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To Enforce a Privacy Right: The Sovereign Immunity Canon and the Privacy Act's Civil Remedies Provision After *Cooper*

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CASE COMMENT

TO ENFORCE A PRIVACY RIGHT: THE SOVEREIGN IMMUNITY CANON AND THE PRIVACY ACT'S CIVIL REMEDIES PROVISION AFTER *COOPER*

Federal Aviation Administration v. Cooper, 132 S. Ct. 1441 (2012)

Daniel J. DiMatteo[*]

In 2005, a joint investigation between separate government agencies revealed that Stanmore Cooper, a pilot, failed to disclose to the Federal Aviation Administration that he was HIV positive.[1] Cooper sued the agencies in the United States District Court for the Northern District of California,[2] claiming that they violated the Privacy Act by disclosing his medical records to one another without his consent.[3] Alleging that the unlawful disclosure of his condition caused him severe emotional distress, Cooper sought monetary relief under the Privacy Act's civil remedies provision, which establishes a cause of action against the government for "actual damages."[4] The dispositive issue in *Federal Aviation Administration v. Cooper* was whether the term "actual damages" includes damages for emotional or mental harm.

Despite finding that the agencies violated the Privacy Act, the district court granted summary judgment to the agencies, holding that the Act did not authorize damage awards for emotional or mental harm.[5] The United States Court of Appeals for the Ninth Circuit reversed the district court's order.[6] The Ninth Circuit reasoned that, when read in connection with the entirety of the Act, the civil remedy provision's "actual damages" language unambiguously includes emotional or mental harm.[7] The circuit court

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1. FAA v. Cooper, 132 S. Ct. 1441, 1446–47 (2012). Cooper had omitted information about his condition when applying to renew his medical certificate in 1998, 2000, 2002, and 2004. He was indicted on multiple counts of making fraudulent statements to a government agency and sentenced to two years of probation. *Id.* at 1447.

2. Cooper v. FAA, 816 F. Supp. 2d 778, 781 (N.D. Cal. 2008).

3. *Id.* at 781, 784–85. With certain exceptions, the Privacy Act of 1974 makes it "unlawful for an agency to disclose a record to another agency without the written consent of the person to whom the record pertains. 5 U.S.C. § 552a(b)." *Cooper*, 132 S. Ct. at 1447 n.2.

4. If a government agency violates the Privacy Act "in such a way as to have an adverse effect on an individual," the Act's civil remedies provision authorizes the injured individual to bring a civil action against that agency. 5 U.S.C. § 552a(g)(1)(D) (2006). If the agency's violation was "intentional or willful," the United States is liable to the individual for "actual damages." 5 U.S.C. § 552a(g)(4) (2006).

5. *Cooper*, 816 F. Supp. 2d at 790–92.

6. Cooper v. FAA, 622 F.3d 1016, 1035 (9th Cir. 2010).

7. *See id.* at 1033–34.

denied a request for an en banc rehearing, and the United States Supreme Court granted certiorari.[8] Reversing the circuit court by a 5–3 vote,[9] the Supreme Court held that the Privacy Act's civil remedies provision does not "unequivocally authorize" the government's waiver of immunity from monetary damages for emotional or mental harm.[10]

The Supreme Court majority reached its decision by construing the Privacy Act's civil remedies provision according to the "sovereign immunity canon," a canon of construction used to determine whether the government has waived immunity with respect to a particular claim or remedy.[11] The canon provides that courts must "strictly construe[]" waivers of sovereign immunity "in favor of the Government."[12] While courts have historically construed waivers of immunity narrowly,[13] the canon of sovereign immunity underwent substantial evolution and refinement in the late twentieth century.[14]

Because of its insight into mid-twentieth century sovereign immunity jurisprudence, *McMahon v. United States*[15] serves as an appropriate starting point for tracking the canon of sovereign immunity's evolution over the last sixty years. The issue before the Court in *McMahon* was whether a law's two-year limitations period commenced on either (1) the date that the party actually suffered the injury, or (2) an administrative disallowance of the party's claim.[16] The plain text of the statute was ambiguous, stating only that if a party's claim is "administratively disallowed in whole or in part," the party has until "two years after the cause of action arises" to sue.[17] The *McMahon* Court articulated and applied the principle that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign."[18] While the Court did not deem the petitioner's interpretation implausible, it construed the statute's ambiguity in favor of the government, and denied relief to the petitioner.[19]

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8. *Cooper*, 132 S. Ct. at 1448.

