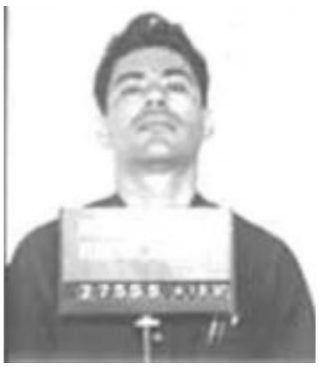
# CONCERNED WOMEN FOR AMERICA

# SUPREME COURT YEAR IN REVIEW
# 2003-04 TERM

## *USAMA MEETS MIRANDA*
## *AND OTHER*
## *'NONSENSE UPON STILTS'*



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# INTRODUCTION

**BY**

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The opinions included in this Review involve a broad range of issues that should include something for everyone: national security and the war against terrorism—the Commander-in-Chief v. the courts; the Pledge of Allegiance—prayer or patriotism; Internet pornography—who bears the burden to protect children; religious liberty—or religious discrimination; sexual harassment in the workplace; when there's a right to remain silent and when there isn't; cities v. sex businesses; and the increasing reliance on "international law" by federal courts.

***Rasul v. Bush:***

"You have the right to an attorney" may be the first words spoken by the U.S. soldier who pulls Bin Laden alive (hint-hint) out of a hole in Afghanistan. Thanks to the Court's decision, alien, illegal enemy combatants, who don't qualify for prisoner-of-war status under the Geneva Conventions, are becoming acquainted with *Miranda* rights and federal courts.

The ruling sets aside *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a precedent from World War II. The Court there held that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." *Id*. at 776.

Justice Anthony Kennedy's concurring opinion gives lip service to *Eisentrager*'s restraint on courts:

> The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. *Rasul*, 2004 LEXIS 4750, at *38 (U.S. June 28, 2004).

Translation—there's precedent and then there's *precedent*:

> *When the judicial camel wants into your tent,*
> *it makes haste to lay waste to its precedent.*

The *Rasul* majority decided that U.S. federal courts have jurisdiction over Guantanamo Bay, Cuba, because the United States leases this piece of Cuban real estate.

I can imagine Castro emerging from his cigar fog long enough for some lackey to explain the ramifications of the ruling. Fidel decides to serve an eviction notice on the "Gitmo" commander and sue Uncle Sam because the Supreme Court essentially converted the lease into absolute title to the land. Since there's no U.S. court on "Gitmo," the ACLU explains "forum shopping" to Castro. He files suit in the federal district court in San Francisco where a presiding

legal loon orders the commander to hoist anchor. The Navy's appeal floats up to the appellant branch of the Mad Hatter's Tea Party, otherwise known as the U.S. Court of Appeals for the Ninth Circuit. (In case you missed it, this bunch torpedoed the Pledge of Allegiance.) The ruling is announced with the Hatter's snappy rendition of *Anchors Away*.

Justice Antonin Scalia found the *Rasul* ruling so intolerable he launched one of his own WMDs (World-class Mordant Dissent) calling it "implausible in the extreme," "irresponsible," "wrenching departure of precedent," "clumsy," "countertextual reinterpretation," "monstrous scheme" and "jurisdictional adventurism of the worst sort."

***Elk Grove Unified School District v. Newdow:***

In keeping with tradition, the Supremes reversed the Ninth Circuit at a rate of 75 percent this term. Fifty percent of the reversals were unanimous. The most notorious ruling and reversal involved the Pledge of Allegiance.

Sadly, we mourn the loss of another Scalia WMD launched at the Ninth. Scalia recused himself from participating in the Court's hearing and opinion because he had made public comments criticizing the ruling, as did most inhabitants of the Western Hemisphere.

The Court's 8-0 ruling means that public schools in the nether world of the Ninth Circuit may lead willing students in the Pledge, including "under God." Because of a procedural issue known as standing, the Court did not decide the constitutionality of the Pledge.

Three members agreed with running the Ninth's nattering nonsense through a paper-shredder but wrote separately to let Newdow and the Ninth know that the Pledge is constitutional.

***Locke v. Davey:***

The Court upheld the right of the state of Washington to deny a scholarship to Joshua Davey, a Christian student, because he sought to pursue a theology degree from "a religious perspective." No doubt it would be okay to pursue it from a pornographic perspective.

The Court agreed with the distinction (hold on to the top of your head) between the study of theology from a religious perspective, which is not permitted, and the study of theology from a nonreligious perspective, which is permitted.

We're not sure if a scholarship student would have to refund the money if he were converted while studying theology from a nonreligious perspective. And here we thought the Court's Establishment Clause jurisprudence couldn't get any murkier.

The Court referred to a "play in the joints" between the Free Exercise and Establishment Clauses with "wiggle room." It sounds like something from the Teletubbies playing chiropractor.

Our summary begins with comments by Josh Davey, who is now a student at Harvard where he is studying law from his religious perspective.

***Ashcroft v. ACLU:***

Once again, five members of the Court, including Justice Clarence Thomas, faulted another effort by Congress to protect children from online pornographers. Sadly, the scales of justice continue to weigh heavier for porn peddlers and their fans than for children.

The majority upheld a preliminary injunction against enforcement of the Child Online Protection Act, which merely requires commercial pornographers operating on the World Wide Web to put their free porn "teaser" images behind an age-verification screen.

The Court sent the case back to the federal district court in Philadelphia for trial to determine whether software filters on a home computer are less restrictive than requiring smut-peddlers to require age verification.

It's a shame that pornographers rank higher on the "PC" totem pole than tobacco companies. Something's amiss when it's okay for kids to see group fornication as long as no one lights up afterward.

***City of Littleton v. Z.J. Gifts:***

Thankfully, it wasn't a complete sweep in the Court this year for porn businesses.

Rather than applying for an "adult" business license as required by a city ordinance, an "adult" bookstore owner filed suit claiming that the ordinance didn't assure him of a "prompt final judicial decision." In a display of industrial-strength chutzpah, he wanted the Court to make the city guarantee him a speedier court decision than other businesses involved in licensing disputes.

The Court refused to grant him first place in line at the courthouse.

***Sosa v. Alvarez-Machain and United States v. Alvarez-Machain:***

In another reversal of the Naughty Ninth, six members of the Court took the opportunity to indulge their affection for international law. While cautioning lower federal courts to be circumspect in use of their "general-common-law making powers," the *We are the World* sextet opened the door for lower federal courts to create private federal causes of action by alien claimants against the United States for violations of "customary international law."

As a result, we have another zinger from Justice Scalia who said that "creating a federal command out of 'international norms,' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the Alien Tort Statute" is "nonsense upon stilts."

***Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County:***

In *Hiibel,* five members of the Court held that if a person is stopped by a law enforcement officer investigating a crime and asked for identification, he must comply if the request for identification is reasonably related in scope to the circumstances which justified the stop. The Court held that failure to comply is cause for arrest, and under these circumstances, the arrest doesn't violate the Fourth or Fifth Amendments to the U.S. Constitution.

A person's Fifth Amendment right to not incriminate himself and his Sixth Amendment right to assistance of counsel apply post-arrest (*Miranda v. Arizona*).

***Hamdi v. Rumsfeld*:**

In a fractured opinion (no pun intended), the Court approved Hamdi's detention as an "enemy combatant" but sent the case back to the lower court for a further hearing. The Government claimed that Hamdi, a U.S. citizen, was captured on the battlefield in Afghanistan. He claims he was there doing relief work. U.S. soldiers who captured him with a Taliban unit relieved him of the Kalishnikov assault rifle he was carrying.

The plurality held that any citizen detained in these circumstances is entitled to a hearing to challenge his status as an enemy combatant. And in the absence of a suitable military tribunal system, a federal District Court applying relaxed evidentiary standards could make a decision on his status.

Since Congress authorized the President to use of military force, which includes lethal force, where do "detainees" in underground rectangular boxes go for a hearing?

Consider: If U.S. soldiers had killed or wounded Hamdi and they were charged with using unnecessary force, they would be limited to a military tribunal. Combatants who kill our military now have access to civil courts.

***Rumsfeld v. Padilla:***

Federal agents arrested Padilla, a U.S. citizen, in Chicago's O'Hare Airport as he returned from Pakistan. Agents took him into custody on a material witness warrant issued by the federal court in southern New York in connection with its grand jury investigation into the 9/11 attacks. The allegations were that Padilla intended to build a "dirty bomb" in order to blow up apartment buildings. After the President ordered the secretary of defense to designate Padilla an "enemy combatant" to be detained in military custody, the military transferred him to the brig at the Navy base in South Carolina.

The Court concluded that the commander of the Navy brig in South Carolina is the only proper respondent to Padilla's *habeas* petition challenging his detention, rather than Secretary of Defense Donald Rumsfeld. Consequently, the District Court in New York did not have jurisdiction over Padilla's custodian in South Carolina. As a result, Padilla's petition was ordered

dismissed. The Court did not decide whether his detention is legal. That will be decided once Padilla files his petition in the South Carolina federal court.

Comparing the holding in *Rasul* with *Padilla* raises an interesting question, to say the least. Unless we're getting our law from fortune cookies at the U.N. snack bar, what legal theory allows the alien combatants held at Gitmo to pick and choose which court in the 94 federal districts they would like for a hearing, but limits citizen Padilla to the one court in South Carolina?

***Pennsylvania State Police v. Suders*:**

Suders is a former employee of the Pennsylvania State Police who resigned and filed suit claiming that she had to resign because of a hostile work environment that became intolerable.

Justice Ginsburg wrote the 8-0 opinion holding that when a constructive discharge suit is brought and no affirmative employment action had been taken, the employer is entitled to assert a defense that the employer did not authorize the harassing actions by other employees. The Court also held that constructive discharge claimants have a duty to lessen the harm by seeking other employment, but that the employer has the burden to allege and prove that the claimant failed to do so.

The *Suders* case is interesting to consider in light of the sex scandal surrounding the Pennsylvania State Police, which involves complaints against numerous officers for sexual misconduct and involvement in pornography.

Last July, a federal judge ordered the release of documents revealing the names of Pennsylvania State Police troopers who committed "sexual indiscretions" with detailed information about their sexual misconduct from 1995 to 2001. These include reports of troopers having sex in barracks and police cars, soliciting sex from prostitutes and confidential informants, asking for sex in exchange for fixing tickets, dealing with pornography, and cases of rape and harassment. A former state trooper, Michael K. Evans, is serving a 5- to 10-year state prison term after pleading guilty to incidents involving six women during the late 1990s.

**Getting serious:**

Finally, while I have poked fun at some of the more unreasonable court rulings, it is not intended to minimize the damage activist judges are doing to our Constitutional Republic. Article VI of the U.S. Constitution declares:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

A treaty made pursuant to the Constitution becomes the law of the United States. That is far different from so-called "international law," which is not the law of the United States. No

court has authority to impose such law on the American people, or to base its interpretation of American law on any such "international law."

> Justice Scalia summed it up in his concurring opinion in *Sosa*:
>
> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.
>
> This Court seems incapable of admitting that some matters—*any* matters—are none of its business. *Sosa*, 2004 LEXIS 4763, at *101.
> …
>
> It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable. *Id*. at 102.

## *Ashcroft v. ACLU*

No. 03-218, 2004 U.S. LEXIS 4762, at *1 (U.S. June 29, 2004)

**FACTS:** Congress passed the Child Online Protection Act (COPA), which was signed into law by President Bill Clinton in 1998. The COPA, among other things, imposes a $50,000 fine and six months in prison for knowingly posting, for "commercial purposes," World Wide Web content that is "harmful to minors." It provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology." *Id*. The ACLU, representing Internet pornographers and other content providers, sought a preliminary injunction against enforcement, arguing that the COPA is unconstitutional because it is not narrowly tailored to serve a compelling Government interest and is not the least-restrictive means available to prevent minors from accessing prohibited materials.

