

No. \_\_\_\_\_

**In the Supreme Court of the United States**

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IN RE: ESTATE OF JERRY WEST, DECEASED,  
*Petitioner*

v.

UNITED STATES DEPARTMENT OF VETERANS  
AFFAIRS,  
*Respondent*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals for the  
Sixth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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October 5, 2018

## QUESTIONS PRESENTED FOR REVIEW

A retroactively-awarded disability payment, by the United States Department of Veterans Affairs, to a deceased veteran, over which a Kentucky state probate court exercised jurisdiction as part of the decedent's Estate, was seized by the United States Treasury from the Estate's attorney's escrow account, without notice or opportunity to be heard, under the purported authority of the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 410 (1988) ("VJRA") and 38 U.S.C. §511(a).

The questions presented are:

- 1) whether the United States District Court correctly held that the Kentucky probate court has exclusive jurisdiction over the disability award in question (the "*res*") under the "*probate exception*" to federal-court jurisdiction;
- 2) whether the application of the VJRA and 38 U.S.C. §511(a) to the Estate's claim, and United States Government's expropriation of the *res* from the Estate's attorney's escrow account to the *res*, violate due process; and
- 3) whether the lower court erroneously reversed the District Court's remand order, and dismissed the underlying case for lack of subject-matter jurisdiction, given the express language of 28 U.S.C. §1447(c) mandating that the underlying action be remanded to the state court.

## **PARTIES TO THE PROCEEDINGS**

Petitioner, the Estate of Jerry West, Deceased, was the Appellee/Cross-Appellant in the court below. Respondent, United States Department of Veterans Affairs, was the Appellant/Cross-Appellee in the court below.

**TABLE OF CONTENTS**

	Page
QUESTIONS PRESENTED FOR REVIEW .....	i
PARTIES TO THE PROCEEDINGS .....	ii
TABLE OF AUTHORITIES .....	vi
OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	1
INTRODUCTION .....	2
STATEMENT OF THE CASE .....	5
A. The Probate Exception” to Federal Court Jurisdiction .....	5
B. Application of VJRA and U.S.C. § 511(a) to Estate’s Claim, and Expropriation of Estate Asset, Violates Due Process .....	7
C. The Case Must Be Remanded to State Court .....	13
REASONS FOR GRANTING THE PETITION ....	15
CONCLUSION .....	17
APPENDIX:	

Judgment of the Court of Appeals for the Sixth Circuit, <i>In Re: Estate of Jerry West, Deceased v. U.S. Department of Veterans Affairs</i> , No. 16-6252/6360 (July 10, 2018) .....	1a
Opinion of the Court of Appeals for the Sixth Circuit, <i>In Re: Estate of Jerry West, Deceased v. U.S. Department of Veterans Affairs</i> , No. 16-6252/6360 (July 10, 2018).....	2a
Memorandum Opinion and Order of the United States District Court for the Western District of Kentucky, <i>In Re: Estate of Jerry West v. U.S. Department of Veterans Affairs</i> , No. 3:16-CV-00166 (June 8, 2016) ....	14a
Statutory Provisions involved .....	20a
28 U.S.C. § 1442(a).....	20a
28 U.S.C. § 1447(c).....	21a
31 U.S.C. § 3712.....	23a
38 USC § 511(a) .....	25a
38 U.S.C. § 5121.....	26a
38 U.S.C. § 5122.....	28a
38 U.S.C. § 5121(a)(2).....	26a
38 U.S.C. § 7105.....	29a
38 U.S.C. § 7101.....	32a
Veteran’s Judicial Review Act (“VJRA”), Pub. L. No. 100-687, 102 Stat. 410 (1988) .....	37a
KRS 396.011.....	39a
KRS 396.015.....	40a
KRS 396.135.....	42a

38 CFR Ch. 1, § 3.1003(b).....	43a
The Fifth Amendment of the United States Constitution.....	45a

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Barnhart v. Sigmon Coal Co.</i> 534 U.S. 438, 442 (2002) .....	15
<i>Bender v. Rochester</i> , 765 F2d. 7 (2 <sup>nd</sup> Cir. 1985).....	8
<i>Collins v. City Harker Heights</i> , 503 U.S. 115 (1992).....	8
<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532 (1985).....	8
<i>Estate of Flemings v. Hays</i> , 542 P.2d 517 (Okla. 1975).....	5
<i>Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund</i> 500 U.S. 72, 89 (1991).....	15
<i>Markham v. Allen</i> , 326 U.S. 490 (1946).....	3,6,13,16
<i>Shamrock Oil and Gas Corp. vs. Sheets</i> , 313 U.S. 100 (1941).....	7
<i>Soehnlen v. Fleet Owners Ins. Fund</i> , 844 F.3d 576 (6 <sup>th</sup> Cir. 2016).....	4
<i>Women's Med. Prof'l. Corp. v. Baird</i> , 438 F.3d 595 (6 <sup>th</sup> Cir. 2006).....	9

**Constitution**

The Fifth Amendment of the United States Constitution.....	7
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**Statutes and Regulations**

28 U.S.C. § 1442(a).....	3
28 U.S.C. § 1447(c).....	4, 7, 14, 15, 16
31 U.S.C. § 3712.....	13
38 USC § 511(a) .....	10
38 U.S.C. § 5121.....	9
38 U.S.C. § 5122.....	9
38 U.S.C. § 5121(a)(2).....	9
38 U.S.C. § 7105.....	10, 11
38 U.S.C. § 7101.....	11
 KRS 396.011.....	6
KRS 396.015.....	6
KRS 396.135.....	6
 Veteran's Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 410 (1988) .....	4, 13, 15
 38 CFR Ch. 1, § 3.1003(b).....	12

## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, the Estate of Jerry West, Deceased, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### **OPINIONS BELOW**

The opinion of Sixth Circuit is reported at 895 F.3d 432, and reproduced in the appendix hereto (“App.”) at App. 2a. The opinion of the District Court for the Western District of Kentucky is not reported, but available at 2016 WL 4180004, and reproduced at App. 9a.

### **JURISDICTION**

The judgment of the Sixth Circuit was entered on July 10, 2018. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Amendment V of the United States Constitution states, in part, “No person shall be...deprived of life, liberty, or property, without due process of law...” U.S. Const. Amend. V

Pertinent provisions of Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 410 (1988) (“VJRA”); 38 U.S.C. Section 511(a); and 28 U.S.C. §1447(c), are reproduced in the Appendix.

## INTRODUCTION

The deceased, Jerry West (“Jerry”) was a Vietnam War veteran, who suffered tremendously from multiple ailments, requiring aid and assistance. On November 27, 2013, after application for benefits, the United States Department of Veterans Affairs (the “VA”) retroactively awarded disability benefits to Jerry. On December 2, 2013, the VA issued a check to Jerry for said benefit in the sum of \$8,660.00. On November 28, 2013, one day after the VA’s award, Jerry passed away. The award check was received by Jerry’s nominated Executrix, Brenda West, who petitioned the Jefferson District Probate Court of Kentucky (the “Probate Court”), and tendered said VA award for probate under Kentucky state law. While said \$8,660.00 was held in the Estate Counsel’s client escrow account pending further probate proceedings, said monies were confiscated by the U.S. Treasury office, pursuant to a purported VA Notice of Reclamation issued to the Estate Counsel’s bank. App. 9a.

Extra-judicial attempts by Estate Counsel to resolve the matter were unsuccessful, resulting in the Estate filing a Motion to Compel Return of Seized Asset with the state Probate Court. App. 9a. On February 16, 2016, Estate Counsel appeared in Probate Court, and after hearing argument, the Probate Court Judge agreed with Estate Counsel that the subject VA payment was an Estate asset; that the VA had made itself a party to the Probate case when it reclaimed said payment after the Estate was opened; and thus, like any other creditor of a decedent’s estate, the VA was required to return

the seized monies. The Probate Court ordered the VA to refund the seized sum of \$8,660.00. App. 9a. The VA ignored the Probate Court's Order.

