CASE COMMENT: *SERVOTRONICS, INC. V. ROLLS-ROYCE PLC*

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Textualist judges seek to interpret statutes objectively by using enacted text as an external source of constraint on their prior intellectual commitments and attitudes. They believe that statutory text provides objectively verifiable answers to most questions of interpretation. But the Seventh Circuit's decision in *Servotronics, Inc. v. Rolls-Royce PLC*[1] illustrates that judges' prior commitments and experiences can infect textualist analysis when judges do not rigorously scrutinize the objective soundness of the conclusions they draw from the text. But whether or not the panel members' personal experiences found their way into the Seventh Circuit's flawed textual analysis, the difficulty of the interpretive question involved ultimately affirms textualism's value as a bulwark of representative government.

I. Introduction

In *Rolls*-Royce, a Seventh Circuit panel used textualism to hold that the term "foreign or international tribunal" in 28 U.S.C. § 1782(a) does not include private commercial arbitral tribunals. But the Fourth Circuit employed textualism to reach the opposite conclusion in *Servotronics, Inc. v. Boeing Co.*,[2] a case that arose from the same facts. Indeed, the circuits are badly split on whether § 1782(a)'s provision allowing United States district courts to order discovery "for use in a proceeding in a foreign or international tribunal" permits discovery assistance for private commercial arbitral tribunals. The Second and Fifth Circuits agree with the Seventh that it does not, while the Fourth and Sixth determined that it does.[3] The Supreme Court will step in to resolve the question during the 2021–22 Term.[4] For now, one thing is clear amid the confusion: the Seventh Circuit's textualist analysis of § 1782(a) is objectively flawed. It is possible that the panel's premonitions led it to see confirmation in the text that was not really there. That possibility does not mean that textualism is a hopeless endeavor or that the panel worked backwards to make its reasoning fit a predetermined result, but it does prove that textualism reaches its full potential only when judges apply it with exacting self-awareness.

The question of § 1782(a)'s scope arose when Rolls-Royce sought indemnification from Servotronics for liability Rolls-Royce incurred to Boeing when an aircraft engine part Servotronics manufactured caused a Rolls-Royce engine in a Boeing aircraft to catch fire during a test.[5] Negotiations failed to produce a settlement, so the parties submitted their dispute to a contractually

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[1] 975 F.3d 689 (7th Cir. 2020*) cert. granted*, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).
[2] 954 F.3d 209 (4th Cir. 2020).
[3] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *In re Guo* , 965 F.3d 96, 104 (2d Cir. 2020); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d at 690; *Servotronics, Inc. v. Boeing Co.*, 954 F.3d at 214; *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 714 (6th Cir. 2019).
[4] *Servotronics Inc. v. Rolls-Royce PLC*, No. 20-794.
[5] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d at 690–91.

agreed-upon arbitral tribunal in England.[6] Servotronics, acting as an "interested party" under § 1782(a), requested that the U.S. District Court for the Northern District of Illinois subpoena Boeing to produce documents for use in that arbitration.[7] The District Court issued the subpoena, but then granted Boeing's motion to quash it.[8] The Seventh Circuit affirmed the District Court's dismissal of Servotronics' petition for discovery assistance.[9]

II. The Textualist Arguments and Rejoinders

To analyze the Seventh Circuit's holding, we do as lawyers and judges should. We look to the text. 28 U.S.C. § 1782(a) reads in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a *letter rogatory issued*, *or request made*, *by a foreign or international tribunal* or upon the application of any interested person . . . .[10]

The Seventh Circuit offered three text-based reasons why that language excludes private commercial arbitral tribunals, that is, tribunals that derive their power to resolve a particular dispute from a contractual agreement between the parties, not a standing grant of power from a sovereign. Other circuits' reasoning, including the Fourth Circuit's decision in *Boeing*, reveals unsoundness in each of those arguments.

