CONFIRMED JUDGES, CONFIRMED FEARS

A Preliminary Look At How Appellate Judges Nominated By President Bush Are Already Threatening The Rights Of Ordinary Americans

People For the American Way Foundation

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In selecting nominees for the federal courts, President George W. Bush has often stated that he is looking for judges who will interpret the law, not make it. In fact, however, Senators and many others have expressed serious concern that many of the Administration's nominees violate that standard. Particularly with respect to such controversial nominees as William Pryor and Priscilla Owen, opponents have contended, many of the Administration's nominees have a record of trying to re-make the law to undermine civil and consumer rights, constitutional liberties, environmental protections, and the authority of Congress to protect these and other rights. Pursuant to its constitutional responsibility, the Senate has declined to consent to several Administration nominees because of such concerns.

Contrary to the claims of some, however, the vast majority of Bush nominees — 169 out of 175 who have reached the Senate floor — have been confirmed, most without controversy. This report provides a preliminary look at the record so far of the most important of those confirmed judges, those who now sit on the federal courts of appeal, in the significant areas of concern raised about Administration nominees.[1] Because the Supreme Court takes so few cases, the federal appellate courts are effectively the courts of last resort for the vast majority of Americans. Although these appellate judges have been on the bench only for a relatively short period, a number have written significant opinions on civil rights, constitutional liberties, congressional authority, and related issues.

The results of this preliminary review are deeply disturbing. In many key cases with divided rulings, appellate judges nominated by President Bush have written or joined opinions seeking to significantly limit congressional authority and protection of individual rights. This is particularly true with respect to Bush-nominated judges who received significant opposition, such as Jeffrey Sutton, Dennis Shedd, Michael McConnell, and John Roberts. These judges have issued a number of troubling opinions, primarily in dissent, that have sought to:

- question the constitutionality of the Endangered Species Act
- overturn National Labor Relations Board rulings against anti-union discrimination and other unfair labor practices by employers
- allow the Bush Administration to keep secret the records of Vice President Cheney's energy task force
- re-write by court order a state law regulating First Amendment activity
- cut back severely on the scope of the federal arson law due to "federalism" concerns

Other Bush-nominated appellate judges have mixed records, but have already written or joined disturbing opinions and dissents that have sought to, for example:

- deny protection to workers who filed claims of race discrimination in the workplace
- deny protections to the disabled under the Americans with Disabilities Act
- make it harder to prevent possible irreparable harm to the environment while environmental lawsuits are being litigated
- allow a federal worker to be fired for refusing to consent to an unconstitutional search
- cut back significantly on the scope of another federal criminal law, the Hobbs Act, on "federalism" grounds
- give immunity to government officials who conducted unconstitutional strip searches

This preliminary report provides important information on the early record of appellate judges nominated by President Bush. It strongly confirms the importance of careful Senate scrutiny of the Bush Administration's judicial nominees. Indeed, such scrutiny of nominees to our nation's appellate courts is critical, particularly for nominees with troubling records on protecting the rights of all Americans.

D.C. CIRCUIT DECISIONS

John Roberts, D.C. Circuit

In the short time since he was confirmed by the Senate in May 2003, Judge Roberts has issued troubling dissents from decisions by the full D.C. Circuit not to reconsider two important rulings. These included a decision upholding the constitutionality of the Endangered Species Act as applied in a California case and a ruling against Bush Administration efforts to keep secret the records concerning Vice President Cheney's energy task force.

- Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003): **constitutionality of Endangered Species Act**

This case involved a real estate development company's contention that the application of the Endangered Species Act to its construction project in California was an unconstitutional exercise of federal authority under the Commerce Clause. After the United States Fish and Wildlife Service determined that the company's project "was likely to jeopardize the continued existence of the arroyo southwestern toad," placed on the Endangered Species List by the Secretary of the Interior in 1994, the company filed suit "[r]ather than accept an alternative plan proposed by the Service." Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1064 (D.C. Cir. 2003). The district court dismissed the company's complaint, and a panel of the D.C. Circuit unanimously upheld the dismissal (323 F.3d 1062), following prior D.C. Circuit precedent upholding congressional authority under the Endangered Species Act. By a vote of 7-2, the D.C. Circuit denied a petition for rehearing en banc (by the entire court) of the panel's ruling.

The only dissenters were Judges Roberts and Sentelle. All of the other Republican-appointed judges on the court — Judges Ginsburg, Henderson, and Randolph — joined the court's Democratic appointees in voting to deny rehearing en banc. The panel's opinion upholding the authority of Congress under the Commerce Clause in this case not only followed D.C. Circuit precedent, but was also consistent with a recent ruling of the Fourth Circuit in Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001). The opinion in that

case upholding the authority of Congress to protect endangered species on private lands was written by Judge J. Harvie Wilkinson, a conservative Republican-appointee.

Roberts's dissent in Rancho Viejo strongly suggested that he thought it would be unconstitutional to apply the Endangered Species Act in this case. By his vote to rehear the case and thus potentially reverse the district court, Roberts indicated that he may well be ready to join the ranks of such right-wing officials as Judge Michael Luttig (who dissented in Gibbs) and Alabama Attorney General William Pryor — nominated by President Bush to the Eleventh Circuit — in their efforts to severely limit the authority of Congress to protect environmental quality as well as the rights and interests of ordinary Americans.

- In re: Richard B. Cheney, Vice President of the United States, 2003 U.S. App. LEXIS 18831 (D.C. Cir. 2003), cert. granted, 2003 U.S. LEXIS 9205 (2003): **secrecy of Vice President Cheney's energy task force**

Judge Roberts was one of the dissenters in the court's 5-3 denial of a petition for rehearing en banc (with one judge not participating) filed by the Bush Administration in its continuing efforts to avoid releasing records pertaining to Vice President Cheney's energy task force. This ruling came in litigation brought by Judicial Watch and the Sierra Club charging that the Vice President's task force had violated federal law by not making its records public. The court's ruling marked "the fourth time a judicial panel has rebuffed efforts to keep the information from the public." Carol D. Leonnig, "Energy Task Force Appeal Refused," *Washington Post* (Sept. 12, 2003). At the Administration's urging, the Supreme Court has agreed to review the case; a decision is expected by the end of June 2004.

FEDERAL CIRCUIT DECISIONS

Sharon Prost, Federal Circuit

Judge Prost has written two disturbing opinions in divided cases concerning civil rights and civil liberties. In one case, she dissented from a ruling that protected a federal worker from being fired for refusing to consent to an unconstitutional search. She also cast the deciding vote holding that an Air Force policy seeking to prevent the perpetuation of racial and gender discrimination must be subject to strict scrutiny.

- Wiley v. Department of Justice, 328 F.3d 1346 (Fed. Cir. 2003): **firing a federal employee for refusing to consent to an unconstitutional search**

Judge Prost dissented from the court's 2-1 ruling that the Fourth Amendment did not authorize the Bureau of Prisons to search the car of a teacher in a federal correctional institution based solely on an uncorroborated, anonymous, ten-month old tip, and that the teacher could not be fired for refusing to consent to the search. According to the anonymous tip, the teacher kept a gun in his car in the prison parking lot. When prison officials asked to search the car, the teacher refused and drove away. He subsequently returned and consented to the search, which turned up nothing. When the teacher was fired for refusing initially to submit to the search he brought suit, contending that the search to which he had refused to submit was unconstitutional. The Federal

Circuit agreed, holding that even under the low threshold of "reasonable suspicion" applied to searches of public employees by their employers to uncover work-related misconduct, the Fourth Amendment did not permit the search in this case. In so ruling, the majority applied Supreme Court precedent holding that an anonymous, uncorroborated tip, standing alone, lacks "the necessary indicia of reliability to serve as the basis for the search." 328 F.3d at 1353.

Judge Prost dissented, and would have allowed the search and thus the firing of the teacher for refusing to consent to it. The majority specifically addressed her dissent, explaining that she had erred in considering the tip to be self-corroborating, whereas the pertinent Supreme Court cases

> make clear that the allegations in an anonymous tip must be corroborated by sources extrinsic to the tip. Thus, the allegations in the tip cannot "corroborate" those very allegations themselves, and we therefore disagree with the dissent, which appears to suggest that this tautology is possible.

Id. at 1356, n.3 (emphasis in original). Had Judge Prost's view prevailed, federal employee rights and Fourth Amendment protections against unreasonable searches and seizures would have been weakened.