Subsequently, the VA removed the case to federal district court under 28 U.S.C. §1442(a), to which the Estate timely filed its Objection and Motion to Remand. In District Court, in its objection to removal, the Estate argued that the VA usurped Kentucky state probate law by its unlawful seizure of Jerry's VA award payment, which had accrued and was already awarded prior to his death. Being a probate matter, the district courts of the United States do not have original jurisdiction. The VA award at issue was a retroactive disability payment, not a payment for benefits earned after Jerry's death. Consequently, said VA check became an asset of Jerry's estate upon his death, was listed on said Probate Petition, and thus came under the jurisdiction of Probate Court for further probate proceedings therein. The U.S. Supreme Court has held that federal courts have no probate jurisdiction, and that federal courts shall not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham v. Allen*, 326 U.S. 490 (1946).

On June 9, 2016, the District Court granted the Estate's Motion to Remand, holding, in part, that because the Probate Court had already exercised *in rem* jurisdiction over Jerry's disability award, an asset of the probate estate, the federal district court was barred by the probate exception (to federal jurisdiction) from exercising jurisdiction over said

asset. App. 9a. On August 5, 2016, the VA filed its notice of appeal from said District Court's remand order. On June 16, 2016, in light of the District Court's remand order, the Estate filed a Motion for costs and attorney fees pursuant to 28 U.S.C. §1447(c). On August 5, 2016, the district court denied the Estate's motion for costs and attorney's fees, to which the Estate timely filed its Notice of Appeal.

On January 30, 2018, the case was argued before the Sixth Circuit, and its opinion and judgment was decided and filed on July 10, 2018. The Sixth Circuit agreed with the VA that the dispute between the Estate and the VA could only be litigated pursuant to the procedures set out in the VJRA, and consequently, reversed the District Court's Order to Remand. However, the Sixth Circuit not only reversed the District Court order, it erroneously dismissed the underlying case for lack of jurisdiction, but not before detailing its concerns about the U.S. Treasury's "expropriation of the Estate's funds without any advance notice or process." App. 3a. As correctly pointed out by dissenting Judge Eric L. Clay, the district court was required to remand the case upon concluding that it lacked jurisdiction. The language of the removal statute, 28 U.S.C. § 1447(c) clearly states, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." App. 7a. If the federal courts are divested of jurisdiction, as the VA argued and the Sixth Circuit majority held, then the district court correctly remanded the underlying case to the Kentucky state court. *Soehnlen v. Fleet Owners Ins.*

*Fund*, 844 F.3d 576, 586 n.5 (6<sup>th</sup> Cir. 2016). The proper enforcement of the express, unambiguous language of 28 U.S.C. §1447(c) clearly warrants this Court's review.

## STATEMENT OF THE CASE

### A. THE “PROBATE EXCEPTION” TO FEDERAL COURT JURISDICTION

It is well settled law that probate matters are the exclusive purview of the state courts, while federal courts are courts of limited jurisdiction. In the lower court, the VA relied exclusively upon cases barring judicial review of VA benefits by any court other than the Federal Circuit, which involved determination of benefits, and/or benefits not yet paid and/or disbursed by the VA. However, the underlying case does not involve the determination of benefits, because Jerry's VA award had already been determined, awarded, and paid. Moreover, by the time of the U.S. Treasury's seizure of said award from Estate Counsel's escrow account, said benefit had already been probated and held in trust by an officer of the state probate court, namely, Estate's Counsel. In the lower court, the VA relied heavily on *Estate of Flemings v. Hays*, 542 P.2d 517 (Okla. 1975), but that case involved an attempt to compel the VA to disburse accrued benefits, which had not yet been paid. The VA was unable to cite any legal authority to the Sixth Circuit, on point, that covers the factual scenario of this case or allows for the seizure of the benefits in the manner conducted.

As stated above, the VA check at issue was a

retroactive payment already awarded to Jerry, not a payment for benefits earned after Jerry's death. In the VA's own Notice of Removal to the district court, it admitted that the award at issue was "a retroactive award of disability benefits issued by the VA." Consequently, said VA payment became an asset of Jerry's estate upon his death, was listed on said Probate Petition, and thus came under the jurisdiction of Probate Court for further probate proceedings. Like any other creditor, the VA was required to follow Kentucky's probate laws to assert any lawful claim against said monies under KRS 396.011 and KRS 396.015. The VA's outright seizure of Jerry's disability award from the Estate Counsel's escrow account was a clear violation of Kentucky state law. KRS 396.135 prohibits any levy against any property of an estate (excepting enforcement of mortgages, pledges or liens in an appropriate proceeding).

The fact that the VA is a branch of the United States government does not exempt it from adhering to Kentucky's probate laws. It is well settled law, as held by the U.S. Supreme Court that federal courts have no probate jurisdiction, and that federal courts shall not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham* at 494. If the VA's position was that it had a claim against Jerry's estate, its remedy was to file a proper claim with the Probate Court, pursuant to Kentucky's probate laws. Federal claims filed in state probate courts is not an unprecedented event. The Federal government is often a creditor in state court proceedings. One need only look at the many

real estate foreclosure lawsuits that occur every year, in which the U. S. government participates as a party in state courts to assert various federal liens (IRS tax liens are the best example). Moreover, Federal courts are courts of limited jurisdiction. Any doubt, ambiguity or uncertainty as to whether Federal Court has jurisdiction is resolved in favor of a remand to state court. *Shamrock Oil and Gas Corp. vs. Sheets*, 313 U.S. 100 (1941).

In the lower court, the VA provided no legal authority on point that covers the factual scenario of this case or allows for the VA seizure of benefits in the manner conducted. Allowing the VA to confiscate probated assets which are under the control and oversight of a state probate court has the practical effect of allowing a federal agency to commandeer a state probate proceeding, despite the ruling in *Markham*. Where the District Court correctly held that because Probate Court had already exercised *in rem* jurisdiction over Jerry's VA award, and the federal district court was barred by the probate exception (to federal jurisdiction) from exercising jurisdiction over said asset, then remand to the Probate Court under 28 U.S.C. § 1447(c) was the appropriate ruling by the District Court.

**B. APPLICATION OF VJRA AND U.S.C. SECTION 511(a) TO ESTATE'S CLAIM, AND EXPROPRIATION OF ESTATE ASSET, VIOLATES DUE PROCESS**

The federal government is prohibited by the Fifth Amendment to the United States Constitution from depriving any person of life, liberty, or property

without due process of law. Due Process not only requires the government to provide a fair procedure when depriving someone of life, liberty or property, but substantive due process also protects individuals against certain government actions regardless of the fairness of the applicable procedures. *Collins v. City Harker Heights*, 503 U.S. 115, 125 (1992). The essential elements of procedural due process are notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). With respect to the entitlement to Due Process, there is no difference between a complainant who is an individual or a decedent's estate. *Bender v. Rochester*, 765 F2d. 7 (2<sup>nd</sup> Cir. 1985)

As stated above, and contained in the records of the District Court and Sixth Circuit, Estate Counsel received a letter from his bank, notifying him of the VA's Notice of Reclamation of Jerry's VA award. However, the confiscation of said monies from Estate Counsel's client escrow account occurred on the same day as the issuance date of said bank letter. App. 3a. Because the monies of Jerry's VA award had already been electronically withdrawn from escrow, before Estate's Counsel's receipt of said bank letter, the withdrawal could not be prevented, much less disputed.

