

## IOLTA VICTORY IN THE UNITED STATES SUPREME COURT

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On March 26, 2003, the U.S. Supreme Court issued its decision in *Brown v. Legal Foundation of Washington*, upholding the constitutionality of IOLTA under the Just Compensation Clause of the Fifth Amendment. Justice Stevens authored the 5-4 majority decision, which Justices O'Connor, Souter, Ginsburg and Breyer joined. In its ruling the Court held that even assuming that a law requiring that the interest generated on IOLTA accounts be transferred to a different owner amounted to a per se taking, that taking was for a valid public use and the amount of just compensation due was zero. As a result, the Court found that the operation of the IOLTA program in Washington does not violate the Fifth Amendment.

### Analysis of Decision

The Court's analysis began by setting forth that the text of the Fifth Amendment "confirms the state's authority to confiscate private property", so long as two conditions are met: "the taking must be for a "public use" and "just compensation" must be paid to the owner." The Court quickly disposed of the "public use" question by stating that "... the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment."

The Court then discussed the type of "taking," if any, involved in the case. Petitioners alleged two takings claims based on, first, the requirement that certain types of client funds be placed in an IOLTA account and, second, the transfer of interest from an IOLTA account to the Washington IOLTA program. Applying a regulatory taking analysis, the Court concluded that the placement of funds in an IOLTA account was not a taking "because the transaction had no adverse economic impact on petitioners and did not interfere with any investment-backed expectations." As to the alleged taking of interest, the Court indicated that the per se analysis was appropriate to the facts of this case and consistent with the finding in *Phillips* that the interest is the property of the clients. The majority assumed that the petitioners' "interest was taken for a public use when it was ultimately turned over to the Foundation." This assumption, however, did not end the Court's inquiry.

The Court held that, in any event, there was no constitutional violation because no just compensation was due. In essence, the Court found that the plaintiffs in the case lost nothing of value given the fact that transaction costs would have outweighed the small amount of gross interest their individual accounts would have earned. In reaching its conclusion, the Court applied a long line of Fifth Amendment cases on just compensation, stating: "[J]ust compensation required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain."

Finally, the Court disposed of the plaintiffs' argument that funds could have mistakenly been deposited in an IOLTA account when the interest generated would actually have exceeded the transaction costs involved, contrary to the law establishing the IOLTA program in Washington State. While recognizing that mistakes might occur, the Court pointed out that the responsibility of ensuring that only qualifying funds are deposited in IOLTA accounts rests with the entity making the deposits (in this case Limited Practice Officers handling real estate escrows). While the property owner might have a claim against the entity making a faulty deposit, that faulty deposit would not involve any state action subject to Fifth Amendment protection.

## The Dissents

Justice Scalia authored a spirited dissent, which was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. In it, IOLTA was likened to a “Robin Hood Taking, in which the government’s extraction of wealth from those who own it is so cleverly achieved, and the object of the government’s larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended.” Justice Scalia argued that the fair market value of the interest earned by the clients’ principal should be the test of just compensation, rather than the net interest approach used by the majority.

Justice Kennedy also issued a brief additional dissent in which he raised First Amendment concerns regarding IOLTA. Kennedy wrote: “The First Amendment consequences of the State’s action have not been addressed in this case, but the potential for a serious violation is there. . . One constitutional violation (the taking of property) likely will lead to another (compelled speech).”

## What’s Next?

Whether the plaintiffs represented by the Washington Legal Foundation will pursue the First Amendment claim remains an open question. In both the Washington case and the Texas case<sup>1</sup>, the issue has already been addressed. In the Washington litigation, the Ninth Circuit Court of Appeals, after ruling that no Fifth Amendment violation existed, remanded the First Amendment issue to the district court to consider “what speech, if any, is at issue and whether the IOLTA program violates any rights Appellants may have emanating from the First Amendment.” In the Texas case, the district court found that no violation of the First Amendment existed, and dismissed the claim. The Fifth Circuit, finding that a Fifth Amendment violation existed, decided that it did not need to address the First Amendment claim. Thus, while the First Amendment issue seems to be on a faster track in the Fifth Circuit, only time will tell if and when it will be further litigated.<sup>2</sup>

Regardless of whether more litigation awaits us, we should rejoice in the *Brown* decision, which is truly a remarkable victory for all advocates of the provision of free legal services to the poor. As American Bar Association President Alfred P. Carlton, Jr. stated: “The real beneficiaries of this ruling are the tens of thousands of poor people who receive legal assistance because of IOLTA.”

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<sup>1</sup> *Phillips, et al v Washington Legal Foundation*, 02-1. On March 31, 2003, the United States Supreme Court acted upon the petition for certiorari in that case, which was filed on June 26, 2002. The Court granted the petition, vacated the decision of the United States Fifth Circuit Court of Appeals, which had found that the Texas IOLTA program violated the Fifth Amendment, and remanded the case to the Fifth Circuit “for further consideration in light of *Brown v. Legal Foundation of Washington*, 538 U. S. \_\_ (2003).”

<sup>2</sup>There is also a case pending in federal district court in Massachusetts that raises a First Amendment claim against the Massachusetts IOLTA program, in which the Washington Legal Foundation is neither a party nor counsel. See *Citizens for the Preservation of Constitutional Rights, et al. v. Justices of the Supreme Judicial Court, et al.*, No. 02-CV-1025.

