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EDITOR’S NOTE

I’m pleased to announce some long-term changes that I believe will greatly improve Court Review. Alan Tomkins, a law and psychology professor with experience in editing a similar journal, has agreed to join me as coeditor. As you’ll see from a greater description of his background, he brings a great number of valuable contacts throughout both the academic world and the judiciary.

Alan is presently the director of the University of Nebraska Public Policy Center after many years as a faculty member in the University of Nebraska-Lincoln Law-Psychology Program. He has worked with the National Center for State Courts on many research projects over the years and he has previously published two articles here in Court Review. He also has worked at the Federal Judicial Center. And he served for five years as the editor of Behavioral Sciences and the Law, a respected, interdisciplinary journal, as well as serving on the editorial boards of two other journals at the intersection of law and social science.

Alan will also be able to enlist the support of others at the University of Nebraska. Elizabeth Neeley, a sociologist who serves as the Public Policy Center’s project director for the Nebraska State Bar Association/Nebraska Supreme Court’s Minority Justice Committee and the Judicial Restructuring Project, and Kimberly Applequist, a lawyer who worked in health law in California before coming to Nebraska to pursue a doctorate in Cognition, Learning & Development, will be helping out as Editorial Board member and assistant editor, respectively.

With the new assistance, we should be able to get Court Review back on track with its publication schedule in the next year. The two issues following this one are already in process, so that you should receive them within a very short time frame. Being both an officer of AJA and the editor of Court Review (while also holding down my “day job” as a judge) was more than I was able to keep up with, I’m afraid, but I appreciate your patience and support as we have worked through it. With Alan’s help, we are now moving forward in ways that will be quite beneficial to you. We will continue to emphasize practical articles and research in the areas most of interest to judges.

This issue includes four articles. Tomkins and Neeley review a test project from the courts in Lincoln, Nebraska, designed to improve the screening for indigency when appointing counsel. Michael Langan discusses case law involving overly litigious pro se litigants—courts in the Second and Third Circuits have acted in several cases to limit special privileges otherwise given to pro se or indigent civil litigants. And our issue concludes with Professor Charles Whitebread’s annual review of the civil and criminal decisions of the United States Supreme Court for the past year.—SL

Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. Court Review seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for Court Review are set forth on page 42 of volume 42, issue 3-4. Court Review reserves the right to edit, condense, or reject material submitted for publication.

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Letters to the Editor, intended for publication, are welcome. Please send such letters to Court Review’s editor: Judge Steve Leben, 100 North Kansas Avenue, Olathe, Kansas 66061, e-mail address: sleben@ix.netcom.com. Comments and suggestions for the publication, not intended for publication, also are welcome.

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Photo credit: Mary Watkins (maryswatkinsphoto@earthlink.net). The cover photo is of the Tarrant County Courthouse in Fort Worth, Texas. Built in 1893, it was the third courthouse built on the site—the first burned in 1876 and the second was torn down to build the larger, current structure. When it was built, the $500,000 price tag so angered the citizens that they voted the county commissioners out of office.

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The American Judges Association is the Voice of the Judiciary. So says the United States Patent and Trademark Office, which accepted the AJA’s registration of this service mark on the principal register for patents and trademarks on March 27, 2007.

This column will seek to answer two questions: What does this mean? And how did it come about?

Let’s take the second question first. Many years ago, the AJA’s long-range planning committee noted that one of our central purposes was to act as a national voice for judges. Later, under the leadership of then-president Gayle Nachtigal, the AJA adopted a single phrase to capture this goal and message: we began calling ourselves the Voice of the Judiciary.

During Gayle’s year as our president, she issued a news release commending the president of a large national legal organization for his public statement in response to attacks that had been made on judges involved in the Terri Schiavo case. The AJA news release noted that “the mission of the AJA, as the Voice of the Judiciary, is to ensure that judges, justices, and other judicial officials remain unaffected in their role as an independent branch of government.” The AJA news release was later circulated on e-mail list serves of both the AJA and a judicial group within the large national legal organization previously referenced.

One month after Gayle’s news release, this other judicial group began including a tag-line on e-mails it sent to its members—the other group was now calling itself “the voice of the judiciary.” It had not done so before. We were disappointed by this move. The AJA had joined in a common campaign with their organization to support judicial independence and to oppose unfair attacks on judges. In response, they had begun using our service mark. Confusion between the groups would no doubt be substantial.

With some research, we learned that many similar associations had avoided such confusion by obtaining trademark protection for similar service marks. For example, groups had obtained trademark protection for “the Voice of the Independent Funeral Home” and “the Voice of the Construction Industry.” So AJA filed for protection of its service mark, the Voice of the Judiciary.

Our application was filed with the U.S. Patent and Trademark Office. After review, it was approved as to form and official notice of our application was published. After opportunity for objection, the application was approved on March 27, 2007 through another published notice and the issuance of a certificate of registration. The AJA is now the owner of a registered service mark, the Voice of the Judiciary, for use in connection with the provision of association services promoting the interests of judges and the judiciary.

That’s how the trademark registration came about. Now, for what this all means.

AJA is fully committed to serving as the Voice of the Judiciary. Perhaps more than at any time in the almost 50-year history of our association, judges and the judiciary are under attack. About a year ago, my wife received a fundraising letter from my law school classmate, U.S. Sen. Sam Brownback. He sought money to fight judiciary tyranny. He wrote that “we are now engaged in the most important political battle of our lifetimes: the battle over whether we continue to be a free, self-governing republic or a nation ruled by judicial edict.” He asked my wife to sign a proclamation against judicial tyranny and, of course, to send money.

Now, I find it hard to believe that Sen. Brownback really believed that this battle against judiciary tyranny was “the most important political battle of our lifetimes.” Could it really be more important than the civil-rights movement? Even if even Sen. Brownback would concede that the civil-rights movement was a tad more significant, though, his rhetoric in fundraising typifies the fire used these days in some quarters to demonize judges.

In response, the AJA is actively working to defend courts that are both fair and accountable—free from political influence but accountable to the Constitution and the rule of law. As a sample of AJA efforts, just in the past month I have had opinion columns defending fair courts published in the National Law Journal and the Providence Journal (in Rhode Island, site of our 2007 midyear meeting). I will be engaging in a debate this summer at a six-state bar conference with those who proposed the misguided “Jail 4 Judges” initiative last year in South Dakota. These sorts of efforts will continue.

In addition, the AJA is working on a major white paper that will outline ways judges in all courts can work to improve public perceptions of their fairness and public satisfaction with and acceptance of their rulings. Our white-paper committee is under the leadership of Kevin Burke, a Minneapolis trial judge who won the prestigious Rehnquist Award for Judicial Excellence in 2003. The paper will be presented at AJA’s 2007 annual educational conference in Vancouver this September. Substantial follow-up efforts will begin immediately after the Vancouver conference.

These and many other efforts by AJA committees and leaders reflect our resolve to speak on your behalf and to earn, through words and deeds, the right to be known as the Voice of the Judiciary.
Evaluating Court Processes for Determining Indigency

Elizabeth Neeley and Alan Tomkins*

The Sixth Amendment to the Constitution guarantees all people accused of a crime the right to legal counsel. In the landmark 1963 decision Gideon v. Wainright,1 the United States Supreme Court affirmed the right of indigent defendants to have counsel provided. But Gideon did not end the Supreme Court’s discussion of the circumstances in which the state is required to provide defendants with an attorney when they claim not to have the means to pay for one.2 Nor did it end the states’ examination of the requirement of any legal assistance paid for by taxpayers.3 Moreover, it is not mandated by constitutional law, congressional statute, or U.S. Supreme Court interpretation how states will fund these programs (will it be a state or local, e.g., county, responsibility?) or the procedures by which a defendant will be deemed indigent. States and counties have developed a range of programs designed to provide counsel to indigent defendants (the most well known is the public defender model; other examples are the appointment from a roster of practicing attorneys and contracts with willing practitioners).

States and counties have also developed a range of procedures to assess whether a defendant is unable to afford an attorney without assistance.4 A 2002 report by the Spangenberg Group documents the variability across states with regard to various aspects of indigency determinations, including how presumptions of indigency are determined (i.e., what factors are taken into consideration, such as the defendant’s income in relation to federal poverty guidelines, assets, complexity of the case, resources of relatives and friends, whether the defendant can afford to pay bail, etc.), whether or not formal guidelines are in place, who makes the determination (the public defender’s office or the court), whether the court utilizes a financial questionnaire or affidavit, whether the client’s claim is investigated, and so on.5

The specific purpose of this article is to report on an evalu-

Footnotes

* We appreciate the assistance we received in visioning, collecting, and assessing the information used in this evaluation. We are especially grateful for the help and guidance we received from the Project Oversight Committee, beginning with their ideas for what needed to be evaluated and concluding with comments and corrections to earlier drafts. The Oversight Committee members included: Steven Burns (Lancaster County District Court Judge), Kerry Eagan (Lancaster County Chief Administrative Officer), James Foster (Committee Chair and Lancaster County Court Judge), Peggy Gentles (Lancaster County Court Judicial Administrator), Dennis Keefe (Lancaster County Public Defender), Gary Lacey (Lancaster County Attorney), Catherine Reech (Lancaster County Court Screener), Toni Thorson (Lancaster County Juvenile Court Judge), Mike Thurber (Lancaster County Corrections Director), and Janice Walker (Nebraska State Court Deputy Administrator). We would also like to acknowledge the following for their assistance: Kimberly Applequist (University of Nebraska Public Policy Center), Pamela Casev (National Center for State Courts), Ian Christensen (University of Nebraska Public Policy Center), Carly Duvall (University of Nebraska Public Policy Center), Jenn Elliott (University of Nebraska Public Policy Center), Carol Flango (National Center for State Courts), Roger Hanson (Independent Law and Society Researcher, Williamsburg, VA), Patrick J. Dorn-Kennedy (University of Nebraska Public Policy Center), Katie Novak (University of Nebraska Public Policy Center), David Rottman (National Center for State Courts), Nancy Shank (University of Nebraska Public Policy Center), and Ann Skove (National Center for State Courts).


5. Spangenberg Group, Determination of Eligibility, supra note 4.
ation of a pilot program implemented in Lancaster County (Lincoln), Nebraska, designed to change the way in which a defendant’s claim of indigence is assessed by the legal system. Regardless of whether a jurisdiction uses public defenders or another form of retaining defense counsel for indigent defendants, a determination must be made regarding a defendant’s indigency status. Given the increasing caseloads for court systems and public defender offices and given the interest in ensuring that governmental procedures are optimized for efficiency and fairness, specific counties or even statewide judicial systems may choose to assess, reform, or implement new systems for determining indigence. There are a myriad of interests in assessing indigency determination programs. For instance, these programs have the potential to increase fairness and consistency in indigency appointments, increase the efficiency of the system, and defray costs of the justice system. Thus, the general purpose of this article is to provide courts with evaluation input into this important public function.

**LANCASTER COUNTY INDIGENT DEFENSE PILOT PROJECT**

Prior to the implementation of an experimental, pilot project in Lancaster County, there were no set guidelines in Nebraska for determining indigence. Judges relied on their own philosophies and definitions of indigence, thereby creating variability in indigency appointments across judges. Similarly, it was left to a judge’s discretion to determine whether the defendant was eligible for a court-appointed attorney. Not surprisingly, there was great variability across judges, ranging from those who employed a rigorous line of questioning, to those who based their decisions on a few questions and an assessment of the defendant’s appearance. As is typical in most jurisdictions, assertions made by defendants regarding claims of indigency were not verified by the court. From time to time, cases occurred in which defendants with great wealth were subsequently found to have been given an attorney at taxpayer expense, thereby creating a maelstrom of news coverage and the popular perception that there are defendants “free-loading” off the system.

In January 2001, a three-year pilot project was initiated in Lancaster County for the purposes of assessing three aspects of the indigency determination system, each of which were initiated at the same time.

1) A *uniform rule* was developed to guide defendant eligibility for court-appointed counsel that judges were required to follow.

2) A *standardized form* for documenting eligibility for appointed counsel was introduced that judges were required to complete.

3) A position was created and a function for the position was determined, meaning there would be would be dedicated county court staff (“Defense Eligibility Technician” or Screener) to obtain financial information from a defendant and verify the information submitted by a defendant in support of a claim of indigency.

The program was limited to adults charged with a felony or misdemeanor. The cost for the Screener was estimated to be approximately $50,000 per year (changing the rule and creating a standardized form did not create annual costs). The impacts were expected to be increased rejection of defendants’ requests for a court-appointed attorney for those not eligible for one and an increase in court-appointed attorneys for those eligible who might have been refused an attorney under previous practices. A preliminary evaluation of the pilot project was conducted in 2002 by the authors.

**Indigency Rule and Financial Eligibility Form**

Lancaster County’s Indigency Eligibility Rule contains...
three provisions, or “tiers.” Financial information relevant to these tiers is documented on a standardized form (the “Indigency Information Form”) and then given to the judge as part of the defendant's file.

The Indigency Information Form provides information relevant to deciding indigency under each tier. Under Tier 1 of the Rule, if a defendant is receiving any type of federal, state, or local poverty assistance, he or she automatically qualifies for court-appointed counsel unless the offense will not result in imprisonment. If the accused is not currently receiving any type of federal, state, or local poverty assistance, the total annual income and the number of dependents must be considered. A defendant is considered indigent under Tier 2 of the Rule if he or she earns less than 125% of the federal poverty guidelines. (Each spring, the amount of money reflected by 125% of the federal poverty guidelines is updated.) If the individual earns more than 125% of the federal poverty guidelines, then the judge’s discretion becomes relevant under Tier 3.

The judge is to consider sources of additional income (interest and dividends, profits off rental property, cash earnings, etc.), assets, and debts in order to determine whether the projected cost of hiring private counsel will interfere with the defendant’s ability to provide for the “economic necessities” of the defendant or his or her family. The judge must make “findings, including [a] comparison of the party’s anticipated cost of counsel and available funds when applicable, on a form . . . filed with the papers in the case.”

In summary, under the first two tiers of the Rule, eligibility is presumptively determined. If the defendant qualifies under the criteria and is in jeopardy of being incarcerated if convicted, then the defendant is eligible for a court-appointed attorney. If the defendant does not qualify under the first two tiers, the judge proceeds to the Tier 3 in order to make the traditional determination of what funds are available to retain private counsel so that the judge can balance the defendant’s assets against the anticipated cost of counsel. It was initially expected that more than 75% of the cases before the courts would be determined under the first two tiers.

**Defense Eligibility Technician.**

The position of Defense Eligibility Technician/Screener was created as a central part of the project. The Screener was designated a paraprofessional position. The Screener collects and verifies information from defendants about their financial status. The Screener briefly interviews defendants to collect financial data, obtaining information about income, debts, resources, and other financial information. The information obtained by the Screener is recorded on the Indigency Information Form. The information is then provided to the judge for an indigency eligibility determination. Thereafter, the Screener maintains a computerized record of the form and verifies the accuracy of parts of the defendant’s financial information, reporting any discrepancies to the judge.

**ASSESSMENT AND METHODS**

Research questions were determined in consultation with a Project Oversight Committee, which included Lancaster County judges, prosecutors, public defenders, court administrators, county commissioners, and court staff. The evaluation was primarily based on information obtained from interviews with key stakeholders. Information also was obtained from basic screener program data (statistical information), an analysis of screener verification efforts (truthfulness inquiry), and courtroom observations. The evaluation design was largely a function of the data available. Although quantitative designs are often preferred in situations such as these for their objectivity and ability to definitively show patterns, trends, and changes overtime, the prior system left no quantitative data available to compare. The best means to make comparisons before and after implementation of the pilot project was to qualitatively explore the opinions and experiences of those involved in the system. Quantitative data available since implementation of the project were combined with stakeholders’ qualitative assessments of the project.

**Interviews**

Interviews were conducted with 25 stakeholders, including judges (county, district, and juvenile court; n=10), lawyers (from the county and city attorneys’ offices and the office of the public defender; n=4), screener staff, judicial administration staff, and criminal justice administration staff (n=6), and defendants (n=5). Interviews were undertaken to obtain stakeholder insights into how the project was operating, along with other stakeholder information such as estimates of time spent on indigency determinations, proportion of cases in which erroneous information is given by defendants, and so on. Interviews were semi-structured, thus providing consistency of information across the respondents, while still allowing for flexibility with each interviewee.

**Screener Program Data**

Prior to the project's implementation, no records of requests for court-appointed counsel were kept. Upon implementation of the project, a database was created that recorded the infor-

12. Rule I, supra note 11.
13. According to the first tier of the Rule, indigent means “[a] party who is [r]ecieving one of the following types of public assistance: Aid to Families with Dependent Children (AFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), poverty related veteran's benefits, food stamps, refugee resettlement benefits, Medicaid, Supplemental Security Income (SSI), or County General Assistance Funds.” Rule I, id.
15. This provision contained in Tier 3 of Lancaster County's Rule is intended to operate in the same manner as Nebraska's current indigency eligibility statute, Neb. Rev. Stat. § 29-3001(3) (Reissue 1995)
Table 1). The data reveal that the court-appointed attorney was higher than might be expected. The issue could be further investigated if judges regularly were to indicate their reason on the Form for not appointing counsel in each case.18

Overall, it seems that the majority, but not all, defendants who were eligible under the Rule to receive counsel appropriately received a court-appointed attorney. It is likely that some defendants who were ineligible to receive counsel were erroneously receiving a court-appointed attorney. Given that so many defendants are, in fact, eligible, however, we believe the cost of an additional $50,000 to employ a Screener to find the comparatively few ineligible defendants is less beneficial than the error of simply providing them with a public defender. Of course, this depends in part on the success rate of identifying ineligible defendants (if most ineligibles will be detected, it is a different matter than if a small percentage of eligibles will be detected). In any event, fairness and consistency are

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Percentage of Cases</th>
<th>Judge Appointed Atty.</th>
<th>Judge Did Not Appoint Atty.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tier 1</td>
<td>1,112</td>
<td>21.2%</td>
<td>75.5%</td>
</tr>
<tr>
<td>Tier 2</td>
<td>2,819</td>
<td>53.9%</td>
<td>81.3%</td>
</tr>
<tr>
<td>Tier 3</td>
<td>1,301</td>
<td>24.9%</td>
<td>62.6%</td>
</tr>
<tr>
<td>TOTAL</td>
<td>5,232</td>
<td>100.0%</td>
<td>75.4%</td>
</tr>
</tbody>
</table>

Note: Some defendants presumptively qualified under both Tier 1 and Tier 2. The number of cases presented in Tier 2 does not include those who previously qualified under Tier 1.

18. This suggestion is consistent with the Rule already. “If the court finds that a party is not indigent under § 2(3)(a) the court shall next determine whether the party is indigent under § 2(3)(b). The court shall record its findings, including its comparison of the party’s anticipated cost of counsel and available funds when applicable, on a form.” (Rule I, supra note 12). However, our review of the Forms indicates that judges do not tend to regularly record their findings.
enhanced by providing more defendants with a public defender even if the county would not have to do so if all the facts were verified.

Judges and other court personnel indicate their confidence that the Indigency Rule and Form have increased the consistency in determining indigence. First, judges are provided with the same information for each defendant; therefore, defendants have a more equal assessment of their financial situation. Second, it provides for somewhat more consistency across judges in that all judges are provided with the same information. This finding of uniformity does not obviate the concern noted previously, that is, the fact of variability across judges; however, the impression we obtained from a variety of interviewees is that most of the legal professionals in the Lancaster Court system believe that uniformity is enhanced both by the Rule and by the standardized information sought by the Form than was obtained before review by the Screener.

Efficiency. When judges were asked about time savings, several responded that before the pilot project, determinations (including questioning) could take anywhere between three and five minutes. They estimated that determinations now take under one minute (courtroom observations confirm that determinations generally take less than 30 seconds). It appears that the information on the Form was adequate in that judges did not ask additional questions. In short, judges found the financial information included on the Form to be useful, allowing them to streamline their time and effort related to determining indigency.

Cost Savings. A cost savings via the introduction of the Rule and Form would be realized if these components resulted in more ineligible defendants appropriately being denied services. This does not appear to be the case. On the whole, interviewees indicated that the majority of Lancaster County judges believe that, considering all interests at stake, it is better to err on the side of providing a public defender than it is to deny someone in need of a public defender. Several of the judges to whom we spoke commented that when jail time is a possibility, even if the prosecutor might not be asking for jail time, they are very likely to appoint an attorney. Our courtroom observations documented this orientation: Even defendants who refused the public defender services that judges offered them were urged to think seriously about refusing.

We commend the practice of these judges. Court appointment of an attorney ensures the defendant will have access to legal advice. Legal advice may help defendants to avoid unnecessarily pleading guilty to an offense in circumstances in which representation may result in conviction for, or pleading guilty to, a less serious offense, or even help secure a defendant acquittal. In addition, court appointment helps to promote efficient administration of justice by avoiding pro se litigation or by ensuring that legal issues are raised and legally relevant facts are presented. As was noted by several of the attorneys and judges we interviewed, the criminal charge is more efficiently resolved when a knowledgeable attorney is representing the defendant. However, it appears not to be simply a matter of case resolution that prompts the judges to encourage (and appoint) public defense counsel, it is a matter of the interest in justice that appears to inspire their behavior. Overall, then, it seems that the rule and form do not appear to have a significant impact on cost savings.

