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# Recent Developments: New York v. United States: Take Title Provision of Low Level Radioactive Waste Policy Amendment Act Held Unconstitutional

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identifying and removing jurors who would "not be able impartially to follow the court's instructions and evaluate the evidence." *Id.* (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981)). The Court, therefore, reiterated that because there was a right to challenge a juror based on bias, then there remained the right to propose questions designed to uncover bias. The trial judge would thereafter be responsible for determining if the challenge was proper. *Morgan*, 112 S. Ct. at 2232.

Finally, the Court addressed the remaining issue of whether questions propounded by the trial court were sufficient to satisfy the petitioner's right to due process. *Id.* The Court determined that jurors who would "unalterably" either oppose or propose the death penalty in every case were incapable of following the law in the performance of their duties. *Id.* at 2233. The Court, therefore, concluded that a trial court's general questions concerning fairness and impartiality would be insufficient to identify jurors with biased views about the death penalty. It would be possible, the Court added, for jurors to intend to uphold the law, but be unaware that dogmatic beliefs about the death penalty would prevent them from doing so. *Id.* The petitioner was thus entitled to ask specific questions which would identify jurors with predetermined opinions about whether or not to impose the death penalty regardless of the facts of the case. *Id.* at 2233.

The Supreme Court in *Morgan v. Illinois* established that the Due Process Clause of the Fourteenth Amendment enables a capital defendant to challenge and remove for cause jurors whose views on capital punishment would lead them to automatically vote for the death penalty upon conviction. The decision is a significant victory for capital defendants and their attorneys because it aids their ability to ferret out jurors who hold unreasonable convictions concerning capital punishment. Because most people perceive themselves as fair, general questions con-

cerning an individual's ability to judge fairly are insufficient inquiry for the purposes of identifying partiality among jurors. Furthermore, the inclusion of capital defendants among those possessed with the ability to impose a *Witherspoon* inquiry balances the scales between the State's and the defendant's ability to successfully challenge jurors and remove them for cause.

- Kim Germaine Judd

### **New York v. United States: TAKE TITLE PROVISION OF LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENT ACT HELD UNCONSTITUTIONAL.**

In *New York v. United States*, 112 S. Ct. 2408 (1992), the Supreme Court of the United States held that the "take title" provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985 violated the Tenth Amendment of the United States Constitution. In reaching its conclusion, the Court resolved a constitutional issue of the proper division of authority between the Federal Government and the States. The Court decided that although Congress may encourage a state to provide for the disposal of low level radioactive waste generated within its borders, it may not compel a state to do so.

At the end of the 1970's, Congress faced an environmental crisis in the disposal of low level radioactive waste. This type of waste, generated from sources as disparate as smoke alarms and medical fluids, must be isolated from humans for up to hundreds of years. Despite a crucial need for repositories of such waste, the number of disposal sites had dwindled. By 1979, the only operating disposal site in the country was in South Carolina. Therefore, that state alone bore the burden of storing low level radioactive waste produced throughout the nation. To avert disaster, Congress responded by enacting the Low-Level Radioactive Waste Policy Act of 1980 ("1980 Act"). The 1980 Act held each State responsible for the disposal of waste

that it generated. A State could dispose of its waste at a disposal facility located either within its borders or in another State with which it had reached a regional compact agreement. Because the 1980 Act carried no penalty for non-compliance, by 1985 thirty-one states had not joined a regional compact and were due to be excluded, leaving them no assured outlet for their low level radioactive waste.

Faced with this prospect, Congress passed the Low-Level Waste Policy Amendments Act of 1985 ("1985 Act"). Three incentives were created to encourage states to provide for disposal of waste generated within their borders. First, monetary incentives in the form of payments from a designated escrow account would be made to States that complied with the statute's deadlines. Second, the deadlines were linked to access to the sites; thus, States that did not comply would be assessed progressively higher surcharges and eventually denied access completely. The third provision required that each State which failed to comply with the established deadline take title to the waste generated within its borders and be held liable for all damages incurred as a consequence of the State's failure to take possession.

The State of New York chose to conform to the Act's requirements by passing legislation to provide for the siting and financing of a disposal facility in its state. The State of New York and residents of two of the counties in which sites had been proposed filed suit against the United States in the United States District Court for the Northern District of New York seeking a declaratory judgment that the 1985 Act was unconstitutional. They acknowledged that Congress could regulate interstate commerce in waste material under the Commerce Clause and that Congress could use the Supremacy Clause to pre-empt state regulation of radioactive waste. They claimed, however, that by directing the states to regulate in this field, Congress violated the Tenth Amendment. Nevada,

South Carolina and Washington intervened as defendants. The United States District Court for the Northern District of New York dismissed the Petitioners' complaint and the Second Circuit Court of Appeals affirmed.