9. Justice Elena Kagan took no part in the decision. *Id*. at 1456.

10. *Id.* at 1456.

11. *See id.* at 1448, 1453.

12. *Id.* at 1447.

13. *See* Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 561 (2008).

14. *See* Lane v. Pena, 518 U.S. 187, 192 (1996) (noting that a waiver of sovereign immunity must clearly appear in a statute's text, not merely a statute's legislative history); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990) (holding that, once a waiver was established, equitable tolling could apply to suits against the government if it did not significantly broaden the waiver).

15. 342 U.S. 25, 27 (1951).

16. *See* McMahon v. United States, 342 U.S. 25, 26–27 (1951).

17. *Id.* at 26.

18. *Id.* at 27 (citations omitted).

19. *See id.*

Irwin v. Department of Veterans Affairs[20] illustrates the evolution of sovereign immunity jurisprudence from the broad principle articulated in *McMahon* into a more refined canon of construction. In *Irwin*, the Supreme Court declined to apply the doctrine of equitable tolling to a Civil Rights Act suit against the government.[21] The statute of limitations required that suits against the government be filed "'[w]ithin thirty days of receipt of notice of final action taken'" by the Equal Employment Opportunity Commission (EEOC).[22] Because he was out of town, the petitioner's attorney did not actually receive the EEOC's letter of notice until two weeks after it arrived by mail, causing the petitioner to file late.[23] Declaring that waivers of immunity "cannot be implied but must be unequivocally expressed,"[24] the Supreme Court declined to imply that the limitations period commenced only with "actual" receipt of notice and ruled against the petitioner.[25] Articulating a rule against waiver by implication and requiring a waiver's unequivocal expression,[26] the Court again resolved an ambiguity to the government's benefit, construing a waiver "strictly in favor of the government."

Like *Cooper*, *Lane v. Pena*[27] concerned waivers of immunity from remedies rather than claims,[28] giving *Lane* greater comparative value than *Irwin* or *McMahon*. In *Lane*, the petitioner claimed that the government excluded him from a "'program or activity conducted by any Executive agency'" because he was disabled, violating the Rehabilitation Act.[29] The civil remedies provision, however, failed to expressly authorize monetary damages for this category of violator, though it did so for another category of violator.[30] Applying the canon's rule that a textual ambiguity exists if there is more than one "plausible interpretation" of the text,[31] the Court considered the civil remedies provision ambiguous. Construing this ambiguity in favor of the government, the Supreme Court ruled against the petitioner. The Court held that the law failed to provide "clarity of expression necessary to establish a waiver of the Government's sovereign

20. 498 U.S. 89 (1990).

21. *Id.* at 96.

22. *Id.* at 92.

23. *Id.* at 91.

24. *Id.* at 95 (citations omitted) (internal quotation marks omitted).

25. *See id.* at 93–96.

26. *See id.* at 95.

27. 518 U.S. 187 (1996).

28. *Id.* at 189.

29. *Id*. at 189–90 (quoting 29 U.S.C. § 794(a) (1988, Supp. V)).

30. 29 U.S.C. § 794a(a)(2) authorizes monetary damages against "any recipient of Federal assistance." 29 U.S.C. § 794a(a)(2) (2006). 29 U.S.C. § 794(a) makes it unlawful for "any program or activity receiving Federal financial assistance" to discriminate against an otherwise qualified individual solely on the basis of a disability. 29 U.S.C. § 794(a) (2006).