**ISSUES:** Whether the lower court abused its discretion in granting an injunction preventing enforcement of the COPA because it is likely to be found unconstitutional at a trial on the merits.

**PROCEDURAL HISTORY:** At the request of the ACLU, the U.S. District Court for the Eastern District of Pennsylvania granted a preliminary injunction against the COPA, ruling that the COPA was likely to be found unconstitutional at a trial on the merits because it is not the

least-restrictive means to prevent minors from viewing pornography on the Internet. The U.S. Court of Appeals for the Third Circuit affirmed the preliminary injunction, holding that the COPA's use of "community standards" for judging what material is "harmful to minors" may not be applied to the World Wide Web. The Supreme Court reversed the Third Circuit and held that community standards do apply in cyberspace. The Court remanded the case to the Third Circuit to decide the remaining constitutional issues, including whether the District Court's grant of the preliminary injunction was correct. On remand, the Third Circuit again affirmed the preliminary injunction.

**HOLDING:** In a 5-4 ruling, the Court affirmed the judgment of the Third Circuit and remanded the case for trial in the District Court to determine if user-based software filtering is less restrictive than the COPA's age-verification requirement.

**JUDGES:** Justice Anthony Kennedy delivered the opinion of the Court, in which Justices John Paul Stevens, David Souter, Clarence Thomas and Ruth Bader Ginsburg joined. Justice Antonin Scalia filed a separate dissenting opinion. Justice Stephen Breyer filed a dissenting opinion, in which Chief Justice William Rehnquist and Justice Sandra Day O'Connor joined.

**ANALYSIS:** Justice Kennedy concluded that the Government must be held to its burden of proving that COPA is the least-restrictive means for protecting children. Since the respondents' proposed alternative means might be less-restrictive, the District Court correctly granted the injunction preventing the enforcement of COPA until the Government proves that COPA is the least-restrictive means. Kennedy argued that the District Court must "ensure that speech is restricted no further than necessary to achieve the goal." *Id*. at 19. The District Court considered the possibility of a blocking and filtering software as the less-restrictive alternative to COPA, and Kennedy believed that filters are indeed less-restrictive than imposing age verification on the Web site operator. *Id*. at 21. Filters only restrict speech selectively on the receiving end, unlike COPA, which creates universal restrictions at the source. *Id.* With a filter system, adults may effectively reach speech they have a right to see without providing credit-card information. *Id.*

Kennedy found that filters may be more effective than COPA for the following reasons. First, a filter prevents children from viewing all pornography, not just pornography on the Internet from America. *Id.* at 21. Kennedy assumed that COPA does not apply to pornography from foreign sites and that U.S. providers would simply shift their operations overseas. Next, he found that verification systems underneath COPA are faulty, since minors with credit cards may gain access to the harmful material. *Id.* at 22. Finally, a filter can be used on all forms of Internet communication, including e-mail. *Id.*

While filtering is not a perfect solution, Kennedy put the burden on the Government to prove that age verification is more effective than filtering. Since this was not proven in the District Court, the preliminary injunction was correctly granted. *Id.* at 24.

Even though Congress may not require parents to use a software filter, Kennedy reasoned that Congress may provide incentives for its use, and this promotion of filters can still be the most effective means. Again, it is the Government's burden to prove otherwise. *Id.* at 27.

Kennedy claimed that there would be a greater harm if the injunction were not upheld. *Id.* at 28. He reasoned that a new fact-finding endeavor is necessary to determine what technological developments have occurred, and the remand will also allow the District Court to consider the "changed legal landscape." *Id.* at 30. Kennedy concluded that COPA still might be ruled as the least-restrictive alternative to accomplish the goal of protecting children from harmful material if the Government meets its burden of proof. *Id.* at 31.

Justice Stevens' concurring opinion agreed that COPA incorrectly punishes a speaker for his freedom of speech. *Id.* at 32. Stevens further stated that COPA's scope is too restrictive because even speakers who attempt to comply with COPA may face criminal charges in trying to show the lawfulness of their speech. *Id.* at 33. Since the line between obscene material and acceptable material is so vague, the use of criminal sanctions is inappropriate. *Id.* at 34. Instead, Stevens concluded that a less drastic means is necessary to protect children from harmful material. *Id*. at 35.

Justice Scalia agreed with Justice Breyer's dissent that COPA is constitutional, and wrote to state that the strictest level of review is not even necessary here. *Id.* at 36. Since the type of material at issue is not constitutionally protected behavior, there is no constitutional concern. This material, "the sordid business of pandering," could be banned entirely in accordance with the First Amendment, so there is no issue in restricting the material through COPA. *Id.* at 36-37.

In his dissent, Justice Breyer agreed with the majority that COPA must pass a strict level of scrutiny, and the restriction must be narrowly tailored to further a compelling interest. *Id.* at 38. However, Breyer stressed that there is no less-restrictive means than those that COPA requires. *Id.* at 39.

First, Breyer analyzed COPA's regulations and its definitions. He found that the COPA's definitions are carefully modeled after the three requirements of *Miller v. California*, 413 U.S. 15 (1973), to limit the scope of restricted material. *Ashcroft*, 2004 U.S. LEXIS 4762, at *40. With these definitions, only obscene material that is not protected by the Constitution is affected. Materials that do not meet the *Miller* standards for obscene material fall outside of the COPA. There are some "borderline materials" that the COPA may apply to, but this is, at most, a modest burden. *Id.* at 46.

Further, the COPA does not censor material, but requires a verification process that is routine in pornography online operations. *Id.* at 46-47. The argument that this verification would cause embarrassment to an adult viewing the material is not a violation of the Constitution, since the Constitution is not intended to protect someone from embarrassment when gathering information from the Internet. *Id.* at 48.

Breyer then stated that while the Court did agree that protecting minors from exposure to commercial pornography is a compelling interest, its holding that a blocking and filtering software may be a less-restrictive means to achieve this interest is incorrect. *Id.* at 49-50. Congress created the COPA to deal with the problem of minors having access to pornography despite the availability of the filtering software. Therefore, reliance on software is reliance on the "status quo, *i.e.*, the backdrop against which Congress enacted the present statute." *Id.* at 50.

Breyer concluded that simply maintaining the status quo would be less restrictive. "It is always less restrictive to do *nothing* than to do *something*. But 'doing nothing' does not address the problem Congress sought to address." *Id.* [Italics in original.]

Breyer reminded the majority that it had faulted software filtering in the past. First, the filtering allows some pornographic material to pass the filter when there are no words that correspond with the pictures. Second, the software costs money, and families may not have the financial resources to install it. Third, the software depends upon parents choosing to regulate where their children surf the Web. In this society, where it is common for parents to work and leave the children unsupervised, children can choose to use computers that don't have the filtering software. Fourth, the software lacks precision. Along with blocking some pornographic material, it also restricts material that is "completely innocuous for both adults and minors." *Id.* at 54. Breyer observed that the majority conceded that, due to these problems, filtering software is not an effective solution.

Congress concluded that age-verification requirements imposed on the purveyor of the material constitute the least restrictive and most effective means to keep minors from being exposed to commercial pornography. It is the position of the legislature to conclude what technology is most effective and least restrictive, and Congress fulfilled this duty in COPA. *Id.* at 56. As the Court stated in a previous case, "[W]e must interpret the Act to save it, not to destroy it." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

Breyer responded to the Court's proposals for less-restrictive means by quoting an observation by Justice Blackman. A "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enabling himself to vote to strike legislation down." *Illinois Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-189 (1979) (concurring opinion).

Breyer concluded his dissent by voicing his concern over the implications of the majority's ruling. With this holding, he wondered what happened to the "constructive discourse between our courts and our legislatures" that "is an integral and admirable part of the constitutional design." *Ashcroft*, 2004 LEXIS 4762 at *59. After the Court struck down Congress' first attempt to protect minors from being exposed to this material, Congress carefully created COPA by using the *Miller* standard to create a statute that would not violate an adult's First Amendment right to access this material. *Id.* at 60. After this ruling, Breyer wondered what else Congress must do in order to protect children from harmful material. *Id.*

—SM

## *City of Littleton v. Z.J. Gifts*

No. 02-1609, 2004 U.S. LEXIS 4026 (U.S. June 7, 2004)

**FACTS:** Littleton, Colorado, has an ordinance that requires an "adult bookstore, adult novelty store or adult video store to have an 'adult business license.'" *Littleton v. Z.J. Gifts*, (ZJ) 2004

U.S. LEXIS 4026, at *5-6. ZJ, an adult bookstore, opened in an area of Littleton that was not zoned for adult businesses. Rather than apply for a license, ZJ brought suit against Littleton, arguing that the city's ordinance is unconstitutional on its face because it does not ensure a prompt final judicial review of the city's final licensing decision as required by the First Amendment.

**ISSUE:** Whether the ordinance complies with the First Amendment.

**PROCEDURAL HISTORY:** The District Court rejected ZJ's argument and ruled that the ordinance is constitutional. The U.S. Court of Appeals for the Tenth Circuit reversed the District Court and held that (1) Colorado law does not provide a "prompt final judicial decision" since it "does not assure that [the city's] license decisions will be given expedited [judicial] review" and (2) an additional contested ordinance provision threatened "lengthy administrative delay." *Id.* at 7. The U.S. Supreme Court granted *certiorari* and reversed.

**HOLDING:** The ordinance meets the First Amendment's requirement that such a licensing scheme assure prompt judicial review of an administrative decision denying a license.

**JUDGES:** Justice Stephen Breyer delivered the opinion of the Court, in which Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Clarence Thomas and Ruth Bader Ginsburg joined. Justice John Paul Stevens joined as to Parts I and II-B and filed an opinion concurring in part and concurring in the judgment. Justices David Souter and Anthony Kennedy joined except as to Part II-B. Justice Souter filed an opinion concurring in part and concurring in the judgment, in which Justice Kennedy joined. Justice Antonin Scalia filed an opinion concurring in the judgment.

**ANALYSIS:** The Court agreed with ZJ that the First Amendment does require "prompt judicial determination." The city argued otherwise, relying on the Supreme Court's previous rulings in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990).

In *Freedman*, the First Amendment was applied to a motion picture censorship statute that required prior judicial approval of a license to display a film. *Id.* at 9. The Court ruled that there must be safeguards that include a procedure that will "'assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.'" *Id.* at 10.

In *FW/PBS*, the Court held that when proper grounds exist for denial of an "adult" business license, a city may deny the license without a prior court hearing because of the difference in censorship of a film, as in *Freedman*, and the licensing of a business. Littleton argued that since the language differed in Justice O'Connor's concurring opinion in *FW/PBS* and only required the "possibility of prompt judicial review," of an administrative denial of a license, the First Amendment only requires an assurance of "speedy access to the courts, not an assurance of a speedy court decision." *Littleton*, 2004 U.S. LEXIS 4026 at *12. The Court rejected this interpretation by reasoning that the prevention of an "undue delay" relates to both judicial and administrative delay. Therefore, the reference to "prompt judicial review" in *FW/PBS*, combined with similar references, "encompass[es] a prompt judicial decision" (as required by *Freedman*). *Id.* at 13. The Court then ruled that the Colorado law meets that requirement.

Justice Breyer outlined four reasons why the state's ordinary judicial review process is sufficient. First, courts are able to "arrange their schedules to 'accelerate' proceedings" to avoid delays that are a violation of the First Amendment. *Id.* at 15. Further, the appeals process allows higher courts to reverse incorrect decisions quickly.

Second, the Court concluded that Colorado judges are able and willing to act in a manner that prevents delays. Since there is no proof that the Colorado system created special delays, no additional safeguards are needed. *Id.* at 15.