- Berkley v. United States, 287 F.3d 1076 (Fed. Cir. 2002): **constitutionality of Air Force policy seeking to prevent perpetuation of racial and gender discrimination**

Judge Prost wrote the court's opinion in a 2-1 ruling reversing the decision of the Court of Federal Claims in a case involving a challenge to an Air Force Memorandum of Instruction ("MOI") pertaining to a reduction in force. The MOI had instructed the board charged with selecting officers for involuntary termination that its "evaluation of minority and women officers must clearly afford them fair and equitable consideration" and that the board "should be particularly sensitive to the possibility that past individual and societal attitudes, and in some instances utilization of policies or practices, may have placed these officers at a disadvantage from a total career perspective." 287 F.3d at 1081, 1082.

In a class action brought by officers who had been involuntarily separated from the Air Force, the Court of Federal Claims rejected the plaintiffs' contention that the MOI, in violation of the Equal Protection Clause, required officers to be treated differently based on race or gender. The lower court concluded that "[i]n order to ensure a fair and equitable process for all officers and to select the best officers for retention, the Memorandum reminds Board Members of the possibility that historical discrimination may have caused the records of minority and female officers to inaccurately reflect their actual abilities from a total career perspective." Berkley v. United States, 48 Fed. Cl. 361, 363 (Fed. Cl. 2000) (emphasis added). According to the court, "[t]he plain language of the Memorandum does not direct Board Members to take any specific action toward female or minority officers, such as lowering or raising scores. It only reminds Board Members to be sensitive to the obstacles that may have been placed in the way of female and minority officers when reviewing their records from a total career perspective." 48 Fed. Cl. at 373. The court therefore held that the MOI did not bestow a benefit or burden based on race or gender and thus did not require heightened scrutiny, and that the MOI was "rationally

related to the legitimate government interest of establishing the proper, total composition of Air Force personnel." 48 Fed. Cl. at 363-64.

On appeal, and over a vigorous dissent, the 2-1 Federal Circuit reversed. According to Judge Prost, the MOI did give "preferential treatment . . . to race and gender" and "did require different treatment of officers under review based on their race and gender," and therefore should be subject to strict scrutiny. 287 F.3d at 1085. The court remanded the case to the Court of Federal Claims for such review.

Judge Dyk dissented. He explained that "[t]he issue here must be considered against the backdrop of undisputed and indisputable discrimination within the military against racial minorities." 287 F.3d at 1092. Judge Dyk specifically accused the majority of acting

> contrary to Supreme Court precedent and our own decision in Baker v. United States, 127 F.3d 1081 (Fed. Cir. 1997). The majority's approach is unsupported by any decision of the Supreme Court or any other court of appeals, and, in my view, will cause enormous mischief by potentially invalidating virtually any governmental directive that cautions against the perpetuation of racial discrimination against minorities and gender discrimination against women.

287 F.3d at 1091.

FIRST CIRCUIT DECISIONS

Jeffrey Howard, First Circuit

Judge Howard has joined majority opinions in two split decisions in favor of government defendants in civil rights-related claims. This included one ruling that granted immunity from any liability to government officials responsible for intrusive, unconstitutional strip searches of people arrested for traffic and other minor offenses.

- Savard v. Rhode Island, 338 F.3d 23 (1st Cir. 2003) (en banc), cert. denied, 2004 U.S. LEXIS 107 (2004): **immunity of government officials from liability for unconstitutional strip searches**

This was a civil rights action for damages brought against prison officials by persons who had been arrested for traffic violations and other non-violent, non-drug-related misdemeanors and subjected to unconstitutional strip searches and body cavity searches when they were held before trial in a Rhode Island prison also housing maximum security convicted felons. Sitting en banc, an equally divided (4-4) First Circuit affirmed the judgment of the district court granting summary judgment to the prison officials on the ground of qualified immunity. According to the four judges, including Judge Howard, who voted to uphold the ruling in favor of the prison officials, "prudent prison officials reasonably could have believed that Rhode Island's strip search policy was constitutional." 338 F.3d at 25. In the opinion of these judges, the law as to the unconstitutionality of these searches was not "clearly established" at the time of the constitutional violation, and the prison officials could therefore not be held liable. Id. at 27.

The other four judges on the court strongly disagreed, stating that "[t]he opinion of our colleagues is wrong on the law, the logic that they adopt is at odds with recent Supreme Court precedent regarding qualified immunity, and we believe their reasoning will put constitutional rights at risk." Id. at 34. These four judges pointedly noted the great personal indignity of the strip searches and body cavity searches conducted in this case,[2] and pointed out that they "were conducted against harmless individuals." Id. For example, one of the plaintiffs had been arrested because of an unpaid six-year-old traffic ticket that his son had received when he borrowed the father's car years earlier; the father was "held overnight and strip searched twice." Id. Another plaintiff had been detained when she called for police assistance after a car accident and was wrongly arrested on the basis of an erroneous outstanding warrant for a probation review. "She was . . . strip searched twice." Id.

The four dissenting judges explained that

> the cases from other circuits, when read in conjunction with our own precedent, would not permit a reasonable prison official to conclude that minor offense arrestees could be strip searched without reasonable suspicion simply because the prison officials decide to mix the arrestees with other prisoners.

Id. at 37. Among other things, these judges concluded that the reasoning of their colleagues had "flout[ed] the Supreme Court's holding in Hope v. Pelzer," id. at 41, in which the Court had refused to grant qualified immunity to prison guards who allegedly had left a prisoner tied to a hitching post for hours in the hot sun without adequate water and bathroom breaks, noting that such treatment was "antithetical to human dignity." 536 U.S. 730, 745 (2002). The four judges warned that their colleagues had "tipped the balance away from the Constitution. They have gone far toward granting absolute immunity under the cloak of qualified immunity. We believe that this court is obliged not only to give due deference to the judgment of government officials but to insist that the constitutional rights of individuals be vigilantly protected." 338 F.3d at 42.

- Chestnut v. City of Lowell, 305 F.3d 18 (1st Cir. 2002) (en banc): **punitive damages award against city**

Judge Howard joined the four-judge majority opinion in this split en banc ruling that overturned a $500,000 punitive damages award against a city in a case brought under 42 U.S.C. § 1983 by a citizen who had been subjected to excessive force by a police officer. The officer permanently damaged the plaintiff's eye, preventing him from continuing to work as a crane operator. (The jury also awarded $210,000 in compensatory damages against the city and the officer.) According to the plaintiff's complaint, the officer had an extensive criminal record, including convictions for assault and battery. At trial, the city's attorney did not object to the claim by the plaintiff's counsel that the plaintiff could seek punitive damages against the city, even though established Supreme Court precedent holds that a municipality is immune from such damages. In fact, the city's attorney did not take advantage of several opportunities to assert this immunity. After the verdict, the city filed a motion for a new trial or to strike the punitive damages. The district court held that the city had waived its immunity.

The en banc majority of the First Circuit, including Judge Howard, held that "plain error" had been committed and reversed, but did allow the plaintiff on remand to elect to have a new trial on actual damages, conceding that the jury might have awarded greater actual damages if it had been told that punitive damages were not available. A fifth judge concurred. Two judges dissented, noting that a client is bound by the mistakes of its counsel, and that immunity from punitive damages can be waived. As the dissent pointed out, the city repeatedly failed to assert an immunity defense, and its "procedural misstep . . . was particularly egregious." 305 F.3d at 28. The dissent saw "no reason to relieve the City of the consequences of its litigation conduct." Id. at 30.

SECOND CIRCUIT DECISIONS

Barrington Parker and Richard Wesley, Second Circuit

- Padilla v. Rumsfeld, 2003 U.S. App. LEXIS 25616 (2d Cir. 2003): **authority of President to detain American citizen seized on American soil in military custody indefinitely and without counsel**

This case concerns the Administration's highly controversial action of imprisoning indefinitely as an "enemy combatant" an American citizen seized in the United States. In May 2002, pursuant to a "material witness" warrant, FBI agents arrested Jose Padilla, an American citizen who was returning to the United States at O'Hare International Airport. Padilla was suspected of involvement in a plan to build and use a "dirty bomb" in this country. Literally two days before a conference on a motion by Padilla's attorney to vacate the material witness warrant in June, the Administration issued a unilateral declaration that Padilla was an "enemy combatant" in the war on terrorism and transferred him to a military prison, where he has been held without access to his attorney or any family members for more than 18 months. In response to a petition for a writ of *habeas corpus* filed by his attorney, the federal district court held that although the Administration had the authority to hold Padilla, the government had improperly denied him any access to counsel or any opportunity to contest in court the determination that he was an "enemy combatant." Both the government and Padilla appealed the ruling to the Second Circuit.