31. *See* FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34, 37 (1992)).

immunity against monetary damages."[32]

Prior to its decision in *Cooper*, there was no obvious indication as to how the Supreme Court would rule on whether the Privacy Act's term "actual damages" authorized damages for emotional or mental harm. Case precedent offered little clarity. Unlike *Lane*, for instance, where a civil remedy provision's omission of a particular phrase presented an ambiguity to be construed in favor of immunity, *Cooper* concerns the construction of a statutory term of art.[33] In a majority opinion written by Justice Samuel Alito, the Court took the canon of sovereign immunity in an even stricter direction, construing the term "actual damages" as too ambiguous to waive the government's immunity from damages for emotional or mental harm.[34]

The Court began its analysis of the issue by highlighting the Privacy Act's failure to define "actual damages."[35] The Court summarily rejected the Respondent's argument that the term should be construed based on the "ordinary meaning" of the word "actual."[36] The Court also rejected the *Black's Law Dictionary* definition of "actual damages" as "circular."[37] But most importantly, the Court rejected these textbook definitions based on the reasoning that the meaning of a legal term of art "changes with the specific statute in which it is found."[38] This principle set the stage for the Court's analysis. Rather than accepting a textbook definition of "actual damages," the Court explained the term's "chameleon-like quality,"[39] reviewing its history of taking on alternative meanings depending on the statute in which it was found.[40] The Court found no definitive understanding of the term.[41] Instead, in the Court came to a conclusion all

32. *Lane*, 518 U.S. at 192.

33. *See Cooper*, 132 S. Ct. at 1449 ("'[A]ctual damages' is a legal term of art . . . .").

34. *See id.* at 1453–56.

35. *See id.* at 1449.

36. *See id.* ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'").

37. *Id.*

38. *Id.* (quoting Cooper v. FAA, 622 F.3d 1016, 1029 (9th Cir. 2010)) (internal quotation marks omitted).

39. *Id.* at 1450 ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.").

40. The Court contrasted how "actual damages" is used in the Fair Housing Act (FHA), 42 U.S.C. § 3613(c); and Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681n, 1681o, with how it is used in the wrongful-death provision of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674; the Copyright Act of 1909, 17 U.S.C. § 101(b) (1970); and the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a). *Id.* at 1449–50. As used in the FHA and FCRA, courts have construed "'actual' damages" to include damages for emotional or mental harm. *Id.* at 1449. On the other hand, as used in the FTCA, Congress defined actual damages to exclude damages for emotional or mental harm. *Id.* Courts have construed "actual damages" in the contexts of the Copyright Act and Securities Exchange Act to allow only economic damages. *Id.* at 1449–50.

41. *See id.* at 1450.

too familiar to sovereign immunity cases:[42] the Court considered the text of the statute ambiguous.[43]

According to the canon of sovereign immunity, a statute fails to "unequivocally" waive immunity from damages, and is therefore ambiguous, when there is any "plausible interpretation" of the text that would not allow damages.[44] The Court formed a number of such plausible interpretations, establishing a basis for finding the text ambiguous.[45] The Court, for instance, revealed parallels between the Privacy Act and the common law tort of libel *per quod*, which bars recovery for emotional or mental harm unless economic damages are established first.[46] Moreover, the Court emphasized that "actual damages" do not include emotional or mental harm in the Federal Tort Claims Act, the Securities Exchange Act, and the Copyright Act.[47] The majority acknowledged that it was not "inconceivable" to construe the term "actual damages" to allow monetary relief for emotional or mental harm, as the Ninth Circuit and Respondent did.[48] However, the Court explained that the mere plausibility of a construction authorizing damages fails to overcome the presumption of immunity that arises whenever there is an ambiguity in the text.[49]

The Court stayed faithful to the canon of sovereign immunity's instruction to strictly construe waivers of immunity "in favor of the Government."[50] The majority followed *Lane*'s footsteps, recognizing an ambiguity when the text failed to clearly assert a waiver of immunity.[51] The Court adhered to the rule articulated in *Irwin*, that waivers of immunity "cannot be implied but must be unequivocally expressed,"[52] and declined to imply a waiver of immunity from liability for emotional or

42. *See* Lane v. Pena, 518 U.S. 187, 192–94 (1996); Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990); McMahon v. United States, 342 U.S. 25, 27 (1951).