Defense Eligibility Technician

Fairness and Consistency. Using a defense eligibility technician to obtain a defendant’s financial information appears to increase fairness and consistency by providing a more uniform and accurate assessment of the defendant’s financial information. The judges uniformly reported that they did not obtain nearly as much financial data as the screeners provide. Additionally, the screener can provide accurate calculations to the judges. Judges appear to like having the opportunity to provide the information to a court employee who is responsible for collecting this information but not for making indigency determinations. They indicated they believed they were being treated fairly. Thus it seems a screener contributes to the efficiency of the court and the dignity and privacy of the defendant by collecting financial information in a more private setting than in the open courtroom, without the pressures and anxieties of providing such information in court as part of a public, and perhaps confusing, process.

Efficiency. According to those involved in the process, when the defendant’s financial information is obtained by the Defense Eligibility Technician prior to, rather than during, a court appearance, there is a decrease in the amount of time that judges, prosecutors, public defenders, and other criminal justice system personnel spend on the issue of determining indigency. A Screener saves judges time that they would otherwise spend obtaining the defendant’s financial information, and it saves attorneys time they otherwise have to spend listening to the judge obtain the information. We spoke to six defendants about screening issues. Defendants who had been screened in the previous and current way commented the new pilot procedure created a time savings and the overall appearance of a more efficient courtroom.

Cost Savings. Interviews indicate that the Screener does provide a time savings. These savings in time could add up to a substantial cost savings if more cases could be processed or if judges and prosecutors were able to conduct other business with the time they saved from having to be involved in collecting or listening to financial information. However, as some interviewees pointed out, since court officials are paid whether they are in court or not, there are probably no measurable savings by having defendants prescreened. Although a time savings may not necessarily translate into a cost savings for the county, there may be value in freeing up the time of court staff (bailiffs, sheriffs, etc.) so that they can better use their time. This savings in time is also relevant for the public, who likely wait less time to be arraigned. On the other hand, several interviewees questioned the expenditure of additional funds on a task that could be done by a judge, who already is receiving a salary from the public.

Verification

Fairness and Consistency. The impetus for reforming current processes for determining indigence typically stem from the
occasional case in which defendants with great wealth are found to have been given an attorney at taxpayer expense, thereby creating a maelstrom of news coverage and the perception that there are defendants “freeloading” off the system. Verification may add a sense of fairness to the system by allowing numerous court personnel, administrators, and taxpayers to feel that defendants are not “getting away” with access to governmental services (i.e., a public defender) to which they are not entitled. Verification provides the sense that some deterrence exists, reducing the likelihood that a defendant will get away with giving false information to the court.

Efficiency. In its current configuration, verification efforts do not appear to impact efficiency. In virtually no cases have there been any additional legal actions taken in instances in which the Screener has found that false financial information has been provided. Even if a falsehood is detected, the majority of judges indicated they were unwilling to stop a case to remove the public defender once the case has started. They offered a range of reasons. Some judges state that even if a defendant lies, it is typically the case that the defendant does not have a lot of resources anyway. Other judges said it would be more expensive to the system to stop proceedings midstream and require the defendant to find private counsel. A few judges believe there should be prosecutions, but other judges say it does not seem to be a good use of scarce resources to prosecute these cases.

Cost Savings. If the screening process is successful in “weeding out” those who do not qualify for counsel it would represent a cost-savings for the court system. In order to successfully identify “freeloaders,” the accuracy of financial information being provided to the court and the Screener’s verification efforts must be considered.

At our request, the Screener gave us information regarding inaccurate or false information for a one-month period. Of the 460 cases screened in the month, the Screener said she learned that 25 individuals (5.4%) lied about financial information. The Screener reported the month was not atypical in numbers of defendants, kinds of cases, and so on.

There were basically three categories of inaccurate or false information:

When asked about their employment, four defendants provided false information as to when they were last employed. Three said they were unemployed recently, but records showed that they were employed from two months to two years longer than they had reported. It is useful to note that this false information would lead a judge to believe the defendants had more financial assets than they actually had. The fourth defendant lied in the expected direction, stating that he had been unemployed longer than he really had been.

Eleven defendants reported that they were currently employed when they were not, at least by the employer with which they said they were employed. This falsehood could have made these defendants ineligible for a public defender when in reality they might have been eligible.

Ten defendants provided a fraudulent Social Security number.

These findings indicate that in a typical month, 5% of defendants provided inaccurate or false information to the court. Of those providing inaccurate information, however, only one person in 25 gave information that could have possibly increased their chances of receiving public defender services. In fact, the inaccurate information may have not even been such that it would have made a difference in eligibility. These findings are consistent with what several interviewees (including the Screener and a defendant) told us: Defendants are as likely to lie to make themselves seem more financially secure than the facts would indicate. The reason for wanting to seem better off financially may include such factors as wanting to appear worthy of lesser bond, not wanting to appear destitute in front of other defendants (even when financial information is provided to the Screener, other defendants are around to overhear the conversation, especially in the jail setting), or as one judge told us, they simply do not know how much compensation they receive from work.

The perception by some in the court system is that the presence of the Screener and the fact of verification both promote honesty. However, conversations with defendants suggest that they are not especially motivated to honesty, or deterred from dishonesty, by the presence of the Screener or the existence of a verification program. No defendant believed financial information was verified—they did not think there would be time to do so between the time they provided the Screener with information and the time of their court appearance. Apparently the prospect of future verification was not a salient concept, nor did they indicate it was a deterrent. Similarly, judges stated their belief that if the defendant was going to lie, the defendant would lie to the Screener as well. The data we obtained from the Screener support the view that either (a) not much lying takes place, or (b) the pilot project was not much better at catching liars than was the system in place beforehand.

CONCLUSION

Overall, the project clearly increased consistency in indigency appointments by ensuring that the same financial information was collected for each defendant and that each judge was provided with the same information regarding each defendant. Collecting financial information from defendants in a

19. Spangenberg & Beeman, Indigent Defense Systems, supra note 4; Spangenberg, Contracting, supra note 9; Spangenberg, Defender Workloads; supra note 6; Stambaugh, supra note 9.
20. The Court Administrator in Oregon claims that their program, which is a statewide—not a single court’s—effort using a centralized screening process, saves $2 for every $1 it spends on verifica-
more private setting prior to the hearing also was advantageous. Not only did it increase the efficiency of the process by reducing in-court time for judges, attorneys, and defendants, but collecting financial information in a more private setting than in the open courtroom also seemed comforting to defendants.

Data are less conclusive with regards to the extent to which the project improved fairness in indigency appointments. The rate of non-appointments for defendants who otherwise seemed eligible (based on Tier I and Tier II eligibility criteria) for a court-appointed attorney was higher than might be expected. Interviews with judges, however, indicated that they prefer to err on the side of providing counsel, rather than denying someone in need of counsel. This issue could be more fully examined if judges provided the rationale for denying counsel on the form.

The project’s verification component in its current configuration does not seem effective in uncovering financial information that results in a denial of public defender appointments that, but for verification, otherwise would have occurred. Findings suggest that the percentage of defendants who are caught providing inaccurate information about their financial status is minimal; defendants who were caught lying were more likely to have tried to make themselves look more financially secure than impoverished enough to have been more readily eligible for court-appointed counsel.

**Implications for Courts Beyond Lancaster County**

For jurisdictions interested in assessing, reforming, or implementing new systems of determining indigence, the results of this evaluation strongly support the adoption of a uniform rule and form for determining indigence. Interviews revealed that those involved in the court system are virtually all positive about the *uniform rule*, primarily because it is believed the Rule has resulted in greater uniformity and consistency in indigency appointments. The *standardized form* is considered beneficial because it helps direct the collection of useful financial information judges need to know in order make the decision whether to appoint counsel.

Although screening staff appear to create a time savings for judges and attorneys, and provide defendants with a semiprivate environment to provide financial information, the benefits of their *verification* are less clear. On the one hand, verification allows people to feel that defendants will not receive benefits (court appointments) at taxpayer expense to which the defendants are not entitled. On the other hand, verification does not appear to fulfill its promise. It is our opinion that defendants are not more honest simply because there is a court employee who will verify financial information. It is not clear that verification efforts succeed in uncovering financial information that results in a denial of public defender appointments that, but for verification, would have otherwise occurred. We do not believe verification detects very much false or inaccurate information. Part of the problem is it is hard to uncover the negative. Thus, it is quite difficult for the verification process to find that a defendant who denies employment actually has a job or to find a savings account when the defendant does not list one. Even when verification uncovers dishonesty, the dishonesty can be so minimal that it does not actually affect the defendant’s indigency status. Finally, in most instances, it does not seem to be good practice or policy either to stop judicial proceedings or to prosecute defendants in those rare instances in which inaccurate or false information is uncovered.

**Alternative Verification Strategies**

There are several options that would make verification efforts more cost-effective. One possible way to address the cost issue is to consider additional changes to the Rule that would allow recoupment of costs incurred to provide indigent services. Spangenberg and his colleagues are advocates of efforts to offset costs. There may be some preference to implement up-front user or application fees as opposed to after-the-fact recoupment costs. With a slight charge as $10 application or use fee per defendant there would be $50,000 in revenue generated, enough to virtually support the annual cost of a Screener. For example, in FY 2001-02, there were 5,232 cases considered for court appointment. If each defendant were charged $10, the revenue would be over $50,000. Or a slightly higher base fee could be established with a sliding scale, with the goal of generating the average amount of $10 per defendant.

Another alternative is to staff the Screener position differently. Might there be others who already have investigative skills who could conduct the verification for the court? If pretrial service officers were conducting verification activities along with their other activities, it might be possible to reduce the costs incurred when a position is designed solely to screen and verify financial information.

If pretrial services were to verify, who would screen? Again, pretrial service staff could collect financial information for the jail population. Clerk staff might be considered for undertaking the responsibility of screening cases for defendants not in jail. Again, you would have staff members who are working on financial matters (in this case, screening) along with other responsibilities throughout their workday. Verification respon-

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**Programs: Eligibility Screening and Cost Recovery Procedures**


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sibilities could be vested solely with pretrial service staff, and pretrial staff could be responsible for checking the financial data obtained by the court administrator's staff.

Postscript

In 2005, the Lancaster County Indigency Screener Project was cut from the county budget. During the four years the screening project took place there was no indication that the program was impacting (reducing) the number of defendants receiving court-appointed attorneys, and there was no indication of a cost savings from verification. Consequently the decision was made to terminate the project, and the money for the project was used to fund an additional attorney in the Public Defender's office. Administrators decided that for the program to be successful, the screening needed to take place days before the arraignment, which was not the way Lancaster County had organized its program.

As detailed in this article, there are clear benefits to a uniform rule and form for determining indigence. Jurisdictions interested in including a screening or verification component should consider the alternative screening/verification strategies discussed in here: establishing a mechanism to recoup costs, pairing the screening position with existing court staff, or pairing verification efforts with existing pretrial services.

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Grounding Frequent Filers: The Trend of Revoking the Special Status of Overly Litigious Pro Se Litigants

Michael G. Langan*

Since the early 1990s, federal courts in the Second and Third Circuits have, with increasing frequency, revoked the special status of pro se civil litigants who have been overly litigious. This article discusses the reasons for this trend's appearance in the Second and Third Circuits, the rationales for the trend, the fairness of the trend, and some practical advice for courts and practitioners wrestling with the issue of whether or not the special status of a particularly litigious pro se litigant should be revoked.

I. NATURE OF SPECIAL STATUS AND TREND

As a general rule, every federal court in the United States affords "pro se" civil litigants special status, although courts often differ on the way they describe that status. This general rule is followed, to varying degrees, by state courts.

Uniformly, this special status consists of a right to have one's pleadings construed more liberally than those of a represented litigant. For example, this liberal construction might result in a court recognizing a pro se plaintiff's complaint as alleging a fact or claim, even if the complaint makes no express mention of such a fact or claim. However, a pro se litigant's pleadings are not the only documents that are routinely afforded a liberal reading. Also liberally construed are a pro se litigant's briefs, affidavits, and notices of appeal.

Moreover, depending on the court, this special status may confer a variety of other benefits on pro se litigants: (1) a right to have one's complaint treated as amended by one's papers in opposition to a defendant's motion to dismiss for failure to state a claim; (2) a right to file an amended complaint, including a second amended complaint; (3) a right to be specifically notified of the consequences of failing to respond to a summary judgment motion before being subjected to those consequences; (4) a right to be excused from complying with service deadlines, discovery deadlines, motion-filing deadlines, and page limits; and (5) a right to be presumed to have been acting in good faith when sanctions are being con-

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* The views expressed in this article are those only of the author and do not necessarily reflect the views of the United States District Court for the Northern District of New York, where the author is employed.

1. “Pro se” is a Latin term meaning “[f]or oneself” or “on one’s own behalf.” Black's Law Dictionary 1236 (7th ed. 1999). When used in a legal setting, the term means acting “without a lawyer.” Similar Latin terms include “pro persona” and “in propria persona.”


6. See, e.g., Dotson v. Griesa, 398 F.3d 156, 159 (2d Cir. 2006); U.S. v. Arnold, 114 F. App’x 76, 78 (11th Cir. 2005); Melencio Legui Lim v. INS, 224 F.3d 929, 933-934 (9th Cir. 2000); Whitfield v. Boglino, 63 F.3d 527, 535 n.10 (7th Cir. 1995); SEC v. AMX, Int’l, 7 F.3d 71, 75 (5th Cir. 1993).

7. See, e.g., Smith v. McMichael, 153 F. App’x 566, 568-69 (11th Cir. 2005); Wilson v. Weisner, 43 F. App’x 982, 986 n.1 (7th Cir. 2002); Connor v. Sakai, 15 F.3d 1463, 1470 (9th Cir. 1992), vacated on other grounds, 61 F.3d 751 (9th Cir. 1995); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974).


The rationale for conferring this special status is that pro se litigants need help since they are often inexperienced or unfamiliar with legal procedures or terminology.13 Historically, federal courts across the United States have been willing, on occasion, to diminish or look past this special status when pro se litigants abuse the litigation process.14 This willingness has been shared by many state courts.15 Moreover, since the early 1990s, federal courts in the Second and Third Circuits have, with increasing frequency, revoked the special status of pro se civil litigants who have been overly litigious.16 While courts outside the Second and Third Circuits have also, during this time period, diminished or looked past the special status of such pro se civil litigants, they have done so less frequently.17

13. See, e.g., Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2d Cir. 1989); see also Brian L. Holtzclaw, Pro Se Litigants: Application of a Single Objective Standard Under FRCP 11 to Reduce Frivolous Litigation, 16 PUGET SOUND L. REV. 1371, 1373-1375 & n.15-16 (Spring 1993) [citing cases].
14. See, e.g., Korsunskiy v. Gonzales, 461 F.3d 847, 850 (7th Cir. 2006); Intl’l Bus. Prop. v. IIT Sheraton Corp., 65 F.3d 175, at *2 (9th Cir. 1999); Flynn, 32 F.3d at 31; Salahuddin v. Coughlin, 781 F.2d 24, 29 (2d Cir. 1986); Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979); Zacek v. Fauquier County, 764 F. Supp. 1071, 1078 (E.D. Va. 1991); Life Science Church v. U.S., 607 F. Supp. 1037, 1039 (N.D. Oh. 1985); see also John C. Rothermich, Ethical and Procedural Implications of “Ghostwriting” for Pro Se Litigants: Toward Increased Access to Civil Justice, 67 FORDHAM L. REV. 2687, 2697 (Apr. 1999) [citing cases].
II. REASONS FOR TREND’S APPEARANCE IN SECOND AND THIRD CIRCUITS

What is different about the Second and Third Circuits that has caused the trend to appear there first? Is it that those two circuits have more pro se litigation than do other federal circuits? The answer appears to be no.

It is beyond cavil that, over the past two decades, it has become more common for parties to litigate pro se in federal and state court. As one commentator has observed, causes for this trend include “increased literacy, consumerism, a sense of rugged individualism, the costs of litigation and attorneys’ fees, antilawyer sentiment, and the breakdown of family and religious institutions that formerly resolved many disputes that are now presented to courts instead.” However, it does not appear that the rise in pro se litigation in the Second and Third Circuits has been any greater than the average rise in such litigation in other circuits. For example, between 1990 and 2005, the Second Circuit experienced a 5.9-fold increase in the number of reported decisions involving pro se litigants, while the Third Circuit experienced a 5.7-fold increase in the number of such decisions. However, 6 of the 13 other federal circuits (counting the D.C. Circuit and Federal Circuit) experienced a greater increase in the number of such decisions. Indeed, the rate of increase of such decisions in the Second Circuit and Third Circuits was below the national average rate of increase (a 14.5-fold increase) of such decisions.

Nor does it appear that, in the Second and Third Circuits, pro se cases comprise an unusually large percentage of all civil cases filed there. Based on an analysis of the number of civil pro se cases filed and the total number of civil cases filed by circuit (excluding the Federal Circuit) during the twelve-month period ending September 30, 2004, it appears that the Second and Third Circuits were in ninth and twelfth place (respectively). Nor does there appear to be an unusually high ratio of pro se cases per judge in the Second and Third Circuits. Among all 13 federal circuits, the Second and Third Circuits issued the fifth and fourth most reported decisions (respectively) involving pro se litigants in 2005. Taking into account the number of authorized federal judgeships in each of those circuits, the Second and Third Circuits remain in fifth and fourth place (respectively) in terms of the number of such decisions issued per judge in 2005. If the ratio of pro se cases per judge were the reason for the trend’s appearance in the Second and Third Circuits, then how would one explain the fact that the trend does not appear to be occurring in the two circuits with the most such decisions issued per judge in 2005, namely, the Fourth and Fifth Circuits?

Is it that the Second and Third Circuits have experienced a rise in the number of prisoners incarcerated there, coupled with the fact that prisoners file most of the pro se cases in fed-
eral court? 28 Again, the answer appears to be no. The three states whose federal courts have issued the most status-revoking decisions from within the Second and Third Circuits since 1990 are New York, Pennsylvania, and New Jersey. 29 However, between 1977 and 2004, the prison populations in New York and New Jersey grew about as fast as the average prison population nationally. 30 Granted, the prison population in Pennsylvania grew slightly faster than did the average prison population nationally. 31 However, of the 15 status-revoking decisions found from courts in the Third Circuit, 11 of those decisions were issued by the Eastern District of Pennsylvania, which does not contain as many prisons as do the Middle or Western Districts of Pennsylvania. 32 More important, only one of those 15 decisions involved a pro se inmate. 33

What, then, is the reason for the trend’s appearance in the Second and Third Circuits? In analyzing the 15 status-revoking decisions from courts in the Third Circuit, it becomes clear that seven of those decisions were in actions involving mortgages. 34 While only four of these decisions came from the Eastern District of Pennsylvania (the other three coming from the District of New Jersey), 35 those decisions are consistent with news articles reporting a surge in the number of borrowers alleging predatory practices by certain lenders in the greater Philadelphia area in the past decade. 36 The cases are also consistent with news reports of a shortage of pro bono lawyers able to represent such borrowers. 37 As a result, one of the reasons for the trend’s occurrence in the Third Circuit appears to have been district courts’ frustration with a handful of particularly abusive pro se litigants who were complaining about lending practices in the greater Philadelphia area.

As for the Second Circuit, while an analysis of prisoner-population growth may not explain the trend’s appearance in that circuit, a further analysis of prisoner litigation in general in that circuit might offer some explanation for the trend’s appearance there. This is because, of the 27 status-revoking decisions that were issued from courts in the Second Circuit since 1990, 18 of those decisions involved pro se prisoners suing for alleged civil-rights violations. 38 But is prisoner litigation in the Second Circuit somehow different from prisoner litigation in other circuits, and if so, why?

It appears that the answer to this question is yes in the sense that, together, the New York State Department of Correctional Services (DOCS) and the federal district courts located in New York State appear to foster the creation of experienced pro se prisoner litigants. This conclusion is based on four pieces of evidence. First, all 18 of the aforementioned status-revoking decisions were issued by federal district courts located in New York State and involved pro se New York State prisoners. Second, the New York State DOCS maintains prison law libraries of a relatively high quality as compared to many other state prison law libraries. “Nearly $2.5 million was spent in Fiscal [Year] 2005-06 [alone] to maintain all the [state correctional facility] law libraries [in New York State], including the updates of the law book and periodical collections, and also the supply of pens, paper and photocopying materials.” 39 Such expenditures are in stark contrast to the cuts in funding of prison law libraries by other states (such as Arizona, California, Florida, Idaho, Iowa, New Mexico, and Washington). 40 The result of such expenditures by New York State is a network of 93 law libraries that appears to generally


29. See supra note 17 (citing cases).


31. Id.

32. See supra note 17; see also Pennsylvania Department of Corrections, Institutional Map http://www.cor.state.pa.us/portal/cwp/view.asp?a=376&q=126815&portalNav= (last visited Dec. 28, 2006).


