No. 21-5667

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DAVID LOCKMILLER, Petitioner

v.

UNITED STATES, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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December 7, 2021

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Petition for Rehearing

Pursuant to Supreme Court Rule 44.2, David Lockmiller respectfully petitions for rehearing of the Court's decision to deny the Petition for Writ of Certiorari issued on November 15, 2021. Lockmiller v. United States, No. 21-5667. This petition for rehearing is filed within 25 days of this Court's decision.

Question at Issue: Is Federal Tort Claims Act (FTCA) § 2678 Constitutional?

Introduction

Federal Tort Claims Act (FTCA) § 2678 reads in its entirety:

> No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.
>
> Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.
>
> (June 25, 1948, ch. 646, 62 Stat. 984; Pub. L. 89–506, § 4, July 18, 1966, 80 Stat. 307.)

The legislative history of the 1966 amendment to Section 2678 shows that its purpose was to "assure competent representation and reasonable compensation" in matters litigated under the FTCA. (S.Rep. No. 1327, 89th Cong., 2d Sess. (1966) U.S. Conde Cong. Ad.News 2515, 2520.) The Court of Appeals in *Joe v. United States*, 772 F.2d 1535, 1536-1537(11th Cir. 1985) prominently noted: "The legislative history [of Section 2678] implies that Congress viewed FTCA claims as typically involving contingent fee arrangements."

The American Bar Association current website provides a concise explanation of an attorney contingency fee arrangement as follows:

> A client pays a contingent fee to a lawyer only if the lawyer handles a case successfully. Lawyers and clients use this arrangement only in cases where money is being claimed—most often in cases involving personal injury or workers' compensation.

> **In a contingent fee arrangement, the lawyer agrees to accept a fixed percentage (*often one-third to 40 percent*) of the recovery, which is the amount finally paid to the client.** If you win the case, the lawyer's fee comes out of the money awarded to you. If you lose, neither you nor the lawyer will get any money, but you will not be required to pay your attorney for the work done on the case. (Emphasis added.) (American Bar Association website, Legal Services Division, ABA Military & Veterans Legal Center, "Working with a Lawyer")

The maximum attorney contingency fee arrangement permitted by the statutory provisions of Federal Tort Claims Act (FTCA) § 2678 is 25 percent. This is 8 percent lower than the percentage amount that American Bar Association recognizes as the lower end of the prevailing market rate range for typical contingency arrangements between an attorney and a client.

It is true that Federal Tort Claims Act (FTCA) § 2678 equally denies *"to the poor and to the rich"* the legal right of either a poor FTCA claimant or a rich FTCA claimant to retain competent and experienced FTCA legal counsel and representation by means of a contingency fee arrangement greater than 25 percent. However, it is also true that the poor FTCA claimant must then either file a lawsuit in *pro se,* or forfeit the FTCA claim, if a contingency fee arrangement with an attorney cannot be made for a "charity rate" maximum of 25 percent. On the other hand, the rich FTCA claimant can pay a qualified FTCA attorney on an hourly cash basis to litigate the very same factually legitimate Federal Tort Claims Act claim as that being made by the poor FTCA claimant. This unequal access to the federal courts by the poor is a direct result of the Federal Tort Claims Act (FTCA) § 2678 provisions limiting contingency fee arrangements *"for the poor and for the rich"* to a maximum of 25 percent.

As stated in the FTCA Amended Complaint filed in the district court, Petitioner was unaware of the provisions of FTCA § 2678 at the time but was willing to accept as much as a 40 percent attorney contingency fee arrangement for retaining competent and experienced FTCA legal counsel and representation to pursue his FTCA legal rights. Petitioner reasoned in his own mind that 60 percent of a compensatory damage award, as determined by a federal district court judge, would be much better for Petitioner than 100 percent of nothing. Petitioner failed to accomplish this task of retaining experienced

and competent FTCA legal counsel on a contingency fee basis to counsel and represent Petitioner in the requisite FTCA judicial proceedings despite six months of diligent effort to do so. In the end of the six month period permitted by the statute to retain legal counsel, Petitioner Lockmiller was left with no choices but either to research and prepare a timely-filed FTCA lawsuit solely by means of his own legal abilities, or forfeit his legal right to recover any compensatory damages forever under the FTCA legislation.

Chief Justice John Marshall Expounds on Issue of Legislation Constitutionality

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803):

> [T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. *(Marbury v. Madison*, 5 U.S. 137, 180.)
>
> In the 3d vol. of his Commentaries, p. 23. Blackstone states "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (*Id.* at 162-163)
>
> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. (*Id.* at 163)
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. (*Id.*)
>
> [W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. (*Id.* at 166)

[It is relevant and important to note, by law of California, Title 17 - Public Health, Section 2500 – Reporting to Local Health Authorities, that Bacillus Cereus – Emetic type, the foodborne illness that Petitioner suffered and causing the permanent loss of nearly 90 percent of Petitioner's senses of taste and smell, was required to be reported by the VA Emergency Room Physician who Petitioner depended upon for the performance of that duty.]