Third, since this issue differs from the issue in *Freedman*, there is no need to create specific time limits. Unlike *Freedman,* where the scheme sought to censor material, this licensing scheme only objectively determines if the business may operate in a certain area. Eight objective criteria constitute the scheme that "seeks to determine where, not whether, constitutionally protected adult material can be sold." *Id.* at 17. Along with the simplicity of applying these criteria, the judicial review process should also be prompt. *Id.* at 18.

Fourth, the previous rulings of *Freedman* and *FW/PBS* do not require each ordinance to include judicial review safeguards. Instead, states are able to decide which safeguards to include. Justice Breyer concluded that since the ordinance "does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type." *Id.* at 19. However, if there is a future incident of undue delay, then a person may argue a constitutional violation is present in that individual case.

Justice Stevens'concurring opinion argued that by equating "the possibility of prompt judicial review" with "prompt judicial decision," the Court creates the possibility for future misinterpretations.

Justice Souter concurred but emphasized "that the state procedures that make a prompt judicial determination possible need to align with a state judicial practice that provides a prompt disposition in the state courts." *Id.* at 23. Since this licensing scheme applies to a business that may be "unpopular with local authorities," prompt review must be assured to protect against delay. *Id.* at 24.

In a third concurring opinion, Justice Scalia stated that "pandering of sex is not protected by the First Amendment." *Id.* Since Littleton could have prohibited the activity of ZJ's business, the licensing of this type of business did not need to comply with the First Amendment. *Id.* at 25.

[Many question why "adult" businesses that may be offering material that is prosecutable as obscene are entitled to a business license. The businesses are allowed to operate because they offer material or entertainment that is presumptively protected by the First Amendment. *Roaden v. Kentucky,* 413 U.S. 496, 504 (1973). Justice Scalia disagrees.]

—SM

# *Elk Grove Unified School District v. Newdow*

___ U.S. ___, 124 S. Ct. 2301 (2004)

**FACTS:** The Petitioner school district in Elk Grove, California, has a policy that requires elementary school teachers to lead their class in the Pledge of Allegiance at the beginning of each school day. Students may refuse to participate. Respondent Michael Newdow is an atheist and the noncustodial parent of a student who attends school within the Elk Grove District. His daughter participates in reciting the Pledge despite Newdow's objection.

**ISSUES:** Whether Newdow had standing to challenge the school district's policy. If so, whether the policy violates the Establishment Clause because of the words "under God" in the Pledge.

**PROCEDURAL HISTORY:** Newdow sued in federal court claiming that the federal statute that added "under God" to the Pledge in 1954 and the school district policy violate the Establishment and Free Exercise Clauses. He also named, among others, President Bill Clinton (later amended to name President George Bush) and Congress as defendants. The District Court dismissed the President and Congress as parties and dismissed Newdow's case for lack of standing.

The U.S. Court of Appeals for the Ninth Circuit issued three separate decisions discussing the merits and Newdow's standing. First, in a 2-1 ruling, it reversed the District Court and held that Newdow had standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." *Newdow v. U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002) (*Newdow I*). It also held that he had standing to challenge the federal statute, because his "injury in fact" was "fairly traceable" to its enactment. *Id.* at 603-605. The court held that both the 1954 Act and the school district's policy violate the Establishment Clause. *Id.* at 612.

Next, the girl's mother filed a motion to intervene or to dismiss the case, arguing that she had exclusive legal custody and, under a California Supreme Court order, it was not in the child's interest to be a party to Newdow's suit.

In its second opinion, the Ninth Circuit reconsidered Newdow's new theory of standing in response to the mother's motion. Newdow now claimed that, despite the custody order, as a noncustodial parent he had "Article III standing to object to unconstitutional Government action affecting his child." *Newdow*, 313 F.3d 500, 502-503 (9th Cir. 2002) (*Newdow II*). The court held that despite the custody order, under California law Newdow retained the right to expose his child to his particular religious views even if those views contradict the mother's, and that the mother's objections as sole legal custodian did not defeat Newdow's right to adjudicate his own parental interests. *Id.* at 504-505.

On February 28, 2003, a full panel of the Ninth Circuit, by a 15-9 vote, refused to rehear the case. In its opinion and order, however, it withdrew the ruling on the federal statute but allowed to stand the ruling that the school district policy "impermissibly coerces a religious act" because of the phrase "under God." *Newdow*, 328 F.3d 466, 468 (9th Cir. 2003) (*Newdow III*).

The Supreme Court granted *certiorari* to decide whether Newdow had standing as a noncustodial parent to challenge the school district's policy, and if so, whether the Pledge is "a religious indoctrination of his child that violates the First Amendment." *Elk Grove Unified School District*, 124 S. Ct., at 2305 (2004).

**HOLDING**: Because California law deprives Newdow of the right to sue as next friend, he lacks prudential standing to challenge the school district's policy in federal court.

**ANALYSIS:** Stevens explained the standing issue under Article III of the Constitution: "In every federal case, the party bringing the suit must establish standing to prosecute the action. In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id*. at 2308.

In order to meet the standing requirement, Newdow needed to show "that the conduct of which he complains has caused him to suffer an 'injury in fact' that a favorable judgment will redress." *Id.* Newdow claimed that his right as a father to control his daughter's upbringing gave him standing.

The Court addressed the "prudential dimensions" of standing in relation to the state family law issues:

> Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Id*. at 2309.

Stevens expressed the need for federal courts to refrain from deciding a constitutional question when domestic relations, which are under the jurisdiction of state courts, are involved:

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. … There is a vast difference between Newdow's right to communicate with his child, which both California law and the First Amendment recognize, and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court. *Id*. at 2312.

While the Court did not rule on the second question, Chief Justice Rehnquist and Justices O'Connor and Thomas, who concurred in the judgment to vacate the Ninth Circuit's ruling, wrote separately to argue that the Pledge, including "under God," is constitutional.

Chief Justice Rehnquist reviewed the legislative history behind the addition of "under God" to the Pledge and concluded that the words did not convert the Pledge into a religious exercise:

> The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church. *Id*. at 2319-2320.

Rehnquist also noted that while Newdow disagrees with "under God" in the Pledge, it "does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress." *Id*. at 2320.

Justice O'Connor reviewed rulings on the Establishment Clause, which, as she has reminded us on several occasions, "cannot easily be reduced to a single test." *Id*. at 2321. O'Connor analyzed the Pledge under the "endorsement" test, "by examining whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders." She concluded:

> Such an [reasonable] observer could not conclude that reciting the Pledge, including the phrase "under God," constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority. *Id*. at 2325.

The coercion test, according to O'Connor, provides that, "at a minimum … Government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a [state] religion or religious faith, or tends to do so." She concluded that "symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test." *Id*. at 2327.

Justice Thomas concluded that the school policy did not violate either the Establishment Clause, which, he argues, is not applicable to the States, or the Free Exercise Clause, which is.

He began by characterizing the Ninth Circuit's erroneous ruling as "a testament to the condition of our Establishment Clause jurisprudence. … Our jurisprudential confusion has led to results that can only be described as silly." *Id*. Thomas "would take this opportunity to begin the process of rethinking the Establishment Clause." *Id*. at 2328.

Thomas especially criticized the Court's ruling in *Lee v. Weisman*, 505 U.S. 577 (1992), because it "adopted an expansive definition of 'coercion' that cannot be defended however one decides the 'difficult question' of 'whether and how the Establishment Clause should constrain

state action under the Fourteenth Amendment.'" *Elk Grove Unified School District*, 124 S. Ct., at 2328 (2004).

To Thomas, "the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right." *Id*. at 2331. He conceded that the "best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right enforceable against the Federal Government, to be free from coercive federal establishments." Even if that were true, "it does not follow that the Clause created or protects any individual right." Thus, "it is more likely that States and only States were the direct beneficiaries." *Id*.

Thomas argued that under the Court's "precedent" involving the "coercion" test, which "has no basis in law or reason," the Pledge policy is "unconstitutional." *Id*. at 2330. In his view, peer pressure, "as unpleasant as it may be, is not coercion." *Id*. The "kind of coercion implicated by the Religion Clauses is that accomplished '*by force of law and threat of penalty*.'" *Id*. [Italics in original.]

Thomas concluded:

> Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted Government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution. *Id*. at 2333.

Justice Scalia did not participate in the Court's hearing or ruling. At Newdow's request, Scalia recused himself because of public comments he had made criticizing the Ninth Circuit's ruling.

—JML

## ***Hamdi v. Rumsfeld***

No. 03-6696, 2004 U.S. Lexis 4761 at *1 (U.S. LEXIS June 28, 2004)

**FACTS:** Members of the Northern Alliance, a coalition of military groups fighting the Taliban in Afghanistan, seized American citizen Yaser Esam Hamdi and eventually turned him over to the United States military. The Government asserted that Hamdi was initially detained and questioned in Afghanistan until January 2002, when he was transferred to the U.S. Naval Base in Guantanamo Bay, Cuba. In April 2002, upon learning that Hamdi is an American citizen, the military transferred him first to a naval brig in Norfolk, Virginia, and finally to a brig in Charleston, South Carolina. The Government classified Hamdi as an "enemy combatant" and, given this classification, sought to detain him indefinitely. After "9/11," Congress passed the Authorization for the Use of Military Force (AUMF), which empowered the President to use "all

necessary and appropriate force" against those directly and indirectly involved in the attacks. The Government sought to detain Hamdi under this authority.

**ISSUE:** Whether the Executive has the authority to detain American citizens who qualify as "enemy combatants." If so, "what process is constitutionally due to a citizen who disputes his 'enemy combatant' status." *Hamdi*, 2004 U.S. LEXIS 4761 at *31.

**PROCEDURAL HISTORY:** In June of 2002, Hamdi's father filed a petition for a writ of *habeas corpus*, naming as petitioners his son and himself as next friend. The petition argued that Hamdi's detention by the military was not legal and requested, among other things, that counsel be appointed for Hamdi, that the military be ordered to cease interrogations, that an evidentiary hearing be scheduled, and that the Government be ordered to release Hamdi. The U.S. District Court for the Eastern District of Virginia found that Hamdi's father was a proper next friend, appointed counsel and ordered that counsel be given access to Hamdi. The U.S. Court of Appeals for the Fourth Circuit reversed and directed the District Court to consider more cautious procedures first, in light of the Government's security and intelligence concerns. The Fourth Circuit also found that Hamdi's detention, if the facts alleged were true, would be lawful.

On remand in the District Court, the Government filed a motion to dismiss the *habeas* petition, supported by an affidavit from Michael Mobbs, special advisor to the Under Secretary of Defense for Policy. In Mobb's affidavit (Declaration) he set forth facts supporting the Government's classification of Hamdi as an "enemy combatant," including that Hamdi was captured while carrying a Kalishnikov assault rifle. Based on this declaration, the Fourth Circuit directed the District Court to proceed in accordance with its prior ruling and consider the sufficiency of the Declaration. The District Court found that it fell "far short" of supporting Hamdi's detention and ordered the Government to produce documents relating to Hamdi for *in camera* review.

The Government appealed the production order and the Fourth Circuit reversed, concluding that the factual assertions in the Declaration established a sufficient basis upon which to conclude that Hamdi had been constitutionally confined pursuant to the President's war powers. The court dismissed the *habeas* petition. Hamdi's father appealed and the Supreme Court granted *certiorari*.

**HOLDING:** The judgment of the Fourth Circuit was vacated and the case was remanded to the District Court.

**JUDGES:** Justice Sandra Day O'Connor announced the judgment of the Court and delivered an opinion in which Chief Justice William Rehnquist, Justices Anthony Kennedy and Stephen Breyer joined. Justice David Souter filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which Justice Ruth Bader Ginsburg joined. Justice Antonin Scalia filed a dissenting opinion, in which Justice John Paul Stevens joined. Justice Clarence Thomas filed a dissenting opinion.