43. *See Cooper*, 132 S. Ct. at 1453.

44. *Id.* at 1448 ("Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.") (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34, 37 (1992)).

45. *See id.* at 1449–53.

46. *See id.* at 1451 ("This parallel between the Privacy Act and the common-law torts of libel *per quod* and slander suggests the possibility that Congress intended the term 'actual damages' in the Act to mean special damages. The basic idea is that Privacy Act victims, like victims of libel *per quod* or slander, are barred from any recovery unless they can first show actual—that is, pecuniary or material—harm.").

47. *See id.* at 1449–50.

48. *Id.* at 1453.

49. *Id.* ("We do not claim that the contrary reading of the statute accepted by the Court of Appeals and advanced now by respondent is inconceivable. But because the Privacy Act waives the Federal Government's sovereign immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss.").

50. *See id*. at 1447.

51. *See id.* at 1453; Lane v. Pena, 518 U.S. 187, 192 (1996).

52. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (citations omitted) (internal quotation marks omitted).

mental harm, though such a construction was not "inconceivable."[53] And the Court ratified the rule exercised in *McMahon*, that statutes waiving the government's immunity are to be strictly construed in favor of the sovereign,[54] and resolved the Privacy Act's ambiguity in favor of the government. Accordingly, the Court held that the Privacy Act does not waive the government's sovereign immunity from liability for emotional or mental harm, and reversed the Ninth Circuit.[55]

Because the Court seemed to reach its conclusion by adhering to a cohesive line of case precedent, it may be tempting to view *Cooper* as ordinary and to overlook *Cooper*'s potential ramifications. On closer inspection, however, *Cooper* carries consequences greater than those of its predecessors. Applying the canon of sovereign immunity, both *McMahon* and *Irwin* merely tilted the limitations periods of two statutes in a more pro-immunity direction.[56] *Lane* went substantially further in strengthening the government's immunity in that it eliminated the remedy of monetary damages; however, it did so only with respect to a particular class of violators.[57] In *McMahon*, *Irwin*, and *Lane*, the Supreme Court placed new limits on a party's ability to sue the government, but the Court left the remedial design of each statute mostly intact. *Cooper* failed to extend to the Privacy Act the same courtesy.

In her dissenting opinion, Justice Sonia Sotomayor argued that the majority's decision in *Cooper* completely eliminated the remedy for the "primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress."[58] She explained that as a result, the Court's holding "cripples the Act's core purpose of redressing and deterring violations of privacy interests,"[59] rendering the civil remedies provision "impotent in the face of concededly unlawful agency action."[60]

While the dissent did not dismiss the canon of sovereign immunity's usefulness in general,[61] the dissent rejected the degree of rigor with which the majority applied the canon.[62] The dissent reasoned that the canon

53. *See Cooper*, 132 S. Ct. at 1453.

54. McMahon v. United States, 342 U.S. 25, 27 (1951).

55. *Cooper*, 132 S. Ct. at 1456.

56. *See Irwin*, 498 U.S. at 95–96; *McMahon*, 342 U.S. at 27.

57. *See Lane*, 518 U.S. at 192–93, 200 (holding that the Rehabilitation Act did not unequivocally authorize monetary damages against any "programs or activities conducted by any Executive agency").

58. *Cooper*, 132 S. Ct. at 1456 (Sotomayor, J., dissenting). Justice Ruth Bader Ginsburg and Justice Stephen Breyer joined Justice Sotomayor's dissent. *Id*.

59. *Id.*

60. *Id.* at 1463.

61. *See id.* at 1455 n.12 (majority opinion) ("[A]lthough the dissent belittles the sovereign immunity canon, the dissent does not call for its abandonment.").

