

Sam's Prediction Was Wrong—The 5th Circuit Reversed the Southern District of Texas on the Constitutionality of the Hazlewood Act

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Update on Sam Wright

8.0—Veterans' preference

11.0—Veterans' claims

Harris v. Cantu, 81 F. Supp. 3d 566 (S.D. Tex. 2015), reversed sub nom. Harris v. Hahn, No. 15-20105 (5th Cir. June 23, 2016).

"It's tough to make predictions, especially about the future." Yogi Berra.

In Law Review 16041 (June 2016), I wrote about *Harris v. Cantu*, 81 F. Supp. 3d 566 (S.D. Tex. 2015). That is a 2015 decision by Judge Ewing Werlein, Jr. of the United States District Court for the Southern District of Texas. Judge Werlein held that part of Texas' Hazleton Act (HA) was unconstitutional. Texas appealed to the 5th Circuit.³ On June 23, 2016, a three-judge panel of the 5th Circuit⁴ reversed Judge Werlein and held that the HA was not unconstitutional.

The HA provides free tuition in Texas' state-supported colleges and universities to certain veterans—those who *lived in Texas at the time of enlistment in the armed forces*, live in Texas at the time of utilizing the tuition benefit, and have exhausted their federal veterans' educational benefits. The plaintiff (Keith Harris) met the other two conditions, but not the condition of having been a resident of Texas at the time of enlistment. He lived in Georgia in

¹ I invite the reader's attention to www.roa.org/lawcenter You will find more than 1500 "Law Review" articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

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³ The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

⁴ The three judges were Edith B. Clement, Jennifer W. Elrod, and Carl E. Stewart, all active judges of the 5th circuit. Judge Elrod wrote the decision, and the other two judges joined in a unanimous panel decision.

1996, when he graduated from high school and joined the Army. Harris was disqualified from receiving HA benefits to complete his law school education at the University of Houston Law School, based on his residence in Georgia (not Texas) at the time he enlisted in the Army. Judge Werlein found the Texan-at-enlistment rule to be unconstitutional under the United States Constitution and enjoined the University of Houston from applying that rule to Harris. The three-judge panel of the 5th Circuit reversed.

I continue to believe that Judge Werlein got this right. This case is not necessarily over. Harris' likely next step is to apply to the 5th Circuit for rehearing *en banc*. If his motion is granted, there will be new briefs and a new oral argument before all of the active (not senior status) judges of the 5th Circuit, and then there will be a new decision, either affirming or reversing the decision of the three-judge panel.

If Harris chooses not to apply for rehearing *en banc*, or if the 5th Circuit denies *en banc* reconsideration, or if the 5th Circuit grants rehearing *en banc* and then affirms the panel decision, Harris' final step would be to apply to the United States Supreme Court for a writ of *certiorari*.

Granting *certiorari* requires the affirmative vote of at least four of the nine (currently eight) Justices. *Certiorari* is denied in more than 99% of the cases in which it is sought. When the Supreme Court denies *certiorari*, the decision of the Court of Appeals is affirmed and the case is over.

Certiorari is a long shot, but I think that it is not inconceivable that it could be granted in this case. This is an interesting and important constitutional law issue. The relevant Supreme Court case law is confusing and cumbersome and contradictory. The Supreme Court might take this case to provide guidance going forward for the lower courts.

We will keep the readers informed of future developments in this case, if there are any future developments.

UPDATE—June 2017

The Court of Appeals decision is now officially published. The citation is *Harris v. Hahn*, 827 F.3d 359 (5th Cir. 2016).

On January 9, 2017, the United States Supreme Court denied certiorari (discretionary review). 2017 U.S. LEXIS 640. The Court of Appeals decision is now final, and this case is over.

For more information about Hazlewood Act veterans' educational benefits in Texas, please see [Law Review 17026](#) (March 2017).