January 2019

Cases of Note-Punctilious for Punctuation

Bruce Strauch  
*The Citadel, strauchb@citadel.edu*

Bryan M. Carson  
*Western Kentucky University, bryan.m.carson@gmail.com*

Jack Montgomery  
*Western Kentucky University Libraries, jack.montgomery@wku.edu*

William Hannay  
*Schiff Hardin, LLP, whannay@schiffhardin.com*

---

**Recommended Citation**

Strauch, Bruce; Carson, Bryan M.; Montgomery, Jack; and Hannay, William () "Cases of Note-Punctilious for Punctuation," *Against the Grain*: Vol. 29: Iss. 2, Article 56.  
DOI: [https://doi.org/10.7771/2380-176X.7755](https://doi.org/10.7771/2380-176X.7755)

---

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.
LEGAL ISSUES

I

f you Google the phrase “Oxford comma,” you get literally a million hits, most I would think since March 13, 2017. That’s when the U.S. Court of Appeals for the First Circuit in Boston — normally one of the most prestigious courts in America — handed down a preposterous decision in O’Connor v. Oakhurst Dairy, 2017 U.S. App. LEXIS 4392 (1st Cir.). The decision hinged on the absence of an “Oxford comma” in a piece of employment legislation in Maine.

If this silly decision stands, it will cost Maine employers millions of dollars in unexpected overtime charges.

The statute at issue requires employers to pay overtime, unless the employment activity involves food, specifically:

A U.S. magistrate rejected the drivers’ interpretation of the statute, holding that the absence of a comma made the words “packing for shipment or distribution” refer to the single activity of “packing” foods and thus the exemption does not apply to them, and they are owed overtime.

Judge Barron is a controversial figure. After graduating from Harvard College and then Harvard Law School, he briefly worked in the U.S. Department of Justice and then became a professor at Harvard. In 2009, he took a leave of absence from teaching and served as the Acting Assistant Attorney General in charge of the DOJ’s Office of Legal Counsel.

In that position, he authored a 2010 legal opinion justifying President Obama’s decision to order a drone strike on an American citizen who was a radical Islamic militant living in Yemen. When Mr. Barron’s memo was made public in 2014, The New York Times described it as “a slapdash pastiche of legal theories — some based on obscure interpretations of British and Israeli law — that was clearly tailored to the desired result.” By that time, President Obama had nominated him to the First Circuit. He was criticized in the Senate debate for being — in the words of Sen. Ted Cruz — an “unabashed judicial activist … disregarding the terms of the Constitution.” (He was confirmed by a vote of 53-45.)

In the milk drivers case, Judge Barron looked at the text of the statutory exemption and concluded that the absence of a comma after the word “shipment” made the wording ambiguous. Given this ambiguity and the supposed lack of clear legislative intent as to “distribution,” the court decided to err on the side of the general purpose of overtime laws which is to protect employees’ health and welfare.

The use of a comma at the end of a list of items — referred to as a “serial” or “Oxford” comma — is itself somewhat controversial.

Judge Barron creates an unusual sentence structure which has no “terminal conjunction.” Normally a list ends with an “and” or an “or.” But the First Circuit’s reading has no such terminal conjunction, thus making hash of the text.

One would hope that reason and common sense would prevail in this linguistic never-neverland, but I am doubtful that enough other members of the First Circuit would want to take on the issue. I am even more doubtful that the Supreme Court would want to wade in.

Bill Hannay is a partner in the Chicago-based law firm, Schiff Hardin LLP, and is an Adjunct Professor of Law at IIT/Chicago-Kent College of Law. He is a frequent speaker at the Charleston Conference.

Questions & Answers — Copyright Column

Column Editor: Laura N. Gasaway (Associate Dean for Academic Affairs, University of North Carolina-Chapel Hill School of Law, Chapel Hill, NC 27599; Phone: 919-962-2295; Fax: 919-962-1193) <laura_gasaway@unc.edu>

www.unc.edu/~ uncrlg/gasaway.htm

QUESTION: A government agency librarian asks about a recent report proposing an amendment to section 105 of the Copyright Act to create some exceptions that would permit government employees to own copyright in the works they create even in the course of their employment.

ANSWER: In response to an inquiry from the House Judiciary Committee about reforming copyright, the Chair of the Joint Chiefs of Staff responded asking for an exception to section 105, the section of the Act that generally provides that no copyright shall exist in works created by the U.S. Government. The concern is for faculty members at the service academies, war or staff colleges and other schools of professional military education. According to the proposal, this ban on copyright ownership is making it difficult to recruit faculty members for these institutions. Section 105 prevents

continued on page 40