**ANALYSIS:** Justice O'Connor, writing for a plurality of the Court, analyzed the Executive's detention authority in light of 18 U.S.C. § 4001(a). It provides that "no citizen shall be

imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." O'Connor first rejected the Government's argument that § 4001(a) was intended to apply only to criminal and not military matters. Secondly, she agreed with the Government that if Hamdi's detention can be considered an act pursuant to the AUMF, it would be lawful. Finding that "the AUMF is explicit congressional authorization for the detention" of citizen enemy combatants, the plurality held that the President is authorized to detain Hamdi "for the duration of the particular conflict in which [he was] captured." *Id.* at 19. There is "no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id* at 21.

Justice O'Connor began at a point of agreement between the parties: "[T]he writ of habeas corpus remains available to every individual detained within the United States." *Id.* at 32. Examining the terms of the federal *habeas* statute, O'Connor noted that provision has been made therein for an opportunity for petitioner to present facts and rebut those presented by the Government.

O'Connor rejected the Government's arguments against any further process. O'Connor contested the Government's claim that "it is 'undisputed' that Hamdi's seizure took place in a combat zone" and thus the habeas determination can be made as a matter of law. Secondarily, the Government argued that "respect for separation of powers and the limited institutional capacity of courts in matters of military decision-making" suggest that courts should not interfere in such cases. *Id.* at 36. Though recognizing these concerns, the plurality determined that allowing unchecked detention by the Executive would serve "only to *condense* power into a single branch of Government." *Id.* at 51.

Next, O'Connor considered *Matthews v. Eldridge*, 424 U.S. 319 (1976), which acknowledges the "most elemental of liberty interests" and the "very real" risk of erroneous detention on the one hand and "the weighty and sensitive Governmental interests" on the other. *Hamdi*, 2004 U.S. Lexis 4761 at *43. O'Connor found that the proper constitutional balance is struck by requiring "that a citizen-detainee seeking to challenge his classification as an enemy combatant … receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." *Id.* at 46.

Though the specific elements of the process due in such a case are not enumerated, the plurality suggests that these "proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 47. This may include the acceptance of hearsay or affidavit evidence, a rebuttable presumption in favor of the Government's evidence, limiting relevant facts to the alleged combatant's acts, and "an appropriately authorized and properly constituted military tribunal." *Id.* at 55. The "some evidence" standard proposed by the Government, in which its factual assertions would go unchallenged, would not satisfy the demands of due process.

Justice Souter joined the judgment in order to achieve "remand on the terms closest to those I would impose." *Id.* at 157. Souter agreed with the plurality's reasoning only as far as their rejection of limitation on the exercise of habeas jurisdiction and refused to defer to the President's powers as Commander in Chief. He disagreed with the plurality's determination that

the AUMF empowers the President to detain citizen enemy combatants, regardless of the process.

He argued that because Congress intended to "preclude another episode like the [Japanese internment camps]" there is a "powerful reason" to believe that the Non Detention Act was meant "to require clear congressional authorization before any citizen can be placed in a cell." *Id*. at 140.

Souter further argued that, since Hamdi is not being treated as a prisoner of war as prescribed by the Geneva Convention, the Government cannot maintain the assertion that the detention "amounts to nothing more than customary detention of a captive taken on the field of battle." *Id.* at 150.

He acknowledged some "genuine emergency" when the Executive may be authorized to detain a citizen "if there is reason to fear he is an imminent threat to the safety of the Nation and its people." *Id.* at 156. Souter concluded that Hamdi's case is not such an emergency.

Justice Scalia argued that the Government ought to release Hamdi, charge him with treason, or suspend the writ of *habeas corpus*. Scalia chronicles the history of similar cases and concludes that "the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge." *Id.* at 58. As he points out, the Constitution contains a provision that accommodates military emergencies. The Suspension Clause permits Congress to expend the writ in cases of invasion or rebellion.

Quoting Blackstone, Scalia highlights two elements of "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers" – due process as a right, and *habeas corpus* as "the instrument by which due process could be insisted upon by a citizen." *Id.* at 60. Noting that these essentials of freedom are both explicitly mentioned in the Constitution, Scalia argues that they ought not be lightly dismissed.

Scalia concluded by accusing the plurality of "writing a new Constitution" and "transmogrifying the Great Writ," pointing out that the "role of *habeas corpus* is to determine the legality of Executive detention, not to supply the omitted process necessary to make it legal." *Id.* at 93. According to Scalia, the plurality opinion "reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right." *Id.* at 94. Scalia cautions, "The problem with this approach is not only that it steps out of the court's modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of Government by the people." *Id.* at 95.

Justice Thomas argued that the detention "falls squarely within the Federal Government's war powers, and [the Court] lack[s] the expertise and capacity to second-guess that decision." *Id.* at 99. Thomas rests his conclusion on the "basic principles of the constitutional structure as it relates to national security and foreign affairs." *Id.* at 99.

According to Thomas, "the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion." *Id.* at 102. Thomas recognized the Legislative role in foreign policy but admonished that the Court ought not infer that by granting the President broad authorities the "Congress intended to deprive him of particular powers not specifically enumerated." *Id.* at 106.

Thomas further advocated deference to the President by quoting then-Judge Scalia as saying, "the [C]ourt's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550-1551 (D.C. Cir. 1984). Thomas concluded that Hamdi's detention under the AUMF is constitutional and that the judgment of the Court of Appeals ought to be affirmed.

—MR

## *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*

No. 03-5554, 2004 U.S. LEXIS 4385 at *1 (U.S. March 22, 2004)

**FACTS:** Petitioner Larry Dudley Hiibel was arrested and convicted for failure to comply with a Nevada "stop and identify" statute. The statute allows a police officer to "ascertain [the] identity and the suspicious circumstances surrounding" a person who the officer reasonably believes "has committed, is committing or is about to commit a crime." *Hiibel*, 2004 U.S. LEXIS 4385 at *1. A caller to the Humboldt County, Nevada, Sheriff's Department reported having seen a man assault a woman, and provided a description of the location and the vehicle involved. A sheriff's deputy responding to the call found Hiibel standing next to a vehicle matching the description with a young woman seated inside. The officer observed skid marks behind the vehicle, leading him to believe it had come to a sudden stop. The officer explained the nature of his investigation, and asked Hiibel if he had "any identification on [him]." *Id.* at 8. Hiibel, who appeared to the officer to be drunk, refused to produce any identification and asked why the officer wanted to see it. The officer repeated his reason and need to see some identification. After taunting the officer for several minutes and 11 more fruitless requests by the officer for identification, the officer warned Hiibel that he would be arrested. The officer placed him under arrest and charged him with "willfully resist[ing], delay[ing], or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office," in this case the right to ascertain the identity of a suspicious individual. *Id.* at 9.

**ISSUE:** Whether the statute violates the Fourth Amendment's prohibitions against unreasonable searches and seizures or the Fifth Amendment's prohibition against compelled self-incrimination.

**PROCEDURAL HISTORY:** Hiibel was convicted and fined $250. He appealed to the Sixth Judicial District Court, which held that the statute does not violate the Fourth and Fifth Amendments. The Nevada Supreme Court rejected the Fourth Amendment challenge and declined to resolve the Fifth Amendment issue. The U.S. Supreme Court granted *certiorari*.

**HOLDING:** The officer's request for identification was "reasonably related in scope to the circumstances which justified" the stop. *Hiibel*, 2004 U.S. Lexis 4385 at *16 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). Neither the stop, nor the request, nor the State's requirement of a response, violated the Fourth Amendment. Also, Hiibel's Fifth Amendment challenge failed because "in this case disclosure of his name presented no reasonable danger of incrimination." *Hiibel*, 2004 U.S. Lexis 4385 at *24.

**JUDGES:** Justice Anthony Kennedy delivered the opinion of the Court, in which Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Clarence Thomas joined. Justice John Paul Stevens filed a dissenting opinion. Justice Stephen Breyer filed a dissenting opinion, in which Justices David Souter and Ruth Bader Ginsburg joined.

**ANALYSIS:** Justice Kennedy described "Stop and identify" statutes as laws that combine the elements of traditional vagrancy laws with provisions intended to control police actions during an investigatory stop. Though the form varies from state to state, all permit a police officer to ask or require a suspect to disclose his identity. The failure to comply has been a misdemeanor or civil violation in some states; it is a factor to be considered in determining whether the suspect has violated loitering laws in others. Other states allow a suspect to decline to identify himself without penalty.

In the past, the Court struck down traditional vagrancy laws due to their unconstitutional vagueness. In *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), the Court held that because of an overbroad scope and imprecise terms, potential offenders were denied proper notice and police officers were thereby permitted to exercise unfettered discretion in law enforcement.

The Court found Fourth Amendment violations in *Brown v. Texas*, 443 U.S. 47 (1979), where the initial stop was not "based on specific objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity." *Hiibel*, 2004 U.S. Lexis 4385 at *14 (paraphrasing *Brown*). In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court invalidated a modified version of a statute that required a suspect to provide "credible and reliable" identification upon request. *Id.* at 360. Because there were no guidelines for compliance, police had "virtually unrestrained power to arrest and charge persons with a violation." *Hiibel*, 2004 U.S. Lexis 4385, at *14 (quoting *Kolender*, 461 U.S. at 360).

Prior to *Hiibel*, "stop and identify" statutes were constitutional where the initial stop was based on a reasonable suspicion founded upon objective or clearly stated facts that indicate a person's involvement in a crime. The *Terry* Court recognized that reasonable suspicion allows a law-enforcement officer to stop a person for a short time and initiate an investigation. *Terry*, 392 U.S. 1. Police action must be "justified at its inception, and … reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. Kennedy wrote that many cases have established that "questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Hiibel*, 2004 U.S. Lexis 4385, at *17; *see U.S. v. Hensley*, 469 U.S. 221 (1985). This questioning serves an important Government interest in advancing criminal investigations.

Hiibel's conviction raised the issue of whether, where the constitutional requirements for the initial stop are met, it is permissible for an officer to arrest a suspect for failure to comply. Hiibel cited Justice Byron White's concurring opinion in *Terry*, which asserted that, although a police officer may constitutionally question a suspect during a *Terry* stop, the suspect is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." *Hiibel*, 2004 U.S. Lexis 4385, at *19. Kennedy was not persuaded because the questioning involved in a "stop and identify" statute "does not go beyond answering an officer's request to disclose a name." *Id.* at 20.

The Court rejected Hiibel's argument that the statute circumvents the probable cause requirement, saying that the reasonable suspicion requirement restrains police actions by limiting requests for identification to those which are "reasonably related to the circumstances justifying the stop." *Id*. at 22. Thus, "the stop, the request and arrest for failure to comply did not contravene the guarantees of the Fourth Amendment." *Id.*

Hiibel further alleged that the "stop and identify" statute violated the Fifth Amendment's prohibition against forced self-incrimination. The Fifth Amendment guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." These protections apply to communications which are "testimonial, incriminating, and compelled." *Id.* at 23.

The respondents argued that the communications required by the "stop and identify" statute are not testimonial. The Court declined to resolve that issue. Instead, it held that the required communication is not incriminating, because "disclosure of his name presented no reasonable danger of incrimination." *Id.* at 24. Citing the lack of "any articulated real and appreciable fear" of incrimination, the Court deferred to the state legislature's determination that a suspect should be required to disclose his identity upon request. *Id.* at 25.

Justice Stevens' dissent asserts that the Fifth Amendment provides a "broad constitutional right to remain silent" and does not allow even the limited exception defined in the Nevada statute. *Id.* at 28.