Clearly, upon the VA's retroactive award of disability benefits to Jerry for his past military service, Jerry possessed a property interest in said award, protected by Due Process. Once Jerry passed away, and the Probate Court exercised its exclusive probate jurisdiction and recognized said VA award as an asset of Jerry's Estate, then said property

interest was transferred to the Estate, entitling the Estate to the same due process protections. The expropriation of the Estate asset, without prior notice, from Estate's counsel's escrow account (while under the jurisdiction of the Probate Court) deprived the Estate (and thus Jerry's right to dispose of his assets in accordance with his Last Will and Testament) of this property interest, without affording the Estate procedural rights to challenge the confiscation. See *Women's Med. Prof'l. Corp. v. Baird*, 438 F.3d 595, 611 (6<sup>th</sup> Cir. 2006).

The VA argued, for the first time in the lower court, that 38 U.S.C. §5121 and §5122 govern the payment of veteran's benefits when a veteran has died. Specifically, the VA argued that 38 U.S.C. §5121(a)(2) "governs the Estate's asserted eligibility to the veterans benefits at issue because it is undisputed that the Estate's decedent, Jerry West, died before the VA issued the veterans' benefits check in question." According to the VA's interpretation the VJRA scheme, specifically, 38 U.S.C. §5121(a)(2), if a veteran dies before physically negotiating a check (for a retroactive award), then his/her estate is deprived of that award. According to the VA, the VJRA dictates to whom those benefits are to be paid (even if contrary to the deceased veteran's Last Will & Testament). Clearly, the Estate cannot imagine a more arbitrary and capricious governmental action than depriving a decedent's estate of an asset based on whether the veteran signed or did not sign a check (which is merely a method of payment).

The Sixth Circuit questioned as to when a paid-

benefit was no longer subject to the VA Secretary's determination. The VA relies upon 38 U.S.C. § 511(a), which states:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

However, §511(a) clearly applies to the determination of benefits, and offers no guidance on benefits already determined and in possession of a deceased veteran's estate. There is no legal authority directly on point that affords the VA unlimited jurisdiction to alter a previously determined and retroactively awarded disability benefit. Consequently, the amount of Jerry's award was sum-certain, no longer subject to revision, and thus no longer subject to the VA Secretary's determination. Logic would dictate that such severance of VA jurisdiction would apply to the case at hand. Because of Jerry's death, no appeal of the VA's award decision was initiated by Jerry, pursuant to his right of appeal under 38 U.S.C. § 7105. Moreover, the VA took no action, other than the confiscation of Jerry's award from the Estate Counsel's escrow account, claiming that any portion of said award was miscalculated, over-paid, or otherwise, in error.

38 USCS § 7105, Filing of notice of disagreement and appeal, states in part:

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter [38 USCS §§ 7101 et seq.] and regulations of the Secretary.

(b)

(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter [38 USCS §§ 7101 et seq.] within the prescribed period, the

**action or determination shall become final and the claim will not thereafter be reopened or allowed,** except as may otherwise be provided by regulations not inconsistent with this title. [Emphasis added]

As provided above, no notice of disagreement was filed by Jerry, which was a practical impossibility due to his death, within the prescribed one-year period. Therefore, Jerry's retroactive award became final, and could not be reopened or altered, except as otherwise provided by the applicable VA regulations. Essentially, to have reopened Jerry's retroactive award, the VA would have to seek a revision of decision, but no such action was ever instituted by the VA. For example, where evidence establishes an error, the prior decision will be reversed or amended; otherwise, previous determinations are final and binding.

The closest VA regulation that governs the current factual scenario is 38 CFR Ch. 1, §3.1003(b), which states, in part, "any amount not paid in the manner provided in paragraph (a) of this section [referring to a check not negotiated by the veteran prior to death, but not returned to, or recovered, by the VA] shall be paid to the estate of the deceased payee, provided that the estate...will not revert to the state because there is no one eligible to inherit it." If the foregoing regulation is applicable, it certainly appears that the proper action for the VA would be to return the seized monies to the Estate.

As for the actual expropriation of the Estate asset from Estate Counsel's escrow account, the Sixth

Circuit recognized that said seizure was “without notice or process of any kind...[and] that a person (or an Estate) with a bank account has a property interest in the funds therein.” (p. 4-5) The record below clearly evidences that neither the Estate nor Estate Counsel received notice, or an opportunity to contest, the VA’s purported reclamation under 31 U.S.C. § 3712.

### **C. THE CASE MUST BE REMANDED TO STATE COURT**

Both parties, the District Court and the Sixth Circuit (both the majority and the dissent), agree on one issue: the federal courts do not possess subject-matter jurisdiction over the underlying case. The Estate argues that federal jurisdiction is lacking because the matter is governed by state probate law, and under the probate exception to federal jurisdiction, Kentucky has exclusive jurisdiction over the case. The VA contends that the dispute is governed exclusively by the VJRA, and that neither state court nor federal district courts have jurisdiction (though the VA removed the case to the District Court, and demanded it exercise jurisdiction over the controversy in order to dismiss the underlying case). The Sixth Circuit majority agreed with the VA that the dispute between the Estate and the VA could only be litigated pursuant to the procedures set out in the VJRA, and consequently, reversed the District Court’s Order to Remand for lack of subject-matter jurisdiction. The Sixth Circuit dissenter, Judge Clay, also concluded that the District Court lacked jurisdiction.

However, the Sixth Circuit not only reversed the District Court order, it erroneously dismissed the underlying case for lack of jurisdiction, but there is no legal authority for the Sixth Circuit's dismissal. The language of the removal statute, 28 U.S.C. §1447(c) clearly states, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Sixth Circuit majority states that §1447(c) "plainly assume that the state court actually has jurisdiction to decide the case." (p. 6). As Judge Clay correctly argues, "...that assumption has no basis in the text of the statute, itself; it [referring to §1447(c)] says simply the case shall be remanded."

The Sixth Circuit majority held that a remand to the Probate Court would be "pointless." (p. 6) However, Judge Clay correctly points out that once a case (as with all cases) is remanded, it will be the state court's determination whether it has jurisdiction over the action. With respect to a remand being "pointless," Judge Clay cites this Court's previously expressed reservations about a "futility exception" to §1447(c):

"We also take note...of the literal words of §1447(c), which, on their face, give...no discretion to dismiss rather than remand an action...The statute declares that, where subject matter jurisdiction is lacking, the removed case "shall be remanded." 28 U.S.C. §1447(c) (emphasis added) We therefore reverse the decision of the Court of Appeals and remand the case to the District Court

with instructions that the case be remanded to the Civil District Court for the Parish of Orleans, Louisiana.”

*Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (quotation marks and citation omitted).

Judge Clay’s dissent could not be more on point. The language of §1447(c) is plain and unambiguous when it requires a remand, and only a remand, when the district court lacks jurisdiction. In cases involving statutory construction, this Court begins with the language of the statute, with the first determination being whether the statutory language at issue has a plain and unambiguous meaning with regard to the dispute in question, and the inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 442 (2002).

## **REASONS FOR GRANTING THE PETITION**

A decedent’s Last Will and Testament represents that individual’s final intentions of his/her life, and as such, there can no declaration more sacred and solemn. Consequently, state courts are vested with exclusive jurisdiction over the estates of its citizens to ensure the sanctity of decedents’ last Wills. The arbitrariness and capriciousness of the VA’s actions, in the attempted application of the VJRA to Jerry’s VA award and the expropriation of that award without affording Jerry’s estate its constitutional right to due process, has violated that sanctity.