The Seventh Circuit, after canvassing contemporary dictionary definitions of "tribunal" and concluding that some definitions were broad enough to include private commercial arbitration while others were not, examined the word in its statutory context.[11] The panel turned first to statutory history[12] to note that § 1782(a) reached its current form in 1964, when Congress adopted wholesale, language proposed by a commission statutorily charged with improving "judicial assistance and cooperation" between "State and Federal tribunals" and "foreign courts and quasi-judicial agencies."[13] The panel reasoned that, because the amending Congress simultaneously rewrote 28 U.S.C. §§ 1696 and 1781's rules for assisting a "foreign or international tribunal" with service of process, and by letters rogatory, respectively, and because both service of process and letters rogatory are matters of comity among sovereigns, "the phrase

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[6] *Id.* at 691.
[7] *Id.* at 691–92.
[8] *Id.*
[9] *Id.* at 696.
[10] 28 U.S.C. § 1782(a) (1996) (emphases added).
[11] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d at 693–94.
[12] That is, how Congress amended the enacted text over time, as distinguished from legislative history, which is what Congressmembers said or wrote about the text while it was being crafted. *Compare* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: INTERPRETATION OF LEGAL TEXTS 256–60 (2012) (discussing relevance of linguistic changes to statutes made during reenactment) *with* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (defining legislative history and explaining its inappropriateness as an interpretive tool).
[13] *Id.* at 694 (quoting Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743).

'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels."[14]

But as the Fourth Circuit reasoned in *Boeing*, that conclusion does not follow from the panel's premises. The 1964 amendments to § 1782(a) "deleted from the former version of the statute the words 'in any *judicial* proceeding pending *in any court* in a foreign country' and replaced them with the phrase 'in a proceeding in a foreign or international *tribunal*.'"[15] That change shows that Congress expanded the scope of § 1782(a) discovery assistance beyond foreign courts to quasi-judicial agencies, which might include private tribunals whose orders foreign courts are legislatively permitted to enforce. Upon full reflection, then, the statutory history provides no guidance—the 1964 amendments as likely as not included private commercial arbitral tribunals in the phrase "foreign court or international tribunal." A proper textualist analysis should have said so.

In fairness, the Seventh Circuit thought it saw scale-tipping evidence in § 1782(a)'s mention of "letters rogatory" as one permissible method of requesting discovery assistance. The panel explained that letters rogatory are requests between courts transmitted through diplomatic agencies.[16] That these devices are available only to sovereigns no doubt suggested to the panel that Congress designed the entire provision to apply only to adjudicative bodies established by sovereigns.[17]

Yet that inference cannot be drawn from the text, so the panel's decision to draw the inference must have been either a misreading the text, or influenced by the judges' atextual attitudes, personal beliefs, or experiences. § 1782(a)'s mention of "letters rogatory" sheds no light on whether the provision permits assistance to private commercial arbitral tribunals for an elementary reason that the Sixth Circuit identifies in *In re Application to Obtain Discovery for Use in Foreign Proceedings*. The statute refers to "a letter rogatory issued, or request made, by a foreign or international tribunal,"[18] and though only bodies exercising sovereign power can issue letters rogatory, "[a] private arbitral panel can make a request for evidence, so this section does not indicate that the word 'tribunal' in the statute refers only to judicial or other public entities."[19] A judge carefully applying nothing but objective reason to the text would see that the phrase's structure does not require that *every* "foreign or international tribunal" have the power to issue letters rogatory. The phrasing makes sense so long as *some* such tribunals do.

The text reveals nothing about § 1782(a)'s scope, even when read together with Congress' simultaneous amendments to other statutory vehicles for discovery assistance. It should come as no surprise that those extant vehicles applied only to courts because, prior to 1964, discovery assistance was permissible only in actions before courts. If the amendments to §

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[14] *Id.* at 694–95.
[15] *Servotronics, Inc. v. Boeing Co.*, 954 F.3d at 213 (emphasis original) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248–49 (2004)).
[16] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d at 691–92 & n.1.
[17] *See Id.*
[18] 28 U.S.C. § 1782(a) (1996).
[19] *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 723 & n.8.

1782(a) permitted assistance to and from private arbitral tribunals for the first time (the issue before the court), then of course there were no simultaneous amendments to statutory vehicles for assisting private tribunals. No statutory vehicle could have existed to perform a function that was never before permitted. The Seventh Circuit's contrary conclusion begs the question presented.