Stevens cited *Miranda v. Arizona,* 384 U.S. 436, 467 (1966), to require that "the Fifth Amendment privilege is available outside of criminal court proceedings'" and extends to "all settings in which [the] freedom of action is curtailed in any significant way." *Hiibel*, 2004 U.S. Lexis 4385, at *29. He agrees with the majority that Fifth Amendment protections apply only to testimonial communications, but argues that identification pursuant to a *Terry* stop is a testimonial communication. Protected statements are those that involve the "extortion of information from the accused,' [or] the attempt to force him 'to disclose the contents of his own mind." *Id.* at 31. Stevens argues that self-identification "would furnish a link in the chain of evidence needed to prosecute the claimant" and as such falls within the Fifth Amendment protections. *Id*. at 34.

Justice Breyer's dissent argued that previous Court statements in prior cases, "while technically dicta," established that no person could be required to answer a police officer's questions. *Id.* at 39. He argued that these *dicta* were of the type "that the legal community typically takes as a statement of the law." Breyer's analysis is based on the notion that "the Fourth Amendment

protects the 'right of every individual to the possession and control of his own person.'" *Id.* at 37.

Breyer warns that allowing the state to require self-identification could lead to a state demanding other information from individuals, such as their address or license number, could prove to be incriminating, which would violate the Fifth Amendment, in addition to the Fourth.

—MR

## *Locke v. Davey*

No. 02-1315, 2004 U.S. Lexis 1626, at *1 (U.S. February 25, 2004)

**Introductory Comments by Joshua Davey:**
Sometime during my early teen years, I decided to adopt the faith I had inherited from my parents as my own. In doing so, I determined that I would live my life in service to God. During this time, the message conveyed by the church I attended (not overtly, but in more subtle ways) was that if I were serious about living a life of service to God, my only option was to enter the ministry. Accordingly, I planned to attend a Christian college and study theology, in preparation for a career as a church pastor.

It was only after I entered college and filed my lawsuit that my perspective began to change. I realized that the options for those who wished to serve God through their professions were not limited to vocational ministry, and that Christians were desperately needed in law, medicine, Government, academics, and every other field. Indeed, I began to realize that I could accomplish through a career in law the very same things I had hoped to accomplish through a career in ministry—making a positive contribution to society as I lived out my faith through my profession.

Accordingly, I decided to go to law school. After applying to about 15 schools, I was accepted at Harvard, where I now attend. After graduation, I plan to seek a judicial clerkship and then litigate at a law firm for a few years. After that, I may move into the public sector in some capacity—perhaps in Government or religious liberties work.

**FACTS:** The state of Washington instituted the "Promise Scholarship" (PS) in order to aid academically gifted students with education-related expenses associated with a post-secondary degree. Students are eligible for a scholarship based on academic, income and enrollment requirements outlined in the PS program. Specifically, a student must graduate in the top 15 percent of his or her high school or college class or score 1,200 or 27 on the SAT or ACT, respectively; his or her family must not have an income of greater than 135 percent of the state's median income; and the school at which the student applies for the scholarship must be accredited by a national accreditation agency. The PS may not be used toward a "degree in theology." While the meaning of the provision is not explained in the statute establishing the PS, both parties stipulated that the language codifies the state Constitution's prohibition of providing funds to students for pursuit of degrees that are "devotional in nature or designed to induce

religious faith." *Id*. at 7-8 (quoting Wash. Const., Art. I, § 11). A student who meets the academic and income requirements will receive the PS after his or her academic institution of choice certifies that the student is enrolled at least half-time and is not seeking a devotional theology degree.

Joshua Davey received a PS and chose to attend Northwest College. Northwest is a private, Christian school, which is eligible under the PS program. He planned to pursue an education that would equip him for a position as a church pastor. For this reason, Davey chose to pursue a double major in pastoral ministries and business management/administration. During a meeting with his financial-aid counselor at the beginning of the 1999-2000 school year, Davey learned that he would not be allowed to utilize his PS unless he would sign a form certifying that his education at Northwest would not be "devotional theology." Davey refused to sign the certification and filed suit under 42 U.S.C. § 1983 to enjoin the state from refusing to award his PS and for damages.

**ISSUE:** Whether by prohibiting the application of a PS to a devotional theology degree, the state of Washington violated the First Amendment's Free Exercise Clause.

**PROCEDURAL HISTORY:** The District Court denied the preliminary injunction request. The parties filed cross-motions for summary judgment. The court granted the state's motion but rejected Davey's argument that Washington's actions violated the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed the District Court's decision. The court reasoned that the state had singled out religion for negative treatment and, under the Supreme Court's decision in *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993), the imposition of the burden must be narrowly tailored to achieve a compelling state interest. The Ninth Circuit also held that the state's anti-establishment concerns failed to reach this level and declared the PS Program unconstitutional. The Supreme Court granted *certiorari* and reversed.

**HOLDING:** A "devotional theology exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment." *Locke*, 2004 U.S. Lexis 1626, at *5.

**JUDGES:** In a 7-2 decision, Chief Justice Rehnquist delivered the opinion of the Court, in which Justices John Paul Stevens, Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Antonin Scalia filed a dissenting opinion, in which Justice Clarence Thomas joined. Justice Thomas filed a dissenting opinion.

**ANALYSIS:** Chief Justice Rehnquist found a tension between the Establishment and Free Exercise Clauses and looked to the "play in the joints between them" in order to resolve the issue in this case. *Id.* at 11 (quoting *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970)). Rehnquist acknowledged, however, that this "play in the joints" would allow a state to fund religious education without violating the Establishment clause.

The Court rejected Davey's argument that because the program is not facially neutral, it is presumptively unconstitutional. Rehnquist disagreed because it "would extend the *Lukumi* line of cases beyond not only their facts but their reasoning." *Locke*, 2004 U.S. Lexis 1626, at *14. In *Lukumi*, the Court held that the law sought to suppress the customs of a particular religion, while the burden involved here is "far milder." *Lukumi*, 508 U.S. at 535. Specifically, the Court found that the PS program "does not require students to choose between their religious belief and receiving a Government benefit." *Locke*, 2004 U.S. Lexis 1626 at *14.

The majority rejected Justice Scalia's argument that generally available Government benefits should be part of the "baseline against which burdens on religion are measured," the Court asserted that religious and secular education are fundamentally different. *Id*. at 24. Since training a minister is a "religious endeavor," is motivated by a "calling," and involves an issue explicitly addressed in the U.S. and state Constitutions, Rehnquist considers it reasonable that Washington would treat this education differently from its secular counterpart. *Id.* at 16.

To demonstrate the extent of anti-establishment concerns, Rehnquist references revolts provoked by taxes collected to support church leaders and numerous state statutes prohibiting the use of Government funds to support the ministry.

Dismissing the possibility that hostility toward religion motivated the law, the Court found that the PS program actually "goes a long way toward including religion." *Id.* at 21. Since Northwest College, an eligible institution under the PS program, has a Christian perspective and requires its students to take at least four devotional classes, the program is considered by the majority to accommodate religion.

The Court held, based on the state's substantial interest in avoiding establishment problems and the absence of any animus toward religion, that prohibiting application of a Government scholarship toward vocational religious instruction imposes a relatively minor burden and is not "inherently constitutionally suspect." *Id.* at 22.

Scalia begins his dissenting opinion, in which Justice Thomas joins, by demonstrating through precedent that a law that burdens religious practice which is not neutral on its face must face the "most rigorous of scrutiny." *Id.* at 23 (quoting *Lukumi*, 508 U.S. at 546). Moreover, he cites a longstanding principle that a state "cannot exclude individual[s] … because of their faith, or lack of it, from receiving the benefits of public welfare legislations." *Id.* at 24 (quoting *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947)). He continues, "When the state makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured." *Id.* at 24. Scalia concludes that exclusion from those benefits on the basis of religion constitutes a Free Exercise violation.

Scalia charges that the majority's use of historical "uprisings" is "misplaced." *Id.* at 25. Since the laws involved in those events were laws that singled out ministry for support, and not laws which concerned the inclusion of them for financial aid, public reaction to them is irrelevant. As Scalia points out, "No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church." *Id.* at 26.

According to Scalia, if there were any "play in the joints" it would not be implicated by this case as the PS program does not present a "close call," since the program is not neutral on its face. *Id.* at 27.

Highlighting the absence of any attempt by the majority to defend the neutrality of the PS program, Scalia rejects the notion that the minimal burden imposed and its benevolent purpose "render its discrimination less offensive." He argues that, assuming there is some threshold harm requirement (which he contends there is not), Davey certainly met it when he was unable to apply his PS to the course of study he wished to pursue.

In closing, the dissent warns that the ruling in this case will be extended beyond training of clergy to denial of prescription drug benefits to ministers and the like.

Justice Thomas wrote his own dissent to note that the statute implementing the PS program does not define a degree in theology. Were the term construed broadly to apply to devotional and nondevotional study of theology, this would raise a different constitutional question. Because the parties have stipulated that the language of the statute means to exclude devotional study only, Thomas joins in Scalia's interpretation of the law.

—MR

## *Pennsylvania State Police v. Suders*

No. 03-95, 2004 U.S. LEXIS 4176, at *1 (U.S. March 31, 2004)

**FACTS:** Three months after Nancy Drew Suders was hired as a police communications operator for the Pennsylvania State Police (PSP), she felt uncomfortable with the sexual comments and actions by her supervisors. As a result, she approached Virginia Smith-Elliott, the PSP's equal employment opportunity officer, and stated that she "might need some help." Smith-Elliot gave Suders her phone number but neither person took further action. Two months later, Suders told Smith-Elliot that she was being harassed and was afraid. Smith-Elliot told her to file a complaint but did not give her information about how to obtain the correct form. Suders' supervisors arrested her two days later on theft charges after she was caught returning her exams to their drawer after taking them to determine if she had truly failed the tests. While being interrogated, Suders gave her written resignation to her supervisors, who released her without bringing theft charges against her. Suders then filed suit for sexual harassment and constructive discharge on the grounds that her abusive working environment became so intolerable that her resignation qualified as a fitting response.

**ISSUES:** Whether an employee's constructive discharge caused by a supervisor's harassment makes the employer vicariously liable when the plaintiff did not give the employer an opportunity to remedy the harassment. Whether each party bears a burden of proof in hostile-environment constructive-discharge cases.

**PROCEDURAL HISTORY:** The District Court held that the PSP was not vicariously liable for the supervisors' conduct and granted its motion for summary judgment. It held that Suders' hostile work environment claim was invalid since she unreasonably failed to follow the PSP's internal anti-harassment procedures. The U.S. Court of Appeals for the Third Circuit reversed the decision and remanded the case for trial. The District Court held that there was concern about the effectiveness of the PSP's program to address sexual harassment claims, and that Suders did state a claim of constructive discharge due to hostile work environment. Further, the court ruled that if constructive discharge is proven, it would constitute a tangible employment action for which PSP would be strictly liable so that PSP would be prevented from asserting the "affirmative exhaustion defense." The Supreme Court vacated the Third Circuit's ruling that prohibited the affirmative defense and remanded the case for further proceedings.

**HOLDING:** By a vote of 8-1, the Court held that an employer may assert an affirmative defense to a constructive-discharge claim unless "the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, *e.g.*, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."

**JUDGES:** Justice Ruth Bader Ginsburg delivered the opinion of the Court, in which Chief Justice William Rehnquist and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, David Souter, and Stephen Breyer joined. Justice Clarence Thomas filed a dissenting opinion.

**ANALYSIS:** Justice Ginsburg reaffirmed that when an employee brings a hostile work environment claim under Title VII of the Civil Rights Act of 1964, he or she must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67. The employee has a further burden of proof when establishing constructive discharge and "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Suders*, LEXIS 4176, at *11.