The United States Supreme Court began its analysis by observing that this case, like many others, required it to determine which powers were given to the Federal Government and which were reserved to the States under the Tenth Amendment. *Id.* at 2417. The Court applied the framework laid out in the Constitution to ascertain whether any of the three incentives of the Act violated the allocation of power between federal and state authority. *Id.* at 2418.

After examining the long history of the battle between the Federal Government and the States, the Court emphasized that although the Court will not allow Congress to coerce a State to regulate in a specific fashion, there are two types of incentives that may be used to influence the States. *Id.* at 2423. First, Congress may attach conditions which relate to the federal spending power on receipt of federal funds. *Id.* Second, where Congress is empowered to regulate private activity under the Commerce Clause, it can offer States a choice of regulating according to federal standards or having its state law pre-empted by federal regulations. *Id.* at 2424. The Court recognized that the benefit of having incentives to regulate over compelled regulation is that "state governments remain responsive to the local electorate's preferences; [and] state officials remain accountable to the people." *Id.*

Next, the Court analyzed the three incentives Congress offered to encourage the States' compliance with the 1985 Act. First, the Court held that Congress may authorize States to impose surcharges on waste received from other states. *Id.* at 2425. The Court found that the collection of this surcharge was no more than a permissible tax on interstate commerce under the

Commerce Clause. *Id.* at 2426. Furthermore, Congress's appropriation of money from the escrow account was found to be a valid exercise of its Spending Clause authority because the conditions imposed were related to the purpose of the expenditure. *Id.*

Second, the Court found that the access incentives were sound because they fell within Congressional power which allowed States to discriminate against interstate commerce. *Id.* at 2427. The Court held that Congress is permitted to offer States the choice of either regulating the disposal of waste according to federal standards or having their laws pre-empted. *Id.* In this way, the State's residents always retain the right to choose how to spend the State's resources. *Id.* Therefore, the Court held that the 1985 Act's access incentive was a legitimate exercise of the Commerce Clause power and did not intrude on the Tenth Amendment. *Id.*

Unlike the monetary and access provisions, however, the Court held that the take title "incentive" was coercive. *Id.* at 2428. Congress offered the States a "choice" to take title to the radioactive waste and become liable for all damages suffered or to regulate according to Congress's instructions. *Id.* at 2428. Petitioners claimed there was no real choice because Congress lacked the power to offer either option. *Id.*

The Court stated that requiring States to be liable for the generator's damages was similar to requiring them to assume liabilities of their particular residents. *Id.* The Court asserted that this would commandeer States into serving federal regulatory goals and would be inconsistent with the Constitution's allocation of authority between federal and state governments. *Id.* at 2428. The Court also found that regulating under Congress's direction would impermissibly compel state legislatures to implement Congress's legislation. *Id.*

Because both alternatives were beyond Congressional authority, the

Court emphasized that Congress may not force states to make a "choice" which really amounted to no choice at all. *Id.* The Court found that no matter what option the State chose, it would have to follow Congress's directives. *Id.* The Supreme Court therefore held that whether the take title incentive lay outside Congress's enumerated powers or violated the Tenth Amendment, it was inconsistent with the federal structure of the United States Constitution. *Id.* at 2429.

After reaching this conclusion, the Court rejected the arguments offered by the United States, explaining that they were inadequate to uphold the "take title" provision. The Court found that no matter how powerful the federal interest, Congress was not constitutionally permitted to require the states to regulate and that controlling interstate commerce by ordering states to regulate went against the intent of the Framers. *Id.* at 2429-30. Finally, the cited State Respondents contended that a federal statute should not be found unconstitutional because it infringed upon state sovereignty if state officials consented to its passage. *Id.* at 2431. The Court held that this type of consent cannot be used to justify Congress's departure from the constitutional plan, because the "constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed." *Id.* at 2432.

The Court concluded with a reminder that the Constitution sets out our form of government and protects against the temptation to concentrate power by dividing power among sovereigns and among branches of government. *Id.* at 2434. Although the environmental crisis posed by the need to dispose radioactive waste is important, the Court stated that it will not license extra-constitutional government. *Id.* The Court emphasized that State governments are not just administrative agencies of the federal government, but instead hold powers reserved to them under the Tenth Amend-

ment. *Id.* at 2434-35. Thus, the federal government can pre-empt state regulation and offer incentives to the states as a means of encouraging them to adopt regulatory schemes, but it cannot direct the states to provide for disposal of waste generated within their borders. *Id.* at 2435. The Court held that the take title provision was not a constitutional method of achieving regional self-sufficiency in waste disposal. *Id.*

By holding that the "take title" provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985 violated the United States Constitution, the Court reinforced the sovereignty of the States that is reserved to them by the Tenth Amendment. Thus, when enacting environmental legislation, Congress must be careful not to infringe on States' power by directing their activities. Although disposing of radioactive waste is a serious problem, Congress must remain within Constitutional bounds when creating more innovative inducements for the States to adopt its regulatory schemes.