37. See, e.g., Paul Davies, Private Lawyers Sought for Predatory-Loan Cases, PHILA. DAILY NEWS, at 6 (May 18, 2001).

38. See supra note 17.


40. See, e.g., Richard D. Vogel, Silencing the Cells: Mass Incarceration and Legal Repression in U.S. Prisons, 56 MONTHLY REV. 37 (May 1, 2004); Nationwide, State DOCS Face Deepest Budget Cuts in 20 Years, 7 CORR. PROF. 10 (Feb. 12, 2002); Steve Terrell, Prison Contention, SANTÉ FE NEW MEXICAN, at A-4 (Jan. 22, 2002); Prisons Get Those Pens Ready, The FLA. TIMES-UNION, at B-6 (June 30, 2001); David Neiwert, Prison Shell Game, SEATTLE WKLY., at 14 (Feb. 14, 2001); Amid Controversy, Arizona DOC Facilities Are Free of Law Libraries, 6 CORR. PROF. 3; Corrections Director Wants to Phase Out Prison Law Libraries, ASS’D PRESS STATE AND LOCAL WIRE (Feb. 15, 1999); Paul Davenport, Corrections Chief Says Troubled Paralegal Program Back on Track, ASS’D PRESS STATE & LOCAL WIRE (Dec. 1, 1998); DOCS Change Inmate Legal Access Policies, 3 CORR. PROF. 18 (June 5, 1998); Idaho Dismantles Law Library System, 1 CORR. EDUC. BULL. 9 (June 1998).
exceed the Supreme Court’s minimum requirements for “adequate” prison law libraries. Indeed, the collections of New York State’s prison law libraries appear to exceed even the requirements set forth by the American Association of Law Libraries’ Special Committee on Law Library Services to Prisoners. Furthermore, New York State is one of the few states that has four non-prison libraries that provide legal materials to prisoners. In this regard, New York State prisoners appear to have greater legal resources at their disposal than do the prisoners in other states.

Third, the New York State DOCS appears to formally educate more of its inmates in the law each year than do the correctional departments of other states. Specifically, “[b]etween 350 and 400 [New York State] inmates earn legal research certificates each year.” Again, these efforts seem in contrast to the efforts of other states (such as Arizona, Pennsylvania, and Washington), which appear to be cutting the funding of such vocational-education programs. Clearly, the New York State inmates receiving this legal training are better equipped, and perhaps more inclined, to file suit. In addition, many of the New York State inmates receiving this training provide legal guidance to other New York State inmates. For example, New York State’s prison law libraries are staffed, in part, by certified inmate law clerks, who assist inmates in preparing their own legal papers.

Fourth, federal district courts located in New York State make a concerted effort to help pro se prisoner litigants, with- out, of course, providing substantive legal advice to them. For example, both the Northern District of New York and the Western District of New York provide rather lengthy self-help manuals to pro se litigants free of charge, while the Eastern District of New York provides a number of shorter instructional materials for pro se litigants, also free of charge. In addition, the Eastern District of New York has created an additional magistrate judge’s position specifically to improve “the decisionmaking for pro se litigants” and to “direct greater attention to those pro se cases involving potentially meritorious claims.” Finally, the Southern District of New York has what one former court staff attorney calls “one of the most progressive and largest pro se offices in the country” with “eight attorneys and seven writ clerks.”

Perhaps as a result of all these efforts, it appears that, over the past decade, the experience of pro se prisoner litigants in the Second Circuit has generally increased. For example, a recent study conducted of pro se cases in the Southern District of New York during the second half of the 1990s revealed that, during that time period, the number of “repeat filers” of pro se prisoner cases rebounded in 1999 following a temporary drop after the enactment of the Prison Litigation Reform Act in 1996, which placed certain restrictions on such filings. Moreover, the success rate of prisoner civil-rights actions appears to have increased somewhat.

Also appearing to increase is the complexity of pro se prisoner complaints. For example, in the Southern District of New York, pro se prisoner civil-rights complaints that named multiple defendants increased in complexity in the sense that they named more defendants per complaint over the course of the latter half of the 1990s. It is noteworthy that an increase in...
sophistication of pro se New York State prisoner litigants, and a willingness on the part of federal district courts located in New York State to help pro se litigants, would largely explain why, between 2000 and 2005, the Second Circuit was last (of the 12 circuits, including the D.C. Circuit) in terms of the median time to disposition for prisoner civil-rights cases (9.8 months as compared to a national average of 5.7 months). For example, one would expect sophisticated pro se prisoner litigants to be more aware that extensions of time are available and more likely to ask for extensions of time in which to respond to dispositive motions filed by defendants; and one would expect district courts determined to help pro se litigants to be more likely to routinely grant such requests (thus, delaying the ultimate resolution of the cases).

In sum, while the reason for the trend’s occurrence in the Third Circuit appears partly to be the result of district courts’ frustration with abusive pro se litigants complaining about lending practices in Philadelphia over the past decade, the reason for the trend’s occurrence in the Second Circuit appears to be an increase in the skill of pro se inmate litigants due to an effort to educate them by the New York State DOCS and the federal district courts located in New York State. However, more enlightening than the reason for the trend’s appearance is an analysis of the rationales for the revocation of special status.

III. RATIONALES FOR TREND

Generally, courts have articulated two distinct rationales for their revocation of the special status of overly litigious pro se litigants. The first rationale is that the pro se litigant’s excessive litigiousness demonstrates his experience, the lack of which is the reason for conferring the special status upon the pro se litigant. The second rationale is that the pro se litigant’s excessive litigiousness is tainted with abuse (e.g., frivolousness or vexatiousness), warranting sanctions to curb future abuses.

Courts relying on the “experience” rationale look at a variety of factors in assessing whether or not the pro se litigant is experienced. Most often, these factors include (1) the number of previous federal or state court actions or appeals filed, and (2) the recency or simultaneity of the actions or appeals.

Courts relying on the “abusiveness” rationale also look at a variety of factors in assessing whether a pro se litigant has abused the legal system. Most often, these factors include (1) whether the litigant’s previous actions, appeals and/or motions were dismissed or denied, and, if so, whether they were so wholly without merit as to indicate an intent to annoy or harass, (2) whether the previous actions were related to the subject matter of the current proceeding so as to indicate an intent to litigate issues already decided, and (3) whether the litigant has violated a rule of civil procedure or court rule, especially after having been repeatedly advised of the rule so as to indicate willful disobedience. Slightly more important than the number of previous abuses appears to be the magnitude or severity of those abuses. In this regard, the rationale contains a distinct punitive element, unlike the “experience” rationale. For example, the “experience” rationale would likely consider a previous dismissal or a violation of a procedural rule as a sign of inexperience, mitigating against the revocation of the pro se litigant’s special status.

56. These figures come from a chart on file with the author. The chart was prepared by the Clerk’s Office for the Northern District of New York, using data provided by the Administrative Office of the U.S. Courts. See, e.g., Admin. Office of U.S. Courts, Table C-5: U.S. District Courts–Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending June 30, 2005 http://www.uscourts.gov/caseload2005/table/C05mar05.pdf (last visited on Jan. 3, 2007).

57. See, e.g., Eggersdorf, 8 F. App’x at 143; Gummerson, 201 E3d at *2; Flynn, 32 E3d at 31; Saunders, 2006 WL 3051792, at *2; Pidylpchak, 2006 WL 3751340, at *2; Frawley, 2006 WL 1742738, at *3; Talbot, 2005 U.S. Dist. LEXIS 39576, at *20, accord, Riddick, 2005 U.S. Dist. LEXIS 5394, at *7; Yip, 2004 WL 2202594, at *3; Dean, 204 F.R.D. at 257 & n.5; Santiago, 91 F Supp. 2d at 670; McGann, 1999 WL 173596, at *2; Brown, 1995 U.S. Dist. LEXIS 213, at *2 n.1.


60. See, e.g., Hollis, 2005 WL 3077853, at *4, 7-9; Litton Loan Serv., LP 2005 WL 289927, at *1, 3 & n.7-8; Transam., 2000 U.S. Dist. LEXIS 324, at *2; Frempong, 2000 U.S. Dist. LEXIS 113, at *2.

61. See, e.g., Broad. Music, Inc., 1995 WL 552881, at *2 (imposing sanctions on pro se plaintiff after filing of only two actions or appeals); Douris, 2005 U.S. Dist. LEXIS 1279, at *2-5 (imposing sanctions on pro se plaintiff after filing of only five federal court actions).


Generally, courts in the Second Circuit have applied the “experience” rationale, while courts in the Third Circuit have applied the “abusiveness” rationale, although there have been some exceptions. Perhaps the most interesting (and instructive) such exception occurred in the winter of 2000 in the Eastern District of Pennsylvania. There, U.S. District Judge Herbert J. Hutton faced a litigious pro se plaintiff named Stephen Frempong-Atuahene, who had previously filed a dozen lawsuits in the Eastern District of Pennsylvania. In two decisions, Judge Hutton revoked Frempong-Atuahene’s special status on the ground that, because Frempong-Atuahene was an experienced litigant, he was not in need of special status. However, by February, Judge Hutton’s patience had apparently worn thin; continuing to revoke Frempong-Atuahene’s special status, he based that revocation on the ground that Frempong-Atuahene should be punished for abusing the judicial system. Perhaps this is the inevitable progression of a court’s experience of a particularly litigious pro se litigant—liberal leniency, followed by strained patience, followed by downright frustration.

IV. FAIRNESS OF TREND

Is this revocation of special status fair? A litigious pro se litigant might advance a number of arguments in support of his position that the revocation is unfair. First, he might argue that he has a constitutional right (e.g., under the First Amendment to the U.S. Constitution) to use the courts with or without counsel, that he needs to exercise that right in order to remedy certain injustices (e.g., errors in the criminal justice system, abuses in the nation’s overcrowded prisons, etc.), and that the revocation of his special status constitutes retaliation for exercising that right. Second, he might argue that, through the denial of a lenient reading of his pleadings, he is being subjected to a “heightened pleading standard,” which runs afoul of the Federal Rules of Civil Procedure and the Supreme Court’s prohibition of heightened pleading standards. Third, he might argue that any abusive conduct by pro se litigants is already being remedied by various statutes that inhibit abusive conduct by pro se litigants (e.g., vexatious litigation statutes such as those in California, Connecticut, Florida, Hawaii, and Texas). The opponents of an overly litigious pro se litigant would, no doubt, have some rather predictable responses to these arguments. With respect to the First Amendment argument, they would probably argue that (1) requiring pro se litigants to present their claims in compliance with the same rules imposed on represented litigants does not deny the pro se litigants access to the courts, (2) the constitutional right of access to the courts is neither absolute nor unconditional (e.g., there is no constitutional right to abuse the litigation process), and (3) the causation element of a retaliation claim is missing under the circumstances (since it is not the exercise of the pro se litigant’s constitutional right that has caused the court to revoke his special status but the fact that the pro se litigant is experienced or abusive). With respect to the “heightened pleading standard” argument, opponents of an overly litigious pro se litigant would probably argue that, when the special status of an overly litigious pro se litigant is revoked, the litigant is not being subjected to a “heightened pleading standard” but to an ordinary pleading standard (i.e., instead of the lowered pleading standard ordinarily conferred to pro se litigants due to their usual inexperience). With respect to the argument that abusive conduct by pro se litigants is being remedied by reliance on various statutes that prohibit abusive conduct by pro se litigants, opponents of an overly litigious pro se litigant would probably argue that, in part because such statutes are so...
limited in scope, they often do not apply; \textsuperscript{76} furthermore, even when they do apply, they do not always stop “repeat filers” from continuing to file complaints. \textsuperscript{77}

In addition, opponents of an overly litigious pro se litigant would probably argue that, by infusing missing claims and arguments into the papers of the overly litigious pro se litigant, courts are unfairly tipping the scales of justice against the pro se litigant’s opponents and in favor of the pro se litigant, who is in fact either experienced or abusive. \textsuperscript{78} For example, such opponents might point out that, with increasing frequency, the papers of “pro se” litigants are in fact being “ghostwritten” by attorneys. \textsuperscript{79} As a result, they might observe, as did one district court, that the result is that “[undisclosed ghostwriting] necessarily causes the court to apply the wrong tests in its decisional process . . . . The entire process [is] skewed to the distinct disadvantage of the non-offending party.” \textsuperscript{80} In addition, opponents of an overly litigious pro se litigant might point out that a pro se prisoner litigant “may possess several distinct advantages over the ordinary litigant: time to draft multiple and prolonged pleadings; ability to proceed in \textit{forma pauperis} and thus escape any financial obstacles confronting the usual litigant; and availability of free materials which the state must provide the prisoner, including paper and postage.” \textsuperscript{81} They might also argue that civilian pro se litigants are increasingly helped by online self-representation resources, \textsuperscript{82} and that all pro se litigants are increasingly helped by legal self-help books. \textsuperscript{83} Indeed, they might argue that the end result of all of these advantages is that, often, the papers prepared by an experienced pro se litigant are in many ways comparable to the papers prepared by either inexperienced or time-pressed attorneys representing the pro se litigant’s opponents. \textsuperscript{84}

Similarly, all of the courts’ represented litigants might argue that any conferral of special status to overly litigious pro se litigants is unfair since it causes the resolution of their cases to be delayed months, perhaps years, as judges (and their law clerks) struggle with the papers of overly litigious pro se litigants in order to imagine every conceivable claim and argument they could have raised, stretching the courts’ limited resources. This burden on the courts has been well documented, both anecdotally (e.g., through comments by judges in decisions) \textsuperscript{85} and more formally (e.g., through surveys and studies). \textsuperscript{86} The courts’ represented litigants might also point out that, almost always, the represented litigants have paid the courts’ costly filing fees, \textsuperscript{87} while, almost always, the overly litigious pro se litigants have not paid those fees, having been


\textsuperscript{77} See Rosenblum, supra note 28, at 354.


\textsuperscript{80} Johnson v. Bd. of County Comm’rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994); see also Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997); McCauley, supra note 78, at 59; Goldschmidt, supra note 78, at 1148.

\textsuperscript{81} Procup v. Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986).


\textsuperscript{84} See Case, supra note 11, at 737 (“While a pro se litigant is not necessarily on equal terms with a litigant who is well represented, he may well be on such terms with a litigant who is poorly represented.”) [citations omitted]; cf. Wechsler v. R. D. Mgmt. Corp., 861 F. Supp. 1133, 1137 (E.D.N.Y. 1994) (“It is hardly an unwaranteed leap in logic to extend the command of solicitude [ordinarily afforded to pro se litigants] to a party represented by a less than adequate lawyer who has failed to plead an absolute defense or an incontrovertible cause of action.”).


\textsuperscript{87} For example, as of the date of publication of this article, the national federal-court filing fees are as follows: $455 in the courts of appeals (raised from $250 on April 9, 2006), and $350 in the district courts (raised from $250 on April 9, 2006).
granted in \textit{forma pauperis} status. Thus, the courts’ represented litigants would probably argue that, in terms of time and money, the courts’ “paying customers” are shouldering much of the cost imposed by pro se litigation.

For these reasons, it appears that, based on a balancing of the equities, the revocation of special status in the case of overly litigious pro se litigants is generally fair. As one federal district court judge noted more than 20 years ago, “[T]here must come a point at which the solicitude owed the justice system must (like a supply-demand curve) rise to, intersect and surpass the obligation owed a persistent litigant such as [plaintiff].”

V. \textsc{practical advice for courts and practitioners}

When courts and practitioners are considering whether the special status of a particularly litigious pro se litigant should be revoked, they might want to keep four points in mind. First, because the “experience” rationale is remedial in nature and not punitive, it is generally a more narrowly tailored solution to the problems posed by a pro se litigant’s litigiousness than is the “abusiveness” rationale. Again, when relying on the “experience” rationale, courts are simply taking away a court- conferred litigation advantage after finding that the advantage is no longer necessary. Conversely, when relying on the “abusiveness” rationale, courts are punishing an overly litigious pro se litigant in a way that is often not directly related to the reason for the punishment. There are a number of sanctions that may be more directly related to an abusive litigant’s particular abuses than is the revocation of his special status. Furthermore, courts’ application of the “abusiveness” rationale often ignores the fact that the pro se litigant remains (despite his abusiveness) in need of special treatment because of his inexperience. As a result, it appears that, generally, using an “experience” rationale is preferable to using an “abusiveness” rationale, when a choice exists between the two. (A conceivable example of when such a choice might not exist is when a pro se litigant has filed dozens of frivolous actions in a court, necessitating an order barring him from again proceeding pro se in that court without prior leave of the court.)

Second, there is, of course, no formula for determining “How many cases is too many?” However, it appears that, generally, the magic number is about a dozen. Granted, there are some cases revoking the special status of a pro se litigant who has filed fewer than a dozen cases. However, there appear to be more cases refusing to revoke the special status of a pro se litigant who has filed fewer than a dozen cases. Interestingly, this \textit{de facto} “rule of twelve” is consistent with the California Code of Civil Procedure, which declines to extend a reduction in small-claims-court filing fees to those litigants who have filed more than 12 small-claims lawsuits in the state within the previous 12 months.

Third, when employing the “experience” rationale for revoking special status, courts need not myopically view what factors indicate whether a pro se litigant is “experienced.” As explained earlier, when assessing such experience, courts usually look at the number of federal and state court actions and appeals the pro se litigant has previously filed, as well as the

88. See Rosenbloom, supra note 28, at 324-325.
89. See, e.g., Iwachiw, 396 F.3d at 529; Ferdik, 963 F.2d at 1261; Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990); Procup, 792 F.2d at 1074; City of Buffalo, 1998 U.S. Dist. LEXIS 6070, at *16.
91. Among these sanctions may be the following: (1) refusing to extend a procedural deadline (if the litigant’s abuses have to do with procedural delays); (2) treating designated facts as established for purposes of the action, refusing to allow the litigant to support or oppose designated claims, prohibiting the litigant from introducing designated matters in evidence, or drawing an inference adverse to the litigant (if the litigant’s abuses have to do with the discovery process); and (3) striking part of the litigant’s motion papers or opposition papers (if the litigant’s abuses have to do with the filing of frivolous or improper motion papers or opposition papers).
92. See, e.g., Eggertsdorf, 8 F. App’x at 143 (denying leniency to pro se inmate who had previously filed eight federal court actions or appeals); McClellan, 1996 U.S. Dist. LEXIS 8164, at *3-4 & n.3 (denying leniency to pro se inmate who had filed seven previous lawsuits against prison officials); Brown, 1995 U.S. Dist. LEXIS 213, at *2 n.1 (denying leniency to pro se inmate who had seven lawsuits pending in W.D.N.Y.).
93. See, e.g., Gummerson, 201 F.3d at *2 (denying leniency to pro se inmate who had 12 simultaneously pending lawsuits in N.D.N.Y.); Gummerson, 201 F.3d at *2 (denying leniency to pro se inmate who had 12 simultaneously pending lawsuits in N.D.N.Y.); Talbot, 2005 U.S. Dist. LEXIS 39576, at *18-20 & n.10 (denying leniency to pro se inmate who had filed 20 lawsuits in N.D.N.Y.); Riddick, 2005 U.S. Dist. LEXIS 5394, at *7 & n.3 (denying leniency to pro se inmate who had filed 20 lawsuits in N.D.N.Y.).
94. See, e.g., McEachin v. Faruki, 03-CV-1442, 2006 WL 721570, at *2 n.3 (N.D.N.Y. March 20, 2006) (refusing to deny leniency to pro se inmate who had filed 11 other federal lawsuits since 2000); Pritchett v. Portondo, 03-CV-0378, 2005 WL 2179398, at *2 n.3 (N.D.N.Y. Sept. 9, 2005) (refusing to deny leniency to pro se inmate who had filed eight other federal lawsuits since 1996); Burke v. Seitz, 01-CV-1396, 2006 WL 383513, at *2 n.5 (N.D.N.Y. Feb. 13, 2006) (refusing to deny leniency to pro se inmate who had filed six other federal lawsuits in previous nine years); Ariola v. Onondaga County Sher. Dep’t, 04-CV-1262, 2007 WL 119453, at *3 (N.D.N.Y. Jan. 10, 2007) (refusing to deny leniency to pro se inmate who had previously filed five actions or appeals in federal or state court); Smith, 2006 WL 2805242, at *3 & n.4 (refusing to deny leniency to pro se inmate who had posted five other lawsuits); Loren v. Feerick, 97-CV-3975, 1997 WL 441939, at *1 & n.9 (S.D.N.Y. Aug. 6, 1997) (continuing to afford special status to pro se litigant who had filed five previous actions in state or federal court regarding current matter); Abbas v. Senkowski, 03-CV-0476, 2005 WL 2179426, at *2 n.4 (N.D.N.Y. Sept. 9, 2005) (continuing to afford special status to pro se inmate who had filed three other federal actions since 1997).
recency or simultaneity of the actions and appeals. However, some courts also look at the pro se litigant's **effectiveness** in litigating the action(s) or appeal(s) in question. Specifically, these courts typically examine things such as (1) the quality of pleadings (e.g., whether they are typed, crafted in accordance with the relevant rules of civil procedure, etc.), (2) the cogency of motion papers (e.g., whether they are supported by applicable legal authorities, filed in accordance with court rules, etc.), and (3) the ultimate success of any motions, actions or appeals the litigant has previously filed (or the failure of any motions previously opposed). Such a practice seems appropriate in that it is consistent with the standard often used by courts to decide whether to appoint counsel to a pro se litigant. Such a practice seems appropriate also as a matter of common sense. Is there a better indicator of experience than skill?

Finally, when applying the "experience" rationale, courts need not treat special status as an "all or nothing" benefit. Courts may confer special status to a pro se litigant on a "sliding scale," treating the litigant more leniently than other represented litigants but not as leniently as inexperienced pro se litigants. Similarly, courts may limit the conferral of the benefit, or the denial of the benefit, to the particular motion or stage of the proceeding in question. Doing this would help mitigate any deleterious effect of mistakenly concluding that a pro se litigant is experienced when in fact he has simply been helped by a ghostwriter on a particular occasion.