When an employer faces liability for a hostile environment in which no tangible employment action has been taken, he or she has an affirmative defense. The employer must prove that he or she "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765.

The majority then ruled that an employer may be liable for a constructive discharge under Title VII claims. *Suders*, LEXIS 4176, at *26. The constructive discharge doctrine originated in the labor-law field in the 1930s to address circumstances where employers forced employees to resign by creating unbearable working environments. *Id.* at 23. Several courts of appeals have recognized these constructive discharge claims in a variety of Title VII cases, including sexual harassment, race, pregnancy, national origin, sex and religion. *Id.* at 25. Although the Supreme Court has never ruled on a constructive discharge case under Title VII, Justice Ginsburg noted that the Court has addressed this type of claim in labor-law cases. *Id.* at 26.

Next, the Court considered if constructive discharge creates vicarious employer liability. The beginning point in a hostile environment claim is established through the two categories in *Ellerth/Faragher*. An employer is strictly liable if the harassment "culminates in a tangible employment action," but an employer may assert an affirmative defense if the harassment takes place in the absence of a tangible employment action. *Ellerth*, 524 U.S. at 765.

The Court had previously ruled that Title VII's definition of "employer" includes the employer's "agents." *Id.* at 754. When a supervisor takes a tangible employment action against a subordinate, it clearly falls into the category of a decision that an agent makes under his authority given by his employer. *Suders*, LEXIS 4176, at *29. With this connection, an employer is strictly liable for the actions of the supervisor. When there is no resulting tangible employment action, however, "it is 'less obvious' that the agency relation is the driving force." *Id.* at 30. Therefore, it is possible that the supervisor acted outside his authority. *Id.* When this situation exists, an employer may assert an affirmative defense consisting of two burdens of proof. An employer must establish that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765.

The majority held that the burdens of proof as established in *Ellerth* and *Faragher, infra,* remain intact. In a hostile environment claim, each party's burden of proof follows the avoidable consequences doctrine of tort law. *Id.* at 764. This doctrine states that victims have "a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Faragher v. Boca Raton*, 524 U.S. at 806. Thus, the employee must reasonably avoid harm if possible, but the employer still has the burden to prove that the plaintiff did not reasonably avoid the alleged harm. *Ellerth*, 524 U.S. at 765.

In a hostile environment constructive discharge, the employee must show more than the offending behavior altered the working conditions. The employee must also show that the "working conditions [were] so intolerable that a reasonable person would have felt compelled to resign." *Suders*, LEXIS 4176, at *33. A constructive discharge must not always be caused by an official act (like actual termination). Instead, it may result from a precipitating conduct, which may or may not involve official action. *Id.* at 35. When there is no official action, an employer has access to the affirmative defense. *Id.* at 37. Otherwise, there is uncertainty as to whether the supervisor acted under the employer's authority, and the defense is available to the employer. *Id.*

Justice Ginsberg stated that if the Third Circuit's rule governed, then the affirmative defense would be unavailable in all hostile-environment constructive-discharge cases, but still be available in "ordinary" hostile-work-environment cases. *Id.* This would allow the employee to more easily prove the graver case of hostile-environment constructive-discharge than the less harmful case of hostile work environment. *Id.* at 38.

Justice Thomas dissented because he believes the Court's definition of constructive discharge does not resemble the definition of actual discharge. Instead of requiring that an employee prove that the employer intended to force him to quit through the adverse employment action, the employee must show only that the environment was intolerable. *Id.* at 44. Constructive

discharge, therefore, cannot be viewed as an equivalent to an actual discharge and "is more akin to 'an aggravated case of … sexual harassment or hostile work environment.'" *Id.* at 45-46. Thomas concludes that the correct standard is the standard he proposed in *Faragher:* An employer would be liable only for a hostile environment constructive discharge if he or she acted negligently. *Id.* at 46. Since Suders did not show that the employer knew or should have known of the alleged harassment, the Pennsylvania State Police should not be liable for the action of Suders' supervisors.

—SM

## *Rasul v. Bush/Fahad Al Odah v. United States*

No. 03-334/No. 03-343, 2004 U.S. LEXIS 4760, at *1 (U.S. June 28, 2004)

**FACTS:** After terrorists attacked America on September 11, 2001, Congress passed the Authorization for Use of Military Force, Pub. L. 107-40, §§1-2, 115 Stat. 224 (AUMF), which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks … or harbored such organizations or persons." Based on the AUMF, the President sent U.S. forces into Afghanistan to wage a military campaign against terrorist organizations. The petitioners in this case are two Australian citizens and 12 Kuwaiti citizens who were captured on the battlefield in Afghanistan and are detained at the U.S. Navy Base at Guantanamo Bay, Cuba. The United States leases Guantanamo Bay from Cuba and exercises exclusive jurisdiction, but not ultimate sovereignty. The petitioners asserted that they were wrongly detained without being charged with wrongdoing or given access to any counsel or court proceedings. They claimed that the denial of these rights is a violation of the U.S. Constitution, international law and treaties.

**ISSUES:** Whether the U.S. courts have jurisdiction to hear challenges to detention by aliens captured abroad as enemy combatants and detained at Guantanamo Bay Naval Base, Cuba.

**PROCEDURAL HISTORY:** The District Court dismissed the petitioners' writs of *habeas corpus* holding that it did not have jurisdiction. The ruling relied on the Supreme Court's opinion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of *habeas corpus*." 215 F.Supp. 2d 55, 68 (D.C Cir. 2002). The U.S. Court of Appeals for the D.C. Circuit affirmed that *habeas* relief does not extend to aliens held in a territory where the United States does not have sovereignty; therefore federal courts do not have jurisdiction to hear such petitions. The Supreme Court granted certiorari, and reversed and remanded the case.

**HOLDING:** In a 6-3 ruling, the Court held that federal courts do have jurisdiction over the petitioners' *habeas corpus* claims.

**JUDGES:** Justice John Paul Stevens delivered the opinion of the Court, in which Justices Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined. Justice Anthony Kennedy filed a concurring opinion. Justice Antonin Scalia filed a dissenting opinion, in which Chief Justice William Rehnquist and Justice Clarence Thomas joined.

**ANALYSIS:** Justice Stevens began by reviewing the history of a writ of *habeas corpus*. A federal court has jurisdiction over these applications, within its jurisdiction, to protect any person who believes he or she is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§2241(a), (c)(3). The writ "has served as a means of reviewing the legality of Executive detention." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

The Court determined that the *habeas* statute gives federal courts the necessary jurisdiction to review the legality of alien prisoners being detained at Guantanamo Bay. The opinion distinguishes *Rasul* from the facts in *Eisentrager*, where the Supreme Court ruled that there was no *habeas corpus* jurisdiction. Stevens found that the six critical facts in *Eisentrager* were that the prisoner was an enemy alien, had never resided in the United States, was captured outside of American territory and held as a prisoner of war, was tried and convicted by a Military Commission, was tried for offenses committed outside of the country, and was imprisoned outside of America at all times.

The majority differentiated the petitioners here from the *Eisentrager* prisoners because they are not nationals of countries at war with the United States, they did not admit to acting in plots against the United States, they have received no military trials or convictions, and they have been imprisoned in a territory where the United States has exclusive jurisdiction and control. *Rasul*, U.S. LEXIS 4760, at *18-19.

The Court then addressed previous rulings on the *habeas* statute. In *Ahrens v. Clark*, 335 U.S. 188 (1948), the Court held that a District of Columbia court lacked jurisdiction over a detainee in New York. That opinion did not address the issue of a detainee's *habeas corpus* rights when he or she is not located in an area subject to federal court jurisdiction. The Court of Appeals in *Eisentrager* believed this created a gap in the *habeas* statute. *Rasul*, U.S. LEXIS 4760, at *22. Due to this statutory gap, the Supreme Court in *Eisentrager* evaluated the case based on "fundamentals." *Id.* The Court then cited the holding of *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), that, "the writ of *habeas corpus* does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden*, 410 U.S. at 494-495. The *Braden* Court ruled that an Alabama prisoner was able to seek a writ of *habeas corpus* in a Kentucky court since the custodian was under the Kentucky court's jurisdiction. The Court concluded that *Braden* ended *Ahrens*' "inflexible jurisdictional rule," and *Ahrens* is no longer useful for determining whether a claim can be heard. *Id.* at 499-500.

Stevens reasoned that since *Ahrens* no longer stands, with respect to determining if a person is able to bring a claim under the *habeas corpus* statute, the ruling in *Eisentrager* (which was based on *Ahrens*) does not apply to this case involving the detainees at Guantanamo Bay. *Rasul*, LEXIS 4760, at *24. Deciding that *Eisentrager* and *Ahrens* are no longer controlling, the Court considered the Government's concession that the *habeas* statute would confer federal court jurisdiction over American citizens held at Guantanamo Bay. Because the statute does not

distinguish between Americans and aliens, alien detainees should have equal access to the federal court system to challenge detention. *Id.* at 26-27.

Stevens reasoned that this interpretation is consistent with the historical application of the statute. *Id.* at 27. He cited cases holding that courts have jurisdiction over aliens detained in sovereign territories and that the writ may be extended to detainees in areas that were not formal sovereign lands. *Id.* at 28-29. Stevens cited to English common-law cases and made but one reference to the President as Commander in Chief acting in a time of war.

Justice Kennedy's concurring opinion also distinguished *Eisentrager*. In *Eisentrager*, the prisoners were detained outside of the United States, and they had already been tried and convicted in a military proceeding. *Id.* at 38. He reasoned, however, that despite *Eisentrager*'s holding that there was no federal jurisdiction over these prisoners, it also meant that there may be circumstances when federal jurisdiction may extend to alien detainees. *Id.* at 37. He found that Guantanamo Bay is "in every practical sense a United States territory" and the detainees are being held indefinitely without any trial or legal proceeding. *Id.* at 37-38.

Justice Scalia's dissent argues that the availability of the *habeas* statute to aliens detained beyond the territorial jurisdiction of U.S. courts contradicts the precedent set forth in *Eisentrager* more than 50 years ago. *Id.* at 40. The ruling of the majority overturns settled law by misinterpreting previous court rulings. Scalia first mentioned that the federal courts have limited jurisdiction, and this is one area that the federal courts have never had jurisdiction. *Id.* at 42.

Scalia argued that the majority incorrectly interpreted the meaning of "within their respective jurisdictions" in the statute to find jurisdiction for the detainees. First, the Court ruled in *Ahrens* that a person must be detained in the territorial jurisdiction of the District Court in which the person files for a writ of *habeas corpus*. The Court stated in *Ahrens* that it was "not sufficient … that the jailer or custodian alone be found in the jurisdiction." *Id.* at 43.

According to Scalia, the *Eisentrager* Court rejected both a constitutional basis and a statutory basis for conferring jurisdiction on a federal court: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes*." *Id.* at 46. [Italics in original.] The lack of an in-depth statutory analysis indicated that the Court clearly found that the statute did not give the District Court jurisdiction over an alien outside the country. *Id.* at 47.

Finally, Scalia wrote that the Court in *Braden* did not overrule *Ahrens*. Instead, *Braden* distinguished *Ahrens* by ruling that a Kentucky District Court had jurisdiction over the petitioner confined in Alabama because his dispute was with the commonwealth of Kentucky. *Id.* at 51. *Eisentrager* was not even addressed in the *Braden* decision, so Scalia concluded that *Eisentrager* controlled with respect to the detention of the aliens in Guantanamo Bay.

Scalia concluded that the majority instead overruled *Eisentrager* and "extend[ed] the *habeas* statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts." *Id.* at 54.