- Kristen L. Orff

***Derricott v. State*: MARYLAND DECLARES REASONABLE SUSPICION FOR A LAWFUL "STOP AND FRISK" REQUIRES MORE THAN MATCHING CHARACTERISTICS OF A DRUG COURIER PROFILE.**

The Court of Appeals of Maryland in *Derricott v. State*, 327 Md. 582, 611 A.2d 592 (1992), held that the reasonable suspicion required for a valid search of an individual is not satisfied by simply matching the characteristics of a statistically-based drug courier profile. Applying a totality of the circumstances analysis, the court held that a police officer must be able to articulate reasons beyond the profile that would warrant an invasion of someone's Fourth Amendment rights.

On June 3, 1988, Corporal Michael Thomas ("Corporal Thomas") of the Maryland State Police observed a brown sports car driving at excessive speed on Interstate 270. Corporal Thomas pulled the car over without inci-

dent and the driver of the vehicle, Darone A. Derricott, ("Derricott") readily handed over his driver's license and registration. During this encounter, Corporal Thomas observed that Derricott was young, black, and wearing gold jewelry. He also observed a "beeper" on the dash and various papers containing telephone numbers lying on the passenger seat.

A check of Derricott's license and registration revealed no irregularities. Despite this information and the fact that the Corporal had not observed any suspicious behavior by Derricott, he requested backup and a "drug dog" to perform a "sniff search" of Derricott and his vehicle. Corporal Thomas' sole justification for this action was that his earlier observations of Derricott matched the State Police drug courier profile.

When the back-up arrived, Corporal Thomas ordered Derricott to exit his vehicle and conducted a patdown which revealed no weapons. Corporal Thomas then searched the vehicle. The Corporal found and seized a cellophane bag containing what appeared to be cocaine and Derricott was arrested for possession of a controlled dangerous substance.

Prior to trial in the Circuit Court for Montgomery County, Derricott moved to suppress the drugs claiming they were the product of an unreasonable search and seizure contrary to his Fourth Amendment rights. After the motion was denied, Derricott waived his right to a jury trial and proceeded to trial before Judge McKenna on an agreed statement of facts. Judge McKenna found him guilty of possession of a controlled dangerous substance with intent to distribute, as well as speeding. The Court of Special Appeals of Maryland affirmed. The Court of Appeals of Maryland granted certiorari to determine the reasonableness of the search under the Fourth Amendment.

The state argued that the stop and search of Derricott was lawful based upon the limited "stop and frisk" doctrine exception to the Fourth Amendment as established in *Terry v. Ohio*,

392 U.S. 1 (1968), and its progeny. *Derricott*, 327 Md. at 587, 611 A.2d at 595. The court summarized the law regarding stop and frisk, noting that a lawful stop requires that an officer possess a reasonable, articulable suspicion of criminal activity. *Id.* Once an individual is lawfully stopped, an officer must have a reasonable, articulable suspicion that the individual is armed and dangerous in order to justify a frisk. *Id.* A lawful search of the passenger compartment of an automobile for weapons demands the same level of suspicion and is limited to those areas to which an individual could gain immediate access to weapons. *Id.*

The court proceeded to distinguish a *Terry* type search for weapons from a *Belton* search. Unlike *Terry*, *Belton* does not require suspicion, but instead authorizes an officer to search the interior of an automobile incident to a lawful arrest. *Id.* (citing *New York v. Belton*, 453 U.S. 454 (1981)). Since the search of Derricott's car was not the result of a lawful arrest, the court determined that *Terry* demanded an "evaluat[ion] [of] the totality of the circumstances to decide whether a reasonable prudent person in [Corporal Thomas'] position would be warranted in believing that his safety or that of others was in danger." *Id.*

The court first recognized that Corporal Thomas' suspicions were based solely upon the fact that Derricott matched several aspects of a drug courier profile. *Id.* at 588, 611 A.2d at 596. Noting that reliance upon a drug profile does not give rise to any special legal significance, the court held that an officer must demonstrate how the observation of elements of the profile would lead a reasonable person to determine that an individual is armed and dangerous. *Id.* at 589, 611 A.2d at 596. The court rejected the state's argument that a match to the "statistically-based profile" established by the police narcotics section was sufficient in and of itself to establish a reasonable suspicion justifying a search or frisk. *Id.* at 591, 611 A.2d at 597.