Moreover, the exercise of the VA's power in this case has usurped the exclusive jurisdiction of the Commonwealth of Kentucky in its protection of its citizens and their final estates. Consequently, the District Court was correct when it remanded this case to the state probate court. It is well settled law that federal courts have no probate jurisdiction, and that federal courts shall not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham*, at p. 494. The District Court correctly held, "In this case, the state court has already exercised *in rem* jurisdiction over the \$8,660 check to Jerry West, an asset of the probate estate. Accordingly, this Court is barred by the probate exception from exercising jurisdiction over this asset." To hold otherwise would arbitrarily and capriciously deprive the Estate of a vested property interest, depriving it of due process under the law. Simply put, there is no legal precedent which supports the VA's conduct in this matter.

Lastly, the Sixth Circuit correctly held that federal district courts lack jurisdiction over such matters; however, as detailed in Judge Clay's dissent, the Sixth Circuit's outright dismissal of the underlying case violates the plain and unambiguous language of the removal statute. 28 U.S.C. §1447(c) clearly states, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The dismissal of this case, and thus the VA's seizure of an estate asset being held as part of a state probate proceeding, without due process, abrogates the

sound holding of *Markham*, the long standing principals of federalism, traditional rules of statutory construction, and fundamental fairness.

## CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2018

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
Nos. 16-6252/6360

IN RE: ESTATE OF JERRY WEST, Deceased,  
Plaintiff - Appellee/Cross - Appellant,  
v.

UNITED STATES DEPARTMENT OF VETERANS  
AFFAIRS,  
Defendant - Appellant/Cross - Appellee.

Before: BOGGS, CLAY, and KETHLEDGE, Circuit  
Judges.

**JUDGMENT**

On Appeal from the United States District Court  
for the Western District of Kentucky at Louisville.  
THIS CAUSE was heard on the record from the  
district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED  
that the district court's remand order is  
REVERSED, and the case is DISMISSED for lack  
of subject-matter jurisdiction. IT IS FURTHER  
ORDERED that the Estate's appeal of the district  
court's denial of its motion for attorneys' fees is  
MOOT.



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Deborah S. Hunt, Clerk  
Filed July 10, 2018

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT  
NOS. 16-6252/6360

IN RE: ESTATE OF JERRY WEST, Deceased,  
*Plaintiff-Appellee/Cross-Appellant,*

*v.*

UNITED STATES DEPARTMENT OF  
VETERANS AFFAIRS,  
*Defendant-Appellant/Cross-Appellee.*

On Appeal from the United States District Court  
For the District of Kentucky at Louisville.  
No. 3:16-cv-00166—Thomas B. Russell,  
District Judge.

Argued: January 30, 2018  
Decided and Filed: July 10, 2018  
Before: BOGGS, CLAY, and KETHLEDGE,  
Circuit Judges.

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**COUNSEL**

**ARGUED:** Lowell V. Sturgill, Jr., UNITED  
STATES DEPARTMENT OF JUSTICE,  
Washington, D.C., for Appellant/Cross-Appellee.  
Jason T. Hardin, HARDIN LAW, PLLC, Louisville,  
Kentucky, for Appellee/Cross-Appellant. **ON**

**BRIEF:** Lowell V. Sturgill, Jr., Charles Scarborough, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant/Cross-Appellee. Jason T. Hardin, HARDIN LAW, PLLC, Louisville, Kentucky, J. Allan Cobb, COBB LAW PLLC, Louisville, Kentucky, for Appellee/Cross-Appellant.

KETHLEDGE, J., delivered the opinion of the court in which BOGGS, J., joined.  
CLAY, J. pp. 7-8), delivered a separate dissenting opinion

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**OPINION**

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KETHLEDGE, Circuit Judge. The Department of Veterans Affairs and the Estate of Jerry West, a Vietnam veteran, dispute whether certain benefits owed to West at the time of his death should be paid to the Estate. The district court remanded that dispute to Kentucky probate court, but the government contends the dispute can be litigated only pursuant to the procedure set forth in the Veterans' Judicial Review Act. We agree with the government and reverse the district court's remand order, albeit with some concerns about the government's expropriation of the Estate's funds without any advance notice or process.

**I.**

Jerry West was an Army veteran who served in Vietnam during the early 1970s. In June 2013, he applied to the VA for disability benefits. On November 26, 2013, the VA determined that West was eligible for a disability pension. But two days later West died. Four days after that—without knowing that West had died—the government sent West a check for \$8,660, which was the amount of his pension benefit retroactive to June 2013.

In March 2014, a Kentucky probate court appointed West's ex-wife, Brenda West, as the Executor of his estate. In that capacity, Brenda endorsed the VA check—which was the Estate's

only cash asset—and deposited the \$8,660 into an escrow account for the Estate.

There the funds sat for the next three months, until the VA determined that West's estate was not entitled to the benefits owed to him at the time of his death. *See 38 U.S.C. § 5121(a).*

The government directed the Estate's bank to wire the \$8,660 back to the United States Treasury, which the bank did on June 10, 2014. The Estate itself did not learn until several days later— when it received a letter from the bank—that its account had been drained of funds.

More than eighteen months later, the Estate moved in the Kentucky probate court for an order requiring the government to return the funds. The probate court granted the motion. The government then removed the matter to the district court. *See 28 U.S.C. § 1442(a).* The Estate 3

filed a motion to remand back to the probate court, which the district court granted on the ground that the \$8,660 was already subject to the probate court's jurisdiction. The Estate later filed a motion for attorneys' fees, which the court denied. The parties then brought these appeals.

## II.

As an initial matter, the Estate argues that we lack jurisdiction over the government's appeal of the district court's order remanding this matter to the probate court. A remand order generally is not appealable. *See* 28 U.S.C. § 1447(d). But that same provision expressly allows us to review orders to remand in cases "removed pursuant to section 1442[.]" *Id.* The government removed this case under § 1442, so we have jurisdiction here.

We review the district court's remand order de novo. *See Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017).

## A.

The government argues that the district court should have dismissed this case rather than remanded it. Specifically, the government says that the Estate's entitlement to the \$8,660 is reviewable only pursuant to the process described in the Veterans' Judicial Review Act ("Review Act" or "Act"), 102 Stat 4105 (1988). That process begins with a decision by the Secretary of Veterans Affairs as to whether a veteran or his "dependents or survivors" are entitled to benefits. 38 U.S.C. § 511(a). A veteran may appeal that decision to the Board of Veterans' Appeals, a body within the VA. *Id.* § 7104(a). From there a veteran may appeal to an Article I court, namely the Court of Appeals for Veterans Claims. *Id.* §§ 7252, 7261. That court's

legal (but not factual) determinations are then subject to review by an Article III court, namely the Federal Circuit, whose decision is subject to discretionary review by the Supreme Court. *Id.* § 7292(a), (c). Apart from this review process (and subject to three exceptions not relevant here), the Secretary's determination as to benefits "may not be reviewed by any other official or by any court[.]" *Id.* § 511(a).

The Secretary's determination here was that West's estate was not entitled to the benefits owed to him at the time of his death. *See id.* § 5121(a)(2)(B). (Apparently the Secretary thinks that West's daughter was entitled to the benefits.) That determination was one "affect[ing] the provision of benefits by the Secretary to veterans or the dependents or survivors of veteran[s]" and thus reviewable only under the regime described above. *Id.* § 511(a); *see also Beamon v. Brown*, 125 F.3d 965, 971 (6th Cir. 1997). Neither the district court nor the Kentucky probate court is part of that regime, so the district court should have dismissed the case on jurisdictional grounds.