In a 2-1 decision, Judge Rosemary Pooler and Bush nominee Judge Barrington Parker ruled that Padilla's detention was not authorized by Congress, and that the President did not have the authority to imprison him indefinitely as an "enemy combatant." The court explained that a 1971 statute explicitly precludes the detention of American citizens on American soil without specific congressional authorization. The court noted that the 1971 law was enacted to help avoid future situations like the shameful detention of American citizens of Japanese descent during World War II, and that the Joint Resolution passed by Congress immediately after September 11 did not specifically authorize unilateral imprisonment of American citizens by the President. Sitting "only a short distance from where the World Trade Center once stood," the court acknowledged its keen awareness of the demands of the war on terror and the responsibilities of law enforcement officials. 2003 U.S. App. LEXIS 25616, at 5. The question in the case was not "whether those responsibilities should be aggressively pursued," the court explained, but whether the President is obligated to "share them with Congress." Id. at 6. The

court ordered that Padilla be released to civilian custody, where he would have the right to counsel and other constitutional rights that had been denied to him, within 30 days.

Bush nominee Judge Richard Wesley dissented in part. He agreed that the case was properly before the court and agreed with the district court that the government had improperly denied Padilla any access to counsel or any opportunity to contest in court the determination that he was an "enemy combatant." Wesley maintained, however, that subject to those protections, the President had the authority to detain Padilla as part of his "inherent authority to thwart acts of belligerency at home," and that the Joint Resolution passed by Congress immediately after September 11, 2001 was enough to authorize the President's action. Id. at 88.[3]

The Administration has asked the Supreme Court to hear the case, and has asked the Second Circuit to stay its ruling in the meantime.

THIRD CIRCUIT DECISIONS

D. Brooks Smith, Third Circuit

- Dia v. Ashcroft, 2003 U.S. App. LEXIS 25901 (3d Cir. 2003) (en banc): **legality of Attorney General's "streamlining" regulations governing Board of Immigration Appeals**

At issue in this case was whether certain "streamlining" regulations issued by the Attorney General in 1999 to deal with a "crushing caseload" at the Board of Immigration Appeals ("BIA") violate the Immigration and Naturalization Act ("INA") and the due process requirements of the Constitution. 2003 U.S. App. LEXIS 25901 at 6-7. The regulations govern appeals by aliens to the BIA from decisions by Immigration Judges, and in certain specified circumstances permit a single member of the BIA, rather than the usual three-member panel, to consider an appeal and to affirm the decision of the Immigration Judge without opinion. According to the regulations, any such affirmance "does not necessarily imply approval of all of the reasoning of the IJ's decision . . . ." Id. at 9.

Nine members of the court, including Judge Smith, held that the regulations violate neither the INA nor the Constitution. Four judges dissented, charging that the majority had sanctioned a "perversion of judicial review" (id. at 104) because the regulations do not require the BIA to provide the reason for affirming the ruling of the Immigration Judge. Thus, according to the dissenters, an alien might be removed from the country for reasons not subject to judicial review. The dissenters had harsh words for the majority: "The Court's suggestion that it makes no difference whether the explanation is provided by the final decision-maker or the IJ is reminiscent of Alice's Wonderland. The difference is between the asylum seeker's having judicial review of the reason for his removal and his having no such review." Id. at 114.

FOURTH CIRCUIT DECISIONS

Dennis Shedd, Fourth Circuit

Significant opposition to Judge Shedd's confirmation arose both inside and outside the Senate, due to his record as a district judge concerning discrimination and other issues. In his very short time on the court of appeals, Shedd has written a 2-1 opinion reversing an NLRB finding of unfair labor practices by an employer, producing a strong dissent by a very conservative Fourth Circuit judge that the majority had "overstepped its bounds as a reviewing court." In another divided case, the majority explained that Shedd's dissent "misse[d] its mark" by arguing that a bank should have been able to foreclose on a family farm, contradicting court precedent.

- National Labor Relations Board v. Transpersonnel, Inc., 349 F.3d 175, 2003 U.S. App. LEXIS 23133 (4th Cir. 2003): **employer's unlawful solicitation of employees to sign anti-union statements**

Judge Shedd wrote the majority opinion in this 2-1 ruling overturning the findings of the National Labor Relations Board that an employer had unlawfully solicited nine of its employees to sign anti-union statements and had unlawfully withdrawn recognition of the union that had represented its employees at one of its customer's sites. Transpersonnel, the employer, leased long-haul truck drivers to its customers. After the collective bargaining agreement at one customer's site had expired, some of the employees began an economic strike and Transpersonnel hired replacement drivers. The NLRB found that Transpersonnel had unlawfully coerced nine of its 22 employees to sign anti-union statements, and that it had unlawfully withdrawn recognition of the union.

Judge Shedd, joined by Judge Michael Luttig, ruled that there was no substantial evidence to support the finding that Transpersonnel had coerced seven of the nine employees, and that Transpersonnel had unlawfully withdrawn recognition of the union. Judge J. Harvie Wilkinson issued a strong dissent focused on the special expertise of the NLRB in examining an employer's conduct "in the context of its labor relations setting," and noted that the reviewing court's role was limited to determining whether the Board had taken "a permissible view of the evidence." 2003 U.S. App. LEXIS 23133, at 39, 38. Judge Wilkinson accused the majority of having "overstepped its bounds as a reviewing court" by reconstructing the dynamics of what had occurred and failing to "accord[] the appropriate deference to the ALJ who heard the testimony . . . ." Id. at 39. Wilkinson emphasized that "[t]he right to self-organization is the fundamental guarantee of the National Labor Relations Act," and that employers are therefore forbidden to interfere with employees in the exercise of their rights. Id. at 42. According to Wilkinson, even if the court "may not have come to the same conclusion if we were reviewing this case in the first instance," the NLRB's "findings had support in the record and therefore should be sustained." Id. at 43.

- Litton v. Wachovia Bank, 330 F.3d 636 (4th Cir. 2003): **preventing foreclosure of family farm**

In this bankruptcy case, the Fourth Circuit ruled 2-1 in favor of a family seeking to cure a default on the mortgage on their principal residence, a small farm. Judge Shedd dissented. The majority, noting that it was following Fourth Circuit precedent as well as precedent from other circuits, held that the family's bankruptcy plan was not an improper modification of a prior bankruptcy order pertaining to the same loan. Shedd would have ruled in favor of the bank, asserting that the court's decision gave a benefit to the family without the family's having to furnish any additional consideration to the bank. The majority specifically addressed Shedd's dissent, stating that it "misses its mark," and expressly noted that the result of its ruling was "merely the consequence of Congress's decision to place certain debtor-friendly provisions into the Bankruptcy Code [which] does not require that the debtor furnish consideration in exchange for a cure." 330 F.3d at 645. Shedd's dissent, in sharp contrast, would have authorized foreclosure of the family's farm and was clearly debtor-unfriendly.

FIFTH CIRCUIT DECISIONS

Edith Brown Clement, Fifth Circuit

Judge Clement has joined troubling dissents from two important decisions by the full Fifth Circuit. In one, Judge Clement maintained that the scope of an important federal criminal law, the Hobbs Act, should be severely limited on "federalism" grounds. In the other, Clement voted to allow the unlawful firing of a public school teacher. Judge Clement also wrote the opinion in a 2-1 decision reversing a jury's award of damages for pain and suffering of a mother and daughter killed in a grisly truck accident.

- United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (en banc), cert. denied, 123 S. Ct. 1749 (2003): **constitutionality and scope of the Hobbs Act**

The defendant in this criminal case had been convicted under the Hobbs Act for the armed robbery of four different retail convenience stores. The Hobbs Act makes it a federal crime for someone "in any way or degree" to obstruct, delay, or affect "commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . ." 18 U.S.C. § 1951. The Act is important in authorizing the federal government to prosecute crimes that affect interstate commerce. On appeal in this case, the defendant argued that these were local robberies and that application of the Hobbs Act was unconstitutional. A three-judge panel of the Fifth Circuit affirmed the defendant's conviction, following existing Fifth Circuit precedent under which the Hobbs Act is considered applicable to conduct that, in the aggregate, can reasonably be thought to substantially affect interstate commerce. One of the judges specially concurred and urged en banc reconsideration of the case. United States v. McFarland, 264 F.3d 557 (5th Cir. 2001).