**VI. CONCLUSION**

One of the reasons for the trend's occurrence in the Third Circuit appears to be district courts' frustration with a handful of particularly abusive pro se litigants complaining about lending practices in the Philadelphia area in the past decade, while the main reason the trend's occurrence in the Second Circuit appears to be an increase in the skill of pro se inmate litigants due an effort to educate them by the prison system and federal district courts in New York State. This difference in these reasons for the trend mirrors the difference in the underlying rationales for the trend: (1) that the pro se litigant's excessive litigiousness is tainted with **abuse**, warranting sanctions to curb future abuses; and (2) that the pro se litigant's excessive litigiousness demonstrates his **experience**, the lack of which is the reason for conferring special status onto him. Regardless of which rationale is used, the practice is generally fair. However, courts and practitioners might want to keep four points in mind when wrestling with the issue of whether the special status of an overly litigious pro se litigant should be revoked.

First, the "experience" rationale for the revocation of special status appears to be a more narrowly tailored solution to the problems posed by a pro se litigant's excessive litigiousness than does the "abusiveveness" rationale. Second, while there is no formula for determining "How many cases is too many?" generally the magic number appears to be about 12. Third, when using the "experience" rationale for revoking a pro se litigant's special status, courts should not look simply at the number of actions and appeals the pro se litigant has previously filed, and the recency or simultaneity of those actions and appeals; courts should look also at the pro se litigant's **effectiveness** in previously litigating the actions and appeals. Finally, when applying the "experience" rationale, courts should not fall into the trap of believing that special status is an "all or nothing" benefit: rather, it may be conferred on a "sliding scale," and it may be revoked for a discrete phase of the litigation. By keeping these points in mind, courts may more easily balance the need of pro se litigants to special treatment against the right of represented litigants to a playing field that is level and justice that is swift.

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96. See *supra* note 59 and accompanying text.
98. See, e.g., *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986); *Tabron v. Grace*, 6 F.3d 147, 155-156 (3d Cir. 1993); *Farmer*, 990 F.2d at 322; *Terror v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991);
100. See *supra* note 79 and accompanying next.
Recent Criminal Decisions of the United States Supreme Court: The 2005-2006 Term

Charles Whitebread

In this term, as in the previous one, the United States Supreme Court reasserted the rule of law in the context of the detainees in the war on terror. At the same time, however, the addition of two new justices shifted the Court's ideological balance to the right. In terms of criminal cases, the Court handed down a mixed bag of decisions. It was a bad term for Fourth Amendment claimants with the government prevailing in four of five search-and-seizure cases. Outside the context of the Fourth Amendment, however, criminal defendants fared a little better.

In this article, I review some of the Court's decisions in the criminal context. In a separate article, I review some of the Court's decisions in the civil context.

FOURTH AMENDMENT

Justice Scalia delivered the opinion of the majority in United States v. Grubbs, which held that anticipatory warrants do not violate the Fourth Amendment so long as there is probable cause to believe that contraband or evidence of crime will be found in a particular place when the warrant is executed. Justices Souter, Stevens, and Ginsburg concurred in part but believed the court erred when it held that an anticipatory warrant does not need to state the contingency intended by the magistrate to trigger authorization.

Jeffrey Grubbs purchased a child pornography videotape from a Web site run by an undercover postal inspector. The Postal Inspection Service arranged for a controlled delivery of the videotape to Grubbs's residence and applied for a search warrant proposing that the search warrant would not be executed “unless and until the parcel has been received by a person(s) and has been physically taken into the residence.” The magistrate judge issued the warrant and the controlled delivery proceeded. The postal inspectors executed the warrant, giving Grubbs a copy of the warrant, which included two attachments that described the places to be searched and the things to be seized, but not the affidavit that explained when the warrant would be executed. Grubbs moved to exclude the evidence, arguing the warrant was invalid because it failed to list the triggering condition. The district court denied the motion and the Ninth Circuit reversed.

The Court begins its analysis by concluding that anticipatory warrants are not categorically unconstitutional. Most anticipatory warrants have conditions precedent to their execution and, if executed before that condition occurs, “probable cause has not yet been satisfied when the warrant is issued.” The Court rejects the argument, however, that this condition precedent makes anticipatory warrants a violation of the Fourth Amendment. According to the Court, “[p]robable cause exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Therefore, all warrants are “anticipatory” because the requirement of probable cause focuses on whether evidence will be discovered “when the search is conducted.” The Fourth Amendment only calls for two additional requirements for anticipatory warrants to be valid: (1) “if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place”; and (2) “that there is probable cause that the triggering condition will occur.”

The majority also believes that the Fourth Amendment does not require the anticipatory warrant to specify the triggering condition. The Fourth Amendment “specifies only two matters that must be ‘particularly described’ in the warrant: the place to be searched and the persons or things to be seized.” The Court declines to expand these requirements to include the conditions precedent to the execution of a warrant.

In Georgia v. Randolph, a 5-3 Court held that even if a co-occupant consents to a warrantless search, if the other occupant is present and expressly denies the police permission to enter the premises, the search is unreasonable under the Fourth Amendment. Justice Souter delivered the opinion while Chief Justice Roberts and Justices Scalia and Thomas filed dissenting opinions. Justice Alito took no part in the decision.

Respondent's wife called police to complain about a domestic dispute. She also accused her husband of using cocaine. Respondent's wife consented to a search of the house while respondent, who was present, expressly refused the police permission to enter. The police found a drinking straw with cocaine residue. Respondent's wife subsequently withdrew her consent, but the police obtained a warrant and searched the house. They found further evidence of drugs and respondent was indicted for possession of cocaine.

Respondent moved to suppress the evidence as products of a warrantless search. The trial court denied the motion stating that respondent's wife had “common authority to consent to the search.” The Court of Appeals of Georgia reversed and the Georgia Supreme Court affirmed, stating that “the consent to conduct a warrantless search of a residence given by one occu-

Footnotes
pant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search.” The state supreme court found the case of United States v. Matlock distinguishable because Matlock did not address the scenario where the co-occupant was at the scene and expressly denied consent to a search.

The Supreme Court agrees. Warrantless searches of a person’s house are “unreasonable per se” with “one jealously and carefully drawn exception…consent of an individual possessing authority.” That consent can be given by “a fellow occupant who shares common authority over property, when the suspect is absent.” The Court does not believe, however, that consent by a co-occupant to a warrantless search should extend to situations where the householder is present and refuses to give consent. As evident in Matlock, Fourth Amendment rights are not limited by laws of property but are heavily influenced by “widely shared social expectations.”

The Court starts with the assumption that without any recognized hierarchy, for example, a parent and child relationship, there is no “common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.” It concludes that “the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”

In light of its decision, the Court feels it must discuss Matlock, where the tenant was in a squad car not far away, and Illinois v. Rodriguez, where the tenant was asleep in his room. The Court does not want to undercut the holdings in those cases by its decision and admits it is drawing a fine line. However, it finds this line justified. It adds that the police cannot remove the objector for the sake of avoiding a possible objection, but that police are not required to seek out possible objectors as this would be impractical and “would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field.”

Chief Justice Roberts dissents, stating that the “Court creates constitutional law by surmising what is typical when a social guest encounters an entirely atypical situation.” He believes the Court’s precedent clearly establishes that “[i]f an individual shares information, papers, or places with another, he assumes the risk that the other person will in turn share access to that information or those papers or places with the government.” Under the Fourth Amendment, the test is whether the search is unreasonable, not whether consent is given. Justice Scalia also dissent. He argues that the issue is not that neither the wife nor husband is master over the other, but what to do when there is a “conflict between two equals.” Justice Thomas, also dissenting, finds that Coolidge v. New Hampshire is controlling in this case. In Coolidge, the Court held that no Fourth Amendment search occurs where “the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing.”

In Brigham City v. Stuart, a unanimous Court held that police have an objectively reasonable basis for entering a home without a warrant when they see an occupant of the home is seriously injured or imminently threatened with serious injury. In Brigham, police responded to a call regarding a loud party at a residence. When they arrived, they heard shouting inside and proceeded up the driveway to investigate. They saw two juveniles drinking beer in the backyard and, through the screen door and windows, saw an altercation between four adults and one juvenile taking place in the kitchen. The police opened the door to the kitchen and announced their presence. Nobody noticed so the police entered the kitchen and announced their presence again. Respondents were arrested and charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. Respondents moved to suppress all evidence arguing that the warrantless entry violated the Fourth Amendment.

The Supreme Court granted certiorari “in light of differences among state courts and the Courts of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation.” While warrantless searches and seizures inside a home are presumptively unreasonable, “the exigencies of the situation” may make “the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.” One exigency “is the need to assist persons who are seriously injured or threatened with such injury.” The Court reiterates that when determining if an emergency situation exists, making warrantless entry reasonable, the circumstances must be viewed objectively. In this case, “the officers were confronted with ongoing violence within the home.” The Court believes that “the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning.”

The Court also concludes that the “manner of the officers’ entry was also reasonable.” In these circumstances, the officer’s announcement after he opened the door but prior to entering was equivalent to and satisfied the knock-and-announce rule. The Court states, “once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.”

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5. 403 U.S. 443 (1971).
Justice Stevens filed a short concurrence in which he calls this “an odd fly-speck of a case.” He writes that the only difficult question is what is “most peculiar”: (1) that the state courts found a Fourth Amendment violation; (2) that the case was pursued all the way to the Supreme Court; or (3) that the Court granted certiorari.

The Court held in *Hudson v. Michigan* that exclusion is not a remedy for violation of the knock-and-announce rule. Justice Scalia delivered the opinion of a five-member majority and an opinion in part. Justice Kennedy concurred in part and in the judgment, while Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented.

In this case, police obtained a warrant to search petitioner's home for drugs and firearms. When they arrived, the police announced their presence but only waited about three to five seconds before entering. Petitioner moved to exclude the evidence found during the search, “arguing that the premature entry violated his Fourth Amendment rights.” The trial court granted the motion, but the Michigan Court of Appeals reversed. Hudson was convicted and renewed his claim on appeal. Since respondent concedes a violation of the knock-and-announce rule, the Court focuses only on a remedy for the violation. The Court states: “[s]uppression of evidence...has always been our last resort, not our first impulse.” It is “applicable only where its remedial objectives are thought most efficaciously served....that is, where its deterrence benefits outweigh its substantial social costs.” The Court clarifies its approach by stating that “exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence.” Instead, the more appropriate question in such a case is “whether granting establishment of the primary illegality, the evidence to which instant objection is made, has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” This attenuation can occur when the causal connection is remote and, “even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”

The warrant requirement shields individuals and their property from government scrutiny. The Court has held that “[e]xclusion of the evidence obtained by a warrantless search vindicates that entitlement.” However, the Court believes the interests protected by the knock-and-announce requirement are different. The latter protects human life and limb, “because an unannounced entry may provoke violence in supposed self-defense by the surprised resident,” property from being destroyed by a destructive entry, and “those elements of privacy and dignity that can be destroyed by a sudden entrance,” for example, by giving individuals time to dress. It concludes that applying the exclusionary rule to a violation of the knock-and-announce rule does not vindicate these interests.

In addition, the Court believes the deterrence benefits do not outweigh the social costs. It finds the costs here considerable. The costs include not only “the grave adverse consequences that exclusion of relevant incriminating evidence always entails,” but also would result in a flood of challenges regarding alleged failures to follow the rule. In addition, the Court believes that applying the exclusionary rule would result in police “refraining from timely entry,” which may result in such things as violence against officers or destruction of evidence. At the same time, the Court concludes that the “deterrence benefits” do not amount to much. While a violation of the knock-and-announce rule might occasionally lead to the discovery of otherwise undiscoverable evidence, ignoring the rule primarily achieves nothing other than “the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even ‘reasonable suspicion’ of their existence, suspend the knock-and-announce requirement anyway.”

Justice Breyer dissents because the Court's opinion “destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement.” Justice Breyer also believes the majority opinion is a significant departure from the Court's precedent, and “weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.”

In *Samson v. California*, a 6-3 Court, in an opinion written by Justice Thomas, held the Fourth Amendment does not bar a police officer from conducting a suspicionless search of a parolee. Petitioner was on parole in California when he was stopped and searched without a warrant or probable cause. The search was conducted pursuant to California Penal Code section 3067(a), which authorizes a warrantless and suspicionless search of a parolee. The officer conducting the search found a plastic baggie containing methamphetamine and petitioner was charged with possession. The trial court denied petitioner's motion to suppress the evidence, finding that section 3067(a) “authorized the search and that the search was not arbitrary or capricious.” Petitioner was convicted and the conviction was affirmed on appeal.

The Court begins by conducting a Fourth Amendment analysis, examining the “totality of the circumstances” to determine whether a search is reasonable within the meaning of the Fourth Amendment.” The Court states, “[w]hether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” The Court mentions that it recently applied this approach in *United States v. Knights*, where it determined that a California law subject-

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ing a probationer to a warrantless search was reasonable. In Knights, the Court determined (1) that a probationer’s expectation of privacy was significantly diminished due to his status as a probationer, and (2) that the law was necessary to promote legitimate governmental interests, mainly the dual interests of “integrating probationers back into the community and combating recidivism.”

Applying the same analysis, the Court believes that a parolee has even less of an expectation of privacy than a probationer because parolees “are on the continuum of state-imposed punishments.” In addition, the Court finds salient, as it did in Knights, that “the parole search condition under California law…was clearly expressed to petitioner;” he “signed an order submitting to the condition and thus was unambiguously aware of it.” The Court also finds, as it did in Knights, that the state’s interests are substantial. The state’s interests in reducing recidivism and promoting reintegration in society “warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment.” The Court looks at empirical evidence regarding recidivism to support its conclusion.

**SIXTH AMENDMENT**

In Washington v. Recuenco, Justice Thomas delivered the opinion of a 7-2 Court, which held that a Blakely error is subject to a harmless-error analysis. Respondent threatened his wife with a handgun. He was charged with second-degree assault, which is defined under Washington law as “intentional assault…with a deadly weapon.” The trial court used a special-verdict form “that directed the jury to make a specific finding whether respondent was armed with a deadly weapon at the time of the commission of the crime.” There was nothing on the form, however, that identified the deadly weapon as a handgun. The jury returned a guilty verdict. At sentencing, the trial court determined that respondent qualified for, and imposed, the three-year firearm enhancement instead of the one-year deadly weapon enhancement.

Before the Washington Supreme Court heard respondent’s appeal, the Supreme Court decided Apprendi v. New Jersey and Blakely v. Washington. In Apprendi, the Court held that, pursuant to the Sixth Amendment, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In Blakely, the Court held that “the statutory maximum for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” The Washington Supreme Court held that a Sixth Amendment violation occurred. It also determined that a harmless-error analysis did not apply.

The Court states that it has “repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal.” Only a “structural” error, an error that “necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence,” requires automatic reversal. Relying on its decision in Neder v. United States, the Court concludes that a Blakely error is not a structural error. In Neder, the district court failed to instruct the jury on an element of the crime. The Court held that a harmless-error analysis applied “because an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The Court believes this case is indistinguishable from Neder because its decision in Apprendi makes clear that elements of a crime and sentencing factors are “treated the same for Sixth Amendment purposes.”

Justices Stevens and Ginsburg filed dissenting opinions. Justice Stevens believes that even if the Court had the power to decide this case, there was no reason it should since the Washington Supreme Court can set its own standards for this type of error. He also states that the Court did not address respondent’s strongest argument: “that Blakely errors are structural because they deprive criminal defendants of sufficient notice regarding the charges they must defend against.” Justice Ginsburg believes that no error occurred during trial. The prosecutor proceeded under the theory of assault with a deadly weapon and the jury rendered a guilty verdict as requested. According to Justice Ginsburg, “[t]he harmless-error doctrine was not designed to allow dislodgment of that error-free jury determination.”

In Davis v. Washington, the Court considered the companion cases of Davis v. Washington and Hammon v. Indiana. An 8-1 Court, in an opinion delivered by Justice Scalia, held that statements made during a 911 call are non-testimonial, and not covered by the Sixth Amendment’s Confrontation Clause, when objective circumstances show that the interrogation by police is necessary to assist in an ongoing emergency. However, statements made to the police are testimonial when there is no ongoing emergency and objective circumstances show the primary purpose of the interrogation is to gather evidence for later criminal prosecution.

In Davis, Michelle McCottry made numerous statements to a 911 operator who had determined that McCottry was involved in a domestic disturbance with her former boyfriend, Adrian Davis. McCottry did not testify at Davis’s trial so, to establish McCottry’s injuries were caused by Davis, the prosecution, over Davis’s objections, used the 911 tapes. Davis was convicted and his conviction was affirmed on appeal.

In Hammon, police responded to a reported domestic dis-

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15. No. 05-5224.
16. No. 05-5705.
“Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose . . . is to enable police assistance to meet an ongoing emergency.”

As to a 911 call, the Court believes it “is ordinarily not designed primarily to ‘establish or prove’ some past fact, but to describe current circumstances requiring police assistance.” The Court views McCottry’s statements as speaking to events as they occurred and that McCottry was facing an ongoing emergency. In addition, the Court concludes that, viewed objectively, “the elicited statements were necessary to be able to resolve the present emergency.” The Court concludes that while a 911 call may become testimonial, “the circumstances of McCottry’s interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency.” She was not a “witness” or in the act of “testifying.”

As to Hammon, the Court believes the statements are “not much different from the statements we found to be testimonial in Crawford.” The Court writes, “[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct—as, indeed, the testifying officer expressly acknowledged.” While it is true that the interrogation in Crawford was much more formal, that difference only makes it more objectively apparent that the statements obtained were testimonial in nature; it does not change the characterization of the statements made in Hammon. Although the Court implicitly rejects the Indiana Supreme Court’s implication that “virtually any initial inquiries at the crime scene will not be testimonial…[it] do[es] not hold the opposite—that no questions at the scene will yield nontestimonial answers.” As the Court already indicated, the police might need to obtain answers to “assess the situation, the threat to their own safety, and possible danger to the potential victim.”

Justice Thomas concurs in the judgment in part and dissents in part. He believes that the Court has adopted a test as equally unpredictable as that abandoned by Crawford. Instead of requiring courts to divine the primary purpose of police interrogations, Justice Thomas would focus instead on what type of statements qualify as testimonial: those include “extra-judicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confession.” He believes that neither the 911 call nor the statements made by Amy to the police are testimonial.

In United States v. Gonzalez-Lopez, Justice Scalia, writing for a 5-4 Court, held that the denial of a defendant’s Sixth Amendment right to private counsel based on the erroneous disqualification of counsel requires automatic reversal. Respondent was charged with conspiracy to distribute marijuana. His family hired John Fahle to represent him. After the arraignment, respondent hired Joseph Low, an attorney from California. The trial court denied Low’s numerous motions for admission pro hac vice on the grounds that Low violated Rule 4-4.2, which prohibits a lawyer from contacting a represented client directly without consent of counsel. The district court determined that Low’s contact with respondent was made without consent by Fahle. During trial, respondent was represented by local counsel Karl Dickhouse and was convicted.

The Eighth Circuit reversed after it determined that the district court erred in interpreting Rule 4-4.2. It then concluded that because of this error, the district court “violated respondent's Sixth Amendment right to paid counsel of his choosing.” It held that the violation was not subject to harmless-error review. The Supreme Court agrees.

The Sixth Amendment guarantees a criminal defendant the right to counsel. The Court has previously interpreted this guarantee as including “the right of a defendant who does not require appointed counsel to choose who will represent him.” The Court does not believe, as argued by the government, “that the Sixth Amendment violation is not ‘complete’ unless the defendant can show that substitute counsel was ineffective within the meaning of Strickland v. Washington,19—i.e., that substitute counsel’s performance was deficient and the defendant was prejudiced by it.” Nor does it believe “that the defendant must at least demonstrate that his counsel of choice would have pursued a different strategy that would have created a reasonable probability that...the result of the proceedings would have been different.” The Court writes that “the Government’s argument in effect reads the Sixth Amendment as a more detailed version of the Due Process Clause—and then proceeds to give no effect to the details.” The purpose of the Sixth Amendment is ultimately to provide a fair trial; however, “it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.”

Following this same line of reasoning, the Court also held that this error is not subject to review for harmless. The Court cites to Arizona v. Fulminante,20 where it divided constitutional errors into two classes: (1) “trial error,” because the errors occurred during presentation of the case to the jury and their effect may be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt”; and (2) “structural defects” that “defy analysis by ‘harmless-error’ standards because they affect the framework within which the trial proceeds, and are not simply an error in the trial process itself.” The Court has little difficulty in concluding that the deprivation of counsel of one’s choice is a structural error. The Court again rejects the government’s attempt to compare this type of error with ineffective assistance of counsel.

**EIGHTH AMENDMENT**

In Oregon v. Guzek,21 the Court determined that the Eighth and Fourteenth Amendments do not provide a criminal defendant with the right to introduce new evidence of innocence at a sentencing hearing. Justice Breyer delivered the opinion of the Court while Justice Scalia, joined by Justice Thomas, filed an opinion concurring in the judgment. Justice Alito took no part in the decision.