The district court instead remanded the case under the so-called "probate exception" to federal-court jurisdiction—a hoary, judge-made rule under which a federal court declines to exercise jurisdiction over an asset (*i.e.*, a *res*) that is also subject to the jurisdiction of a state probate court. *See Marshall v. Marshall*, 547 U.S. 293, 299, 311 (2006). The doctrine thus avoids dueling state and federal "jurisdiction over the same *res*." *Id.* at 311. But here the Kentucky court lost jurisdiction over the

question presented (*i.e.*, whether the Estate was entitled to the \$8,660) immediately upon the government's removal of the case. *See* 28 U.S.C. § 1446(d) (providing that, upon removal, "the State court shall proceed no further unless and until the case is remanded"). Hence there was no dueling jurisdiction to prevent. Rather than remand the case, therefore, the district court should have bowed out—by means of a dismissal on jurisdictional grounds—to allow the Estate to challenge the Secretary's determination, if the Estate so chose, under the exclusive process set forth in the Review Act. B.

That leaves the Estate's argument that the government violated the Fifth Amendment's guarantee of procedural due process when the government took \$8,660 from the Estate's bank account without any advance notice or hearing for the Estate. Although the government seems to take for granted the constitutionality of that action, we do not. "The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Property, for purposes of this guarantee, is "defined by existing rules or understandings that stem from an independent source such as state law[.]" *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). It is at least plausible, to understate matters, that a person (or an Estate) with a bank account has a property interest in the funds therein. *See, e.g., Barnhill v. Johnson*, 503 U.S. 393, 398

(1992). That is why one typically needs a court order to seize or otherwise attach funds in a bank account belonging to someone else.

Yet in this case the Treasury Department—pursuant to its “reclamation” authority, *see* 31 U.S.C. § 3712—seized the \$8,660 from the Estate’s account without advance notice or process of any kind. Indeed, at oral argument, the government appeared to contend that it can take any amount, from anyone’s bank account, anytime it thinks the account holder owes the government money—again without advance notice or process of any kind. Oral Arg. at 8:59. The government holds that position despite its concession that, in cases where the government uses this procedure, the Treasury Department proximately causes the bank to wire the account holder’s funds to the government. Oral Arg. at 12:31; *see generally, e.g., Campbell v. PMI Food*

*Equip. Grp., Inc.*, 509 F.3d 776, 784 (6th Cir. 2007) (“The state compulsion test requires that a state exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state” (internal quotation marks omitted)). In fact, sometimes a citizen’s first notice that the government has used this procedure is that her checks begin to bounce. *See, e.g., Breault v. Heckler*, 763 F.2d 62, 63 (2d Cir. 1985) (the government debited the account of the plaintiff, “an elderly widow,” who “gave a check to a garage, believing there was sufficient money in her account to cover the check. The check bounced”).

The government says we should not reach this issue because in its view the Estate waived the issue below. That may overstate matters, since in the district court the government did not reveal that it took the Estate's funds by means of the reclamation process set forth in § 3712. Yet the fact remains that the record on this issue is undeveloped here. We therefore choose not to reach it, though the Estate should be free to raise it in future litigation.

\* \* \*

We offer some final observations about our disposition of the case, which is to dismiss rather than remand it. None of the courts to consider this case—the state probate court, the district court, and now this court—have jurisdiction to revisit the Secretary's determination as to the Estate's entitlement to benefits. In that circumstance a remand to state court would be pointless, and we should simply dismiss the case. *See, e.g., Evans v. Greenfield Banking Co.*, 774 F.3d 1117, 1123-24 (7th Cir. 2014) (affirming dismissal where the state court lacked jurisdiction under the Review Act). True, as our dissenting colleague points out, 28 U.S.C.

§ 1447(c) provides that, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded” back to the state court. As a practical matter, however, that section plainly assumes that

the state court actually has jurisdiction to decide the case. Moreover, as an interpretive matter, statutory text must always be read in context. *See, e.g., Utility Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014). Here the relevant context includes 38 U.S.C. § 511(a), which bars the state court from revisiting the Secretary’s determination. And § 511(a) speaks to the state court’s jurisdiction on that point much more specifically than does § 1447(a). Thus § 511(a) controls. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

We therefore reverse the district court’s remand order, and ourselves dismiss the case for lack of subject-matter jurisdiction. Given that disposition, the Estate’s appeal of the district court’s order denying its motion for attorneys’ fees is moot.

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## DISSENT

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CLAY, Circuit Judge, dissenting. I agree with the majority that this case turns on a decision “affect[ing] the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans” and therefore 38 U.S.C. § 511(a) divested the district court of subject matter jurisdiction. I write separately, however, because I believe the district court was required to remand the case upon concluding that it lacked jurisdiction.

The removal statute's language is clear: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded.*" 28 U.S.C. § 1447(c) (emphasis added). The statute nowhere gives district courts judicial authority to peer into the state court's own asserted basis for jurisdiction. The majority asserts that § 1447(c) "plainly assumes that the state court actually has jurisdiction to decide the case." To the contrary, that assumption has no basis in the text of the statute, itself; it says simply "the case *shall be remanded.*" True enough, the statute provides that after remand "[t]he State court may thereupon proceed with such case," *id.*, but part of those proceedings will be (as in every case) for the state court to determine whether it has jurisdiction over the action. And although the majority says that remand in this case would be "pointless," the Supreme Court has expressed reservations about applying a "futility exception" to § 1447(c):

We also take note . . . of the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action. . . . The statute declares that, where subject matter jurisdiction is lacking, the removed case "*shall be remanded.*" 28 U.S.C. § 1447(c) (emphasis added). We therefore reverse the decision of the Court of Appeals and remand the case to the District Court with instructions that the case be remanded to the Civil District Court for the Parish of Orleans, Louisiana.

*Int'l Primate Prot. League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (quotation marks and citation omitted).

The plain language of the statute is clear; indeed, it could not be clearer. And “[i]f the language of the statute is clear, the court applies the statute as written.” *In re Corrin*, 849 F.3d 653, 657 (6th Cir. 2017). Because this Court may reach the same conclusion as the district court for reasons different from those given by the district court, I would affirm on the alternative ground that the district court was required to remand because § 511(a) divested it of jurisdiction.

*See Soehnlen v. Fleet Owners Ins. Fund.*, 844 F.3d 576, 586 n.5 (6th Cir. 2016).

United States District Court  
Western District of Kentucky  
Louisville Division  
August 5, 2016, Decided; August 5, 2016, Filed  
CIVIL ACTION NO. 3:16-CV-00166-TBR

IN RE: THE ESTATE OF JERRY WEST,  
Plaintiff

V

U.S. DEPARTMENT OF VETERAN AFFAIRS.  
Defendant

**Judges:** Thomas B. Russell, Senior United States  
District Judge.

**Opinion by:** Thomas B. Russell

#### **MEMORANDUM OPINION AND ORDER**

This matter comes before the Court on Plaintiff's motion for costs and attorneys' fees. (DN 12, 14). Defendant has responded. (DN 15). Plaintiff has replied. (DN 16). This matter is now ripe for adjudication. For the following reasons, Plaintiff's motion for costs and attorneys' fees is DENIED.

#### **BACKGROUND**

This action arises out of a probate action filed by the Estate of Jerry West (the "Estate") in Jefferson County District Court. Jerry West, a Vietnam War veteran, applied for disability benefits with the VA. On November 26, 2013, the VA determined

that West was entitled to a nonservice-connected pension and a special monthly pension. (DN 5-1). Two days later, West passed away.

The VA issued a check to Jerry West for \$8,660. This check was listed as an asset in West's estate and was transferred to an escrow account. On June 10, 2014, Branch [\*2] Banking and Trust Company ("BB&T") notified the Estate that the VA had filed a Notice of Reclamation of the \$8,660 check. The same day BB&T transferred the funds to the VA. The VA argues that because the check was received after Jerry West's death, it was properly returned to the VA. The Estate filed a Motion to Compel Return of Seized Asset with the probate court. (DN 5). The Jefferson County District Court granted that motion and ordered the sum of \$8,660 returned to the Estate. (DN 1-3).