Thereafter, the Fifth Circuit, "by reason of an equally divided en banc court," 8-8, affirmed the defendant's conviction in a per curiam (unsigned) ruling. 311 F.3d at 377. Judge Clement was one of the eight judges who dissented from that affirmance and who would have

reversed the defendant's conviction. Clement joined two different dissents. The first was a dissent written by Judge Garwood, joined by all of the dissenters, in which the dissenters opined that the "aggregation" principle should not be employed under the Hobbs Act, and that doing so brought "within the scope of the Commerce Clause the proscription of local violent (and other) crimes not constituting the regulation of commercial activity . . ." Id. at 409. In this dissent, the eight judges expressly acknowledged that the manner in which they would interpret the Supreme Court's Commerce Clause precedent for purposes of the Hobbs Act was inconsistent with the holdings of several other circuits. Id. at 394-95. In other words, Judge Clement voted to significantly limit the reach of the Hobbs Act and the authority of Congress under the Commerce Clause. In doing so, she would have overturned established Fifth Circuit precedent and ruled in a manner inconsistent with the law in several other circuits.

Clement, however, did not stop there. Along with three other judges, she also joined a dissent written by Judge Edith Jones that excoriated the eight judges who had voted to affirm the defendant's conviction for not writing an opinion. Clement and the four other dissenters accused the eight judges of "withdraw[ing] from the field of reasoned dispute" and "default[ing] their duties of public explication, accountability and transparency." Id. at 416, 417. Then, stating that, "[b]ecause our colleagues are unwilling to speak for themselves," these five dissenters went on to "attempt to paraphrase the most significant arguments for [the eight judges'] position," id. at 421, and proceeded literally to put words in the other judges' mouths, setting up arguments for those judges and then knocking them down. (E.g., "[t]hose who affirm concede that," "some of our silent colleagues would agree that," etc. Id. at 421 422.)

This extraordinary dissent prompted a sharp rebuke from two of the judges who had voted to affirm the defendant's conviction. Those judges wrote specifically to state that it was "a deep mystery to us why five judges thought it helpful or appropriate to take eight fellow judges to task for failing to explain why they decline to change the established law of this circuit and create a circuit split. We of course disclaim their attempt to attribute views to us." Id. at 377.

- Coggin v. Longview Independent School District, 337 F.3d 459 (5th Cir. 2003) (en banc), cert. denied, 124 S. Ct. 579 (2003): **constitutionality of firing a public school teacher without a hearing**

Clement was one of six dissenting judges in the court's 8-6 en banc affirmance of the district court's ruling that the defendant school board was liable for the due process violation that resulted when it terminated the plaintiff-teacher's employment without a hearing. Under Texas law, the state Commissioner of Education was, upon the teacher's timely request, required to assign a hearing examiner to conduct a hearing into the board's proposed termination of the teacher's contract. The Commissioner refused to assign an examiner, erroneously thinking that the teacher had failed to request a hearing in a timely manner. The board then went ahead and terminated the teacher's contract without a hearing, although the board had "actual knowledge" that the teacher had timely requested a hearing.

The district court, the panel majority, and the en banc majority all held that the teacher's due process rights had been violated, and that the board was responsible, since it had terminated his contract without giving him the hearing to which he was entitled. The dissenters disagreed,

and would have held that the teacher should have been required to bring a case in state court challenging the Commissioner's refusal to appoint a hearing examiner. The majority opined that such right to appeal had been mooted by the board's summary termination of the teacher's employment. Three separate dissents were written (by Judges Jolly, Jones, and Garza) and Clement joined each of them. Had the view of the dissenters, including Clement, prevailed, the teacher would not have been given relief from the unlawful termination of his contract.

- Vogler v. Blackmore, 2003 U.S. App. LEXIS 24020 (5th Cir. 2003): **damages for pain and suffering of mother and child killed in truck accident**

This case concerned a truck accident involving an eighteen-wheeler tractor trailer that veered off a highway pavement, crossed the center line, and headed directly into the path of a car driven by Becky Vogler. The truck hit the front and passenger sides of the car and then "ran over the roof of the car from front to back." 2003 U.S. App. LEXIS 24020, at 2. Both Mrs. Vogler and her three-year-old daughter Kallie, who was the only passenger, "were dead by the time they were removed from the vehicle." Id. A jury found the truck company and driver liable and awarded damages, which included $200,000 each to the estates of Becky and Kallie Vogler for their pain and mental anguish prior to death, as approved by the trial court. The defendants did not contest their liability, but appealed on several issues concerning the damages awarded.

In a 2-1 opinion written by Judge Clement, the court affirmed much of the judgment of the court below, but reversed on the damages for Becky and Kallie Vogler's pain and suffering. Because "none of the factually-similar cases in this Circuit" involved such an "extensive" damages award, the majority reduced the award to Mrs. Vogler's estate to $30,000. Id. at 24-25. The majority reversed the award for Kallie's pain and suffering completely, stating that there was no specific evidence of her "awareness of the impending collision." Id. at 27 (emphasis in original.)

Judge Reavley strongly dissented. As the majority itself had acknowledged, appellate courts should be "chary of substituting [their] views for those of the trial judge" and jury, who have "seen the parties and heard the evidence," particularly on matters of "judgment" like damages for pain and suffering in such cases. Id. at 6-7. The damages in this case, Judge Reavley noted, clearly did not meet the legal standard of being so excessive as to "shock my conscience" or be "unjust or contrary to reason." Id. at 28. On the contrary, "[w]hile no witness could testify to screams or terror" of Kallie, Judge Reavley explained, it would certainly "be reasonable to believe that this young girl experienced terrible fright and some pain" as "she faced and felt this horror," clearly warranting the jury's award. Id. at 29. Reducing the award to Mrs. Vogler based on verdicts by "different juries and judges, for different parties and circumstances," Judge Reavley stated, violated the "rule of deference to jury verdicts." Id. Such decisions, Judge Reavley pointedly noted, should be made "after a full and fair trial by those eight jurors rather than by my fine judicial colleagues." Id. at 28.

SIXTH CIRCUIT DECISIONS

Julia Smith Gibbons, Sixth Circuit

In her relatively short time on the Sixth Circuit, Judge Gibbons has a mixed record in divided cases. For example, she wrote the majority opinion in a 2-1 ruling denying accommodation under the Americans with Disabilities Act to a woman with multiple sclerosis seeking the right to park closer to her workplace. Judge Gibbons, however, did concur in the court's 2-1 decision upholding a lower court's preliminary ruling prohibiting religious displays of the Ten Commandments in public schools and courthouses.

- Jones v. City of Monroe, 341 F.3d 474 (6th Cir. 2003): **failure to provide accommodation to person with multiple sclerosis under Americans with Disabilities Act**

Judge Gibbons wrote the majority opinion in this 2-1 ruling upholding the district court's denial of a preliminary injunction to a person with multiple sclerosis who sued under Title II of the Americans with Disabilities Act. Title II provides that

> no qualified individual with a disability shall by reason of such disability be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The plaintiff, Helen Jones, suffers from multiple sclerosis, which prevents her from walking except for short distances; she therefore relies on a wheelchair. Jones works for the Salvation Army in downtown Monroe, Michigan, as a substance abuse counselor for deaf and hard-of-hearing clients. The City of Monroe maintains free all-day parking spaces in several downtown locations, but they are too far from Jones's workplace for her to use them. The city also has free one-hour parking spaces adjacent to Jones's workplace. Jones, who has a handicapped parking permit, had often parked her car all day in the one-hour spaces when she was at work, and had been ticketed for exceeding the one-hour parking limit. Jones sued the city, claiming that its "refusal to modify its municipal parking program constitutes unlawful and intentional discrimination on the basis of disability in violation of federal law." 341 F.3d at 475. The district court denied her motion for a preliminary injunction, holding that she had failed to establish a likelihood of success on her claim.

