth

Plaintiff, American Booksellers Association (“American”), challenged a New Mexico statute which regulated the display for sale of materials considered “harmful to minors.” No prosecution under the law had been initiated by the Attorney General, and the district court dismissed for lack of standing, finding no case or controversy was presented. American appealed, alleging it had standing.

The Tenth Circuit reversed and remanded for further proceedings. The court found that the “threat” of a determination by the Attorney General of “harmfulness” was substantial enough to establish standing. The Attorney General’s failure to enforce the law against American prior to the suit’s commencement made no difference. American still may entertain a reasonable fear that the statute will be enforced and affect its rights in the future.

*Copp v. Unified School District*, 882 F.2d 1547

Per Curiam

Dissent: Judge Moore

Plaintiff, Copp, brought suit against defendant, Unified School District (“school district”), claiming that his first amendment rights were violated. Copp argued that his right to freedom of association and freedom of speech were infringed after he was given an adverse transfer from his job. The jury found for Copp, and the school district subsequently motioned for judgment notwithstanding the verdict (“JNOV”). The district court denied the motion, and the school district appealed.

The Tenth Circuit held that the district court erred in denying the school district’s motion for a JNOV regarding the freedom of association issue. The court reasoned that the type of association claimed by Copp was not protected under the first amendment right of association. The court, however, found that Copp’s speech was protected. Consequently, the court concluded that the jury could have found that Copp’s right to freedom of speech was violated. The court applied a three-prong test: (1) the plaintiff must show as a matter of law that the speech deserved constitutional protection; (2) the plaintiff must show that the protected speech was a substantial or motivating factor in the adverse decision; and (3) the defendant must then show that it would have reached the same decision even in the absence of the protected conduct. The court could not determine whether the jury awarded damages on the speech claim, the association claim, or both. Consequently, the court remanded the case for determination of whether Copp’s speech was a substantial or motivating factor in the decision to transfer him and

whether defendants would have transferred him even in the absence of his protected conduct.

*Devine v. New Mexico Department of Corrections*, 866 F.2d 339

Author: Judge Seymour

Defendant, Devine, who is serving life in prison for first degree murder, filed a petition for a writ of *habeas corpus* in district court. Devine claimed that the state unconstitutionally delayed his parole eligibility after he committed the crime. The district court denied his petition and Devine appealed. He argued that *ex post facto* principles preclude retroactive restrictions on parole eligibility, that the due process clause governs *ex post facto* principles, and that the district court's decision to apply a statute which was contained in the compiler's notes was unforeseeable and thus violative of due process.

The Tenth Circuit held for Devine and remanded the case to district court. The court held that a law which imposes additional punishment to that already prescribed is violative of *ex post facto* principles. In addition, the court held that since the *ex post facto* clause bars legislatures from passing laws which impose additional punishment, then it follows that the due process clause bars courts from achieving the same result by judicial construction. Also, the court held that the application of an uncodified statute was unforeseeable and thus violated the due process clause.

*Flanagan v. Munger*, 890 F.2d 1557

Author: Judge McKay

Plaintiffs, high-ranking police officers, were reprimanded by defendants, police chief Munger and the City of Colorado Springs (the "City"), for part-ownership and participation in a video rental business. The police officers rented a small percentage of sexually explicit films. After plaintiffs removed the adult films from their inventory, Munger spoke to the press about the City's reprimands for violation of police regulations. The police officers brought suit against both Munger and the City contending that the reprimands were illegal. The district court granted summary judgment for Munger and the City. The court found that neither Munger nor the City violated the police officers' first amendment, liberty, federal and state privacy, and federal and state due process rights. Further, the district court held that the department regulations were not impermissibly vague. Moreover, the district court held that Munger did not violate plaintiff Flanagan's rights by failing to reappoint him as deputy chief. The police officers subsequently appealed.