62. *See id.* at 1456 (Sotomayor, J., dissenting) ("The canon simply cannot bear the weight the majority ascribes it.").

should not displace "the other traditional tools of statutory construction."[63] Developing its point, the dissent declared that the plain meaning rule of construction should control, and that a court should only utilize the canon of sovereign immunity if the text's plain meaning is unclear.[64] The dissent argued that the plain meaning of "actual damages" unambiguously includes damages for emotional or mental harm.[65] The dissent reasoned that this plain reading is the appropriate construction because it "best effectuates the statute's basic purpose."[66] The dissent concluded that because the text speaks clearly, the majority should not have reached for the canon of sovereign immunity, a canon designed to construe ambiguous texts.[67]

The majority and minority agreed that ambiguities should be resolved in favor of immunity. The central disagreement, rather, was over what qualifies as a textual ambiguity in the first place. The majority would have found statutory text ambiguous when it is subject to more than one "plausible interpretation"[68]—a sweeping method that is likely to identify textual ambiguity quite often. Finding the term "actual damages" used alternatively in a variety of contexts led the majority to discern a plausible, alternative interpretation of the term,[69] rendering it ambiguous. In comparison, making greater use of "traditional tools of statutory construction," the minority would evaluate whether the plain meaning of the text comports with the statute's substantive provisions and remedial objectives.[70] This method would potentially construe the scope of a waiver more expansively.[71]

In contemplation of *Cooper*'s ramifications for civil remedy provisions throughout federal law, practitioners should consider a few points. Any claim in which relevant textual language possesses "chameleon-like" qualities—like the Privacy Act's "actual damages"—will likely face strict construction of that language. Before filing, practitioners should research whether relevant statutory text assumes any alternate meanings in other statutes. Researching this could better enable a practitioner to (1) decide whether the claim is worth filing; (2) consider alternative litigation

63. *Id.* (quoting Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008)) (internal quotation mark omitted).

64. *Id.* at 1456–58 ("Here, traditional tools of statutory construction . . . provide a clear answer: The term 'actual damages' permits recovery for all injuries established by competent evidence in the record, whether pecuniary or nonpecuniary, and so encompasses damages for mental and emotional distress.").

65. *See id.* at 1457–58.

66. *Id.* at 1462.

67. *Id.* at 1456–58 ("There is no need to seek refuge in a canon of construction.").

68. *See id.* at 1448 (majority opinion) ("Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.").

69. *See id.* at 1449–53.

70. *See id.* at 1456, 1458–59 (Sotomayor, J., dissenting) (suggesting that "the statute's text, structure, drafting history, and purpose" provide clearer statutory construction).

71. *See id.* at 1456–58.

strategies; and (3) anticipate counterarguments that the text is ambiguous—specifically arguments that the text is subject to more than one "plausible interpretation."

A generation from now, legal scholars may view *Cooper* as the moment the Supreme Court erected a mountainous barrier to public accountability. The Privacy Act, which was enacted to protect "an individual against an invasion of personal privacy,"[72] now offers no remedy to an individual harmed by an intentional or willful violation unless that individual can prove economic damages, no matter how debilitating the individual's emotional or mental distress.[73] In practice, this remaining semblance of a remedy will exist, mostly, only in name. As Justice Ruth Bader Ginsburg said during oral arguments, an individual whose privacy has been violated typically "doesn't have out-of-pocket costs but is terribly distressed, nervous, anxious, and all the rest."[74] The dissenting opinion echoed Justice Ginsburg's point, describing emotional or mental harm as "the primary, and often only, damages sustained as a result of an invasion of privacy."[75]

If the Court's repudiation of the Privacy Act's remedial purpose is any indication of how courts will begin construing remedial provisions, people unlawfully harmed by public officials will have no meaningful opportunity to seek compensation for their injuries. This is repugnant to the notion of public accountability. The minority's approach to construing waivers of immunity is worth considering, however, because it may someday be law. The Court's decision, after all, came down to a 5–3 split. It is quite possible that the recused Justice Kagan will join the dissenting justices next time the Court construes a waiver of immunity. In that case, the Supreme Court would be a single vote away from restoring operation to remedial provisions throughout the United States Code.

72. *Id.* at 1462 (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896 (1974)).

73. *See id.* at 1463.

74. Transcript of Oral Argument at 4, FAA v. Cooper, No. 10-1024 (2011).

75. *Cooper*, 132 S. Ct. at 1456 (Sotomayor, J., dissenting).