The Sixth Circuit panel majority upheld this ruling in an opinion by Judge Gibbons, which concluded that Jones had not been denied the benefits of the city's parking system. According to Gibbons,

> [a]ccess to the one-hour and all-day parking places is facially neutral. The one-hour limit applies to individuals with disabilities and those without disabilities. Similarly, both disabled and able-bodied persons may park in all-day parking. . . Jones has equal access to the free downtown parking, and she can park there if she chooses.

Id. at 478. This completely ignored the fact that Jones's disability prevented her from walking to her workplace from the all-day parking facilities. The majority accepted the city's argument that the one-hour limit on the closer parking spaces was needed to encourage people to shop at downtown businesses, and that altering the time limit would be a "fundamental alteration of the parking scheme." Id. at 480, n.9.

Judge Cole strongly disagreed. In a dissenting opinion, Cole wrote that the

> majority opinion errs in its application of the ADA to the facts of this case, applying the statute in a manner that essentially eviscerates the ADA's purpose and renders the ADA impotent in its ability to provide recourse for disabled individuals, such as Helen Jones, who face a form of discrimination which Congress has explicitly prohibited.

Id. at 481 (emphasis added). According to Cole, while Jones could park for free in the all-day lots, she did not have the "'meaningful access' that the ADA requires. . . Parking is only meaningful insofar as it provides individuals with access to their destinations." Id. at 484-85 (citation omitted). Judge Cole took particular exception to the majority's holding that accommodating Jones would require a "fundamental alteration" to the city's parking scheme, noting that the city's one-hour parking program provided 110 free spaces, and that 109 would still be available if Jones were accommodated. Cole concluded that "[t]he majority decision is in direct conflict with the intent of Congress, the text of the statutes, and the corresponding regulations, and the decision also violates binding Supreme Court precedent." Id. at 491.

- Smith v. Yarrow, 2003 U.S. App. LEXIS 21395 (6th Cir. 2003): **prisoner's Eighth Amendment claim of deliberate indifference to his medical condition**

This was a civil rights case brought pro se (without counsel) by a prison inmate who had a hernia and who charged that prison officials had been deliberately indifferent to his medical condition. In particular, the inmate, who worked in the prison library, claimed that the librarian knew of his condition but nonetheless "required him to perform strenuous work such as picking up and delivering books and newspapers." 2003 U.S. App. LEXIS 21395, at 10. The district court ruled against the inmate and granted summary judgment to the prison officials on all of the inmate's claims, and the inmate appealed.

In an opinion written by Judge Eric Clay and joined by Judge Cleland, the Sixth Circuit upheld the district court's ruling in favor of all defendants except the prison librarian. As to the librarian, the majority held that summary judgment should not have been granted because the inmate had presented evidence that she knew of his medical condition not only from him but also from his supervisor, to whom the inmate had complained after the librarian had ordered him to engage in heavy lifting. According to the court, the evidence showed that the librarian had ordered the defendant to engage in heavy lifting after she became aware of his "serious medical condition." Id. at 18.

Judge Gibbons dissented from the majority's opinion concerning the librarian. Although Judge Gibbons expressly acknowledged that "there is evidence that [the librarian] was aware of [the inmate's] hernia," she nonetheless would have ruled against the inmate because he had

"failed to present evidence that [the librarian] was subjectively aware that Smith's condition precluded him from safely carrying out library assignments." Id. at 48.

- ACLU of Kentucky v. McCreary County, 2003 U.S. App. LEXIS 25606 (6th Cir. 2003): **constitutionality of governmental religious displays of the Ten Commandments**

The plaintiffs in this lawsuit challenged the constitutionality of displays of the Ten Commandments in public school classrooms and courthouses in several municipalities in Kentucky. The district court issued a preliminary injunction in favor of the plaintiffs and ordered that the displays be removed. The school district and counties appealed. Judge Gibbons cast the deciding vote in the Sixth Circuit's 2-1 ruling upholding the district court's order on the ground that the plaintiffs had shown a strong likelihood of succeeding on the merits of their claim that the displays lacked a secular purpose and therefore violated the Constitution.

John M. Rogers, Sixth Circuit

In his short time on the Court of Appeals, Judge Rogers has dissented from two important civil rights-related rulings, including a Title VII retaliation case. He cast the deciding vote in several other cases denying civil and constitutional rights claims, including one ruling that prevented a jury from even considering a claim that substandard medical care had caused the death of a prisoner with diabetes.

- Tesmer v. Granholm, 333 F.3d 683 (6th Cir. 2003) (en banc): **standing of defense attorneys to challenge refusal to appoint counsel for indigent defendants on appeal**

This case involved a challenge by poor people charged with crimes and by criminal defense attorneys to the constitutionality of a statute codifying the practice of Michigan state judges of denying appellate counsel to indigent defendants who had pleaded guilty or nolo contendere. The district court declared the statute to be unconstitutional. In an en banc ruling joined by seven judges, the Sixth Circuit held that because of pending state criminal proceedings, the claims of the indigent defendants could not then be heard in federal court under the doctrine of abstention. However, the majority also held that the attorneys, who accepted appointments in criminal appeals, did have third-party standing to challenge the statute, and affirmed the lower court ruling that the statute was unconstitutional.

Judge Rogers wrote a partial dissent, joined by three other judges, in which he would have held that the criminal defense attorneys lacked standing to challenge the denial of appellate counsel to indigent defendants. In Rogers's opinion, the test for third-party standing was not met because other parties "can assert their own rights." 333 F.3d at 711 (emphasis in original). The majority specifically refuted Judge Rogers's dissent, stating that it sought to "stretch" the third-party standing test "from a showing of a hindrance to asserting one's own rights to a requirement of impossibility," noting that this was "a stretch the [Supreme] Court [had] disavowed . . . ." Id. at 692. The majority further noted that "[t]he Supreme Court has, on at least two occasions, held that attorneys have third-party standing to assert constitutional rights of clients when a right to

representation was affected by government action." Id. at 693. Rogers's dissent would have significantly limited third-party standing to challenge unconstitutional practices.

- Howard v. Board of Education of Memphis City Schools, 2003 U.S. App. LEXIS 13512 (6th Cir. 2003): **proof of illegal retaliation against employee under Title VII**

In this Title VII case, Judge Rogers dissented from the court's 2-1 holding that the plaintiff, an African American teacher, had presented sufficient evidence to establish a prima facie claim of unlawful retaliation following her filing of race discrimination complaints, and that her claim should have been presented to a jury. Specifically, the teacher contended that, after she had filed charges of race discrimination, "she was transferred from her classroom [to a 'portable' facility or to a floating position], subjected to continued scrutiny and monitoring by [the school principal], sabotaged in her efforts to obtain an administrative position, transferred to several different schools, and given a service pin commemorating her service as a custodial helper [rather than as a teacher]." 2003 U.S. App. LEXIS 13512, at 29. The majority held that the teacher had presented "sufficient evidence" for her retaliation claim to have been submitted to a jury, specifically noting that the teacher had "engaged in a series of activities protected by Title VII," and that "[a] number of actions were taken thereafter that might be regarded as amounting to an adverse employment action against [the teacher] and/or retaliatory harassment by a supervisor. . . . [T]here is evidence in the record supporting a causal connection between the conduct complained of and the protected activities." Id. at 29.

Rogers's dissent was utterly dismissive of the significance to the teacher of the retaliatory acts, and would have held that the evidence was insufficient to state a claim for retaliation. Among other things, Rogers stated that "there was no evidence that the portable classrooms were anything more than distasteful" and that the evidence the teacher had presented "was simply that [the principal] was unfriendly towards her and treated her with suspicion." Id. at 36. Had Rogers's view prevailed, the teacher would have been prevented from even presenting her retaliation claim to a jury.

- Estate of Young v. Martin, 2003 U.S. App. LEXIS 13251 (6th Cir. 2003): **liability for substandard medical care**

This civil rights lawsuit, brought by the estate of a deceased prison inmate, claimed that the inmate had been denied proper medical care for his diabetes and had died as a result. Judge Rogers cast the deciding vote in the court's 2-1 ruling reversing the district court's denial of summary judgment to the prison warden. The warden had moved for summary judgment on the ground of qualified immunity, a motion denied by the district court on the basis that genuinely disputed material facts existed as to whether qualified immunity applied. Judge Rogers joined the opinion of District Judge Joseph M. Hood of the Eastern District of Kentucky, holding that summary judgment should have been granted to the warden.