The Tenth Circuit held that Munger violated the police officers' first amendment rights, but was entitled to qualified immunity and, thus, was not liable. The court held that the City was liable for violating the police officers' first amendment rights. The case was subsequently remanded for determination of damages. The district court affirmed the court's decision on both the privacy and deprivation of liberty claims because

Munger's statements to the press were truthful and not highly personal. The pertinent regulations of the police code were not found facially vague, but the vagueness claim was remanded for findings regarding the code "as applied." The charges of retaliation by Munger were found to contain genuine issues of material fact, and summary judgment on this issue was reversed and remanded for further proceedings.

*Foremaster v. City of St. George*, 882 F.2d 1485

Author: Judge Wright, sitting by designation

Plaintiff, Foremaster, brought suit alleging violations of the establishment clause by the City of St. George. The action challenged the depiction of the Mormon temple in the city logo and the city's subsidy of the temple's electric bills. The district court dismissed the portion of the complaint regarding the subsidy for lack of standing, and denied Foremaster's motion for attorney's fees. The district court subsequently dismissed on the issue of the logo.

The Tenth Circuit held that Foremaster did have standing to sue, based on (1) his having suffered actual injury, (2) a causal link between the subsidy and the injury, and (3) the likelihood that the court proceeding would result in redress of the injury. In granting attorney's fees, the court applied a catalyst test, finding that the lawsuit was a substantial factor in the city's decision to terminate the electric subsidy and that Foremaster had prevailed on the merits. The court held that the subsidy impermissibly supported the Mormon faith in violation of the establishment clause.

The court held that Foremaster had standing to challenge the city logo because he was directly and continuously confronted by it. Finding the existence of a genuine issue of material fact as to whether or not an observer would perceive the logo as a governmental endorsement of religion, the court remanded for determination of the primary effect of the logo.

*Johnsen v. Independent School District*, 891 F.2d 1485

Author: Judge Ebel

Plaintiff, Johnsen, brought an action against defendant, Independent School District (the "school district"), pursuant to 42 U.S.C. § 1983, for violation of her first amendment rights. Johnsen contended that her contract as a school nurse was not renewed after she spoke out against the school district's medication policy. The district court granted judgment in favor of the school district, notwithstanding the jury's \$10,000 award to Johnsen. Johnsen subsequently appealed.

The Tenth Circuit found that the district court improperly submitted to the jury the question of whether Johnsen's speech was protected. The court concluded, however, that it could independently determine the question. The court implemented a test to decide whether an adverse employment decision violated a public employee's first amend-

ment right to free speech. Under the test, the speech must touch a matter of public concern, and the employee's interests in making the speech must outweigh the employer's interests in promoting the efficiency of its public services. The court found that Johnsen's speech failed the balancing test. Consequently, the court concluded that Johnsen's speech was not constitutionally protected. The court explained that the school district's interests in promoting its public services outweighed Johnsen's interests, because of the manner, time, and place which Johnsen used to express her viewpoint. The evidence revealed that Johnsen circumvented school district procedures, contacted outside agencies, organized meetings, dominated and intimidated co-employees, generated discord and disruption, and made public false accusations about the medication policy.

*United States v. King*, 891 F.2d 780

Author: Judge Tacha

Defendant, King, pleaded guilty to the felony of assault with a dangerous weapon with intent to do bodily harm. The district court subsequently ordered King to pay a special assessment fee of \$50. The court reasoned that pursuant to 18 U.S.C. § 3013, any individual convicted of a felony must pay a special assessment fee of \$50. King contended the special assessment was in violation of the origination clause of the federal Constitution, U.S. Const. art. I, § 7, cl. 1. The district court rejected his contention, and King appealed.

The Tenth Circuit, on *de novo* review, held that 18 U.S.C. § 3013 does not violate the origination clause of the Constitution. The reach of the origination clause was held by the United States Supreme Court to encompass only bills with the main purpose of raising revenue, not bills which raise revenue incidentally. The court determined that the main purpose of 18 U.S.C. § 3013, is punitive. The judgment of the district court was, therefore, affirmed.