The VA removed this case to federal court. (DN 1). The Estate moved to remand. (DN 5). This Court found that, in general, § 1442(a)(1) permits a federal agency to remove a lawsuit to federal court. However, the "probate exception" to federal jurisdiction stripped this Court of jurisdiction. Accordingly, this Court was required to remand this action to state court.

The Estate now moves for an award of costs and attorneys' fees.

## STANDARD

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable [\*3] basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547 (2005). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* A district court has discretion in making this determination. *Id.* at 136 ("Section 1447(c) . . . provides that a remand order 'may' require payment of attorney's fees—not 'shall' or 'should.'"); *see also Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527 (6th Cir. 2010).

## DISCUSSION

The Estate, having prevailed in arguing that this case should be remanded to state court, now requests costs and attorneys' fees for bringing that motion. The VA responds that this request should be denied because the VA had an objectively reasonable basis for removing this case to federal court. While this Court has remanded the case to state court, it agrees that the VA's decision to seek removal was not objectively unreasonable. Accordingly, the Court will deny the Estate's request.

As a starting point, the Court notes there was clear authority for the VA to seek removal. Pursuant to 28

U.S.C. § 1442(a), a "civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending." In general, "§ 1442(a)(1) as amended permits [\*4] a federal agency to remove to federal district court without limitation." *City of Cookeville v. Upper Cumberland Elec. Mbrshp. Corp.*, 484 F.3d 380, 390-91 (6th Cir. 2007).

This case was remanded because the Estate successfully argued that, notwithstanding this clear authority for removal, this Court lacked jurisdiction because of the probate exception to federal jurisdiction. "[T]he probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from disposing of property that is in the custody of a state probate court." *Marshall v. Marshall*, 547 U.S. 293, 311-12, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006).

The presence of a justifiable reason for remanding this case to state court, as opposed to a complete lack of justification for ever seeking removal, distinguishes this case from those relied upon by the Estate. See *Caudill v. Ritchie*, 2009 U.S. Dist. LEXIS 37452, 2009 WL 1211017, at \*1 (E.D. Ky. May 1, 2009) (granting request for attorneys' fees in a case where "[c]omplete diversity is [\*5] lacking on the face of the plaintiffs' complaint because the plaintiffs—who are citizens of Kentucky—have asserted claims against two defendants who are also citizens of Kentucky").

Furthermore, the VA raised an independent argument for why this Court could not remand this case to state court. The VA argued that its decision to recover the \$8,660 check cannot be reviewed by a court because 38 U.S.C. § 511(a) "precludes judicial review by any court, state or federal." (emphasis in original) (DN 4-1). The VA asked this Court to instead dismiss the Estate's claim. This Court found that the Estate's argument may have merit. Other courts have dismissed claims for VA benefits in similar circumstances. *Thompson v. Veterans Admin.*, 20 F. App'x 367, 368 (6th Cir. 2001) (unpublished); *Hall v. Dep't of Veterans Affairs*, 2014 U.S. Dist. LEXIS 27298, 2014 WL 836284, at \*1 (E.D. Tenn. Mar. 4, 2014). However, this Court found that it could not address this argument because the probate court had already exercised jurisdiction over the *res* in dispute, and accordingly, this Court lacked jurisdiction to grant the relief sought by the VA.

Finally, the Estate claims it would be "grossly unfair" for the Estate to "absorb the legal fees in fighting an improper removal," as the \$8,660 check and a \$500 Buick are the only assets belonging to Jerry West's estate. In support of this argument, the Estate [\*6] cites to *Kasprowicz v. Capital Credit Corp.*, 524 F. Supp. 105 (E.D. Mich. 1981). The *Kasprowicz* court awarded attorneys' fees to the party prevailing on a motion to remand as doing so was "in the interest of justice." *Id.* at 107. However, despite using this language, the *Kasprowicz*'s analysis was still based on the fact that "there was no reasonable basis to assert federal question jurisdiction for removal." *Id.* Accordingly,

notwithstanding the fact that sympathy lies on the side of the Estate inthis case, the Court finds that the VA has a reasonable basis for removing this case and therefore will deny the Estate's request for attorneys' fees and costs.

IT IS HEREBY ORDERED that, for the foregoing reasons, Plaintiff's motion for costs and attorneys' fees (DN 12, 14) is DENIED.

/s/ Thomas B. Russell

**Thomas B. Russell, Senior Judge**

**United States District Court**

August 5, 2016

**Footnotes**

- While this is a seemingly clear statement of the law, the Supreme Court has acknowledged that its precedent on this topic has been, at times, "enigmatic" and "not a model of clear statement." *Id.* at 310-11. (*citing Markham v. Allen*, 326 U.S. 490, 66 S. Ct. 296, 90 L. Ed. 256 (1946)). Nor can the contours of the probate exception be considered long-established, as made clear by the Sixth Circuit's recent opinion charting the developing of that doctrine following *Marshall*. *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 804 (6th Cir. 2015).

§ 1442. Federal officers or agencies sued or  
prosecuted

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- (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
  - (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
  - (2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
  - (3) Any officer of the courts of the United States, for or relating to any Act under color of office or in the performance of his duties;
  - (4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

**§ 1447. Procedure after removal generally**

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- **(a)** In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
- **(b)** It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
- **(c)** A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.
- **(d)** An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title [28 USCS § 1442 or 1443] shall be reviewable by appeal or otherwise.
- **(e)** If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny

joinder, or permit joinder and remand the action to the State court.

28 USCS § 1447

§ 3712. Time limitations for presenting certain claims of the Government

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**(a)** Claims over forged or unauthorized endorsements.

**(1)** Period for claims. If the Secretary of the Treasury determines that a Treasury check has been paid over a forged or unauthorized endorsement, the Secretary may reclaim the amount of such check from the presenting bank or any other endorser that has breached its guarantee of endorsements prior to--

**(A)** the end of the 1-year period beginning on the date of payment; or  
**(B)** the expiration of the 180-day period beginning on the close of the period described in subparagraph (A) if a timely claim is received under section 3702 [31 USCS § 3702].

**(2)** Civil action.

**(A)** Except as provided in subparagraph (B), the United States may bring a civil action to enforce the liability of an endorser, transferor, depository, or fiscal agent on a forged or unauthorized signature or endorsement on, or a change in, a check or warrant issued by the Secretary of the Treasury, the United States Postal Service, or any disbursing official or agent not later than 1 year after a check or warrant is presented to the drawee for payment.

**(B)** If the United States has given an endorser written notice of a claim against the endorser within the time allowed by subparagraph (A), the 1-year period for bringing a civil action on that claim under subparagraph (A) shall be extended by 3 years.

**(3)** Effect on agency authority. Nothing in this

subsection shall be construed to limit the authority of any agency under subchapter II of chapter 37 of this title [31 USCS §§ 3711 et seq.].

**(b)** Notwithstanding subsection (a) of this section, a civil action may be brought within 2 years after the claim is discovered when an endorser, transferor, depositary, or fiscal agent fraudulently conceals the claim from an officer or employee of the Government entitled to bring the civil action.

**(c)** The Comptroller General shall credit the appropriate account of the Treasury for the amount of a check or warrant for which a civil action cannot be brought because notice was not given within the time required under subsection (a) of this section if the failure to give notice was not the result of negligence of the Secretary.

**(d)** The Government waives all claims against a person arising from dual pay from the Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay.

**(e)** Treasury check offset.

**(1)** In general. To facilitate collection of amounts owed by presenting banks pursuant to subsection (a) or (b), upon the direction of the Secretary, a Federal reserve bank shall withhold credit from banks presenting Treasury checks for ultimate charge to the account of the United States Treasury. By presenting Treasury checks for payment a presenting bank is deemed to authorize this offset.