Judge Moore dissented, and would have held that there was a genuine issue of material fact as to whether the warden had been "involved in implementing the prison policy that delivered substandard medical care to prisoners, thereby posing substantial risk of serious

medical harm, such as [this inmate's] death," as well as material fact questions regarding the warden's personal knowledge of the inmate's "grave condition" after a telephone call that the warden had with the inmate's sister. 2003 U.S. App. LEXIS 13251, at 15.

- Cox v. Mayer, 332 F.3d 422 (6th Cir. 2003): **requiring exhaustion of non-existent remedies**

This civil rights case was brought by a former prison inmate against a prison doctor who allegedly had forcibly medicated him. Judge Rogers again cast the deciding vote with District Judge Hood in the Sixth Circuit's 2-1 ruling reversing an order of the district court that had allowed the plaintiff to pursue his case although he had not exhausted his administrative remedies when he was still in prison. The district court allowed the plaintiff to proceed with his complaint once the plaintiff made it known to the court that he was no longer in prison and therefore had no administrative remedies to pursue. Judge Rogers joined Judge Hood in ruling that, even though the plaintiff had no administrative remedies to pursue, the district court should have dismissed his complaint without prejudice for his failure to exhaust administrative remedies.

Judge Moore dissented, noting that the majority's ruling would result in a waste of judicial resources since the plaintiff had the right to re-file his lawsuit. In particular, Judge Moore criticized the majority's interpretation of Fed. R. Civ. P. 15(d), which Moore described as allowing a party to "file a supplemental pleading identifying facts that have changed since an earlier filing," and which "exists so that litigants may avoid wasting the judicial resources involved in dismissing and refiling a complaint. . . ." 332 F.3d at 429.

- Parks v. City of Chattanooga, 2003 U.S. App. LEXIS 14471 (6th Cir. 2003): **proof of retaliation against police officer under Title VII**

In this Title VII case, Judge Rogers cast the deciding vote in the court's 2-1 ruling against a former Chattanooga police officer, holding that the plaintiff had not presented sufficient evidence to state a prima facie claim of unlawful retaliation. The plaintiff, an African American, had made a number of complaints of race discrimination within the city's police department. Another officer "corroborated" many of his allegations. 2003 U.S. App. LEXIS 14471, at 4. Subsequently, the plaintiff became the subject of an Internal Affairs investigation and a criminal investigation, which led to his termination from the police department. He filed suit, claiming that he had been fired because of his race and also in retaliation for his having complained about race discrimination in the department. The district court granted summary judgment in favor of the defendants, holding that the officer "did not produce sufficient evidence to support his claims." Id. at 2. The Sixth Circuit affirmed.

Judge Clay dissented as to the plaintiff's retaliation claim, and would have held that there were sufficient factual disputes as to that claim to establish a prima facie case of retaliation. Clay explained that the majority had failed "to so much as consider evidence that goes to the heart of the [officer's] claim — in contravention of the summary judgment standard" requiring that all evidence be viewed "in favor of" the officer. Id. at 35.

Judges Gibbons and Rogers, Sixth Circuit

- Dotson v. Wilkinson, 329 F.3d 463 (6th Cir. 2003)(en banc): **use of federal civil rights law to challenge unlawful state parole hearing procedures**

Judges Gibbons and Rogers dissented in part and concurred in part (along with two other judges) in this en banc case in which the issue was the circumstances under which a prisoner challenging procedural aspects of his state parole hearing could bring an action under 42 U.S.C. § 1983 or was required to proceed via habeas corpus. All 10 judges agreed that one of the plaintiffs, who was challenging the retroactive application of new parole regulations delaying his eligibility for parole, could pursue a suit under Section 1983. But Gibbons, Rogers and two others dissented from the six-judge majority opinion holding that the other plaintiff, who alleged that his due process rights were violated by the state's failure to follow the required procedures at his parole hearing, could also pursue a Section 1983 claim (as opposed to a habeas petition). According to the majority, the state's violations included refusing to allow the prisoner to speak on his own behalf at his parole hearing and basing the decision to deny parole on two alleged convictions for which he was not even charged, in violation of state law governing what could be considered in the parole decision.

Jeffrey Sutton, Sixth Circuit

Jeffrey Sutton is one of the most controversial of the Bush nominees confirmed to the Court of Appeals. There was significant opposition to Sutton's confirmation, in large measure because Sutton was one of the leaders of the modern "states' rights" or "federalism" movement promoted by the Federalist Society and other right-wing advocates that, over the past decade, has severely limited federal civil rights and other protections, particularly by restricting the authority of Congress to pass laws or require compliance with them.

Sutton was questioned extensively at his confirmation hearing by Senate Judiciary Committee members about his role in recent Supreme Court cases in which he had urged the Court to restrict congressional authority to protect Americans' rights, sometimes even more substantially than the Court majority did. Sutton testified that he was merely a lawyer representing the views of his clients when he took these "federalism" positions as well as other positions harmful to individual rights, and that his arguments did not reflect his views and legal philosophy. Now, however, in less than a year on the bench, Sutton has already issued a dissenting opinion in which he would have drastically narrowed the scope of the federal arson law and seriously questioned the authority of Congress under the Commerce Clause based on such "federalism" concerns. He also dissented from a ruling in a First Amendment case in which the majority explained that he was attempting to make more severe a state statute regulating First Amendment activity through "judicial legislation."

- United States v. Laton, 2003 U.S. App. LEXIS 24770 (6th Cir. 2003): **constitutionality and scope of federal arson law**

In this case, the majority held that an arsonist could be prosecuted under the federal arson law for burning down a local firehouse if there was sufficient evidence for a jury to find that the

firehouse was either "used in interstate commerce or . . . used in any activity affecting interstate commerce," which the majority held was the case here. 2003 U.S. App. LEXIS 24770, at 9. In so ruling, the majority relied on the express language of the statute, which applies to the destruction by fire of "any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Id. at 8 (emphasis added; quoting 18 U.S.C. § 844(i)).

Sutton dissented, and would have held that the federal arson law does not apply to buildings that are not used for active commercial purposes, thereby narrowing the law significantly and potentially exempting prosecution for the arson of most municipal buildings. In Sutton's view, arson is a local crime and "the National Legislature" had not clearly conveyed its purpose to regulate in an area traditionally regulated by the states. Id. at 58. According to Sutton, moreover, it would have raised "grave and doubtful constitutional questions" to hold that Congress had tried to do so, seriously questioning the authority of Congress under the Commerce Clause. Id. at 57.

The majority specifically repudiated Sutton's assertions, stating that "counter to the dissent's belief that [the statute] suffers from a lack of clarity, Congress made transparent its objective in passing [the statute]. It fashioned a statute that covered the arson of 'any' building" used in interstate commerce or in any activity affecting interstate commerce. Id. at 10. The majority noted that Sutton's dissent not only ignored the plain language of the statute, but also its legislative history, since Congress had not only omitted the limiting phrase "for business purposes" from the statute as originally proposed but also explained that it had done so in order to ensure that the law "covered more than just traditional business properties." Id. at 28. The majority noted that according to the Supreme Court, the federal arson law could thus cover "the bombings of schools, police stations, and places of worship." Id. at 26. Had Sutton's view prevailed, the scope of the federal arson law would have been narrowed significantly.

- Dean v. Byerley, 2004 U.S. App. LEXIS 177 (6th Cir. 2004): **First Amendment right to engage in residential picketing**

This case raised important First Amendment questions concerning the right to engage in peaceful residential picketing. Stephen Dean, who applied to practice law in Michigan, became concerned about the treatment of his application and picketed at the state bar office and the residence of a state bar official. According to Dean, the official came out of his residence, threatened that Dean would never become a member of the state bar due to his picketing, and also threatened to have Dean arrested. After the confrontation, Dean left and ceased all picketing. The official then wrote Dean a letter on state bar stationery warning Dean not to trespass on his or the state bar's property. Dean sued the official, claiming that the official had violated his First Amendment rights because of the threat that Dean would never be admitted to the state bar because of the picketing. The district court granted summary judgment for the official because it determined that he was not acting under color of state law.