*Luethje v. Peavine School District*, 872 F.2d 352

Author: Judge Logan

Plaintiff, Luethje, claimed infringement of her first amendment rights when her employer, defendant Peavine School District ("School District"), adopted a rule restricting employees from certain discussions regarding school problems. Luethje dismissed the suit when the school district removed the prohibitory language from the rule. The district court denied Luethje recovery of attorney's fees as a "prevailing party" under 42 U.S.C. § 1988.

Reversing the district court's decision, the Tenth Circuit ruled that a plaintiff who obtains relief from a defendant qualifies as a prevailing party if the lawsuit is causally linked to obtaining the relief and if defendant's conduct in response to the lawsuit is required by law. The court held that the district court's causation finding was clearly erroneous.

Luethje's suit need not be the sole reason for the School District's action; a significant catalyst or substantial factor is enough.

In *de novo* review, the court determined that the district court erred in its finding that the change was not required by law. Whether the school district's policy was unconstitutional depended on whether it stifled speech of public concern, and whether the policy was nonetheless permissible was based on a balancing of the interests of Luethje and the School District. The court found Luethje's complaints a matter of public concern. Luethje's speech did not impair the discipline or operation of the school since the School District's interest in maintaining harmony was insufficient to justify restrictions on speech of public concern. The court held that the School District was required by law to change its rule.

*Martinez v. Sullivan*, 881 F.2d 921

Author: Judge Holloway

Dissent: Judge Seymour

Plaintiff, Martinez, petitioned the district court for a writ of *habeas corpus* following his conviction for second degree murder. Martinez alleged violation of his sixth and fourteenth amendment rights to confront witnesses, to effective counsel, to a jury fairly selected from the community, and to severance of the trial.

The Tenth Circuit held that admission of an out-of-court declarant's testimony was proper because the prosecution had exercised due diligence in securing the witness' attendance, and the witness was "unavailable", thus meeting the requirements of the confrontation clause. A second out-of-court declarant's testimony was also held properly admitted. The witness was unavailable and reliability was based on two established hearsay exceptions: present sense impression and excited utterance. The district court was also correct in admitting a co-conspirator's statements. Affirming the conviction, the court agreed that Martinez' attorney was not laboring under a conflict of interest which resulted in ineffective assistance of counsel. Finally, the court concluded without discussion that neither the jury selection process nor the joint trial violated Martinez' constitutional rights.

In a strong dissent, Judge Seymour would have granted the *habeas corpus* petition and ordered a new trial. Regarding availability of witnesses, the judge would adopt a *per se* ruling requiring use of the Uniform Act as a condition precedent to finding a good faith effort to secure the witness' attendance. He also concluded that finding the witness unavailable was not harmless error.

*Meder v. City of Oklahoma City*, 869 F.2d 553

Author: Judge Seymour

Plaintiff, Meder, an Oklahoma City police officer, attempted to "fix" some traffic tickets for a third party. Meder subsequently received free tires for his personal vehicle from the third party. Meder was informed

at an oral interview that these were grounds for dismissal. He was given written notice of a hearing before a disciplinary board, and he was discharged following the hearing. Meder filed a suit claiming he was denied due process. The district court granted summary judgment in favor of the defendant, Oklahoma City. Meder appealed, asserting that the due process he received was inadequate because (1) the disciplinary board was not impartial, (2) he was not given adequate notice of the charges against him, and (3) he was not allowed to confront or cross-examine the witnesses against him.

The Tenth Circuit held that Meder was provided adequate due process. The court stated that Meder had no reason to question the board's impartiality because he admitted in his deposition that no member of the board should be excluded. The court also held that Meder was adequately informed of the charges pending against him when he received both oral and written notice. The court further held that Meder did not prove how confrontation and cross-examination would have changed the board's inference that acceptance of free tires was reasonably related to "fixing" of the tickets.