> The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in

some form, may be exercised over the present case; because the right claimed is given by a law of the United States. (*Id.* at 173-174)

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." (*Id.* at 174)

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. ((*Id.* at 176)

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. (*Id.*)

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. (*Id.*)

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. (*Id.* at 176-177)

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. (*Id.* at 177)

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. (*Id.*)

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. (*Id.*)

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. (*Id.*)

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. (*Id.*)

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. (*Id.*)

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. (*Id. at* 178)

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. (*Id.*)

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. (*Id.*)

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. (*Id.*)

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions -- a written constitution -- would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. (*Id.*)

The judicial power of the United States is extended to all cases arising under the constitution. (*Id.*)

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? (*Id.* at 178-179)

This is too extravagant to be maintained. (*Id.* at 179)

There are many other parts of the constitution which serve to illustrate this subject. (*Id.*)

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted t recover it. Ought

judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law? (*Id.*)

The constitution declares that "no bill of attainder or ex post facto law shall be passed." (*Id.*)

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve? (*Id.*)

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature. *(Id. at* 179-180)

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! *(Id. at* 180)

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that *I will* administer justice without respect to persons, and *do equal right to the poor and to the rich*; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States." (Emphasis added.) (*Id.*)

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? (*Id.*)

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime. (*Id.*)

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank. (*Id.*)

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. (*Id.*)

In the federal law under consideration, the Federal Tort Claims Act (FTCA), a first part of the law grants to every citizen the right to recover compensatory damages for the wrongful or negligent act of a federal government employee. However, a second part of the law, FTCA § 2678, legislatively denies, both "to the poor and to the rich," the legal right to recover damages by means of an attorney contingent fee arrangement greater than 25 percent of the compensatory damages awarded by the court.

In accordance with the controlling constitutional law precedent expounded by United States Supreme Court Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803), Federal Tort Claims Act (FTCA) § 2678 should and must be declared by the current Justices of the United States Supreme Court to be unconstitutional.

Additional Relevant "Legislation-Constitutionality" Judicial Precedents

The U.S. Supreme Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 691-692 (2012):

> When an unconstitutional provision is but a part of a more comprehensive statute, the question arises as to the validity of the remaining provisions. The Court's authority to declare a statute partially unconstitutional has been well established since *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803), when the Court severed an unconstitutional provision from the Judiciary Act of 1789.

The federal district court in *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1054 (2002):

> As a district judge I am duty bound to scrutinize the laws applied in my court for conformance with the Constitution lest I apply an unconstitutional law. See Marbury v. Madison, 5 U.S. 137, 177, (1803); U.S. v. Raines, 362 U.S. 17, 20, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) ("[t]he very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — `the gravest and most delicate duty that this Court is called on to perform.'") quoting *Blodgett v. Holden*, 275 U.S. 142, 148, 48 S.Ct. 105, 72 L.Ed. 206 (1927)(Holmes, J.)

The U.S. Supreme Court in *Perry v. United States*, 294 U.S. 330, 375 (1935):

> The oft repeated rule by which the validity of statutes must be tested is this – "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

The end or the objective of Federal Tort Claims Act (FTCA) § 2678 legislation by Congress was not to "assure competent representation and reasonable compensation" in matters litigated under the FTCA. The real purpose of the FTCA § 2678 provision was to prevent, or limit as much as possible, both "to the poor and to the rich" legitimate FTCA claimants, access to the federal courts to litigate their claims by means of an attorney contingency fee arrangement.

Conclusion

The Oath of Office for Federal Justices and Judges - 28 U.S. Code § 453 reads:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, ___ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and ***do equal right to the poor and to the rich***, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___ under the Constitution and laws of the United States. So help me God." (Emphasis added.) (June 25, 1948, ch. 646, 62 Stat. 907; Pub. L. 101–650, title IV, § 404, Dec. 1, 1990, 104 Stat. 5124.)

The only way to resolve this constitutional conundrum and "***do equal right to the poor and to the rich***," is for the Justices of the United States Supreme Court to declare Federal Tort Claims Act (FTCA) § 2678 unconstitutional. Thereby, the Justices of the U.S. Supreme Court fulfill their solemn Oath of Office and grant an ***"equal right to the poor and to the rich,"*** i.e., the equal right to retain experienced and competent Federal Tort Claims Act (FTCA) legal counsel and representation in the federal courts by means of an unfettered contingency fee arrangement to contest the legitimate FTCA claims of each.

Petitioner Lockmiller moves this Court to grant this petition for rehearing to reconsider the question of the constitutionality of Federal Tort Claims Act (FTCA) § 2678 on other substantial grounds not previously presented and considered by this Court. If FTCA § 2678 is unconstitutional, is it not also a violation of each Justice's Oath of Office to "***do equal right to the poor and to the rich***" by a failure to declare FTCA § 2678 unconstitutional?

Date: December 7, 2021 Signature: David Lockmiller

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay. This Petition is limited to substantial constitutional law grounds not previously presented to the Court.

A succinct description of the efforts by Petitioner to produce this Petition for Rehearing is in order:

Petitioner includes a detailed analysis by Chief Justice John Marshall of the twin constitutional principles "that a law repugnant to the constitution is void; and that courts, as well as [the legislative] department, are bound by that instrument." *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

Petitioner also cites a 2002 published federal district court opinion quoting Justice Holmes in *Blodgett v. Holden*, 275 U.S. 142, 148 (1927):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power – 'the gravest and most delicate duty that this Court is called on to perform.'"

Petitioner also quotes a concise defining statement made in *Perry v. United States*, 294 U.S. 330, 375 (1935) regarding the "oft repeated rule" for determining the constitutional validity of statutes.

Finally, Petitioner Lockmiller quotes from a more recent U. S. Supreme Court opinion in *Nat'l Fed'n of Indep. Bus. v. Sebellius*, 567 U.S. 519 (2012) that "[t]he Court's authority to declare a statute partially unconstitutional has been well established since Marbury v. Madison, 5 U.S. 137 (1803)."

Petitioner requests to have only Federal Tort Claims Act § 2678 to be declared unconstitutional by the United States Supreme Court.

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