Finally, Scalia rejected the majority's reliance on historical precedent. *Id.* at 62. Previous case rulings only refer to sovereign dominions (which Guantanamo Bay is not) and jurisdiction over subjects (which the alien detainees are not). *Id.* at 63. Extending this precedent to a leased territory where aliens are detained is a departure from the Court's rule of *stare decisis*. He quoted *Eisentrager* to show the Court's concern: "Such trials would hamper the war effort and bring aid and comfort to the enemy." *Eisentrager,* 339 U.S., at 778-779. Congress is the appropriate body to change existing jurisdictional laws, and this expansion by the Court now provides "wartime prisoners greater *habeas* rights than domestic detainees." *Id.* at 69.

—SM

## *Rumsfeld v. Padilla*

No. 03-1027, 2004 U.S. Lexis 4759, at *1 (U.S. June 28, 2004)

**FACTS:** As a result of the terrorist attacks on the United States on September 11, 2001, Congress passed the Authorization for the Use of Military Force (AUMF) empowering President Bush to use "all necessary force" against those nations, organizations and individuals involved in the perpetration or assistance in the perpetration of those acts of terrorism. Federal agents arrested Hosea Padilla, a U.S. citizen, upon his arrival at Chicago's O'Hare Airport from Pakistan. The arrest was based on a material witness warrant issued by a grand jury in the federal District Court in southern New York investigating the September 11 attacks.

**ISSUES:** Before reaching the merits of the case, the Court considered the question who is the proper respondent to [the *habeas*] petition? And second, does the Southern District [of New York] have jurisdiction over him or her?" *Padilla*, 2004 U.S. Lexis 4759, at *16.

**PROCEDURAL HISTORY:** While Padilla was held in New York in federal criminal custody, he moved to dismiss the material witness warrant. Pursuant to the AUMF and several factual determinations regarding Padilla, President George Bush ordered Secretary of Defense Donald Rumsfeld to designate Padilla as an "enemy combatant." The Government withdrew the material witness warrant and transferred Padilla to military custody at the Consolidated Naval Brig in Charleston, South Carolina. Padilla's counsel filed a *habeas corpus* petition in the Federal District Court for the Southern District of New York challenging his detention, naming President Bush, Secretary Rumsfeld, and Commander Melanie A. Marr, the commander of the naval brig, as respondents. Padilla claimed his detention violated the Fourth, Fifth and Sixth Amendments and the Suspension Clause of Article I of the U.S. Constitution. The Government moved to dismiss the petition on the grounds that Commander Marr is the only proper respondent and since the New York court lacked jurisdiction over her, it had no authority to issue the petition. The District Court held that Secretary Rumsfeld's "personal involvement" in the case made him a proper respondent; therefore, it could assert jurisdiction over the Secretary under its long-arm statute. The District Court also held that the "President has the authority to detain as enemy combatants citizens captured on American soil during a time of war." *Id.* at 14-15. The U.S. Court of Appeals for the Second Circuit agreed that Rumsfeld exercised "the legal reality of control" over Padilla and as such was the proper respondent. *Id.* at 14. The Second

Circuit reversed the District Court's ruling regarding the President's authority. Pointing to a "strong presumption against military detention," it further found that the President lacks the authority to detain Padilla militarily. *Id.* at 15. The writ of *habeas corpus* was granted and Secretary Rumsfeld was directed to release Padilla from military custody within 30 days. The Supreme Court granted *certiorari*.

**HOLDING:** Applying the "immediate custodian rule," the Court held that the proper respondent to Padilla's petition should have been Commander Marr. Second, that the New York District Court lacked jurisdiction over Commander Marr in South Carolina and ordered a dismissal of Padilla's petition without prejudice [meaning it may be refiled in the proper court].

**JUDGES:** Chief Justice William Rehnquist wrote for the majority and was joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. Justice Kennedy filed a concurring opinion, in which Justice O'Connor joined. Justice John Paul Stevens filed a dissenting opinion, in which Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer joined.

**ANALYSIS:** Chief Justice Rehnquist began by examining the federal *habeas* statute, which "provides that the proper respondent to a *habeas* petition is 'the person who has custody over [the petitioner].'" *Id.* at 15. Based on the "consistent use of the definite article in reference to the custodian," the Chief Justice held that there is only one proper respondent in a *habeas* petition. *Id.* at 16.

More than 100 years ago, the Court interpreted the *habeas* statute to allow a "proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party." *Wales v. Whitney*, 114 U.S. 564, 574 (1885). This interpretation in conjunction with the statutory language has produced a long-standing practice of limiting respondents in *habeas* challenges to the warden of the facility where the prisoner is held.

Padilla first asserted that the *habeas* requirements are elastic and expanding by citing *Hensley v. Municipal Court, San Jose-Milpitas Judicial District*, 411 U.S. 345 (1973), in which the Court found that "custody" for the purposes of *habeas* petitions included more than physical detention. The majority rejected Padilla's reliance on *Hensley* as a "non sequitur" because it "does nothing to undermine the rationale or statutory foundation of *Wales*' immediate custodian rule where physical custody *is* at issue." *Padilla*, 2004 U.S. Lexis 4759, at *21. [Emphasis in original.]

Similarly, the Court found that *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973) does not apply. It permits a detainee to name as respondent someone other than the detainee's immediate custodian *only* with respect to an order for future detention and when the proper respondent is deemed to be the individual who would be the immediate custodian during that future detention. The majority found *Strait v. Laird*, 406 U.S. 341 (1972), suffered from the same flaw—it did not involve present physical confinement, and therefore offered Padilla no support.

Chief Justice Rehnquist distinguished *Ex Parte Endo*, 323 U.S. 283 (1944), from the present case based on the filing of the *habeas* petition. In *Endo*, the petitioner filed a *habeas* petition against

her immediate custodian before the Government moved her to a different district. Since Padilla filed his petition after he had already been moved out of New York, *Endo* does not help his case.

The Court found nothing in the facts of Padilla's detention that "would provide an arguable basis for a departure" from the traditional rule. *Padilla*, 2004 U.S. Lexis 4759 at *29. Accordingly, the proper respondent for Padilla's petition is his custodian, Commander Marr, and not Secretary Rumsfeld.

Turning to the second issue raised by the case, Rehnquist examined the jurisdictional limitation in the statute, which allows District Courts to grant *habeas* relief "within their respective jurisdictions." It was added by Congress to avoid the "inconvenient [and] potentially embarrassing possibility that every judge anywhere [could] issue the [*habeas*] writ on behalf of applicants far distantly removed from the courts whereon they sat." *Id.* at 30. Since that addition, the "traditional rule has always been that the Great Writ is issuable only in the district of confinement." *Id.*

Rehnquist cites other portions of the *habeas* statute which support its "common sense" reading. Those sections mention "*the* District Court of the district *in which the applicant is held*" and "*the* District Court having jurisdiction to entertain it" as proper issuing courts for a *habeas* petition. *Id*. at 31. [Emphasis in original.] He further notes that "Congress has also legislated against the background of the 'district of confinement' rule by fashioning explicit exceptions to the rule in certain circumstances." *Id.* at 31.

Combining the district of confinement rule with the immediate custodian rule, the Court states "a simple rule," which applies in the lower courts, including in the military detentions: "Whenever a … *habeas* petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." *Id.* at 39. According to Rehnquist, this rule "serves the important purpose of preventing forum shopping by *habeas* petitioners." *Id*. at 40.

Rehnquist addressed the "mistaken belief" of Justice Stevens and the Court of Appeals that exceptions have been made to the *habeas* rules whenever "exceptional, special, or unusual cases have arisen." *Id.* at 40. Rehnquist rejects Stevens' request that the Court "pretend" that Padilla and his immediate custodian were within the jurisdiction of the southern district when the *habeas* petition was filed. Dismissing Stevens' contention that the Government acted improperly in the transfer, the Chief Justice points out that Stevens "cites no authority whatsoever for [his] extraordinary proposition that a District Court can exercise statutory jurisdiction based on a series of events that did not occur, or that jurisdiction might be premised on 'punishing' alleged Government misconduct." *Id*. at 42. Nor can the dissent "cite *a single case*" in which the Court has deviated from the *habeas* rule outlined by the majority. *Id.* at 43. [Emphasis in original.]

Justice Kennedy's concurring opinion discusses his "understanding of how the statute should be interpreted in light of the Court's holding." *Id.* at 44. The two rules relied on by the majority – the immediate custodian and district of confinement rules – are, according to Kennedy, to be considered not questions of subject-matter jurisdiction, but either issues of either personal jurisdiction or venue. Because Kennedy classifies them as such, he believes that "objections to

the filing of petitions based on those grounds can be waived by the Government." *Id.* at 46. However, no such waiver was made.

Kennedy goes on to note that the *habeas* rules are subject to certain exceptions. He concludes: "None of the exceptions apply here." *Id.* at 50. The *habeas* petition reveals that Padilla's lawyer knew his location and custodian. Moreover, the facts indicate that "Padilla's change in location and his change of custodian reflected a change in the Government's rationale for detaining him." *Id.* at 51.

Stevens' dissent proposes treating the petition as if it had been filed two days earlier, claiming that it is "reasonable to assume" Padilla's attorney would have done so. *Id.* at 57. Under this scheme, Secretary Rumsfeld is the proper respondent by virtue of his "familiarity with the circumstances … and his personal involvement" therein. *Id.* at 61. Thus, the southern district of New York is the proper district because Rumsfeld can be reached by service of process through the state's long-arm statute.

In the histrionic finale of his dissent, Stevens claims that what is "at stake in this case is nothing less than the essence of a free society." *Id.* at 67. He attributes to the Government a "naked interest in using unlawful procedures to extract information" through "unconstrained Executive detention." *Id.* at 68, 67. In a footnote, Stevens actually likens Padilla's treatment to that received in the English Star Chamber, where "there is torture of mind as well as body; the will is as much affected by fear as by force." *Id.* at 67. Finally, in defense of the "ideals symbolized by [the] flag," Stevens melodramatically cautions against "wield[ing] the tools of tyrants even to resist an assault by the forces of tyranny." *Id.* at 68.

—MR

## *Sosa v. Alvarez-Machain/U.S. v. Alvarez-Machain*

2004 U.S. LEXIS 4763 at *1(U.S. June 29, 2004)

**FACTS:** In 1985, Mexican nationals in Mexico captured Enrique Camarena-Salazar, an agent with the U.S. Drug Enforcement Agency (DEA). They murdered him after interrogating and torturing him for two days. The DEA believed that Humberto Alvarez-Machain ("Alvarez"), a Mexican physician, aided in the crimes by keeping the agent alive for further interrogation and torture. The DEA sought help in capturing Alvarez from Mexican officials, but received none. Thereafter, the DEA hired Jose Francisco Sosa ("Sosa") and other Mexican nationals to abduct Alvarez so that he could be tried in the United States. Sosa and others brought him by private plane to El Paso, Texas, where federal agents arrested him.

Once in the United States, the DEA quickly interrogated Alvarez and afforded him all of the rights of criminal defendants. He moved to dismiss all of the charges against him based on outrageous Government conduct. The District Court dismissed the charges, holding that there was no federal court jurisdiction, and the U.S. Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, holding that the fact of Alvarez's forcible seizure did not affect the

jurisdiction of a federal court. The case was tried in 1992; the District Court granted Alvarez's motion for a judgment of acquittal.

**ISSUES:** Whether Alvarez's allegation in his civil suit that the DEA instigated his abduction from Mexico to the United States supports a claim under the Federal Tort Claims Act; and whether Alvarez may recover under the Alien Tort Statute.