Respondent was convicted of capital murder and sentenced to death. On appeal, the Oregon Supreme Court affirmed the conviction but remanded for a new sentencing hearing. Guzek was sentenced to death two more times and each time the Oregon Supreme Court ordered a new sentencing hearing. When the case was before it a fourth time, the Oregon Supreme Court, “[s]eeeking to avoid further errors...also addressed the admissibility of certain evidence Guzek [sought] to introduce at that proceeding, including live testimony from his mother about his alibi.” This type of evidence falls into the category of “residual doubt” evidence as it goes toward whether the defendant committed the crime as opposed to his or her role in the crime. The Oregon Supreme Court held “that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce this evidence at his upcoming sentencing proceeding.”

The Supreme Court does not agree. The Court distinguishes the cases relied on by the Oregon Supreme Court. In Lockett v. Ohio,22 the plurality determined that the Eighth and Fourteenth Amendments require introduction of evidence related to “any aspect of defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” This statement was adopted by the majority in Eddings v. Oklahoma,23 The Court states that Lockett is distinguishable from the case before it because in Lockett the evidence “tended to show how, not whether, the defendant committed the crime. Nor was the evidence directly inconsistent with the jury’s finding of guilt.”

The Court also points out that, contrary to the Oregon Supreme Court’s understanding, its decision in Green v. Georgia24 does not undermine this factual distinction. That opinion “focused only upon the hearsay problem, and it implicitly assumed that, in the absence of the hearsay problem, state law would not have blocked admission of the evidence.” Regardless, the Court concludes that its subsequent opinion, Franklin v. Lynaugh,25 made “clear, contrary to the Oregon Supreme Court’s understanding, that this Court’s previous cases had not interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast ‘residual doubt’ on his guilt.”

The Court in Franklin did not determine whether the Eighth Amendment required a trial court to allow residual-doubt evidence to be introduced during a sentencing hearing. Instead, the plurality held that “the sentencing scheme at issue was constitutional even if such a right existed.” The Court

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Holmes v. South Carolina . . . held that a rule barring the admission of evidence that a third-party committed the crime cannot rest on the strength of the prosecution's case. Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted.

FOURTEENTH AMENDMENT

Justice Alito wrote for a unanimous Court in Holmes v. South Carolina,26 which held that a rule barring the admission of evidence that a third-party committed the crime cannot rest on the strength of the prosecution's case. Petitioner was convicted for murder, first-degree criminal sexual conduct, first-degree burglary, and robbery. He was sentenced to death and his conviction was affirmed on appeal. Petitioner received a new trial after successful post-conviction review. At the second trial, petitioner sought to undermine the prosecution's case by showing that the evidence was contaminated and the police were trying to frame him. As part of this, petitioner introduced the testimony of expert witnesses and evidence that a third party committed the crime.

The trial court excluded petitioner's third-party guilt evidence, citing State v. Gregory,27 which states that such evidence is admissible if it "raises a reasonable inference or presumption as to [the defendant's] own innocence" but is inadmissible if it merely "casts a bare suspicion upon another" or "raises a conjectural inference as to the commission of the crime by another." The South Carolina Supreme Court affirmed, holding that where strong evidence of an appellant's guilt exists—especially strong forensic evidence—evidence of a third party's guilt "does not raise a reasonable inference as to the appellant's own innocence."

The Court begins by recognizing the constitutional broad latitude afforded to state and federal rulemakers to enact rules excluding evidence from criminal trials. However, this latitude is limited by a criminal defendant's right to present a complete defense. The Court does not specify from where this limitation stems but recognizes that it may arise from the "Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment." A defendant's right to present a complete defense is undercut by evidentiary rules that "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve."

The Court provides examples from previous cases where it held that a defendant's right to present a full defense was violated. It writes that although the Constitution prohibits rules that exclude evidence and which "serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of issues, or potential to mislead the jury." For instance, evidence that another individual committed the crime may be regulated under these principles if the evidence is inconsistent with a defendant's guilt and do not raise a reasonable inference or presumption as to the defendant's innocence. However, South Carolina attempted to extend this type of rule.

The Court criticizes South Carolina's approach because the trial judge does not weigh the probative value or potential adverse effects of admitting the third-party guilt evidence, and instead the critical analysis turns on the strength of the prosecution's case. Further, this approach "seems to call for little, if any, examination of the credibility of the prosecution's witnesses or the reliability of its evidence." The Court concludes that this rule "does not rationally serve the end that the Gregory rule and its analogues in other jurisdictions were designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."

Justice Souter delivered the opinion of the Court in Clark v. Arizona,28 which held that a state does not violate the Due Process Clause by limiting evidence of insanity to the insanity defense and excluding its admission to rebut mens rea. Justice Breyer filed an opinion concurring in part and dissenting in part. Justice Kennedy, joined by Justices Stevens and Ginsburg, filed a dissenting opinion.

Petitioner Eric Clark killed a police officer. Clark was charged with first-degree murder and "did not contest the shooting or death, but relied on his undisputed paranoid schizophrenia at the time of the incident in denying that he had the specific intent to shoot a law enforcement officer or knowledge that he was doing so, as required by the statute." He wanted to present the evidence of mental illness in two ways: (1) as an affirmative defense; and (2) to rebut the prosecutor's evidence of the requisite mens rea. The trial court held that Clark could not use evidence of his mental illness to dispute the mens rea. It relied on State v. Mott,29 which "refused to allow psychiatric testimony to negate specific intent, and held that Arizona does not allow evidence of a defendant's mental disorder short of insanity...to negate the mens rea element of a crime." The Court of Appeals of Arizona affirmed and the Arizona Supreme Court denied further review.

27. 198 S.C. 98 (1941).
When Arizona first codified the insanity rule, it adopted the "landmark English rule in M’Naghten’s Case," which provides that a party is not guilty by reason of insanity if "the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." In 1993, however, Arizona modified its insanity rule and dropped the cognitive-incapacity portion. Thus, under current law, "a defendant will not be adjudged insane unless he demonstrates that at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong." The Court rejects Clark's argument that the M’Naghten test "represents the minimum that a government must provide in recognizing an alternative to criminal responsibility on grounds of mental illness or defect."

The Court also rejects Clark's alleged due-process violation based on the Arizona Supreme Court's adoption of the rule in Mott. The Court believes that Clark's argument "turns on the application of the presumption of innocence in criminal cases, the presumption of sanity, and the principle that a criminal defendant is entitled to present relevant and favorable evidence on an element of the offense charged against him." As to the presumption of innocence, the prosecution must prove each element of a crime beyond a reasonable doubt, including the mens rea. The presumption of sanity is "equally universal in some variety or other, being (at least) a presumption that a defendant has the capacity to form the mens rea necessary." However, unlike the presumption of innocence, a state can decide whether to allow a defendant to bring forth "evidence of mental disease or incapacity for the bearing it can have on the government's burden to show mens rea" or may allow insanity only to be raised as an affirmative defense. In these instances, the burden is carried by the defendant and the state may determine the extent of that burden.

Finally, the Court believes that Clark's argument touches upon the principle that a criminal defendant has the due-process right to "present evidence favorable to himself on any element that must be proven to convict him." This right may be curtailed for good reason. The Court writes: "While the Constitution...prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." The Court believes that Arizona's law channeling and restricting mental-disease and capacity evidence satisfies the standard of fundamental fairness required by due process. The Court concludes by stating that Arizona has the "authority to define its presumption of sanity...by choosing an insanity definition...and by placing the burden of persuasion on defendants who claim incapacity as an excuse from customary criminal responsibility."

In Dixon v. United States, a 7-2 Court held that neither the Due Process Clause nor modern common law requires the government to bear the burden of disproving duress. Petitioner was indicted and convicted of "one count of receiving a firearm while under indictment...and eight counts of making false statements in connection with the acquisition of a firearm." At trial, petitioner "admitted that she knew she was under indictment when she made the purchases and that she knew doing so was a crime; her defense was that she acted under duress because her boyfriend threatened to kill her or hurt her daughters if she did not buy the guns for him." She argued that "the Government should be required to disprove beyond a reasonable doubt the duress." The district court, bound by Fifth Circuit precedent, denied the request and petitioner renewed her argument on appeal, claiming: (1) "her defense controverted the mens rea required for conviction and therefore that the Due Process Clause requires the Government to retain the burden of persuasion on that element"; and (2) "that the Fifth Circuit's rule is contrary to modern common law."

The Supreme Court disagrees. The Court states: "[t]he duress defense, like the defense of necessity...may excuse conduct that would otherwise be punishable, but the existence of duress normally does not controvert any of the elements of the offense itself." In addition, the Court believes it bears repeating that under common law, the defendant had the burden of proving an affirmative defense. The Court does not believe that any recent developments, including its decision in Davis v. United States, support a contrary conclusion.

**CRIMINAL STATUTORY INTERPRETATION**

In Scheidler v. NOW, Justice Breyer delivered the opinion of the Court in which all justices joined except Justice Alito, who took no part in the decision. The Court held that the Hobbs Act only criminalizes violence that is related to robbery or extortion; it does not criminalize free-standing physical violence.

Respondents brought an action against petitioners under the Hobbs Act and the Racketeer Influenced and Corrupt Organizations Act (RICO), claiming that petitioners' protest activities at abortion clinics amounted to extortion and "that these extortionate acts created a pattern of racketeering activity." The Hobbs Act, Title 18 of the United States Code, "says that an individual commits a federal crime if he or she obstructs, delays, or affects commerce by robbery, extortion, or committing or threatening physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section."

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A jury found in favor of respondents and the district court entered a nationwide injunction. The Seventh Circuit affirmed but the Supreme Court reversed. It noted that the Hobbs Act defines extortion ‘as necessarily including improper obtaining property from another.’ The Court did not agree that the ‘claimed property consisted of a woman’s right to seek medical services from a clinic, the right of the doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services for free from wrongful threats, violence, coercion, and fear.’ On remand, the Seventh Circuit did not reverse the district court’s decision or terminate the injunction. Instead, it ‘considered respondents’ argument that the jury’s RICO verdict rested not only upon many instances of extortion-related conduct, but also upon four instances (or threats) of physical violence unrelated to extortion.’ Since this theory was not presented in the district court, the Seventh Circuit determined that the Court did not have a chance to determine if these acts were sufficient to constitute a Hobbs Act violation. The Seventh Circuit remanded, but the petitioners sought, and the Court granted, a writ of certiorari.

The Supreme Court believes the determinative question is whether the phrase, “in furtherance of a plan or purpose to do anything in violation of this section,” as used in the Hobbs Act, refers to violence “(1) that furthers a plan or purpose to affect commerce...by robbery or extortion, or to violence (2) that furthers a plan or purpose simply to affect commerce.” The Court chooses the former, more restrictive, reading for four reasons. First, the Court believes the “more restrictive reading [is] the more natural one” in light of the entire subparagraph. Second, the Court finds support in the fact that “Congress often intends such statutory terms as ‘affect commerce’ or ‘in commerce’ to be read as terms of art connecting the congressional exercise of legislative authority with the constitutional provision (here, the Commerce Clause) that grants Congress that authority.” Here, it provides a limit to what Congress intended to define as criminal conduct. Third, the Court relies on legislative history. Finally, the Court believes that the other reading “broadens the Act’s scope well beyond what case law has assumed” and “would federalize much ordinary criminal behavior.”

In Zedner v. United States,33 Justice Alito delivered the opinion of the Court, holding that a criminal defendant may not prospectively waive application of the Speedy Trial Act of 1974. He was joined by all the Members of the Court except Justice Scalia who joined only in part and filed a separate opinion concurring in part and in the judgment.

Petitioner was indicted by a grand jury on seven counts of attempting to defraud a financial institution and one count of knowingly possessing counterfeit obligations of the United States. After numerous continuances, the trial court requested that petitioner waive his rights under the Act “for all time.” The petitioner gave both an oral and written waiver. Due to other delays, the trial did not start for another six years. Petitioner moved to dismiss the charges for violation of the Act, but the trial court denied the motion based on petitioner's prospective waiver. Petitioner was convicted and the Second Circuit affirmed. It determined that petitioner’s waiver may have been ineffective; however, an exception exists “when defendant’s conduct causes or contributes to a period of delay.”

The Court begins its opinion with a synopsis of the Act’s provisions and purposes. The Act requires a trial to begin within 70 days from the time the information or indictment is filed or the defendant makes his initial appearance. The Act also provides a “detailed list of periods of delay that are excluded in computing the time within which the trial must start.” Among these is an “ends-of-justice” continuance, which “permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-the-record findings that the ends of justice served by granting the continuance outweigh the public’s and defendant’s interests in a speedy trial.”

The Court agrees with petitioner that he could not prospectively waive application of the Act. First, the Court notes that the Act does not list as one of the categories of delay a period during which the defendant waives application of the Act. Instead, it specifically requires “that defense continuance requests fit within one of the specific exclusions set out” in the Act. Even the flexible “ends-of-justice” delay requires the district court to consider certain factors on the record. The Court believes that if a “defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion.” Additionally, the Court believes that the “purposes of the Act also cut against exclusion on the grounds of mere consent or waiver.” The Act protects both a defendant’s rights and the public’s interests in a speedy resolution; the latter cannot be served if defendants can opt out of the Act.

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Recent Civil Decisions of the United States Supreme Court: The 2005-2006 Term

Charles Whitebread

In this article, I review the key civil decisions of the 2005-2006 Term. It was a tough term for First Amendment claims: almost all the major cases were decided against free-speech claims. The most widely noted case of the Term determined that the President lacked the authority to convene military commissions as part of the war on terrorism.

CIVIL RIGHTS

The Court decided two cases related to the Individuals with Disabilities Education Act (IDEA): Schaffer v. Weast1 and Arlington Central School Dist. Bd. v. Murphy.2 In Schaffer, the Court held that the party seeking relief under IDEA has the burden of persuasion. In Arlington, it held that IDEA does not authorize a district court to award expert fees to prevailing parents.

IDEA, passed by Congress in 1970, was designed to reverse a history of neglect of disabled students in the educational environment. IDEA establishes a cooperative process between parents and schools: “State educational authorities must identify and evaluate disabled children…develop an [“individualized education program” (IEP)] for each one . . . and review every IEP at least once a year.” Among parents’ rights are the right to “obtain an independent educational evaluation of their child” and, if they believe an IEP is inappropriate, to “seek an administrative impartial due process hearing.” While Congress allows the states discretion in determining who conducts the hearings and establishing fair hearing procedures, it “has chosen to legislate the central components of due process hearings,” i.e. minimal pleading standards, the presentation of evidence, and the ability of the parties to compel witnesses to testify.

In Schaffer, Brian Schaffer, who suffers from learning disabilities and speech-language impairments, was asked to leave his school. Brian’s parents contacted the Montgomery County Public School System (MCPS), which convened an IEP team and eventually recommended placement in one of the two MCPS middle schools. The parents were not satisfied with the arrangement and enrolled Brian in a private school. They “initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian’s subsequent private education.” As per Maryland’s procedures, the hearing was conducted by an administrative law judge (ALJ). The ALJ “deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district.” The parents filed a civil action in the district court challenging the result. The district court reversed and remanded, concluding the school district held the burden of persuasion. The ALJ “deemed the evidence truly in ‘equipoise,’ and ruled in favor of the parents.” The district court affirmed and a divided panel for the Fourth Circuit reversed.

A 6-2 Court affirmed, concluding that the parents bore the burden of persuasion. According to the Court, the term “burden of proof,” of which the burden of persuasion is part, “is one of the slipperiest members of the family of legal terms.” To decide who has the burden of proof in a statutory context, the Court first looks to the statute. The plain text of IDEA fails to specify which party bears the burden of persuasion. The Court, therefore, “begin[s] with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” While there are exceptions to this rule, the Court will not shift the burden “at the outset of a proceeding” unless there is reason to believe such a result was intended by Congress. Despite petitioner’s arguments, the Court does not find such reason. The Court does not believe that “putting the burden of persuasion on school districts will further IDEAs purposes because it will help ensure that children receive a free appropriate public education.” It concludes that “very few cases will be in evidentiary equipoise” and such assignment might make IDEA more costly to administer.

In Arlington, respondents filed an action under IDEA on behalf of their son, “seeking to require petitioner Arlington Central School District Board of Education to pay for their son’s private school tuition.” They prevailed in district court and the judgment was affirmed by the Court of Appeals for the Second Circuit. Respondents sought to recover fees for the services of an educational consultant, Marilyn Arons, who assisted respondents throughout the proceedings. The district court awarded respondents part of Arons’ fees. The Second Circuit affirmed but the Court, in an opinion written by Justice Alito, reversed, finding IDEA does not authorize recovery of expert fees. Justice Ginsburg filed an opinion concurring in part and in the judgment. Justices Souter and Breyer filed dissenting opinions.

IDEA was enacted pursuant to the Spending Clause, which therefore guides the Court’s decision. Under the Spending Clause, “when Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out unambiguously.” In other words, the state must have clear notice regarding the liability at issue. The statutory text of IDEA does not provide that prevailing parents are entitled to recover expert fees. The relevant portion provides, “in any action of proceeding brought under this section, the court, in its discretion, may

Footnotes

that Justice "the allegations in the complaint were vague and constituted
eighth-Amendment claims under § 1983 against certain indi-
filing…alleged facts sufficient to support a limited number of
state sovereign immunity." The Court of Appeals for the

given "to defend the constitutionality of Title II's abrogation of
state sovereign immunity . Goodman appealed and the United States inter-
granted summary judgment against Goodman for his monetary
insufficient notice pleading as to Goodman's § 1983 claims.” It
also dismissed Goodman's Title II claims and, after the Court's
decision in Board of Trustees of University of Alabama v. Garret,
4 granted summary judgment against Goodman for his monetary
claims on the grounds that those claims were barred by sover-
eign immunity. Goodman appealed and the United States inter-
vended "to defend the constitutionality of Title II's abrogation of
state sovereign immunity." The Court of Appeals for the
Eleventh Circuit reversed "because Goodman's multiple pro se
filings…alleged facts sufficient to support a limited number of
Eighth-Amendment claims under § 1983 against certain indi-
vidual defendants." The Eleventh Circuit did not "address the
sufficiency of Goodman's allegations under Title II" and,
though, affirmed the district court's determination that
Goodman's claims for monetary damages were barred by sover-
eign immunity. The Court granted certiorari on this issue.

Justice Scalia, writing for the Court, begins the opinion by
stating that the Court will "assume without deciding" that
Goodman "alleged actual violations of the Eighth Amendment" and
that the same conduct that violated the Eighth Amendment
violates Title II of the ADA. The Court also suggests that
Goodman's claims for money damages might have been based
"on conduct that independently violated the provisions of § 1
of the Fourteenth Amendment." Therefore, Goodman's claims
differ in the sense that the Court's other cases address
"Congress's ability to abrogate sovereign immunity pursuant to
its § 5 powers."

The Court states that while its members have "disagreed
regarding the scope of Congress's prophylactic enforcement
powers under § 5 of the Fourteenth Amendment…no one
doubts that § 5 grants Congress the power to enforce…the provisions
of the Amendment by creating private remedies against the States for
actual violations of those provisions.” According to
the Court, “[t]his enforcement power includes the
power to abrogate state sovereign immunity by
authorizing private suits for damages against the
States.” Therefore, “insofar as Title II creates a pri-

tate cause of action for damages against the States for conduct that actually violates the
Fourteenth Amendment, Title II validly abrogates state sover-
eign immunity.” The Court instructs on remand that the lower
court should determine on a claim-by-claim basis which of
Goodman's claims fit under this rule.

In Burlington Northern and Santa Fe Ry. Co. v. White, 3 Justice
Breyer delivered the opinion of the Court, in which all the jus-
tices joined except Justice Alito, who filed an opinion concur-
ing in the judgment. The Court held Title VII's anti-retaliation
provision covers those employer actions that are materially
adverse to a reasonable employee, but does not confine the
actions and harms it fords to those that are related to employ-
ment or occur in the workplace.

Sheila White was the only female employee in her depart-
ment. Shortly after she began employment as a forklift opera-
tor, she complained to Burlington officials that her supervisor,
Bill Joiner, “had repeatedly told her that women should not be
working in… [her] department” and also “made insulting and
inappropriate remarks to her in front of her male colleagues.”
Burlington investigated and suspended Joiner for ten days. At
the same time White was informed of Joiner's punishment, she
was also informed that she was being removed from her duties
and reassigned. Burlington "explained that the reassignment
reflected co-worker's complaints that, in fairness, a more senior
man should have the less arduous and cleaner job of forklift
operator.”

White filed a complaint with the Equal Employment
Opportunity Commission (EEOC). After exhausting her
administrative remedies, White filed an action against
Burlington, claiming, in relevant part, that “Burlington's
actions—changing her job responsibilities, and suspending her
for 37 days without pay—amounted to unlawful retaliation in
violation of Title VII.” The jury found in favor of White and
awarded her damages. The Court of Appeal for the Sixth
Circuit, sitting en banc, affirmed. While the panel unanimously
agreed on the outcome, the members disagreed as to the proper
scope of the anti-retaliation provision.

The Court recognizes that there are some limits in the anti-retaliation provision . . . .