*Moss v. City of Colorado Springs*, 871 F.2d 112

Author: Judge Seth

Plaintiffs, four family members (the "Mosses"), brought an action against defendant, City of Colorado Springs (the "City"), contending that the City's police officers violated their fourth amendment rights. The Mosses argued that the police officers used excessive force and engaged in an unreasonable execution of a search warrant after bursting into their home with no warning. The Mosses also brought pendant state claims.

The Tenth Circuit held that the jury's verdicts in the district court action were inconsistent. The court stated that since it was unable to harmonize the verdicts, the case was remanded for a new trial. The court explained that the jury found against the City, but in favor of the individual officers on the "unreasonable execution of a search" charge. Further, the court was unclear as to which constitutional claim the jury considered when deciding in favor of the police officers. The court remarked that the jury instructions were ambiguous, and the resulting verdicts were indicative of the jury's confusion.

*National Commodity and Barter Association v. Gibbs*, 886 F.2d 1240

Per Curiam

Plaintiff, collectively known as National Commodity and Barter Association ("NCBA"), appealed dismissal by the district court of alleged violations of the NCBA's first, fourth, and fifth amendment rights through unwarranted investigation and collection of unlawful penalties under the Internal Revenue Code by defendant federal agencies and federal employees.



The Tenth Circuit affirmed the dismissal of the NCBA's claim for alleged violations of its fifth amendment rights. Claims against the defendants in their official capacity as officers of the federal government were barred by sovereign immunity. The NCBA's attempt to avoid this bar by compliance with the Federal Tort Claims Act was ineffective, since 28 U.S.C. § 2680(c) expressly excepts tax assessment functions from waiver. Fifth amendment violations do not mandate court-created damage remedies because the NCBA had recourse to challenge the legality of the penalty assessments under several provisions of the Internal Revenue Code.

However, the court determined that the alleged first and fourth amendment violations may warrant a court-created damages remedy. Thus, the court remanded to the district court to permit the NCBA to file an amended complaint which clearly outlines the basis for these claims.

*United States v. Neu*, 879 F.2d 805

Author: Judge Anderson

Defendant, Neu, sought review of the district court's denial of his pretrial motion to suppress. Neu argued that a state trooper's stop and detainment of him was pretextual and violative of the fourth amendment. Consequently, Neu argued that the search of him, which yielded weapons, was unconstitutional and thus, the weapons should not be admitted into evidence.

The Tenth Circuit stated that it must accept the district court's findings of fact and uphold its ruling if there is reasonable evidence to support it. Since a traffic stop is a limited seizure under the fourth amendment, the court applied the *Terry* test for constitutional "unreasonableness": "whether the officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." A traffic detention is justified and is not a pretext for investigating unrelated criminal activities if probable cause for the seizure exists and if "under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." The court held that the facts supported the district court's conclusion that the stop was constitutionally reasonable. The state trooper had probable cause to believe Neu had violated the traffic laws. Therefore, the court concluded that a reasonable officer would have stopped Neu and requested his driver's license under these circumstances.

*Oklahoma Education Association v. Alcoholic Beverage Laws Enforcement Commission*, 889 F.2d 929

Author: Judge Tacha

Plaintiffs appealed a district court order upholding the constitutionality of article 28, § 8 of the Oklahoma Constitution and its statutory counterpart, title 37, § 511(D) of the Oklahoma Statutes. These provi-

sions prohibit state employees from working in any phase of the alcoholic beverage business. Plaintiffs claimed that the provisions violate the equal protection and due process clauses of the fourteenth amendment and their first amendment right to association.

In a *de novo* review, the Tenth Circuit found no fundamental right to pursue government employment free from restrictions on additional employment. Upon finding that the Oklahoma provisions are rationally related to legitimate state purposes, the court held that the provision violated neither the equal protection nor substantive due process rights of the plaintiffs. The court further held that procedural due process was not violated because the law affects a general class of persons who are not entitled to individualized hearings and the legislative process enabled the provisions to be fairly and accurately applied to the entire class. Finally, the court did not find any violation of the right to association, holding that the right applied only to relatively small personal affiliations. The decision of the district court was affirmed.