In an opinion by Judge Karen Nelson Moore joined by Judge Martha Daughtrey, the Court of Appeals reversed. The court found that the official was acting under color of state law, especially as demonstrated by the letter sent on state bar stationery. The court explained that Dean had a First Amendment right to engage in residential picketing on public streets and

sidewalks, which have long been recognized by the Supreme Court as public forums. Although the Court ruled in Frisby v. Schultz, 487 U.S. 474 (1988), that a government can choose to ban all picketing targeted at a single residence, the majority explained that Michigan law banned only labor picketing at private residences. Accordingly, the majority explained, Dean had raised genuine issues of material fact that should be decided in the court below as to whether the bar official had violated his First Amendment rights by threatening that he would never be admitted to the state bar because of his picketing and deterring him from further First Amendment activity.

Although Judge Sutton did not disagree that the official was acting under color of state law, he vigorously dissented on First Amendment grounds. According to Sutton, there is no First Amendment right to engage in targeted residential picketing after Frisby. In any event, Sutton argued, Michigan law actually banned all targeted residential picketing, not just labor picketing, and Dean's picketing was labor picketing because it concerned "his effort to become a lawyer in the State of Michigan" and "be available for employment in that profession." 2004 U.S. App. LEXIS 177 at 62. Sutton thus concluded that Dean's First Amendment claim should be dismissed.

The majority severely criticized Judge Sutton's analysis. "Supreme Court precedent makes it clear," the majority explained, that citizens have a First Amendment right to protest on streets and sidewalks "unless and until" a proper law is passed regulating time, place, and manner, like the targeted residential picketing ban in Frisby. Id. at 21. The fact that Dean's ability to get a Michigan law license "may affect his future employability," the majority said, "does not convert his protest into labor picketing," and Sutton had cited "no authority for his overly expansive definition of labor picketing." Id. at 17. The majority stated that none of the parties claimed that Michigan law "bans all targeted residential picketing," in contrast to Sutton's view, and that the title and preamble of the Act in which the picketing ban appears, as well as the surrounding clauses, "all clearly indicate" that the ban "applies only to labor picketing." Id. at 10, 13. The majority pointedly noted that "[i]t would be tantamount to judicial legislation and would raise serious federalism concerns if we, a federal court, were to broadly construe" the Michigan statute "to criminalize conduct that the Michigan legislature did not make criminal." Id. at 15. Sutton's view would thus not only have contradicted First Amendment precedent, but also have resulted in improper "judicial legislation."

EIGHTH CIRCUIT DECISIONS

William Riley, Michael Melloy, Lavenski Smith, Eighth Circuit

Bush nominees William Riley, Michael Melloy, and Lavenski Smith have mixed records in divided cases, and in some instances have been on opposite sides of the court's rulings. For example, Judges Melloy and Riley joined the majority in an en banc ruling denying a jury trial to a professor at a public university who claimed that he had been denied a promotion because of his race, while Judge Smith dissented. In two other cases, Judge Riley cast the deciding vote denying a jury trial to employees who contended that they were victims of unlawful discrimination. In one, Riley declined to follow precedent in another circuit and denied relief

under the Americans with Disabilities Act to an insulin-dependent diabetic who was fired because he needed an uninterrupted lunch break to manage his diabetes.

Judges Melloy and Riley also formed the majority in a 2-1 ruling overturning a judgment in favor of a prison inmate who claimed that his right to practice his religion had been violated, holding that the inmate had failed to exhaust his administrative remedies, while the dissent cited evidence that the inmate had been misled into believing there were no remedies to exhaust. In another case, however, Judge Melloy cast the deciding vote reinstating a damages award in favor of the employee in an egregious case of sexual harassment, while Judge Smith dissented.

- Lockridge v. Board of Trustees of the University of Arkansas, 315 F.3d 1005 (8th Cir. 2003) (en banc): **race discrimination in public university promotion**

Judges Melloy, Riley and Smith were on different sides of the court's en banc ruling in this case in which an African American professor at Phillips Community College of the University of Arkansas claimed that he had been denied a promotion to a deanship because of his race. The professor, who was a department chair, contended that he had been denied similar promotions three times, and that the college had improperly changed its policy of filling deanship positions from within once he became the "obvious next choice" for such a position. 315 F.3d at 1015. The defendants maintained that the claim should be dismissed because, after being told that the position would not be filled only from within the college, the professor indicated he would not formally apply and did not do so. The district court decided that there were disputed issues of fact and that the discrimination claim should go to a jury.

The eight-judge majority, including Riley and Melloy, reversed the lower court and ruled that summary judgment should be granted against the professor based on his failure to apply and statement that he did not intend to do so. Four judges, including Smith, dissented. They explained that prior precedent made clear that a discrimination claimant need not have applied for a promotion when the employer has failed to establish a clear promotion procedure, that the professor had presented evidence that the process was "ambiguous and potentially discriminatory" and that the college had improperly changed its practice of hiring from within, and that he therefore "deserve[d] a jury trial." Id. at 1013.

- Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002): **discrimination against insulin-dependent diabetic under Americans with Disabilities Act**

Judge Riley wrote the majority opinion in the court's 2-1 ruling affirming the district court's grant of summary judgment in favor of Wal-Mart in a suit under the Americans with Disabilities Act brought by a Wal-Mart pharmacist who was an insulin-dependent diabetic. The pharmacist contended that Wal-Mart had violated the ADA by refusing to allow him to take an uninterrupted lunch break, which he said was essential in helping him control his diabetes, and then fired him when he insisted on taking such a break so that he could eat. Riley's opinion held that the pharmacist was not disabled within the meaning of the ADA because he had failed to show that his condition substantially limited one or more major life activities. In so holding, Riley refused to follow a recent ruling of the Seventh Circuit that, "in the context of insulin-dependent diabetes, eating constitutes a major life activity." 297 F.3d at 725. According to

Riley, the pharmacist had failed to argue in the district court that eating constitutes a major life activity substantially limited by his diabetes. Although Riley's opinion acknowledged that the Court of Appeals could properly consider an argument newly raised on appeal if "manifest injustice otherwise would result" or if the argument were "purely legal and requires no additional factual development," id., Riley's opinion held that the pharmacist had not persuaded the court that either exception applied. Accordingly, the majority refused even to consider the Seventh Circuit's ruling, and affirmed the lower court's decision to dismiss the pharmacist's claim without a jury trial.

Judge Lay issued a vigorous dissent, criticizing the majority for its "myopic treatment of the record before the district court" in holding that the pharmacist had not raised the issue of eating "as a limitation on one of his life's major activities." Id. at 726. According to Lay, the pharmacist's "entire case turned on the refusal of his employer to allow [him] to follow a dietary regimen. . . To suggest eating was not raised in the district court slights the entire evidentiary record." Id. (emphasis added). Judge Lay would have followed the Seventh Circuit's precedent, and held that the pharmacist's "eating and working are fundamental, major life activities that are substantially limited due to his diabetes." Id. at 727.

- Jacob-Mua v. Veneman, 289 F.3d 517 (8th Cir. 2002): **proof of racial harassment and hostile working environment under Title VII**

In this Title VII case, Judge Riley authored the majority opinion in the court's 2-1 ruling against an African American employee of the Department of Agriculture who alleged that she had been subjected to a hostile work environment created by racially motivated harassment by her co-workers. Riley's opinion affirmed the district court's grant of summary judgment in favor of the USDA, holding that the employee had failed to present evidence that "her employer knew or should have known of the harassment." 289 F.3d at 523. As a result of Judge Riley's opinion, the employee was prevented from having the opportunity to present her discrimination claim at a trial.

Judge Heaney dissented, stating that "the evidence shows a dispute in material fact regarding [the employee's] Title VII claim for hostile work environment harassment by non-supervisory co-workers. Such disputes must be resolved by a fact-finder." Id. at 523. Heaney criticized the majority for "fail[ing] to view the facts in the light most favorable to [the employee]," as a court must in ruling on a summary judgment motion by the employer. Id. at 524. Among other things, Judge Heaney explained that the evidence showed that the employee's supervisors may have condoned the alleged racial harassment, noting that one of the supervisors and a co-worker had "ridiculed" the employee's "style of dress" when she wore "traditional African clothing." Id.