The Court determines that “the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur in the workplace.” It also held, however, that “the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.” Title VII’s anti-retaliation provision “forbids employer actions that discriminate against an employee (or job applicant) because he has opposed a practice that Title VII forbids or has made a charge, testified, assisted, or participated in a Title VII investigation proceeding or hearing.” There is no dispute that “the term ‘discriminate against’ refers to distinctions or differences in treatment that injure protected individuals.” The dispute surrounds “whether the challenged action has to be employment or workplace related and about how harmful that action must be to constitute retaliation.”

Petitioner and the Solicitor General argue that the Sixth Circuit’s requirement that a link be established between the retaliatory action and terms, conditions, or status of employment is correct. Their argument progresses through three stages: (1) “that Title VII’s substantive anti-discrimination provision protects an individual only from employment-related discrimination”; (2) “the anti-retaliation provision should be read in pari materia with the anti-discrimination provision”; and, therefore, (3) “the employer actions prohibited by the anti-retaliation provision should similarly be limited to conduct that affects the employee’s compensation, terms, condition, or privileges of employment.”

The Court disagrees. The language of the substantive provision of Title VII “differs from that of the anti-retaliation provision in important ways.” Primarily, the anti-retaliation provision does not have the same limiting words as the anti-discrimination provision. Therefore, the question is not whether the two provisions should be read in pari materia, but “whether Congress intended its different words to make a legal difference.” The Court normally presumes that where different words are used, Congress purposely intended different results. The Court finds this presumption is also supported by the language of the provisions because they differ not only “in language but in purpose as well”; “[t]he anti-discrimination provision seeks a workplace where individuals are not discriminated against” while “[t]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of the Act’s basic guarantees.” To secure the first objective, Congress only needed to prohibit “employment-related discrimination.” However, to secure the second objective, it needed to prohibit a broader range of behavior.

The Court recognizes that there are some limits in the anti-retaliation provision: the “anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” Adopting the formulation set forth by the Sixth and District of Columbia Circuits, the Court believes that “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The Court uses the words “materially adverse” to “separate significant from trivial harms.” It also uses the word “reasonable” because it believes “that the provision’s standard for judgment harm must be objective.”

A 5-2 Court held in Hartman v. Moore, that in an action for civil damages against the government based on retaliatory criminal prosecution for exercising a constitutional right, the plaintiff has the burden of pleading and showing the absence of probable cause for the underlying criminal charges. Justice Souter delivered the opinion of the Court while Justice Ginsburg, joined by Justice Breyer, filed a dissenting opinion. Chief Justice Roberts and Justice Alito took no part in the decision.

The Postal Service put both respondent and his company, REI, under investigation for various crimes. Despite “very limited evidence,” an Assistant United States Attorney brought charges against respondent, REI, and REI’s vice-president. The district court granted the REI defendants’ motion for judgment of acquittal and respondent subsequently filed an action in district court against the prosecutor and five postal inspectors for civil liability under Bivens v. Six Unknown Fed. Narcotics Agents. Respondent raised five causes of action, including a claim “that the prosecutor and the inspectors had engineered his criminal prosecution in retaliation for criticism of the Postal Service, thus violating the First Amendment.” Ultimately, only respondent’s retaliation prosecution claim against the inspectors was not dismissed.

The Court states that the issue in this case is narrow: “whether a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges.” The Court thinks “there is a fair argument for what the inspectors call an ‘objective’ fact requirement in this type of case,” and the strongest argument for an objective fact requirement stems from “the need to prove a chain of causation from animus to injury.” Turning to its prior cases, the Court states that even if it has not actually specified “any necessary details about proof of a connection between the retaliatory animus and the discharge,” its cases “have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial demonstration that the one caused the other.” The Court also thinks its clear that “the causation is understood to be but-for causation, without which the adverse action would not have been taken.”

The Court believes when the retaliatory action is criminal prosecution, there are two significant changes: (1) “there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge”; and (2) “the re-
uisite causation between the defendant’s retaliatory animus and
the plaintiff’s injury is…more complex…and the need to show
this more complex connection supports a requirement that no
probable cause be alleged and proven.” As to the first, the
Court believes that while this evidence will go a long way to
show whether the government’s actions were retaliatory, it does
not necessarily mean that a plaintiff should be required to plead
and prove no probable cause. As to the second, the Court states
that the retaliation action in this scenario will not be brought
against the prosecutor but an official “who may have influenced
the prosecutorial decision,” like the inspectors in this case.
Therefore, “the causal connection required here is not merely
between the retaliatory animus of one person and that person’s
own injurious action, but between the retaliatory animus of one
person and the action of another.”

The Court identifies this as a “distinct problem of causation”
because “[e]vidence of an inspector’s animus does not neces-
sarily show that the inspector induced the action of a prosecu-
tor who would not have pressed charges otherwise.” Further,
the Court states that there is the added difficulty that the plain-
tiff must overcome the “legal obstacle in the longstanding pre-
sumption of regularity accorded to prosecutorial decisionmak-
ing.” It believes that “[s]ome sort of allegation…is needed both
to bridge the gap between
the nonprosecuting govern-
ment agent’s motive and the
prosecutor’s action, and to
address the presumption of
prosecutorial regularity.” It
concludes that the “connec-
tion, to be alleged and
shown, is the absence of
probable cause.”

**FIRST AMENDMENT**

Chief Justice Roberts
delivered the opinion of the
Court in *Gonzales v. O
Centro Espirita Beneficente Uniao do Vegetal*, in which all the
justices joined except Justice Alito, who took no part in the
decision. The Court held that under the Religious Freedom
Restoration Act (RFRA), the government bears the burden of
showing that a compelling state interest significantly outweighs
the burden placed on a specific religious group by the
Controlled Substances Act.

RFRA prohibits the federal government from substantially

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burdening “a person’s exercise of religion, even if the burden results from a rule of general applicability.” The only exception is when the government can show that the burden to the person “(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

Respondent is a Christian Spiritist sect based in Brazil with approximately 130 members in the United States. Central to its faith is “receiving communion through hoasca…a sacramental tea made from two plants unique to the Amazon region.” One of these plants contains dimethyltryptamine (DMT), a hallucinogen, which is listed in Schedule I of the Controlled Substances Act (CSA). Under the CSA, Schedule I drugs are “subject to the most comprehensive restrictions, including an outright ban on all importation and use, except pursuant to strictly regulated research projects.” After respondent had difficulties importing hoasca, it filed an action for declaratory and injunctive relief, including a preliminary injunction against the Attorney General and other federal law-enforcement officials, alleging that the application of CSA to its “sacramental use of hoasca violates RFRA.”

At the preliminary injunction hearing, the district court determined that the evidence regarding the effects of hoasca, specifically whether it caused or minimized health risks and whether there was a market for hoasca outside its religious use, was in equipoise. It therefore determined that “the Government had failed to demonstrate a compelling interest justifying what it acknowledged was a substantial burden on…[respondent’s] sincere religious exercise.” The Court of Appeals for the Tenth Circuit affirmed.

The central issue before the Court is whether “evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against enforcement of the Controlled Substances Act.” The Court rejects the government’s argument that a finding for a party based on a “mere tie in the evidentiary record” violates the “well-established principle that the party seeking pretrial relief bears the burden of demonstrating a likelihood of success on the merits.” The government admitted that the enforcement of the CSA substantially burdened respondents religious exercise; the district court’s ruling, therefore, was based on whether the government met its burden in showing that its interests outweighed the burden on respondent. The Court does not agree the burden of disproving the asserted interests fell on respondent during the preliminary injunction hearing based on its prior decision in Ashcroft v. ACLU.

The Court also dismisses the government’s second argument “that the Act’s description of Schedule I substances as having a high potential for abuse, ‘no currently accepted medical use in treatment…’, and ‘lack of accepted safety for use…’ by itself precludes any consideration of individualized exceptions such as that sought by [respondent].” The Court states, “RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government’s categorical approach,” as is evidenced from the government’s necessity of “demonstrating that the compelling interest test is satisfied through application of the challenged law to the person.” In addition, RFRA expressly adopts the tests set forth in Sherbert v. Verner and Wisconsin v. Yoder, which require a court to “scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants.”

The Court believes that under the more “focused inquiry,” the government’s argument “cannot carry the day.” Schedule I substances are exceptionally dangerous. However, the classification is not a “categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA.” The Court finds support for this determination in the CSA itself, which allows the government to exempt certain manufacturers, distributors, and dispensers from registration if it “finds it consistent with the public health and safety.” Further, peyote, a Schedule I drug, has been exempt from the ban for 35 years if used for religious purposes. According to the Court, the peyote exception “also fatally undermines the Government’s broader contention that the Controlled Substances Act establishes a closed regulatory system that admits of no exceptions under RFRA.”

Finally, the Court discusses the government’s argument that it had an interest in complying with the 1971 United Nations Convention on Psychotropic Substances, which was signed by the United States and implemented by the CSA. The convention “calls on signatories to prohibit the use of hallucinogens, including DMT.” The Court agrees with the government that the tea is covered by the convention. However, it does not believe that this “automatically mean[s] that the Government has demonstrated a compelling interest in applying the Controlled Substances Act…[to respondent’s] sacramental use of the tea.”

Chief Justice Roberts also filed the opinion for the Court in Rumsfeld v. FAIR, in which all the justices joined except for Justice Alito who took no part in the decision. It held that the Solomon Amendment does not violate the First Amendment by requiring law schools to provide equal access to military recruiters. Respondent Forum for Academic and Institutional Rights (FAIR), “is an association of law schools and law faculties,” which promotes “academic freedom, support[s] educational institutions in opposing discrimination and vindicate[s] the rights of institutions of higher education.” In 2003, FAIR sought a preliminary injunction against the enforcement of the Solomon Amendment. The Court and the parties agree that the amendment requires a law school to “offer military recruiters the same access to its campus and students that it provides to...
the nonmilitary recruiter receiving the most favorable access” in order to receive federal funding.

The district court denied the preliminary injunction. In addition, the district court also determined that “recruiting is conduct and not speech...[and] any expressive aspect of recruiting is entirely ancillary to its dominant economic purpose.” The Court of Appeals for the Third Circuit reversed, finding that the Amendment “violated the unconstitutional conditions doctrine because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university.” The Third Circuit also found that the Amendment regulated speech, not merely expressive conduct.

Congress enacted the Solomon Amendment through its spending powers instead of under its broad authority to raise armies under Article I, section 8. The Court believes this makes “Congress’ power to regulate military recruiting under the Solomon Amendment...arguably greater because universities are free to decline the federal funds.” Generally, the Court has rejected First Amendment challenges to Congress’s spending power on the grounds that Congress attached restrictions to federal funding except in circumstances where the government has denied a benefit “to a person on a basis that infringes his constitutionally protected.”

To support its finding to the contrary, the Third Circuit determined that the Solomon Amendment violated the First Amendment in three ways; the Court discusses each in turn. First, the Court does not agree that because the law school might provide some services, i.e., sending e-mails and distributing flyers, the Solomon Amendment forces them to engage in speech. Second, the Court rejects the argument that because the military comes to campus to express a message, the Solomon Amendment “requires law schools to host or accommodate the military’s speech.” The Court points out that in its prior cases, which found this requirement unconstitutional, the “compelled-speech violation...resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.” Finally, the Court rejects the Third Circuit’s analysis that, if the Solomon Amendment does not regulate speech, it regulates expressive conduct that is protected by the First Amendment. The Court previously rejected the idea in United States v. O’Brien, in that the First Amendment only applies to “conduct that is inherently expressive,” for instance, burning the American flag. Here, the conduct is not inherently expressive.

The Court next discusses whether the Solomon Amendment violates a law school’s First Amendment rights to “expressive association.” FAIR argues that the amendment interferes with this right because it interferes with a law school’s right to express its “message that discrimination on the basis of sexual orientation is wrong.” FAIR, and the Third Circuit, relied heavily on BSA v. Dale. In Dale, the Court held “the Boy Scouts’ freedom of expressive association was violated by New Jersey’s public accommodations law, which required the organization to accept a homosexual as a scoutmaster.” The Court does not agree that the Solomon Amendment has the same impact. According to the court, the recruiters are just “outsiders who come onto campus for a limited purpose of trying to hire students.” The law school is not required to “accept members it does not desire.”

Justice Kennedy delivered the opinion of a 5-4 Court in Garcetti v. Ceballos, which held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Respondent was employed as the calendar deputy in the district attorney’s office during the relevant period. He was contacted by a defense attorney who informed respondent that he had filed a motion to challenge the validity of a warrant. Respondent, in accordance with his job duties, reviewed the case. Respondent determined that the affidavit contained “serious misrepresentations” and relayed his findings to his superiors. The district attorney’s office decided not to drop the charges and a hearing was held on the motion. Defense called respondent, who recounted his observations about the affidavit. The trial court ultimately rejected the challenge to the warrant.

Respondent claimed that in the aftermath “he was subjected to a series of retaliatory employment actions,” including reassignment, transfer, and denial of a promotion. Respondent filed a grievance, which was denied, and then sought relief in district court under 42 U.S.C. § 1983, claiming “petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo.” The district court granted summary judgment for petitioners because respondent, who drafted his memo as part of his employment, was not entitled to First Amendment protection or, alternatively, even if he was, “petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.” The Ninth Circuit reversed, relying on Pickering v. Board of Ed. of Township High School Dist. 205, Will County and Connick v. Myers.

Randall v. Sorrell . . . found that Vermont's campaign finance laws . . . violate the First Amendment.

The Court’s prior decisions have noted “the unchallenged dogma…that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights.” However, there are qualifications: “the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” According to the Court, Pickering and subsequent cases “identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech.” First, the court must determine “whether the employee spoke as a citizen on a matter of public concern.” If the employee did not, then he or she has no First Amendment protection. If the employee did speak as a citizen on a matter of public concern, then the court must determine “whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”

The Court states that the overarching objectives of this inquiry are evident. “Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.” On the other hand, the Court has also recognized that public employees are citizens. Therefore, they are entitled to First Amendment protections and the public employer cannot “leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.” The Court has also “acknowledged the importance of promoting the public’s interest in receiving the well-informed views of government employees engaging in civic discussion.” The Court concludes that its decisions “have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.”

The Court turns to the present case. First, the Court does not think it dispositive that respondent did his “talking” inside his workplace as “it would not serve the goal of treating public employees like ‘any member of the general public’…to hold that all speech within the office is automatically exposed to restriction.” The Court also does not believe it is dispositive that the memo concerned the subject matter of respondent’s employment since the “First Amendment protects some expressions related to the speaker’s job.” The Court believes the dispositive factor is that respondent’s “expressions were made pursuant to his duties as a calendar deputy.”

Justice Breyer announced the judgment of the Court in Beard v. Banks, which determined that Pennsylvania’s regulation denying certain inmates access to newspapers, magazines, and photographs does not violate the First Amendment. He was joined by Chief Justice Roberts and Justices Kennedy and Souter. Justice Thomas, joined by Justice Scalia, filed an opinion concurring in the judgment while Justices Stevens and Ginsburg filed dissenting opinions. Justice Alito took no part in the decision.

Pennsylvania has three special units for difficult prisoners, including the Long Term Segregation Unit (LTSU). Prisoners held in the most restrictive level of LTSU, Level 2, “face the most severe form” of restrictions and “have no access to newspapers, magazines, or personal photographs.” This ban does not include legal correspondence, religious and legal materials, library books, and writing paper. Ronald Banks is confined to Level 2 and filed an action under 42 U.S.C. § 1983, claiming that the Level 2 Policy bears “no reasonable relation to any legitimate penological objective and consequently violates the First Amendment.” The district court granted the secretary’s motion for summary judgment. The Court of Appeals for the Third Circuit reversed on the grounds that “the prison regulation cannot be supported as a matter of law by the record in this case.” The Court granted certiorari.

The plurality starts by citing to Turner v. Safley and Overton v. Bazzetta, which set forth the “basic substantive legal standards governing this case.” In Turner, the Court held that “imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment.” As pointed out in Overton, however, “the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere” and “substantial deference” is due to “the professional judgment of prison administrators.” Ultimately, “restrictive prison regulations are permissible if they are ‘reasonably related’ to legitimate penological interests.” Turner sets forth four factors used to determine reasonableness: (1) there must be a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it”; (2) there must be “alternative means of exercising the right that remain open to prison inmates”; (3) the court must weigh the impact made on prison administrators; and (4) the court must also determine if there are ‘ready alternatives’ for furthering the governmental interest.

The secretary set forth multiple justifications for the prison’s policy, which are not in dispute, “including the need to motivate better behavior on the part of particularly difficult prisoners, the need to minimize the amount of property they control in their cells, and the need to assure prison safety, by, for example, diminishing the amount of material a prisoner might use to start a cell fire.” The plurality believes it need go no further than the first justification to find that summary judgment in the secretary’s favor was warranted. Analyzing the first justification under each of Turner’s four requirements, the plurality con-

cludes that the stated purpose is reasonably related to legitimate penological interests.

Justice Thomas concurs in the judgment. He believes that because “[j]udicial scrutiny of prison regulations is an endeavor fraught with peril,” the framework he set forth in Overton is the best, least perilous “approach for resolving challenges to prison regulations.” In his view, states are free to define incarceration as they see fit—“provided only that those deprivations are constituent with the Eighth Amendment.” Therefore, “[w]hether a sentence encompasses the extinction of a constitutional right . . . turns on State law, for it is a State’s prerogative to determine how it will punish violations of its law.”

Justice Stevens dissents. Using the test set forth in Turner, Justice Stevens states that the regulation cannot survive constitutional scrutiny if “the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary and irrational,...or if the regulation represents an ‘exaggerated response’ to legitimate penological objectives.” He believes it is clear that the regulations infringe upon the inmates’ First Amendment rights and that the secretary has failed, as a matter of law, to establish that the state’s penological interests are sufficient to justify the regulations. Justice Ginsburg also dissents. She agrees with Justice Stevens’s opinion and writes to emphasize that summary judgment was not appropriate in this circumstance.

In Randall v. Sorrell,23 Justice Breyer announced the judgment of the Court, which found that Vermont’s campaign finance laws, which limit the amount of money a candidate can spend on his or her campaign and the amount of money an individual or corporation can contribute, violate the First Amendment. He was joined by Chief Justice Roberts and by Justice Alito in part. Justice Alito filed an opinion concurring in part and in the judgment. Justice Kennedy and Justice Thomas, the latter who was joined by Justice Scalia, filed opinions concurring in the judgment. Justice Stevens filed a dissenting opinion. Justice Souter also filed a dissenting opinion and was joined by Justice Ginsburg and Justice Stevens in part.

In 1997, Vermont enacted more stringent campaign financing laws (the Act), which impose mandatory expenditure limits and restrictions for contributions to campaigns for state candidates. The expenditure limits are indexed for inflation but the contributions limits are not. Petitioners filed an action in federal district court challenging the Act under the First Amendment. The district court agreed that the Act’s expenditure limits violated the First Amendment but held that only certain of the contribution limits were unconstitutional. A divided panel of the Court of Appeals for the Second Circuit “held that all of the Act’s contribution limits are unconstitutional” and “that the Act’s expenditure limits may be constitutional.” It found two compelling state interests—an interest in preventing corruption or the appearance of corruption and an interest in limiting the amount of time state official must spend raising campaign funds—and remanded to the district court to determine if “the Act’s expenditure limits were narrowly tailored to those interest.” The Court granted certiorari.

The plurality begins the opinion by discussing Buckley v. Valeo,24 which considered the constitutionality of the Federal Election Campaign Act of 1971 (FECA). In Buckley, the Court, “while upholding FECAs contribution limitations as constitutional, held that the statute’s expenditure limitations violated the First Amendment.” In Buckley, the government sought to uphold the statute by relying on its interest in preventing “corruption and the appearance of corruption.” However, the Court believed that while “this rational provided sufficient justification for the statute’s contribution limitations,” it “did not provide sufficient justification for the expenditure limitations.” The Court explained the basic reason for this difference: “Expenditure limitations impose significantly more severe restrictions on protected freedoms of political expression and association than do contribution limitations.” The latter only marginally restrict “the contributor’s ability to engage in free communication.”

As to the Act’s expenditure limits, the plurality believes that this case is not distinguishable from Buckley. In both cases, the expenditure limitations impose a “dollar cap” on a candidate’s expenditures. Further, Vermont’s justification for the Act, “preventing corruption and its appearance,” is the same as offered by the government in Buckley. Respondents try to distinguish Buckley by arguing they have an interest also in reducing “the amount of time candidates must spend raising money.” In the plurality’s view, this “protection rationale” does not change the outcome mandated by Buckley and the “Buckley Court was aware of the connection between expenditure limits and a reduction in fundraising time” too when it issued its decision.

The plurality next addresses the Act’s contribution limits. In Buckley, the Court upheld a $1,000 contribution limit on the grounds that “contribution limits are permissible as long as the Government demonstrates that the limits are ‘closely drawn’ to match a ‘sufficiently important interest.’” The question here is whether the Act’s restrictions are “too low and too strict to survive First Amendment scrutiny.” The plurality cannot, as stated in Buckley, probe each possible contribution level or “determine with any degree of exactitude the precise restriction necessary to carry out the statute’s legitimate objectives.” However, the plurality believes it “must recognize the existence of some lower bound” because “[a]t some point the constitutional risks to the democratic electoral process become too great.” It finds “danger signs” present in this case because the Act’s limits “are sufficiently low as to generate suspicion that they are not closely drawn.”