*Ortega v. City of Kansas City*, 875 F.2d 1497

Author: Judge Brorby

Plaintiff, Ortega, was lured across state lines by Kansas City, Kansas, police, telling him to pick up a package. Ortega was subsequently arrested in the sting operation and released on bond. At trial, the district court instructed the jury that Ortega could find the city and officials liable under 42 U.S.C. § 1983 if they lured him across state lines and detained him in violation of extradition laws. The jury returned a verdict for Ortega.

The Tenth Circuit held that arrest of a non-resident suspect charged with a crime while in Kansas does not give rise to a claim under 42 U.S.C. § 1983 for violation of the constitutional right to extradition. Extradition rights exist only when demand is made by one jurisdiction for the surrender of a person in another jurisdiction. Moreover, suspects have no pre-arrest extradition rights.

*Pleasant v. Lovell*, 876 F.2d 787

Author: Judge Baldock

Dissent: Judge McKay (dissenting in part)

Plaintiffs, members of the National Commodity and Barter Association ("NCBA"), sought to recover damages from defendants, five agents of the Criminal Investigation Division of the Internal Revenue Service ("IRS"), for alleged infringement of the members' first and fourth amendment rights. The NCBA advocates opposition to the federal income tax laws. The five agents, Lovell, Batson, Fortune, Pixley and Hyatt, investigated the NCBA with the assistance of inside informant Adams. Adams carried a concealed microphone and transmitter into the NCBA office and presented defendants with NCBA trash. The information obtained from the trash was provided to a grand jury investigation tax protesters. Batson subpoenaed financial records from a bank and

told the bank it was unnecessary to notify its customers of the subpoenas.

The district court granted defendants' motion for summary judgment. Plaintiffs appealed, contending that the district court should have held that: (1) Adams was an agent of the government and therefore her actions could be imputed to the federal defendants; (2) Lovell, Pixley and Hyatt were not entitled to qualified immunity; and (3) Fortune and Batson were liable for their grand jury activities, including service of the subpoenas.

The Tenth Circuit on *de novo* review held that: (1) Lovell, Pixley, and Hyatt were not entitled to qualified immunity on summary judgment because whether Adams was a government agent is a question of fact for the jury; (2) if the jury determines that Adams was a government agent, these defendants would be entitled to qualified immunity regarding information relayed by Adams, if she obtained them within the scope of her duties within the NCBA; (3) Batson was entitled to absolute immunity with regard to delivery of grand jury subpoenas and had qualified immunity in informing the bank that they need not notify a customer of the grand jury subpoena of bank records; and (4) Fortune had absolute immunity with regard to delivery of grand jury subpoenas and qualified immunity for technical consensual monitoring assistance. The court affirmed in part, reversed in part and remanded.

*Rankin v. Independent School District*, 876 F.2d 838

Author: Judge Seymour

Dissent: Judge Barrett (dissenting in part)

Plaintiff Rankin, brought this action pursuant to 42 U.S.C. § 1983, against defendant, Independent School District ("District"). Rankin alleged that the District failed to renew his tenured teaching contract in retaliation for his statements regarding school disciplinary matters. Consequently, Rankin argued that his first amendment rights were violated. Rankin also argued that the nonrenewal violated his fourteenth amendment due process rights. Rankin stated that the applicable Oklahoma statute posed an impermissible burden by requiring Rankin to pay one-half the cost of his post-termination hearing. The district court granted summary judgment to the District.

The Tenth Circuit applied strict scrutiny to the statute, holding that it was unconstitutional on its face. The court reasoned that the statute imposed a substantial open-ended penalty on the exercise of a constitutional right. The court also held, however, that due process does not require a hearing prior to publication of reasons for dismissal. The court held that Rankin presented enough evidence of first amendment violation to withstand a directed verdict for defendants.

