The U.S. Supreme Court's Kafkaesque Decision In *Bowles v. Russell*

By Michael C. Dorf

In *Bowles v. Russell*, No. 06-5306 (U.S. 06/14/2007) the Supreme Court held that a federal appeals court had no jurisdiction to hear an appeal from the denial of a habeas corpus petition because the notice of appeal was filed two days late—even though it was filed one day before the date that the federal district judge had (mistakenly) told the petitioner that it was due. As a consequence of the ruling, Keith Bowles loses his one chance to have a federal appeals court correct what he alleges were errors resulting in his murder conviction and sentence of fifteen-years-to-life in prison.

Of course, no legal system could function without deadlines, and sometimes missed deadlines unavoidably result in miscarriages of justice. However, the majority opinion in *Bowles*—written by Justice Clarence Thomas—appears to go out of its way to avoid doing justice. It is the *reductio ad absurdum* of legal formalism. It is, as I argue below, almost literally Kafkaesque.

The Procedural Issue

The dispute in the *Bowles* case concerned Rule 4 of the Federal Rules of Appellate Procedure, which authorizes a district court to reopen the filing time for an appeal for a period of 14 days. After denying Bowles's petition on the merits, U.S. District Judge Donald Nugent granted Bowles's request to reopen the filing time, pursuant to Rule 4, and—*in a written order*—specified that Bowles had to file his notice of appeal by February 27, 2004.

Bowles filed on February 26. But Judge Nugent had made an error. He should have only given Bowles until February 24. Nonetheless, because the two-day delay was undoubtedly due to his own, rather than Bowles's, error, Judge Nugent treated the notice of appeal as timely.

However, the U.S. Court of Appeals for the Sixth Circuit reversed Judge Nugent's decision, and ordered the appeal dismissed without ever considering the merits of the arguments raised by Bowles.

The "Jurisdictional" Question: Can the Courts Waive the Time Limit?

In affirming the Sixth Circuit dismissal, Justice Thomas distinguished between two kinds of time limits. First, there are the time limits that appear in judge-made rules, which, he said, serve only to ensure that the work of the courts proceeds in an orderly fashion. The courts have discretion to waive these limits in appropriate cases. In contrast, there are the time limits that appear in statutes written by Congress. Such time limits are part of what defines the jurisdiction of the courts. Such "jurisdictional" time limits, Justice Thomas wrote and the majority held, cannot be waived by the courts.

The time limit at issue in *Bowles* appears in the Federal Rules of Appellate Procedure, but that rule merely restates what also appears in a federal statute. Thus, the majority in *Bowles* said, the limit was firm.

> "The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch.
> ...
> Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's lawyer had no obligation to go behind the terms of the order he received."
>
> Justice Souter dissenting in *Bowles v. Russell*

In dissent, Justice Souter (joined by Justices Stevens, Ginsburg, and Breyer) took issue with the majority's claim that all statutory time limits are jurisdictional and therefore unwaivable. According to the dissent, while court rules are never jurisdictional, only those statutory deadlines that Congress intends to be jurisdictional count as jurisdictional.

As a matter of logic, the dissent clearly has the better of the argument here. Suppose Congress specified a time limit for filing some sort of document, but added in the text of the statute that "this time limit is not jurisdictional and may be waived in the interests of justice as found by the courts." Clearly, the time limit would not then be jurisdictional, as even the *Bowles* majority acknowledges by stating that Congress could, if it wished, authorize judges to waive the deadline in future cases.

Accordingly, the real dispute in *Bowles* is what the default rule should be. In other words, when Congress does not expressly state whether a deadline is waivable, should Congress be presumed to intend that it is, or is not, waivable? Given the dire consequences, the dissent said that statutory deadlines should be treated as mere claim-processing rules—and thus waivable—unless they clearly concern the courts' jurisdiction.

The majority did not deny the harsh consequences of its holding. Indeed, the majority seemed to relish them, proudly pointing in a footnote to a recent case in which a petition for review in the Supreme Court itself had been rejected by the clerk without even being distributed to the Justices—and the petitioner executed—because the petition was a day late.

Nonetheless, the majority embraced the rule that statutory deadlines should be presumed to be jurisdictional because of the rule's predictability in application. The dissent's approach, Justice Thomas warned, would only inspire litigation over deadlines.

The Majority's Rejection of the "Unique Circumstances" Exception

Much of the disagreement between the majority and the dissent in *Bowles* concerned how to read the Court's own precedents. The majority purported to apply a longstanding principle that statutory time limits are (presumptively) jurisdictional limits, while the dissent pointed to very recent (unanimous) decisions that adopt a different approach.

Yet even if one thinks that the majority has the better of that general argument, might there not be an exception for unusual cases—like *Bowles* itself—in which some unforeseen circumstance excuses strict compliance with a deadline?

The dissent thought so, and pointed to two cases from the 1960s, in which the Court had excused non-compliance with supposedly jurisdictional deadlines where "district court errors [had] misled litigants into believing they had more time to file notices of appeal than a statute actually provided."

The majority responded by simply overruling those prior cases. The Court, Justice Thomas said, never had the authority to fashion a unique circumstances doctrine, because jurisdictional time limits simply can't be waived.

The Estoppel Analogy: Why It Isn't Persuasive

Perhaps the best that can be said for the majority opinion in *Bowles* (although the

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majority does not make this argument) is that the rule announced is not materially worse than the applicable rule in the administrative context. If you rely to your detriment on a government official's characterization of the law—an IRS agent's informal prediction of the tax consequences of some investment, say—but it turns out that the official was mistaken, you will not ordinarily be excused from complying with the law as written. Put another way, the government is not bound—in legal terms, estopped—by the erroneous representations of its low-level functionaries.