The plurality next examines the record to determine if the limits are “closely drawn” to match Vermont’s interests and con-

Ayotte v. Planned Parenthood . . . held that the lower courts should not have invalidated the New Hampshire statute requiring parental notification of a minor’s abortion in its entirety . . . .


Jones v. Flowers . . . held that the Fourteenth Amendment requires a State to take additional reasonable steps to notify a property owner of a pending tax sale if it knows its prior notice was ineffective.

includes they are too restrictive. It bases its opinion “not merely on the low dollar amounts of the limits themselves, but also on the statute’s effect on political parties and on volunteer activity in Vermont elections.” It concludes: “Taken together, Act 64’s substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives.”

Justice Alito concurs in part and in the judgment. He writes because he believes respondents’ primary defense is different than that articulated by the plurality. Justice Kennedy concurs in the judgment. He believes that, with respect to campaign contributions, the parties have not asked the Court to overrule Buckley or challenge the level of scrutiny that should applied. He agrees with the plurality however that “respondents’ attempts to distinguish the present limitations from those we have invalidated are unavailing.” Justice Thomas also concurs in the judgment but disagrees with the rationale applied by the plurality. He “continue[s] to believe that Buckley provides insufficient protection to political speech, the core of the First Amendment.” Justice Thomas writes that he still believes the Court “erred in Buckley when it distinguished between contribution and expenditure limits, finding the former to be a less severe infringement on First Amendment rights.” He also believes that the plurality’s opinion “demonstrates that Buckley’s limited scrutiny of contribution limits is ‘insusceptible of principled application.’”

Justice Stevens dissents. He believes that Buckley never addressed the issue of “whether the pernicious effects of endless fundraising can serve as a compelling state interest that justifies expenditure limits,” but believes if it did, the holding was wrong. He believes the limits placed on expenditures were a long-established practice prior to the Buckley decision and the Court’s decisions prior to Buckley “provided solid support for treating these limits as permissible regulations of conduct rather than speech.” He believes it is possible for candidates to work under these limits and the state’s interest “in freeing candidates from the fundraising straitjacket” also provides a compelling reasons for expenditure limits. Justice Souter also dissents and would “adhere to the Court of Appeals’ decision to remand for further enquiry bearing on the limitations on candidates’ expenditures, and...think[s] the contribution limits satisfy controlling precedent.”
FOURTEENTH AMENDMENT

In Ayotte v. Planned Parenthood,23 a unanimous Court, in an opinion written by Justice O’Connor, held that the lower courts should not have invalidated a New Hampshire statute requiring parental notification of a minor’s abortion in its entirety as this is the ultimate remedy to be applied only after a court determines it (1) cannot invalidate only the unconstitutional provisions of the statute and (2) the legislature would not have intended the statute to remain in force without the invalidated provisions. The constitutional defect was failure to provide a medical-emergency exception.

New Hampshire enacted the Parental Notification Prior to Abortion Act in 2003. “The Act prohibits physicians from performing an abortion on a pregnant minor…until 48 hours after written notice of the pending abortion is delivered to her parent or guardian.” The Act provides for three exceptions but not an explicit exception for the “physician to perform an abortion in a medical emergency without parental notification.” Respondents filed an action in federal court alleging the Act was unconstitutional on these grounds. The district court agreed and issued a permanent injunction. The Court of Appeals for the First Circuit affirmed. It found the Act unconstitutional because it did not contain an explicit health exception, and “its judicial bypass, along with other provisions of state law, is no substitute.”

The Court begins by stating that the case comes to it with three propositions already established: (1) “States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy”; (2) “a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the mother”; and (3) “[i]n some very small percentage of cases, pregnant minors, like adult women, need immediate abortions to avert serious and often irreversible damage to their health.” New Hampshire concedes that, under the Court’s cases, “it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.”

The Court, therefore, turns to the remedy. When faced with an unconstitutional statute, the Court prefers to “limit the solution to the problem.” For example, it would rather excuse or enjoin enforcement of only that part of the statute instead of invalidating the statute in its entirety. The Court identifies three interrelated principles that inform its approach to remedies: (1) it tries “not to nullify more of a legislature’s work than is necessary”; (2) it does not rewrite state laws to conform to constitutional requirements “even as we try to salvage it,” as it is not the Court’s role; and (3) it looks to legislative intent because “a court cannot use its remedial powers to circumvent the intent of the legislature.” As to the latter, if the Court finds a statute unconstitutional, it asks whether “the legislature [would] have preferred what is left of its statute to no statute at all.”

The Court believes in this case that the courts did not need to invalidate the entire Act because only certain portions of the statute present constitutional problems and “the lower courts can issue a declaratory judgment and an injunction prohibiting the statute’s unconstitutional application.” The Court does not know, however, whether the legislature would have preferred the statute to stay in effect without the invalidated provisions. It concludes: “Either an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute in toto should obviate any concern about the Act’s life exception.”

In Jones v. Flowers,26 a 5-3 Court held that the Fourteenth Amendment requires a State to take additional reasonable steps to notify a property owner of a pending tax sale if it knows that its prior notice was ineffective. Petitioner Gary Jones owned a house in Little Rock, Arkansas, but did not reside there. Jones paid his property taxes through the mortgage company until 1997, when the mortgage was paid off. After 1997, the property taxes were not paid and the property was certified as delinquent. In April 2000, the Commissioner of State Lands attempted to notify Jones of the delinquency by certified letter mailed to the house. The letter went unclaimed and was returned to the commissioner marked “unclaimed.” Two years later, the commissioner published a notice of the public sale in the Arkansas Democratic Gazette. No bids were submitted and the state negotiated a private sale.

Linda Flowers submitted a purchase offer. The commissioner sent another certified letter to Jones at the house, which was also returned “unclaimed.” Flowers purchased the home and, when the 30-day period of post-resale redemption had passed, sent an unlawful detainer notice to the property that was served on petitioner’s daughter. The daughter contacted Jones and notified him of the sale. Jones filed a lawsuit in state court against the commissioner and Flowers, “alleging that the Commissioner’s failure to provide notice of the tax sale and of Jones’ right to redeem resulted in the taking of his property without due process.” The state court granted summary judgment in favor of respondents, concluding that “the Arkansas tax sale statute, which set forth the notice procedure followed by the Commissioner, complied with constitutional due process requirements.” The Arkansas Supreme Court affirmed.

Chief Justice Roberts, writing for the majority, begins by setting forth the due-process requirements. Due process does not require actual notice but only requires the government to provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” The Court has not addressed what additional steps are necessary, if any, when the state “becomes aware prior to the taking that its attempt at notice has failed.” Even so, the Court has held that “when notice is a person’s due process…the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it,”...and that assess-
Hamdan argues, and the Court agrees, that none of the specific allegations of “overt acts” made against him constitute a violation of the law of war.

ing the adequacy of a particular form of notice requires balancing the interest of the State against the individual interest sought to be protected by the Fourteenth Amendment.” The Court concludes that it “do[es] not think that a person who actually desired to inform a real property owner of an impending tax sale...would do nothing when a certified letter sent to the owner is returned unclaimed.” It believes that if the commissioner wanted to inform Jones, he would have taken “further reasonable steps if any were available.”

The Court states that in prior cases it has required the government to consider the particular circumstances of the individual “regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” The commissioner, and the dissent, point out that in the Court’s prior cases the government knew of the individualized circumstances prior to notice and here they did not. The Court agrees that the constitutionality of a particular procedure is assessed “ex ante, rather than post hoc.” However, it concludes that “if a feature of the State’s chosen procedure is that it promptly provides additional information to the government about the effectiveness of notice, it does not contravene the ex ante principle to consider what the government does with that information in assessing the adequacy of the chosen procedure.” The Court also points to numerous additional steps it deems “reasonable,” for example, resending the letter by regular mail, and those that it does not, for example, searching for Jones’s current address in the phonebook or income tax rolls.

FEDERALISM

In Gonzales v. Oregon,27 a 6-3 Court held that the Controlled Substances Act (CSA) does not prohibit state-licensed physicians from prescribing drugs for use in physician-assisted suicide under a valid state law. Justice Kennedy delivered the opinion of the Court. Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, dissented. Justice Thomas also filed a dissenting opinion.

In 1994, Oregon legalized physician-assisted suicide through the enactment of Oregon Death with Dignity Act (ODWDA). The drugs that can be used by physicians under ODWDA are covered by the CSA and classified as Schedule II substances, which are those that are “generally available only pursuant to a written, nonrefillable prescription by a physician.” Under a regulation promulgated by the attorney general, every prescription for a controlled substance must “be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” The CSA requires that a “practitioner” register with the attorney general to lawfully prescribe Schedule II drugs. The attorney general has the power to “deny, suspend, or revoke” a physician’s registration if “the physician’s registration would be ‘inconsistent with the public interest.’” In making this determination, the attorney general is instructed to consider five factors.

In 2001, Attorney General John Ashcroft issued the November 9, 2001 Interpretative Rule “announcing his intent to restrict the use of controlled substances for physician-assisted suicide” on the grounds that it “is not a ‘legitimate medical purpose’” for which controlled substances can be used. The State of Oregon, joined by a number of physicians, pharmacists, and terminally ill patients, filed suit in federal district court seeking a permanent injunction against enforcement of the Interpretive Rule. The district court granted a permanent injunction and a divided panel of the Ninth Circuit affirmed. It determined that “by making a medical procedure authorized under Oregon law a federal offense, the Interpretive Rule altered the usual constitutional balance between the States and the Federal Government without the requisite clear statement that the CSA authorized such action.”

The Court agrees. The Court does not believe that the attorney general’s interpretation of the CSA is entitled to deference under Auer v. Robbins28 or Chevron U.S.A. Inc. v. NRDC.29 Under Auer, instead of giving specificity to a statute or regulation, the Interpretive Rule “does little more than restate the terms of the statute itself.” Under Chevron, deference is not necessary because “the rule must be promulgated pursuant to authority Congress has delegated to the official.” Under the CSA, the attorney general is “not authorized to make a rule declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized under state law.” According to the Court, the CSA only gives the attorney general limited authority: (1) “to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter”; and (2) to regulate the “registration” of state-licensed physicians. The Court finds that the Interpretive Rule does not fall under this latter authorization of power because “[i]t does not undertake the five-factor analysis and concerns much more than registration.”

The Court next turns to whether the “CSA can be read as prohibiting physician-assisted suicide.” The Court concludes that the “statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.” As structured, the CSA presumes state regulation of medicine and, according to the Court, ODWDA is just one example. The Court recognizes that the federal government can set national standards but concludes that the CSA sets standards in only one area, how to treat narcotic addictions.

Finally, the Court addresses the government’s argument that the phrase “written prescription of a practitioner” necessarily implies “that the substance is being made available to a patient for a legitimate medical purpose.” The government argues that it is incumbent upon it to define “medical purpose.” The Court

concludes that the government’s argument fails because it assumes that “the CSA impliedly authorizes an Executive officer to bar a use simply because it may be inconsistent with one reasonable understanding of medical practice.” Further, the attorney general’s ability to schedule drugs requires him only to make findings regarding abuse and the addictive substance of drugs.

Justice Scalia’s dissent rests on the ground that the attorney general has the authority to ensure that prescriptions are issued for legitimate medical purposes, and that Congress’s use of “prescription” and “legitimate medical purposes” are ambiguous. On this basis, he believes the majority’s opinion is incorrect for three reasons: (1) “the Attorney General’s interpretation of ‘legitimate medical purpose’” is valid; (2) even if no deference is required, it is correct upon a de novo review; and (3) even if incorrect, “the Attorney General’s independent interpretation of the statutory phrase ‘public interest’…and…‘public health and safety’…are entitled to deference under Chevron.” Justice Thomas writes separately to point out the inconsistencies between the Court’s opinion in this case and Gonzales v. Raich, in which the Court determined that the CSA preempted California’s medicinal-marijuana law on the grounds that “the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medical purpose, and in what manner.”

**PRESIDENTIAL POWER**

In Hamdan v. Rumsfeld, the Court held that the president lacks the authority to convene the military commissions as described in his November 13, 2001 Order, which were intended to try the individuals held in connection with the War on Terror. Justice Stevens announced the judgment of the Court and delivered the opinion of the Court in part. Justice Breyer filed an opinion concurring in the judgment. Justice Kennedy filed an opinion concurring in part. Justices Scalia, Thomas, and Alito filed dissenting opinions. Chief Justice Roberts took no part in the decision.

After the terrorist attacks on the World Trade Center, Congress adopted a joint resolution, the Authorization for Use of Military Force (AUMF), “authorizing 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…in order to prevent any future acts of international terrorism against the United States.” On November 13, 2001, “the President issued a comprehensive military order intended to govern the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” (the November 13 Order). It covers any individual who the President deems (1) was or is a member of al Qaeda or (2) “has engaged or participated in terrorist activities aimed at or harmful to the United States.” It provides that these individuals “shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.”

The President deemed petitioner Salim Ahmed Hamdan, a Yemeni national being held in Guantanamo Bay, “eligible for trial by military commission” pursuant to the November 13 Order. The proceedings before the military commission commenced. However, on November 8, 2004, the district court granted Hamdan’s habeas petition and stayed the military commission proceedings. The Court of Appeals for the District of Columbia reversed and the Supreme Court granted certiorari.

The Court does not believe the Detainee Treatment Act of 2005 (DTA) divests it of jurisdiction to hear this case and so addresses the substantive issues of the case. It begins with the history and formation of military commissions: “The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.” Subsequently, however, Congress enacted the Uniform Code of Military Justice (UCMJ). Article 21 of the UCMJ sets forth the president’s power to convene military commissions, and the limitations on that power. In general, Article 21 preserved what power the president had under the Constitution and common law of war before 1916—“with the express condition that the President and those under his command comply with the law of war.” Under these laws, the military commissions at issue here are not authorized.

The Court does not believe, as the government asserts, that the AUMF and DTA specifically authorize the president to convene the military commissions at issue here as neither of the Congressional Acts “expands the President’s authority to convene military commission.” Even if the Court assumes the AUMF activated the president’s war powers, “and that those powers include the authority to convene military commissions in appropriate circumstances…there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.” The DTA also does not explicitly authorize it, only “recognizes the existence of the Guantanamo Bay commissions in the weakest sense.”

Writing for the plurality, Justice Stevens turns to the inquiry of whether Hamdan’s military commission is authorized under the president’s authority as set forth in the Constitution and the laws of the United States. Under common law, military commissions were traditionally convened in three circumstances: (1) to replace civil courts when martial law has been declared; (2) in occupied enemy territory where civilian governments are not functioning; and (3) as “an incident to the conduct of war” when there is need to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.” As to the latter, certain preconditions must be met: (1) whether the indi-
held that the use of the word "discharge" in section 401 of the Clean Water Act . . . includes discharge of water from a dam.

individual violated a law of war; (2) whether the violation was committed during a war; (3) whether the military commission is trying an individual of the enemy’s army; and (4) whether certain jurisdictional limitations are met.

Hamdan argues, and the Court agrees, that none of the specific allegations of “overt acts” made against him constitute a violation of the law of war. Therefore, this fact casts doubt on the legality of the charge and, hence, the commission. The Court recognizes that this is not always fatal to the military commission’s viability, but, since Hamdan’s crimes are not necessarily defined by statute or treaty, the precedent upon which the government relies to define the charge as a violation of the law of war must be plain and unambiguous. The standard is not met here.

Justice Stevens then continues for the majority and concludes that, regardless of whether Hamdan’s offense violates a law of war, the commission lacks the power to proceed because the commission’s procedures do not comply with the common law of war, the UCMJ, or “with the rules and precepts of the law of nations,” including the Geneva Convention. Essentially, the Court concludes that because the commissions do not comport with the bodies of laws listed above, the president lacked authority to convene them by his November 13 Order. The Court points to a number of procedures that contravene the common law of war, the UCMJ, the laws of nations, and the Geneva Convention. For instance, if a criminal defendant chooses private counsel over appointed military counsel, “[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to close.”

Justice Breyer concurs. He writes that the Court’s conclusion rests on a single ground: “Congress has not issued the Executive a ‘blank check.’” Justice Kennedy concurs in part. He also believes that this “is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President’s authority.” Primarily, Congress “requires that military commissions like the ones at issue conform to the ‘law of war.’”

Justice Scalia dissents. He believes that the DTA divests the Court of jurisdiction to hear this case. He rests his decision on the “ancient and unbroken line of authority” that establishes “that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date.” In addition, even if the DTA had not explicitly divested the Court of jurisdiction, he believes the Court should have abstained from exercising jurisdiction under “equitable principles” governing “both the exercise of habeas jurisdiction and the granting of the injunctive relief sought by petitioner” since Congress provided an alternative avenue for petitioner’s claims by enacting the DTA. Justice Thomas, also dissenting, agrees but writes also to express his disagreement with the Court’s resolution of the merits.

Justice Alito also dissents. He too believes the Court lacks jurisdiction because of the DTA but writes to add further explanation for his disagreement with the majority. He believes that under Common Article 3 of the Geneva Convention, a “regularly constituted” court has been “appointed, set up, or established” under United States law. He does not believe that a “regularly constituted court” means that it must be “similar in structure and composition to a regular military court or unless there is an ‘evident practical need’ for the divergence.”

ELECTIONS

In League of United Latin American Citizens v. Perry,32 the Court rejected a statewide challenge to a Texas redistricting plan based on the claim it was an unconstitutional political gerrymander. It also rejected a challenge to the redistricting of the Dallas area based on § 2 of the Voting Rights Act, but determined that the state’s redistricting of District 23 in southwest Texas did violate § 2. Justice Kennedy announced the judgment of the Court and delivered the opinion of the Court in part. Justice Stevens, joined by Justice Breyer, filed an opinion concurring in part and dissenting in part. Justice Souter, joined by Justice Ginsburg, also filed an opinion concurring in part and dissenting in part. Chief Justice Roberts, joined in part by Justice Alito, filed an opinion concurring in the judgment, concurring in part, and dissenting in part. Justice Scalia, joined by Justice Thomas and Chief Justice Roberts and by Justice Alito in part, filed an opinion concurring in the judgment in part and dissenting in part.

After the 2000 census, Texas received two additional congressional seats. However, the legislature was unable to pass a redistricting plan. This resulted in litigation and the issuance of a court-ordered plan, which is referred to as “Plan 1151C.” In 2003, the legislature was able to enact a redistricting plan, called “Plan 1374C.” The Court’s opinion involves four consolidated cases where a three-judge court, convened under 28 U.S.C. § 2284, “heard appellants’ constitutional and statutory challenges to Plan 1374C.” In 2004, the district court found in favor of appellees, but the Court reversed for reconsideration in light of Vieth v. Jubelirer.33 The district court, in Henderson v. Perry34 again found for appellees.

In this case, appellants rely on two similar theories to argue that Plan 1374C should be invalidated as an unconstitutional political gerrymander: (1) they argue a presumption of unconstitutionality should apply because the Texas legislature’s purpose for the redistricting plan was for partisan advantage; and (2) a mid-decade redistricting plan for partisan purposes violates the one-person, one-vote rule. The Court has not articulated a standard under which to analyze appellants’ claims. In Davis v. Bandemer,35 it held “that an equal protection challenge to a political gerrymander presents a justiciable case or contro-

versy," but disagreed “over what substantive standard to apply.” The disagreement persists. The Court does not believe it needs to revisit the issue and can instead address “whether appellants’ claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”

Justice Kennedy rejects appellant’s first argument. Article I “leaves with the States the primary responsibility for apportionment of their federal congressional…districts,” although Congress may set further requirements. It has “generally required single-member districts.” In this case, and with appropriate authority, the district court drew a redistricting map when Texas failed to enact a plan that complied with the one-person, one-vote requirement. Appellants claim that the legislature was motivated by partisan objectives and argue that a rule or presumption of unconstitutionality is “salutary” when the legislature’s sole motivation for replacing a court-ordered plan is partisan motivation. Justice Kennedy believes, however, that “appellants’ case for adopting their test is not convincing.” First, there is some merit to appellees’ claim that this was not their sole motivation. Further, “a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.”

The plurality addresses appellants’ second political gerrymandering theory: “that mid-decade redistricting for exclusively partisan purposes violates the one-person, one-vote requirement.” Appellants’ argue that since the population of Texas shifted from 2000 to 2003, the 2003 redistricting which relied on the 2000 census, “created unlawful interdistrict population variances.” The plurality believes, as did the district court, that “this is a test that turns not on whether a redistricting furthers equal-population principles but rather on the justification for redrawing a plan in the first place.” In this regard, the plurality believes that appellants’ argument merely “restates the question whether it was permissible for the Texas Legislature to redraw the districting map.” It cannot agree with appellant “that a legislature’s decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders.”

In Part III of the opinion, Justice Kennedy, writing for the majority, addresses appellants’ arguments that the redistricting plan made changes to district lines in south and west Texas that violated section 2 of the Voting Rights Act and Equal Protection Clause of the Fourteenth Amendment. A state violates section 2 if the totality of circumstances shows that the election process is “not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” In Thornburg v. Gingles, the Court identified “three threshold conditions for establishing a § 2 violation: (1) the racial group is sufficiently large and geographically compact to constitute a majority single-member district; (2) the racial group is politically cohesive; and (3) the majority ‘votes sufficiently as a bloc to enable it…usually to defeat the minority’s preferred candidate.’”