*Seibert v. Oklahoma*, 867 F.2d 591

Author: Judge Ebel

Plaintiff, Seibert, who worked as a plumber for the defendant, University of Oklahoma Health Sciences Center ("University"), persistently voiced concerns about the safety of the University's steam pipes and boilers. Following oral and written reprimand, Seibert left his job for over an hour without permission. Seibert was subsequently terminated after refusing the opportunity to resign and failed to invoke the grievance procedures within ten days of his termination, as allowed by the University's policy manual.

The Tenth Circuit held that the University's pre-termination procedures were constitutionally adequate and Seibert's termination did not violate his first amendment rights. The court concluded that the University's procedures were actually post-termination and not pre-termination as the district court had held. However, the court stated that Seibert had received the requisite pre-termination notice and the opportunity to be heard. The continued verbal and written warnings, including a probation period, provided Seibert with ample opportunity to explain his position. Thus, the court concluded that Seibert was not denied due process. In addition, the court ruled that the University's interest in promoting the efficiency of its public service outweighed Seibert's interest in repeating his disruptive safety complaints after the complaints had been investigated and settled. Thus, summary judgment was proper on Seibert's first amendment claim.

*Sommermeier v. Supreme Court of the State of Wyoming*, 871 F.2d 111

Author: Judge Tacha

Plaintiff, Sommermeier, appealed a court order which upheld rules of the Wyoming Supreme Court. These rules required that an attorney be a Wyoming resident to be eligible for admission to the bar on motion instead of by taking a bar examination. Sommermeier argued that the residency requirement violated the privileges and immunities clause of article IV, § 2 of the United States Constitution.

The Tenth Circuit held Wyoming Supreme Court Rule 5(c) to be unconstitutional. The case was reversed and remanded with instructions that Wyoming admit Sommermeier to the bar of the state.

*Veronie v. Garcia*, 878 F.2d 347

Author: Judge Ebel

Plaintiff, First Southern Insurance Company ("First Southern"), as intervenor, moved for summary judgment against defendant, Garcia, for reimbursement of all worker's compensation benefits that First Southern had previously paid to Veronie because Garcia settled Veronie's claim without First Southern's written approval. A Louisiana statute, La. Rev. Stat. Ann. § 23:1102(c) (1983), provides that a third-party defendant who fails to obtain such written approval must reimburse the em-

ployer's insurer the total amount of benefits paid to the employee. The district court denied the motion for summary judgment holding that the Louisiana statute was unconstitutional. First Southern appealed.

The Tenth Circuit held that Garcia's due process rights were not violated since he had the opportunity to contest the statutory elements. Accordingly, the statute does not violate the due process clause of the fourteenth amendment. The court further held that the statute does not violate the equal protection clause of the fourteenth amendment. While recognizing that section 23:1102(c) imposes a harsh penalty on third-party tortfeasors who settle without employer or insurer approval, the court concluded that the purposes behind the statutory right of reimbursement are legitimate ends of government and section 23:1102(c) is rationally related to those ends. The court reversed and remanded for consideration of the merits of First Southern's claim against Garcia.

*United States v. Wolf*, 890 F.2d 241

Author: Judge Brorby

Defendant, Wolf, appealed the district court's ruling that 18 U.S.C. § 2251 is constitutional as applied to his conviction for sexual exploitation of a child. Specifically, Wolf contended that the photograph at issue was not within the contemplation of the statute because the sleeping child was not exuding sexual suggestiveness and, therefore, the photograph was not a "lascivious exhibition" under the statute.

The Tenth Circuit agreed with the district court's application of the factors to determine the definition of "lascivious exhibition" as set forth in *United States v. Dost*, 636 F. Supp. 828, 830 (S.D. Cal. 1986). The court further stressed that it was the photographer's conduct and the depiction of the child that was defined as lascivious, and that lasciviousness is not a characteristic of the child photographed. The court held that 18 U.S.C. § 2251(a) as defined by 18 U.S.C. § 2256 was constitutional as applied to Wolf's indictment.