Likewise here, it could be argued, Bowles and his lawyer should not have taken Judge Nugent's statement of the deadline as authoritative. They should have consulted the rules and calculated the deadline themselves.

But three important caveats make the administrative example a questionable analogy. First, although the Supreme Court has rejected every claim of so-called "estoppel against the government" in the administrative context, it has never ruled out the possibility that a sufficiently extreme case would warrant estoppel, and the lower courts have occasionally deemed particular cases sufficiently extreme. Thus, the rules in this area are reasonably close to the "unique circumstances" doctrine that the *Bowles* Court overrules.

Second, even if there were a per se bar on estoppel against the government in the administrative context, that would not justify such a bar where the relevant official is a federal district judge, rather than a relatively low-level bureaucrat. Estoppel against the government can be a dangerous doctrine if it effectively gives thousands upon thousands of low-level agency employees the power to overturn decisions made by Congress. However, the professionalism, relatively small number, and constant review of the work of federal judges together place them in a wholly separate category.

Third, the particular facts of *Bowles* are indeed extreme. There is no claim of any prejudice to anybody as a result of the two-day delay. Moreover, as Justice Souter explained in dissent, there was nothing on the face of the order to indicate that it stated the wrong deadline (because the clock runs from the date an order is "entered," which does not appear on the order itself). Thus, Bowles and his attorney had no reason to check Judge Nugent's math.

It turns out, then, that the best that can be said for the majority opinion is not very much at all.

Kafka's *The Trial*

The facts and circumstances of the *Bowles* case are strikingly similar to a chilling allegory in the penultimate chapter of Franz Kafka's dark novel of the bureaucratic state run amok, *The Trial*. The protagonist, K, stands accused of an unnamed crime in a court system with enigmatic procedures. When K stumbles upon the prison chaplain, the latter explains to K that his approach to the law has been naïve.

The chaplain tells a story of a man from the countryside who comes to the door of the law, only to be told by the doorkeeper that he can't be let in at the moment but it's possible that he could be permitted entry later. The man waits before the door for years, until as he is dying, he asks the doorkeeper why, given that everyone wants access to the law, no one but he has come to the door during his many years of waiting. The doorkeeper answers: "Nobody else could have got in this way, as this entrance was meant only for you. Now I'll go and close it."

Like the man from the countryside, Keith Bowles was told by a doorkeeper to the law—a federal judge—just what he needed to do to gain access. For following those instructions, he was repaid only by having the door to the law shut in his face by the Supreme Court.

The Court split 5-4 in *Bowles* along what are conventionally described as conservative-liberal lines, but in this case "conservative" seems a poor description for the majority view. Opposition to arbitrary exercises of power by the bureaucratic state has been one of the hallmarks of the conservative tradition in Anglo-American thought for over two centuries.

The majority opinion in *Bowles* would be better described as statist than conservative. As Justice Souter wrote in dissent: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."

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Aftermath

Biskupic responded defensively to the firestorm of publicity that followed in the aftermath of Thompson's exoneration. His spokesperson, Michelle Jacobs, defended the government's prosecution of Thompson's, saying, "They acted on the evidence as they found it, convinced a jury of 12 that there was criminal conduct, convinced a judge who has been sitting on a state and federal bench for 33 years that the verdict was sound. But we just did not convince the court of appeals …" [20]

One of the jurors, Marvin Bizzelle, was irritated by the appeals court's declaration that Thomson was "innocent" of committing a crime by doing her job and acting to save the state government money. He said, "As far as I'm concerned – and I'm sure any other juror you talk to will tell you the same thing – she was guilty of manipulating the contract." [21] Bizzelle comment was prior to the appeals court's written decision, and as they made clear, what he characterized as "manipulation" was nothing more than Thompson's support for awarding the travel contract to the low bidder, and she only had one vote out of six in the committee that awarded the contract.

It so happened that at the time Thompson was exonerated there was a furor in Washington D.C. over possible improprieties in the firing of at least eight U.S. Attorneys. There were suggestions that some of the U.S. Attorneys who weren't fired, such as Biskupic, showed their loyalty to the Bush administration's pro-Republican political agenda by engaging in questionable partisan activities, such as the prosecution of Thompson who was bluntly described by the appeals court as "innocent."[22]

Thompson was rehired by the state of Wisconsin, and on April 23, 2007 she returned to her old job at her previous pay of $77,300 annually. She was also paid back pay of $67,161. On June 14 Thompson filed a claim with the state Claims Board for reimbursement of $359,048, which included more than $340,000 related to legal expenses [23] She may also qualify for about $18,000 under the federal compensation statute that provides for $50,000 per year of wrongful imprisonment.

Endnotes:

1 The evaluation was tied when the scores were rounded to the nearest whole number. Omega had a score of 1027.3 while Adelman's was 1026.6, so the actual difference between the two bidders score was about 6/1000ths of a percent.
2 *United States v. Thompson*, 484 F.3d 877 (7th Cir. 04/05/2007); 2007.C07.0000350 ¶15 <www.versuslaw.com>
3 *Id.*, at ¶15.
4 *Id.*, Oral Arguments before the Seventh Circuit Court of Appeals on April 5, 2007.
5 *Id.*
6 Experts say ruling hits prosecutor's credibility, By Jason Stein, *Wisconsin State Journal*, April 7, 2007.

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