**(2)** Attempt to collect required. Prior to directing offset under subsection (a)(1), the Secretary shall first attempt to collect amounts owed in the manner provided by sections 3711 and 3716 [31 USCS §§ 3711 and 3716]. 31 USCS § 3712

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**§ 511. Decisions of the Secretary; finality**

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**(a)** The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

**(b)** The second sentence of subsection (a) does not apply to--

- (1)** matters subject to section 502 of this title [38 USCS § 502];
- (2)** matters covered by sections 1975 and 1984 of this title [38 USCS §§ 1975 and 1984];
- (3)** matters arising under chapter 37 of this title [38 USCS §§ 3701 et seq.]; and
- (4)** matters covered by chapter 72 of this title [38 USCS §§ 7251 et seq.].

38 USCS § 511

§ 5121. Payment of certain accrued benefits upon death of[a] beneficiary

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**(a)** Except as provided in section 3329 and 3330 of title 31 [31 USCS § 3329 and 3330], periodic monetary benefits (other than insurance and servicemen's indemnity) under laws administered by the Secretary to which an individual was entitled at death under existing ratings or decisions or those based on evidence in the file at date of death (hereinafter in this section and section 5122 of this title [38 USCS § 5122] referred to as "accrued benefits") and due and unpaid, shall, upon the death of such individual be paid as follows:

- (1)** Upon the death of a person receiving an apportioned share of benefits payable to a veteran, all or any part of such benefits to the veteran or to any other dependent or dependents of the veteran, as may be determined by the Secretary.
- (2)** Upon the death of a veteran, to the living person first listed below:
  - (A)** The veteran's spouse.
  - (B)** The veteran's children (in equal shares).
  - (C)** The veteran's dependent parents (in equal shares).
- (3)** Upon the death of a widow or remarried surviving spouse, to the children of the deceased veteran.
- (4)** Upon the death of a child, to the surviving children of the veteran who are entitled to death compensation, dependency and indemnity compensation, or death pension.
- (5)** Upon the death of a child claiming benefits under chapter 18 of this title [38 USCS §§ 1801 et seq.], to the surviving parents.
- (6)** In all other cases, only so much of the accrued

benefits may be paid as may be necessary to reimburse the person who bore the expense of last sickness and burial.

(b) No part of any accrued benefits shall be used to reimburse any political subdivision of the United States for expenses incurred in the last sickness or burial of any beneficiary.

(c) Applications for accrued benefits must be filed within one year after the date of death. If a claimant's application is incomplete at the time it is originally submitted, the Secretary shall notify the claimant of the evidence necessary to complete the application. If such evidence is not received within one year from the date of such notification, no accrued benefits may be paid.

38 USCS § 5121

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§ 5122. Cancellation of checks mailed to deceased payees

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A check received by a payee in payment of accrued benefits shall, if the payee died on or after the last day of the period covered by the check, be returned to the issuing office and canceled, unless negotiated by the payee or the duly appointed representative of the payee's estate. The amount represented by such check, or any amount recovered by reason of improper negotiation of any such check, shall be payable in the manner provided in section 5121 of this title [38 USCS § 5121], without regard to section 5121(c) of this title [38 USCS § 5121(c)]. Any amount not paid in the manner provided in section 5121 of this title [38 USCS § 5121] shall be paid to the estate of the deceased payee unless the estate will escheat.

38 USCS § 5122

§ 7105. Filing of notice of disagreement and appeal

**(a)** Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter [38 USCS §§ 7101 et seq.] and regulations of the Secretary.

**(b)**

(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereinafter referred to as the "agency of original jurisdiction"). A notice of disagreement postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, the claimant's legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by the claimant or guardian. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter [38 USCS §§ 7101 et seq.] within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

**(d)**

**(1)** Where the claimant, or the claimant's representative, within the time specified in this chapter [38 USCS §§ 7101 et seq.], files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency shall prepare a statement of the case. A statement of the case shall include the following:

- (A)** A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed.
- (B)** A citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision.
- (C)** The decision on each issue and a summary of the reasons for such decision.

**(2)** A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 5701 of this title [38 USCS § 5701] or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is such that disclosure to the representative would be as harmful as if made to the claimant.

**(3)** Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to the claimant's representative, if there is one. The claimant will be

afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The claimant in any case may not be presumed to agree with any statement of fact contained in the statement of the case to which the claimant does not specifically express agreement.

(5) The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

(e)

(1) If, either at the time or after the agency of original jurisdiction receives a substantive appeal, the claimant or the claimant's representative, if any, submits evidence to either the agency of original jurisdiction or the Board of Veterans' Appeals for consideration in connection with the issue or issues with which disagreement has been expressed, such evidence shall be subject to initial review by the Board unless the claimant or the claimant's representative, as the case may be, requests in writing that the agency of original jurisdiction initially review such evidence.

(2) A request for review of evidence under paragraph (1) shall accompany the submittal of the evidence.

38 USCS § 7105

**§ 7101. Composition of Board of Veterans' Appeals**

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**(a)** There is in the Department a Board of Veterans' Appeals (hereinafter in this chapter [38 USCS §§ 7101 et seq.] referred to as the "Board"). The Board is under the administrative control and supervision of a chairman directly responsible to the Secretary. The Board shall consist of a Chairman, a Vice Chairman, and such number of members as may be found necessary in order to conduct hearings and dispose of appeals properly before the Board in a timely manner. The Board shall have such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board. The Board shall have sufficient personnel under the preceding sentence to enable the Board to conduct hearings and consider and dispose of appeals properly before the Board in a timely manner.

**(b)**

**(1)** The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, for a term of six years. The Chairman shall be subject to the same ethical and legal limitations and restrictions concerning involvement in political activities as apply to judges of the United States Court of Appeals for Veterans Claims.

**(2)** The Chairman may be removed by the President for misconduct, inefficiency, neglect of duty, or engaging in the practice of law or for physical or mental disability which, in the opinion of the President, prevents the proper execution of the Chairman's duties. The Chairman may not be

removed from office by the President on any other grounds. Any such removal may only be made after notice and opportunity for hearing.

(3) The Chairman may be appointed under this subsection to more than one term. If, upon the expiration of the term of office for which the Chairman was appointed, the position of Chairman would become vacant, the individual serving as Chairman may, with the approval of the Secretary, continue to serve as Chairman until either appointed to another term or a successor is appointed, but not beyond the end of the Congress during which the term of office expired.

(4) The Secretary shall designate one member of the Board as Vice Chairman. The Vice Chairman shall perform such functions as the Chairman may specify. Such member shall serve as Vice Chairman at the pleasure of the Secretary.

(c)

(1)

(A) The Chairman may from time to time designate one or more employees of the Department to serve as acting members of the Board. Except as provided in subparagraph (B), any such designation shall be for a period not to exceed 90 days, as determined by the Chairman.

(B) An individual designated as an acting member of the Board may continue to serve as an acting member of the Board in the making of any determination on a proceeding for which the individual was designated as an acting member of the Board, notwithstanding the termination of the period of designation of the individual as an acting member of the Board under subparagraph (A) or (C).