Finally, the Seventh Circuit panel attached meaning to § 1782(a)'s word choice in the penultimate sentence of its first paragraph. That sentence permits a district court to order that discovery follow the practice and procedure of "the foreign country or the international tribunal [where arbitration is taking place]."[20] Observing that that phrase "parallels the earlier phrase 'foreign or international tribunal'," and endeavoring to read the statute "as a coherent whole," the panel concluded that a "foreign tribunal" must be an arm of a foreign country that operates "pursuant to the foreign country's 'practice and procedure.'"[21] Once more, the Sixth Circuit's earlier decision on the same question belies this reasoning. The Sixth Circuit explained that the phrase "the foreign country or the international tribunal"

> is consistent with the statute's application to private arbitrations . . . . The sentence's permissive wording . . . indicates that this is an optional borrowing provision: [a district court may, but need not, adopt foreign rules it finds helpful]. But the statute's terms do not require that such procedures exist or that a 'foreign tribunal' be a governmental entity of a country that has prescribed such procedures.[22]

As in the previous example, the Sixth Circuit's anticipatory refutation of the Seventh Circuit's reasoning involves no great insight. This textual "evidence" too, is neutral on the question before the court. At bottom, none of the Seventh Circuit panel's text-based arguments provide support for its conclusion.

III. Conclusion: Textualism Defeated by Ambiguity?

If, as this comment suggests, the circuit courts have found no probative textual evidence of § 1782(a)'s scope, where does that leave textualist judges and textualism as a method of statutory interpretation? First, *Servotronics, Inc. v. Rolls-Royce PLC* and its companion cases address an unusually difficult interpretive question. Very few statutes will divide circuit courts almost evenly and require the Supreme Court's resolution. That § 1782(a) may be truly ambiguous (and perhaps require resort to non-textual interpretive tools to resolve the ambiguity) does not mean that textualism fails to provide objective answers in almost all cases. Nor does the panel's demonstrably flawed textualist analysis mean that textualism merely cloaks ideological judging. Instead, that textual analysis identifies flaws in the Seventh Circuit's reasoning without appealing to values besides American English grammar and syntax speaks to the method's objectivity. Objectivity through textualism is not a lost cause.

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[20] 28 U.S.C. § 1782(a) (1996).
[21] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d at 695.
[22] *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 723.

The *Rolls-Royce* decision's true lesson is a nuanced take on a familiar one—hard cases make bad law. When judges must announce an answer but struggle to find it using the ordinary "tools" of their trade, they face great pressure to consult, consciously or otherwise, their own prior experiences and attitudes. Judges' priors can sneak unnoticed into their reasoning, so textualist judges must be hyper-vigilant to recognize when this is happening. Textualism does not make judicial self-awareness any less critical, but it does make greater self-awareness possible by allowing judges to check their reasoning against known linguistic rules. Those rules provided the Seventh Circuit panel all it needed to discover everything this comment posits.

The panel may have experienced the phenomenon of creeping priors, but not necessarily. Perhaps the panel got disoriented in the directionless desert that § 1782(a) presented and, simply out of desperation to resolve the question, began to see textual mirages indicating a random answer unconnected to the judges' ideological commitments. Whatever the case, textualism rigorously applied evaporates mirages of certainty, even if only to leave shifting dunes of ambiguous text. On the rare occasions when textualism does reveal continued uncertainty, as may be the case with § 1782(a), textualism calls for judicial honesty—an admission that the court cannot discern the right answer from the statutory landscape and has turned to other methods only because all efforts to discover and apply the law-as-written have failed.

Maybe the Seventh Circuit should have made that admission in *Servotronics, Inc. v. Rolls-Royce PLC*. Maybe a more sagacious textualism than this comment and the panel's time and resource constraints permitted can provide a definite answer. But even if textualism cannot determine § 1782(a)'s scope, it continues to protect liberty by revealing to Americans when the law that governs us accurately reflects what our Congressional representatives enacted in writing, and when it does not. If textualism does not prevent judges from ever having to "make up" law, it still shows us when our law is "made up" and gives us an opportunity to do something about it. That virtue alone makes textualism worth adhering to.