This one is too good not to blog. Strictly speaking, it's an immigration case, but it has interesting implications for all statutes and especially environmental ones.

Jawid Habibi is a lawful resident alien, but not someone you'd want to hang around with. He was convicted of domestic misdemeanor battery in California, and then received a 365-day sentence pursuant to state law. Then ICE wanted to deport him under 8 U.S.C. § 1101(a)(43)(F), which allows deportation for someone who commits an aggravated felony, and defines an aggravated felony as a "crime of violence . . . for which the term of imprisonment [is] at least one year."

So what's the problem? Habibi was sentenced to serve in 2000, and 2000 was a leap year. So if he served 365 days, he *didn't* serve a year! He argued that thus, he was ineligible for deportation under the federal statute.

The Ninth Circuit quite properly rejected that argument in *Habibi v. Holder* handed down just yesterday. Here's the summary (sub required):

> In the context of § 1101(a)(43), the court found, the BIA correctly concluded that the phrase "term of imprisonment [of] at least one year" means a sentence of at least 365 days, regardless of whether any part of the sentence was served during a leap year. Adopting Habibi's position that "one year" should mean 366 days when the sentence was served in a leap year would lead to unjust and absurd results. It would mean that an alien's status as an aggravated felon—and his eligibility for removal or cancellation thereof—would turn on a fortuity: the particular day in a particular calendar year in which he began serving his sentence. The court found no indication that Congress intended for the definition of "aggravated felony" to shift depending on what day an alien happened to start serving his sentence.

Very right. But who wrote the Ninth Circuit's opinion? Famed torture-defender and right-wing poster boy Jay Bybee. If you can't get someone like Bybee to adopt a textualist reading, then you have to wonder where this is going.

Note the anti-textualist premises here: "unjust and absurd results"? Looking to what "Congress intended"? *Please*. That is *so* Hart and Sacks. The statute says that the alien has to serve a year. Habibi didn't. End of story.

Now, of course, it's not quite so clear as that. The Ninth Circuit said that the statute was

ambiguous, and so deferred to the agency, a classic textualist move. And there is a smidgeon of ambiguity there — but not much. Moreover, textualists have read meaning into a statute into to prevent absurdities. But not often. In any event, typical *Chevron* deference doesn't apply in immigration cases because unpublished BIA opinions don't get deference, so the Court deferred under an older formulation, from *Skidmore v. Swift*, which textualists decried as being not deferential enough!

Besides how absurd could this be? All it would mean is that in this strange situation, the defendant wouldn't be deported. It wouldn't create a massive loophole. Moreover, it's not clear that Bybee is a textualist, although as a Movement Conservative in good standing, it's expected that he would be. Textualism gives power to the executive, a move that Bybee — *ahem* — has certainly supported in the past.

What's that you say? Textualists throw out their interpretive convictions when doing so would foster their preferred result? I'm *shocked.* Wash your mouth out with soap!

UPDATE: There actually is a pretty decent textualist way to uphold the BIA here. What you'd do is ask, "what is the standard meaning of 'year'" and then look at the dictionary. Webster's Online gives as one definition — out of several — "the period of about 365 and 1/4 solar days required for one revolution of the earth around the sun". But the court didn't try that. It would seem too silly. That tells you what you need to know about textualism.