**PROCEDURAL HISTORY:** In 1993, after returning to Mexico, Alvarez sued the United States, the DEA, Sosa and other Mexican nationals under the Federal Tort Claims Act (FTCA), which waives sovereign immunity in suits "for … personal injury … caused by the negligent or wrongful act or omission of any [Government] employee while acting within the scope of his office or employment," 28 U.S.C. § 1345 (B) (1). He also sued Sosa for violating the Alien Tort Statute (ATS), a 1789 law, which gives District Courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations …," 28 U.S.C. § 1350. *Id*. at *1-2. Alvarez claimed that his abduction violated his civil rights. The District Court dismissed the FTCA claim and granted Alvarez's motion for summary judgment against Sosa on the ATS claim. The Ninth Circuit affirmed the judgment on the ATS claim but reversed the dismissal of the FTCA claim. The Supreme Court granted *certiorari* and reversed.

**HOLDING:** Alvarez is not entitled to a remedy under either the FTCA or the ATS.

**JUDGES:** Justice David Souter delivered the opinion of the Court. The Court was unanimous on Parts I and III. Part II was joined by Chief Justice Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy and Clarence Thomas. Part IV was joined by Justices Stevens, O'Connor, Kennedy, Ruth Bader Ginsburg and Stephen Breyer. Justice Scalia filed an opinion concurring in part and concurring in the judgment, in which Chief Justice Rehnquist and Justice Thomas joined. Justice Ginsburg filed an opinion concurring in part and concurring in the judgment, in which Justice Breyer joined. Justice Breyer filed an opinion concurring in part and concurring in the judgment.

**ANALYSIS:** Justice Souter began by reviewing the FTCA, which gives federal District Courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id*. at *15. The "significant limitation on the waiver of immunity is the Act's exception for any claim arising in a foreign country," which Souter found to be "a provision that on its face seems plainly applicable to the facts of this case." *Id*. at *16.

Alvarez argued that the tort in actuality occurred when the DEA conspired in the United States to wrongfully abduct him and transport him from Mexico to the U.S. The Court rejected that argument, reasoning that the arrest was only "false" and "tortious" because it occurred in Mexico. The arrest would have been perfectly legitimate had it occurred in the United States.

The Ninth Circuit had allowed the claim to proceed because of the "headquarters doctrine." Several courts of appeals had previously held that the foreign country exception does not apply if

acts and/or omissions occurring in the United States have their operative effect in another country.

The Court found that the "headquarters doctrine" would swallow the foreign country exception whole, because a plaintiff could almost always find some act or omission in the United States that would have its operative effect elsewhere. Thus, the Court held that FTCA's foreign-country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.

Alvarez appealed to various international norms and rules in his attempt to convince the Court to recognize his abduction as a violation of the law of nations under the ATS.

The Court, while rejecting his argument, went to great lengths to discuss the history and purpose of the ATS. From the beginning, according to the majority, the United States was bound to receive the "law of nations." From this law of nations, two overriding principles may be derived:

1) There exist general norms governing behavior of national states with each other. This occupied the legislative and executive branches, but not judicial.
2) There is a body of judge-made law regulating the conduct of individuals situated outside the domestic boundaries and consequently carrying an international savor. This occupied the judicial sphere. *Id*. at *41-42.

The Court noted that Congress had tried to get states to enforce the law of nations. Further, the majority concluded that the history of the ATS shows two things:

1) "Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation." *Id.* at *56.
2) "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." *Id*. at *49.

According to the majority, this meant three basic lines of cases: 1) mercantile questions, such as bills of exchange; 2) all marine cases; and 3) all disputes relating to prizes, shipwrecks, hostages and ransom bills. The Court reasoned that the ATS was a resolution to show the world that the new republic would obey the laws of nations:

The Court held that the jurisdictional grant under the ATS enabled federal courts to hear claims in a limited category defined by the law of nations and recognized at common law, but that in 1789, at the time of enactment of the ATS, this category was very limited, and it does not allow for the cause set forth by Alvarez. *Id*. at *36.

Notably, much to the disappointment of Scalia, the Court noted that Congress has not restricted or forbidden federal courts from hearing such cases and recognizing new claims under the law of nations. Id. at *58-59. The majority is persuaded "that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at *65.

After all, according to the majority, *international law is a part of United States law*. *Id*. at *66. [Emphasis added.]

Justice Scalia while joining in the judgment, disagrees with the majority in one major respect: The majority recognized a level of discretionary power in the federal judiciary to create causes of action for the enforcement of international-law-based norms. According to Justice Scalia, the federal judiciary is neither authorized nor suited to create such causes.

Scalia wrote: "General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties." *Id.* at *83. Scalia looked to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that there was no federal common law. However, since *Erie*, Scalia noted that new common law in federal courts has arisen for a few areas where necessary to protect uniquely federal interests and where Congress has given courts the power to develop substantive law. Importantly to Scalia, *the court must have authority before making such substantive law. Id.* at 85-86.

The general rule, as illustrated by Scalia, is that the vesting of jurisdiction in federal courts, as in the ATS, does not in and of itself give the authority to formulate federal common law. There are a few exceptions to this, such as in admiralty law. Yet, according to Scalia (and the majority), the ATS is jurisdictional, creating no new causes of action.

Scalia's primary disagreement with the majority is this: The majority indicates that nothing between the enactment of the ATS and the birth of international human rights litigation under that statute (in 1980) has *precluded* federal courts from recognizing a claim under the law of nations as an element of common law. Scalia would look not to what is *precluded*, but to what has been *authorized*. *Id*. at *91-92.

Before *Erie*, Scalia notes that there might have been room for federal courts to recognize new torts that violated the law of nations. At the time of enactment of the ATS, the law of nations *was not* supreme federal law that could displace state law. But a judicially created federal rule based on international norms *would be* the supreme federal law. *Id*. at *93. Thus, the majority creates a new federal common law that would supercede state law. Scalia believes this is better left to the legislature.

Scalia states that "the idea that a law of nations, redefined to mean a consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human-rights advocates." *Id*. at *100-101. [Italics in original.] Scalia provides an example: The Framers would be appalled at the notion that the American people's democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners. *Id*. at *101.

Scalia scolds the majority and many federal judges by concluding that, for two decades, unelected federal judges have been usurping proper lawmaking power by converting what they regard as norms of international law into American law. The majority opinion, according to

Scalia, while urging more restraint among federal judges, approves of this tactic. It is "nonsense upon stilts." *Id*. at *90.
—JM

## GLOSSARY OF TERMS

**AFFIRMED:** The Court agreed with the ruling by the lower court.

**ANALYSIS:** The Court applies the law to the facts to answer the issue. It includes the Court's reasoning for holding as it did. [The analyses in this publication also include comments by the authors of the articles.]

**AS APPLIED CHALLENGE:** This means that a party to the lawsuit is arguing that the law at issue is unconstitutional as applied to them. Some cases include both facial and as applied challenges.

**CAUSE OF ACTION:** This is the legal grounds for a lawsuit, e.g., false imprisonment, defamation, wrongful death, hostile work environment, etc.

***CERTIORARI*:** The Court's grant of *certiorari* means that it exercised its discretion to review the decision of the court below. When the Court refuses to grant *cert*. in a case, the holding by the court below remains unchanged.

**CONCUR:** A justice agrees with the holding but for a different reason. It can also mean that a justice agrees with the holding and reasoning but writes separately to make an additional comment.

**DISSENT:** A justice or justices disagree with the holding and may write a dissenting opinion to express their reasons.

**FACIAL CHALLENGE:** This means that a party to the lawsuit is arguing that the law at issue is invalid on its face and may not be enforced against anyone.

**HOLDING:** What the Supreme Court ruled in the case.

***IN CAMERA***: Latin for "in chambers." This refers to a hearing or discussions with the judge in the privacy of his chambers or when spectators and jurors have been excluded from the courtroom.

**ISSUE:** The question or questions the Court must answer in order to make a decision.

**JURISDICTION**: The authority given to a court by law to try a case and make a ruling.

**LEASE**: A written agreement in which the owner of the property allows use of the property for a specified period of time for specific periodic payments and other terms and conditions.

**LONG ARM STATUTE**: A statutory method of obtaining personal jurisdiction by substituted service of process over a nonresident defendant who has sufficient purposeful contact with a state so that it is fair and reasonable for the state to adjudicate the dispute involving the defendant.

**MAJORITY:** Five or more justices agree on the holding.

**NEXT FRIEND**: Someone specially appointed by the court to look after the interests of a person who cannot act on his or her own, e.g., a minor.

**PERSONAL JURISDICTION:** The power that a court has over the defendant himself or herself as distinguished from the more limited power a court has over his or her interest in property or the property itself.

**PLURALITY:** An opinion in which five or more justices agree on the holding but fewer than five agree on the reason and write separately to explain their reasons.

**PRELIMINARY INJUNCTION**: A court order made in the early stages of a lawsuit or petition which prohibits the parties from doing an act which is in dispute, thereby maintaining the status quo until there is a final judgment after trial.

**PROCEDURAL HISTORY:** How the case proceeded through the lower courts and what was decided before it arrived at the Supreme Court.

**RECUSE:** A judge removes himself from hearing a case either voluntarily or at the request of a litigant.

**REMANDED:** The Court sent the case back to the lower court with instructions on how to proceed.

**REVERSED:** The Court reversed the ruling of the lower court.

**SERVICE OF PROCESS:** The delivery or other communication of writs, summonses, etc. The delivery or other acceptable communication of a formal notice to the defendant ordering him or her to appear in court in order to answer the allegations made by the plaintiff.

**STANDING:** Article III standing under the U.S. Constitution enforces the Constitution's case or controversy requirement. The plaintiff must show that the conduct of which he complains has caused him to suffer an injury in fact that a favorable judgment will redress. Prudential standing embodies judicially self-imposed limits on the exercise of federal jurisdiction.

**STAR CHAMBER**: An early English court that illegally extended its jurisdiction and acted secretly, arbitrarily and harshly.

**SUBJECT MATTER JURISDICTION:** The court's power or competence to hear and determine this particular kind of case; judicial power over the nature of the action and the relief sought.

**SUMMARY JUDGMENT**: A court order that no factual issues remain to be tried and therefore a cause of action, or all causes of action, in a complaint can be decided upon certain facts without trial. Facts are decided upon statements made under penalty of perjury in declarations, affidavits, depositions, etc.

**TORT:** A civil wrong. A wrong to the person, such as an assault; also a wrong affecting the feelings and reputation, such as libel, slander and malicious prosecution.

**VACATED:** The court sets aside or annuls a ruling or order by a lower court.

**VENUE:** The county or geographical area in which a court with jurisdiction may hear and determine a case.

**VICARIOUS LIABILITY:** Sometimes called "imputed liability," attachment of responsibility to a person for harm or damages caused by another person in either a negligence lawsuit or criminal prosecution. Thus, an employer of an employee who injures someone through negligence while in the scope of employment (doing work for the employer) is vicariously liable for damages to the injured person. In most states a participant in a crime (like a hold-up) may be vicariously liable for murder if another member of the group shoots and kills a shopkeeper or policeman.

**WRIT OF *HABEAS CORPUS*:** Latin for "you have the body," it is a writ (court order) which directs the law enforcement officials (prison administrators, police or sheriff) who have custody of a prisoner to appear in court with the prisoner to help the judge determine whether the prisoner is lawfully in prison or jail. The writ is obtained by petition to a judge in the county or district where the prisoner is incarcerated, and the judge sets a hearing on whether there is a legal basis for holding the prisoner. *Habeas corpus* is a protection against illegal confinement, such as holding a person without charges, when due process obviously has been denied, bail is excessive, parole has been granted, an accused has been improperly surrendered by the bail bondsman or probation has been summarily terminated without cause. Historically called "the great writ," the renowned scholar of the Common Law, William Blackstone, called it the "most celebrated writ in English law."

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