- (C)** An individual may not serve as an acting member of the Board for more than 270 days during any one-year period.
    - (D)** At no time may the number of acting members exceed 20 percent of the total of the number of Board members and acting Board members combined.
  - (2)** In each annual report to the Congress under section 529 of this title [38 USCS § 529], the Secretary shall provide detailed descriptions of the activities undertaken and plans made in the fiscal year for which the report is made with respect to the authority provided by paragraph (1) of this subsection. In each such report, the Secretary shall indicate, in terms of full-time employee equivalents, the number of acting members of the Board designated under such paragraph (1) during the year for which the report is made.
- (d)**
  - (1)** After the end of each fiscal year, the Chairman shall prepare a report on the activities of the Board during that fiscal year and the projected activities of the Board for the fiscal year during which the report is prepared and the next fiscal year. Such report shall be included in the documents providing detailed information on the budget for the Department that the Secretary submits to the Congress in conjunction with the President's budget submission for any fiscal year pursuant to section 1105 of title 31 [31 USCS § 1105].
  - (2)** Each such report shall include, with respect to the preceding fiscal year, information specifying--
    - (A)** the number of cases appealed to the Board during that year;
    - (B)** the number of cases pending before the Board

at the beginning and at the end of that year;

**(C)** the number of such cases which were filed during each of the 36 months preceding the current fiscal year;

**(D)** the average length of time a case was before the Board between the time of the filing of an appeal and the disposition during the preceding fiscal year;

**(E)** the number of members of the Board at the end of the year and the number of professional, administrative, clerical, stenographic, and other personnel employed by the Board at the end of the preceding fiscal year; and

**(F)** the number of employees of the Department designated under subsection (c)(1) to serve as acting members of the Board during that year and the number of cases in which each such member participated during that year.

**(3)** The projections in each such report for the current fiscal year and for the next fiscal year shall include (for each such year)--

**(A)** an estimate of the number of cases to be appealed to the Board; and

**(B)** an evaluation of the ability of the Board (based on existing and projected personnel levels) to ensure timely disposition of such appeals as required by section 7101(a) of this title [38 USCS § 7101(a)].

**(e)** A performance incentive that is authorized by law for officers and employees of the Federal Government may be awarded to a member of the Board (including an acting member) by reason of that member's service on the Board only if the Chairman of the Board determines that such member should be awarded that incentive. A

determination by the Chairman for such purpose shall be made taking into consideration the quality of performance of the Board member.

38 USCS § 7101

VETERANS' JUDICIAL REVIEW ACT, 1988  
Enacted S. 11, 100 Enacted S. 11, 102 Stat. 4105,  
4106, 100 P.L. 687, 1988 Enacted S. 11, 100  
Enacted S. 11

SEC. 1403. RECODIFICATION OF PROVISIONS  
RELATING TO CERTAIN BENEFITS FOR  
SURVIVORS OF CERTAIN VETERANS.

(a) IN GENERAL. -- (1) Subchapter II of chapter 13  
is amended by adding at the end the following new  
section:

"§ 418. Benefits for survivors of certain veterans  
rated totally disabled at time of death

"(a) The Administrator shall pay benefits under  
this chapter to the surviving spouse and to the  
children of a deceased veteran described in  
subsection (b) of this section in the same manner as  
if the veteran's death were service connected.

"(b) A deceased veteran referred to in subsection (a)  
of this section is a veteran who dies, not as the  
result of the veteran's own willful misconduct, and  
who was in receipt of or entitled to receive (or but  
for the receipt of retired or retirement pay was  
entitled to receive) compensation at the time of  
death for a service-connected disability that either -

-  
"(1) was continuously rated totally disabling for a  
period of 10 or more years immediately preceding  
death; or

"(2) if so rated for a lesser period, was so rated continuously for a period of not less than five years from the date of such veteran's discharge or other release from active duty.

"(c) Benefits may not be paid under this chapter by reason of this section to a surviving spouse of a veteran unless --

    "(1) the surviving spouse was married to the veteran for two years or more immediately preceding the veteran's death; or

    "(2) a child was born of the marriage or was born to them before the marriage.

"(d) If a surviving spouse or a child receives any money or property of value pursuant to an award in a judicial proceeding based upon, or a settlement or compromise of, any cause of action for damages for the death of a veteran described in subsection (a) of this section, benefits under this chapter payable to such surviving spouse or child by virtue of this section shall not be paid for any month following a month in which any such money or property is received until such time as the total amount of such benefits that would otherwise have been payable equals the total of the amount of the money received and the fair market value of the property received.

"(e) For purposes of sections 1448(d) and 1450(c) of title 10, eligibility for benefits under this chapter by virtue of this section shall be deemed eligibility for dependency and indemnity compensation under section 411(a) of this title.".

**KRS § 396.011**

Current through the 2018 legislative session.

- **Michie's™ Kentucky Revised Statutes**
- **TITLE XXXIV Descent, Wills, and Administration of Decedents' Estates (Chs. 391 — 397)**
- **CHAPTER 396 Claims Against Decedents' Estates (§§ 396.005 — 396.205)**

**396.011. Presentation of claims against estate — Time limitations — Exceptions.**

**(1)** All claims against a decedent's estate which arose before the death of the decedent, excluding claims of the United States, the State of Kentucky and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented within six (6) months after the appointment of the personal representative, or where no personal representative has been appointed, within two (2) years after the decedent's death.

**(2)** Nothing in this section shall affect or prevent:

- (a)** To the extent of the security only, any proceeding to enforce any mortgage, pledge, lien or other security interest securing an obligation of the decedent or upon property of the estate; or
- (b)** To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

**KRS § 396.011**

**KRS § 396.015**

Current through the 2018 legislative session.

- **Michie's™ Kentucky Revised Statutes**
- **TITLE XXXIV Descent, Wills, and Administration of Decedents' Estates (Chs. 391 — 397)**
- **CHAPTER 396 Claims Against Decedents' Estates (§§ 396.005 — 396.205)**

**396.015. Method of presentation of claims.**

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Claims against a decedent's estate shall be presented as follows:

(1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. If presentment shall be made by filing a written statement of the claim with the clerk of the court, the claimant shall certify as provided in the rules of civil procedure that a copy of the written statement has been given or mailed to the personal representative and his attorney. The claim shall be deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

**(2)** In an action pending against the decedent at the time of his death, which action survives at law, the substitution of the personal representative for the decedent, or motion therefor, shall constitute the presentation of a claim. Such claim shall be deemed to have been presented from the time of substitution, or motion therefor.

KRS § 396.015

**KRS § 396.135**

Current through the 2018 legislative session.

- **Michie's™ Kentucky Revised Statutes**
- **TITLE XXXIV Descent, Wills, and Administration of Decedents' Estates (Chs. 391 — 397)**
- **CHAPTER 396 Claims Against Decedents' Estates (§§ 396.005 — 396.205)**

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**396.135. Execution against estate property prohibited.**

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No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

**KRS § 396.135**

**§ 3.1003 Returned and canceled checks.**

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Where the payee of a check for benefits has died prior to negotiating the check, the check shall be returned to the issuing office and canceled.

**(a)** The amount represented by the returned check, or any amount recovered following improper negotiation of the check, shall be payable to the living person or persons in the order of precedence listed in § 3.1000(a)(1) through (5), except that the total amount payable shall not include any payment for the month in which the payee died (see § 3.500(g)), and payments to persons described in § 3.1000(a)(5) shall be limited to the amount necessary to reimburse such persons for the expenses of last sickness and/or burial.

**(1)** There is no limit on the retroactive period for which payment of the amount represented by the check may be made, and no time limit for filing a claim to obtain the proceeds of the check or for furnishing evidence to perfect a claim.

**(2)** Nothing in this section will preclude payment to an otherwise entitled claimant having a lower order of precedence under § 3.1000(a)(1) through (5), if it is shown that the person or persons having a higher order of precedence are deceased at the time the claim is adjudicated.

**(b)** Subject to the limitations in § 3.500(g) of this part, any amount not paid in the manner provided in paragraph (a) of this section shall be paid to the estate of the deceased payee, provided that the estate, including the amount paid under this paragraph, will not revert to the state because there is no one eligible to inherit it.

**(c)** The provisions of this section do not apply to checks for lump sums representing amounts

withheld under § 3.551(b) or § 3.557. These amounts are subject to the provisions of § 3.1001 and § 3.1007, as applicable.

38 CFR 3.1003

## Amendment V of United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V