The most significant changes in Texas were made to District 23, which contains “an increasingly powerful Latino population that threatened to oust the incumbent Republican,” and, consequently, District 25. Appellants argue that the changes to District 23 diluted the voting rights of Latinos. The Court applies the Gingles requirements to this case and concludes that the preconditions are met. It then moves on to analyze the “totality of the circumstances” to determine whether the redistricting constituted impermissible voter dilution. It first conducts a proportionality inquiry, which it concludes should be conducted on a statewide basis in this instance, instead of a regional basis. In the Court’s estimates, Latinos are two districts shy of proportionality. However, there is no “magic parameter…and rough proportionality...must allow for some deviations.” The Court does not feel it needs to decide if this degree of disproportionality is substantial because there is other evidence, which, coupled with the disproportionality, shows the Texas legislature’s goal was voter dilution. Primarily, “District 23’s Latino voters were posed to elect the candidate of their choice.”

The Court holds that “Plan 1374C violates § 2 in its redrawing of District 23,” and, therefore, does not “address appellants’ claims that the use of race and politics in drawing that district violates the First Amendment and equal protection.” It also does not address whether the drawing of District 25 violates the equal protection because the “districts in south and west Texas will have to be redrawn to remedy the violation in District 23.”

Justice Kennedy continues for the plurality and discusses appellants’ challenges to the redistricting around Dallas on the grounds that “they dilute African-American voting strength in violation of § 2.” Appellants contend that African-American voters had “effective control” of District 24 prior to redistricting even though they made up only the second-largest racial group in the district. The Court assumes, for the sake of this argument, that a section 2 challenge can proceed for a racial group that makes up less than 50% of the population in a district. The Court does not, however, believe appellants’ can show how they satisfy the Gingles prongs. Specifically, appellants cannot demonstrate that African-American voters could have elected the candidate of their choice. It is not relevant that African-Americans had “influence” in the district; they needed to prove they could “elect representatives of their choice.”

Justice Stevens concurs in part and in the judgment. He would hold that Plan 1374C is entirely invalid. Justice Stevens believes the Texas legislature’s redistricting plan, “which creates districts with less compact shapes, violates the Voting Rights

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Act, and fragments communities of interest—all for purely partisan purposes—violated the State's constitutional duty to govern impartially.” Justice Stevens writes that the question posed by this case—“whether it was unconstitutional for Texas to replace a lawful districting plan in the middle of a decade, for the sole purpose of maximizing partisan advantage”—is narrower than the issue considered in Vieth and it is possible for the Court to create a “judicially manageable standard” under which to analyze appellant's claims.

Justice Breyer concurs in part and dissents in part. He agrees that the legislature's sole purpose for the mid-decade redistricting plan was to “maximize partisan advantage” and believes that because the redistricting “will likely have serious harmful electoral consequences,” would find that the plan in its entirety violates the Equal Protection Clause. Chief Justice Roberts concurs in part, concurs in the judgment in part, and dissents in part. He believes that because appellants have not identified a “reliable standard for identifying political gerrymanders” or argued whether any standard exists, the Court properly disposed of this claim. He does not, however, agree with the Court's conclusions that the redistricting of District 23 violated section 2.

Justice Scalia concurs in the judgment in part and dissents in part. He believes that “claims of unconstitutional partisan gerrymandering do not present a justiciable case or controversy.” He criticizes the Court for finding that appellants have not stated a claim for which relief can be granted but never articulating what elements constitute a claim. He also believes that appellants do not state a claim under section 2, arguing that “§ 2 jurisprudence continues to drift ever further from the Act's purpose of ensuring minority voters electoral opportunities.”

**CIVIL STATUTORY INTERPRETATION**

The Court decided two cases relating to the Clean Water Act (CWA or Act): *S.D. Warren Co. v. Maine Board of Environmental Protection*37 and *Rapanos v. United States*.38 In *S.D. Warren*, the Court held that the use of the word “discharge” in section 401 of the Clean Water Act is interpreted by its ordinary meaning and includes discharge of water from a dam. Justice Souter delivered the opinion of the Court and was joined by all the Justices except Justice Scalia who joined only in part.

S.D. Warren operates hydropower dams for which it needs licenses to operate. The licenses are issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. Under section 401 of the CWA, if an activity “could cause a ‘discharge’ into navigable waters; a license is conditioned on a certification from the State in which the discharge may originate that it will not violate certain water quality standards, including those set by the State's own laws.” In 1999, Warren sought to renew its license for five dams and applied for water-quality certifications from Maine “but . . . under protest, claiming that its dams do not result in any ‘discharge’ into the river triggering application of § 401.” The Maine agency issued the certifications with certain caveats and FERC eventually licensed the dams “subject to the Maine conditions.” After filing unsuccessful administrative appeals, Warren filed suit in state court. The court rejected Warren’s claims that its dams did not result in discharges and the Supreme Judicial Court of Maine affirmed.

The Court identifies the issue in this case as the meaning of the word “discharge.” The Act does not define the term; it only “provides that the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.” The Court concludes, however, that “‘discharge’ presumably is broader, else superfluous, and since it is neither defined in the statute nor a term of art, we are left to construe it in accordance with its ordinary or natural meaning.” The ordinary meaning of discharge is “flowing or issuing out” and this meaning is consistent with the Court's interpretation of discharge in prior water cases. The Court states that in fact this meaning was accepted by all the members of the Court in its only prior case dealing with section 401, *PUD No. 1 v. Washington Dept of Ecology*.39 Finally, the Court states that both the Environmental Protection Agency and FERC “have each regularly read ‘discharge’ as having its plain meaning and thus covering releases from hydroelectric dams.”

In *Rapanos*, the Court considered the consolidated cases of *Rapanos v. United States*40 and *Carabell v. United States Army Corps of Engineers*.41 The issue before it in both cases is the definition of “waters of the United States” as used in the Clean Water Act and whether wetlands qualify as a subset of “waters.” Justice Scalia announced the judgment of the Court, which held that the phrase “waters of the United States” as used in the Act only includes those relatively permanent, standing, or continuously flowing bodies of water forming hydrographic features that are described in ordinary parlance. Justice Scalia also wrote the opinion for the plurality. Justice Kennedy filed an opinion concurring in the judgment. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, filed a dissenting opinion. Justice Breyer also filed a dissenting opinion.

The Act’s main objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” Section 1311(a) of the Act, provides “that the discharge of any pollutant by any person shall be unlawful.” The Act defines “discharge of pollutant...broadly to include ‘any addition of any pollutant to navigable waters from any point source.’” Pollutant[s] include “not only traditional contaminants but also solids such as dredged soil,...rock, sand, [and] cellar dirt.” Navigable water is defined as “the waters of the United States, including the territorial seas.”

Prior to the enactment of CWA, the Court “interpreted the
The Court believes that the reasons it suppresses evidence for Fourth and Fifth Amendment violations are entirely absent in the consular notification context.

current regulations define “the waters of the United States” to include “traditional navigable waters...all interstate waters including interstate wetlands,...all other waters such as intrastate lakes, rivers, stream (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,...tributaries of [such] waters,...and wetlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands).” The regulation also defines “adjacent wetlands as those bordering, contiguous [to], or neighboring waters of the United States.”

In United States v. Riverside Bayview Homes, Inc., the Court interpreted the phrase “water of the United States” as they related to “a wetland that was adjacent to a body of navigable water.” The Court upheld the Corps’ interpretation “to include wetlands that actually abutted on ‘traditional navigable waters.’” It reasoned that “the transition from water to solid ground is not necessarily or even typically an abrupt one, and that the Corps must necessarily choose some point at which water ends and land begins.” Since that decision, the Corps has further broadened its interpretation. The Court limited the Corps’ broadening interpretation however and, in Solid Waste Agency v. United States Army Corps of Eng’rs (hereinafter SWANCC), in which it held that “waters of the United States” did not include “nonnavigable, isolated, intrastate waters.” Regardless of this decision, the Corps did not amend its regulations.

The plurality begins by addressing the breadth of the definition of “navigable waters.” They do not believe “navigable waters” should be defined simply as those that are in fact navigable or capable of being made so. The plurality feels that it doesn’t have to define the outer parameters of the definition, however, and needs only to state that it is not as expansive as the Corps defines it. They also believe that the term “the waters of the United States” includes “only relatively permanent, standing or flowing bodies of water.” According to the plurality, this restriction stems from the wording of the phrase itself as well as commonsense.

The plurality also believes that “the Acts use of the traditional phrase ‘navigable waters’ (the defined term) further con-
OTHER SIGNIFICANT DECISIONS

In a per curiam decision in *Lance v. Dennis*, the Court held that a party is not barred by the Rooker-Feldman doctrine from filing a federal court action even if that party is in privity with a party who received an adverse state-court judgment. In May 2001, the Colorado General Assembly failed to pass a redistricting plan and, thus, one was created by the district court. In 2003, the General Assembly passed a redistricting plan, “prompting further litigation—this time about which electoral map was to govern, the legislature’s or the court’s.” The Colorado Supreme Court held in *People ex rel. Salazar v. Davidson* (hereinafter *Salazar*), that the legislature’s plan violated Article V, section 44 of the Colorado Constitution, “which the court construed to limit congressional redistricting to ‘once per decade.’”

A second action that was also filed was removed to federal court based on federal-law claims. The district court held, however, that defendant could not assert any challenges to *Salazar*. This suit, filed in the district court, was filed by Colorado citizens who were unhappy with the Colorado Supreme Court’s decision in *Salazar*. They alleged “that Article V, § 44, of the Colorado Constitution, as interpreted by the Colorado Supreme Court, violated the Elections Clause of Article I, § 4, of the U.S. Constitution…and the First Amendment’s Petition Clause.” A panel of three district court judges dismissed the Elections Clause claim under the Rooker-Feldman doctrine.

The Court begins by stating that it “is vested, under 28 U.S.C. § 1257, with jurisdiction over appeals from final state-court judgments.” This jurisdiction is exclusive and, therefore “under what has come to be known as the Rooker-Feldman doctrine, lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments.” The Rooker-Feldman doctrine is derived from two cases. In *Rooker v. Fidelity Trust Co.*, a party who lost in the state court did not obtain review with the Supreme Court but instead filed an action in federal district court challenging the constitutionality of the state-court judgment. The Court held that the federal action was “tantamount to an appeal of the Indiana Supreme Court decision, over which only this Court had jurisdiction, and said that the ‘aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.’” In *District of Columbia Court of Appeals v. Feldman*, the plaintiff had been denied admission to the District of Columbia bar by the District of Columbia Court of Appeals and sought relief in federal court. The Court held “that to the extent plaintiffs challenged the Court of Appeals decisions themselves—as opposed to the bar admission rules promulgated nonjudicially by the Court of Appeals—their sole avenue of review was with this Court.”

The Court’s cases since *Feldman* “have tended to emphasize the narrowness of the Rooker-Feldman rule.” The Court states that it has never addressed the issue presented here, but has held that Rooker-Feldman is “inapplicable where the party against whom the doctrine is invoked was not a party to the underlying state-court proceedings.” In this case, the plaintiffs were not parties to *Salazar*. Instead, the district court relied on privity, judging it by “the preclusive effect that state courts are required to give federal-court judgments.” The Court believes that the district court “erroneously conflated preclusion law with Rooker-Feldman.” It states that the “doctrine applies only in limited circumstances, ...where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court.” It does not “bar actions by nonparties to the earlier state-court judgments simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment.”

Justice Stevens dissents, stating that “Rooker and Feldman are strange bedfellows.” He believes that Rooker was correctly decided but Feldman was not. He believes that Court correctly “interred the doctrine last term and by precluding the district court from resuscitating it today. He dissents from the majority’s opinion, however, because the Court fails to address the fact that Colorado state law precludes this action.

In *Sanchez-Llamas v. Oregon*, the Court considered the companion cases of *Sanchez-Llamas v. Oregon* and *Bustillo v. Johnson*. The Court held that a violation of Article 36 of the Vienna Convention does not warrant suppression of evidence or relief for state procedural default rules. Chief Justice Roberts delivered the opinion of the Court and was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg filed an opinion concurring in the judgment. Justice Breyer filed a dissenting opinion. He was joined by Justices Stevens and Souter and by Justice Ginsburg in part.

In *Sanchez-Llamas*, petitioner Moises Sanchez-Llamas, a Mexican national, was arrested in December 1999 after a shootout with the police. He was read his rights pursuant to *Miranda v. Arizona* but was never informed of his right to have the Mexican Consulate notified of his detention pursuant to Article 36, which essentially provides that the police must, without delay, inform a detainee of his right to have the consular officers of his home country notified of his detention. During interrogation, Sanchez-Llamas made a number of incriminating statements. He moved to suppress his statements on various grounds, including that “the authorities had failed to comply with Article 36.” His motion was denied and Sanchez-Llamas was convicted. His conviction was affirmed on appeal.

In *Bustillo*, petitioner Mario Bustillo, a Honduran national, was arrested for murder. He was never informed of his Article 36 rights. At trial, his defense rested on the fact that another man, Sirena, who had subsequently fled the country, was responsible for the attack. Bustillo was convicted and, after his conviction became final, filed a state habeas petition. In his petition, he argued for the first time that the authorities had violated his rights under Article 36. Bustillo also argued ineffective assistance of counsel since defense counsel failed to notify him of his rights under Article 36. The consulate provided a letter stating that if it had known of Bustillo’s detention, it would have “helped him locate Sirena prior to trial.” His claim was dismissed on state procedural default grounds.

47. 19 P3d 1221 (2003)(en banc).
48. 263 U.S. 413 (1923).
The Court identifies the three questions for which it granted certiorari: (1) whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding; (2) whether suppression of evidence is a proper remedy for a violation...; and (3) whether an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial.” The Court reaches two conclusions quickly: the “exclusionary rule as we know it is an entirely American legal creation,” which is universally rejected by most other countries and the law is clear that the Court “do[es] not hold supervisory power over the courts of the several States.” The Court concludes, therefore, as argued by the state and United States, that its “authority to create a judicial remedy applicable in state court must lie, if anywhere, in the treaty itself.”

The Court agrees with Sanchez-Llamas that the Vienna Convention “implicitly requires a judicial remedy because it states that the laws and regulations governing the exercise of Article 36 rights ‘must enable full effect to be given to the purposes for which the rights are intended.’” However, it notes that the Convention also states that “Article 36 rights ‘shall be exercised in conformity with the laws and regulations of the receiving State.’” In the United States, the exclusionary rule is not applied lightly and the Court mainly has applied it to deter constitutional violations. It has only applied it in a limited number of circumstances involving the violation of a statute and then only when “the excluded evidence arose directly out of the statutory violations that implicated important Fourth and Fifth Amendment interests.”

The Court believes that the reasons it suppresses evidence for Fourth and Fifth Amendment violations are entirely absent in the consular-notification context. The Court excludes coerced confessions because it disapproves of coercion and “such confessions tend to be unreliable.” It excludes the fruits of unreasonable searches because otherwise “the constraints of the Fourth Amendment might too easily be disregarded.” Failure of the police to inform the defendant of his Article 36 rights is (1) unlikely to result in a coerced or unreliable confession and (2) police would not benefit in terms of a search and seizure by ignoring Article 36.

The Court next discusses Bustillo's claim. Virginia's state procedural default rules provide that if a habeas petitioner fails to raise a claim on direct appeal, he is barred from raising that claim on collateral review. “There is an exception if a defendant can demonstrate both ‘cause’ for not raising the claim at trial, and ‘prejudice’ from not having done so.” Bustillo argues that “state procedural default rules cannot apply to Article 36 claims” because “the Convention requires that Article 36 rights be given ‘full effect’ and Virginia's procedural default rules ‘prevented any effect (much less “full effect”) from being given to’ those rights.”

The Court notes that this is not the first time it has been “asked to set aside procedural default rules for a Vienna Convention claim.” In Brea d v. Green e,32 the petitioner did not raise his Article 36 claim until he filed a federal habeas petition. The Court rejected petitioner's argument that since the convention was the supreme law of the land, it trumped the procedural-default doctrine. It observed, “it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” Further, the Court “reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is no less true of the provisions of the Constitution itself, to which rules of procedural default apply.”

The Court also rejects Bustillo’s argument that two decisions by the International Court of Justice (ICJ), which have “interpreted the Vienna Convention to preclude the application of procedural default rules to Article 36 claims,” should direct the Court’s decision. Under the judicial power created by the Constitution, the courts are vested with “the duty to say what the law is.” The Court believes, therefore, that if “treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.” The Court does not believe that anything in the “structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our court.” In fact, any decision the ICJ renders has no binding effect “even as to the ICJ itself.”

Finally, Article 36 states that “the rights it provides ‘shall be exercised in conformity with the laws and regulations of the receiving State’ provided that ‘full effect...be given to the purposes for which the rights are intended.’” In the United States, this means the application of the procedural-default rules, which even apply to claims under the Convention. The Court believes that the ICJ's ruling fails to give effect to the purpose of the procedural default rule, “which relies chiefly on the parties to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication.” In addition, the Court believes “[p]rocedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention.”

In concluding its analysis of Bustillo's claim, the Court likens the failure to warn a defendant of his Article 36 rights to the failure of the police to inform a defendant of his rights pursuant to Miranda. Similarly, without the warning a defendant might not be aware he even had such rights. Regardless, if a defendant fails to object to a Miranda violation prior to trial, he may be barred from raising it in a collateral proceeding.

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The Resource Page

EDUCATIONAL PROGRAMS

BRYAN GARNER COMES COURTING
http://www.lawprose.org

Bryan Garner has been the editor for the last two editions of Black's Law Dictionary. He also is the author of Garner's Modern American Usage, A Dictionary of Modern Legal Usage, Legal Writing in Plain English, and The Redbook: A Manual on Legal Style.

But it is best known for giving great seminars on legal writing and editing—including an in-house workshop that he has conducted for many state and federal courts on judicial writing. Starting this August, he will be conducting those once-private workshops as part of his regular series of public sessions. We think many judges will be interested.

Garner's “Advanced Judicial Writing” seminar emphasizes techniques used by first-rate judicial writers. Garner has identified 12 different ways to open judicial opinions; he discusses the way in which the opening paragraphs determine the style of what follows and shows which of these ways may best frame the determinative issues of the case. The seminar also demonstrates effective editing techniques, taking materials taught successfully for many years in his seminars for lawyers and adapting them to the unique issues faced in writing judicial opinions.

This year’s Advanced Judicial Writing seminars will be held in San Francisco (August 14), Dallas (August 16), Washington, D.C. (August 21), and New York City (August 22). Registration fees for the full-day seminar are $345.

Those who don’t want to attend the seminar can get much of Garner’s writing and editing advice in Legal Writing in Plain English. For usage tips, both of the usage manuals cited above are good; A Dictionary of Modern Legal Usage has a brief discussion of opinion-writing (under “Opinions, Judicial”).

Last, the Redbook is the legal-style-manual equivalent of the legal-citation Bluebook. Garner asked attendees at his seminars for three to four points of legal style they would like to have answered. The book covers those and more, with basic sections on punctuation and grammar as well as word choices often found in legal writing.

PBS SERIES ON THE U.S. SUPREME COURT
http://www.ambrosevideo.com

A four-hour video series on the United States Supreme Court ran on most PBS stations in January and February 2007. The series is available on DVD for $79.99 and, in addition to being sharply produced, interesting, and well presented, it could have great potential for use in educational settings.

Chief Justice John Roberts and retired Justice Sandra Day O’Connor each gave in-depth interviews for this series. The program aired in four parts. Part one examined the time from the court’s creation through the Dred Scott case in 1857, which New York Law School Dean Emeritus James Simon describes as “the worst opinion ever written” by the court. Part two reviews issues that arose between the Civil War and the 1930s. Part three focused on the court’s rulings in civil rights from the 1940s to the present. Part four focused on the changes brought about by the Rehnquist court, after President Nixon had been given the opportunity to name four of the nine members of the court.

A separate website for educators, providing teaching resources that would be quite helpful to judges, is found at www.historyofsupremecourt.org. The series does a good job of providing both legal history and biography of key players, including litigants before the court. Actor David Strathairn narrates the series.

WEBSITES

NEW RESOURCE ON PROBLEM-SOLVING JUSTICE
http://www.ncsconline.org/PSC

Two years of effort have resulted in a new, online and interactive resource for judges and courts interested in using a problem-solving court approach. The National Center for State Courts has launched the Problem-Solving Justice Toolkit on its website. The toolkit is interactive, so that you can move easily to resources that would be most of interest to you. It includes explanatory text, hundreds of links to online resources, and videoclips from 22 judges, attorneys, social workers, and court managers discussing topics related to problem-solving justice.

Until now, discussion of problem-solving techniques has often been limited to judges assigned to specialty courts—drug courts, family courts, or mental-health courts, for example. The toolkit attempts to take a step toward achieving two separate goals: providing resources for judges in specialized dockets like those, while also providing resources for judges with more general dockets.

To use the toolkit, go to the section marked “Initial Assessment Questions.” Based on what you are most interested in (such as resources available to address problems you’ve been seeing), you’ll be taken to the resources in that area.

Two AJA leaders—Libby Hines, a trial judge in Michigan, and Steve Leben, a trial judge in Kansas—served as members of a 20-person advisory committee that worked with National Center staff on development of the toolkit. For more information, or if you have comments or feedback on the toolkit, contact researcher Pam Casey, project director for the toolkit, at the National Center for State Courts (pcasey@ncsc.dni.us).