- Lyon v. Vande Krol, 305 F.3d 806 (8th Cir. 2002) (en banc): **prisoner's ability to bring civil rights action challenging prison's prohibition on practicing his religion**

Everett Lyon, who was incarcerated at the Iowa State Penitentiary ("ISP"), brought an action against prison officials charging that his constitutional rights had been violated because he

had been prohibited from participating in Jewish services and holidays. The prison chaplain (Vande Krol) maintained that many inmates were falsely claiming to be Jewish solely "for the purpose of taking advantage of the special food accommodations made for Jewish inmates." 305 F.3d at 808. The chaplain had drafted a memo excluding Lyon and all but four other inmates from participating in Jewish services, and asked the Rabbi who was the Jewish consultant for the prison to sign it. When Lyon protested his exclusion, he was told by Vande Krol that "he had merely fulfilled his obligation to see to it that the recommendations of [the Rabbi], as Jewish consultant to ISP, were implemented at the prison." Id. Lyon then wrote a memo attempting to resolve the matter, and was told by the Deputy Warden that "although he would be permitted to attend Jewish services, he would not be allowed to participate," and that "'Jewish experts' suggested that prison inmates should not be converted to Judaism . . . ." Id.

Lyon filed suit under 42 U.S.C. § 1983. At trial, the jury ruled in his favor and awarded him nominal and punitive damages. The trial judge issued injunctive relief in Lyon's favor, ordering prison officials to allow him "access to Jewish artifacts, services, and kosher food." Id. at 810, n.1. On appeal, prison officials claimed that Lyon's suit should have been dismissed because he had failed to exhaust administrative remedies. In an en banc 10-2 ruling, with Judges Melloy and Riley in the majority, the Eighth Circuit agreed, and sent the case back to the district court with instructions that Lyon's complaint be dismissed, depriving him of the damages award and the injunction.

Judges Bright and McMillian dissented, accusing the majority of a "rush to judgment" that was "unseemly and unfair to the parties, the district court, and to the law." Id. at 812. The dissenters would have held that there was a factual issue to be resolved as to whether prison officials had misled Lyon into thinking that there were no administrative remedies to exhaust, since they apparently had led him to believe that only their outside Jewish consultants had the authority to resolve his grievance.

- Christina A. v. Bloomberg, 315 F.3d 990 (8th Cir. 2003): **plaintiffs' right to attorneys' fees in civil rights action**

The plaintiffs in this suit, juvenile inmates at the South Dakota State Training School, brought a class action challenging the conditions of their confinement as unconstitutional in a number of respects. The parties subsequently entered into a settlement agreement which the district court approved. The court then dismissed the action but retained jurisdiction for purposes of enforcing the settlement agreement. The court awarded the plaintiffs nearly $400,000 in attorneys' fees and costs, ruling that the plaintiff class was a "prevailing party" because the "settlement agreement had a positive impact on conditions at the facility." 315 F.3d at 991. The defendants appealed from the award of fees and costs.

In a 2-1 ruling, with Judge Melloy dissenting, the majority reversed, holding that the settlement agreement lacked the necessary judicial imprimatur for the plaintiff class to be considered the "prevailing party" under Supreme Court precedent. Melloy disagreed, and would have held that the district court's approval of the settlement agreement, coupled with its retention of jurisdiction to enforce that agreement, provided sufficient judicial approval of the agreement for the plaintiffs to be entitled to attorneys' fees as the prevailing party.

- Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906 (8th Cir. 2003): **racial harassment in the workplace**

This case concerned complaints by a printing company employee, Tommy Reedy, of a pattern of racial harassment in the workplace. Reedy, an African American, contended that he had been subjected to significant racial harassment from co-workers of which his employer was aware, including racial epithets written in the men's bathroom. Reedy ultimately quit, claiming constructive discharge, and filed suit. The district court granted summary judgment in favor of the employer. The Court of Appeals unanimously affirmed the judgment against Reedy on the constructive discharge claim, but by a 2-1 majority, which included Judge Melloy, reversed on Reedy's claim of a hostile work environment. The majority held that Reedy had "produced sufficient evidence to make out a submissible case," 333 F.3d at 910, and sent the matter back to the district court for a trial on the merits.

- Eich v Board of Regents for Central Missouri State University, 350 F.3d 752, 2003 U.S. App. LEXIS 24362 (8th Cir. 2003): **damages for sexual harassment in the workplace**

Bush nominees Melloy and Smith were on opposite sides of the court's 2-1 ruling upholding a jury's compensatory damages award of $200,000 to a woman who had been subjected to degrading and humiliating sexual harassment by two male co-workers over a period of seven years. The plaintiff, Deborah Eich, was a detective sergeant at Central Missouri State University. As recounted in the court's opinion, one of Eich's male co-workers for years had engaged in such conduct as brushing up against her breasts, running his fingers through her hair, and more than once during handcuff training sessions had "stood behind Eich and simulated a sexual act while Eich was bent over and handcuffed as part of the training." 2003 U.S. App. LEXIS 24362, at 3. Eich also saw him do this to another female officer during handcuff training. In addition, the male officer "simulated sexual acts with a nightstick by sliding the stick in and out of his hand." Id. at 4. On another occasion, the officer commented that "Eich's nipples were hard because she had gotten cold by going outside." Id.

Eich was also harassed for years by another male co-worker, who repeatedly made comments about her body, hair, and face, and who was overheard by Eich commenting about her chest size and that of another female officer "after they had been measured for bulletproof vests." Id. at 5. This officer also "rubbed his hand up and down Eich's leg during meetings and rubbed or pressed up against her while they talked . . ." Id. More than once, the officer "stood behind Eich while she sat at her computer and pressed his groin area into her shoulder." Id. On one occasion, the officer said in the presence of Eich and others that "it was so cold that he had to fish around in his pants to find 'it' in order to go to the bathroom." Id. at 5-6.

Despite Eich's numerous complaints to University officials about the harassment, the conduct continued. Finally, Eich went on administrative leave and filed a charge of employment discrimination with the EEOC. The University conducted an internal investigation and concluded that no sexual harassment had occurred. The University asked Eich to return to work but told her that there would be "no substantial changes in the working conditions." Id. at 9. Not

surprisingly, Eich was unwilling to work under those conditions, "and her employment was terminated." Id.

Eich brought a Title VII employment discrimination lawsuit against the University, charging that she had been subjected to a hostile work environment based on sexual harassment. She prevailed at trial, and the jury awarded her, among other things, $200,000 in non-economic damages relating to the emotional distress she had suffered. However, the district court then ruled in favor of the University as a matter of law on Eich's claims. The court further ruled that if it were reversed on the issue of harassment, Eich must accept substantially reduced damages in the amount of $10,000 or the University would be given a new trial. Eich appealed.

In a 2-1 ruling, the Eighth Circuit upheld the jury's verdict on sexual harassment and reinstated the jury's full award of damages to Eich. The majority opinion, written by Judge Lay and joined by Judge Melloy, considered the harassing conduct so egregious it began by stating "[t]his is a case involving the question of human decency." Id. at 1. After recounting the facts, the majority concluded that the evidence of "sexual touchings and sexual innuendos" continuing over many years was sufficient for the jury to find that Eich had been subjected to "sexual harassment sufficiently severe or pervasive to constitute a hostile work environment." Id. at 17. The majority held that the district court had plainly erred in granting judgment to the University as a matter of law. The majority also held that the court had abused its discretion in ordering Eich to accept reduced damages or face a new trial, noting the "demeaning and humiliating" actions of Eich's co-workers. Id. at 29.

Judge Smith dissented as to the majority's reinstatement of the damages award of $200,000. While Smith agreed that the jury's verdict that Eich had been sexually harassed should stand, he asserted that this was "a much closer call than the majority allows." Id. at 32. According to Smith, a number of the instances of harassment on which the majority had relied did not "amount to discrimination," because they took place in group settings with men and women present and were not individually directed at Eich, including the male officer's "simulated sex act with a nightstick." Id. at 34-35. Although Judge Smith joined the majority in sustaining the verdict for Eich on sexual harassment, he would have upheld the trial judge's order giving Eich the choice of a new trial or accepting reduced damages of $10,000.

NINTH CIRCUIT DECISIONS

Richard R. Clifton, Ninth Circuit

- Earth Island Institute v. United States Forest Service, 2003 U.S. App. LEXIS 24887 (9th Cir. 2003): **suspending commercial logging while environmental lawsuit challenging logging plan was pending**

Environmental groups brought this lawsuit challenging the implementation of a U.S. Forest Service restoration project involving timber sales in the Sierra Nevada mountains. The groups asked the district court for a preliminary injunction to preserve the status quo and prevent irreparable injury by prohibiting logging while the suit was pending. The court denied the groups' motion for the preliminary injunction. In a 2-1 ruling, with Judge Clifton dissenting, the

Ninth Circuit reversed, holding that the district court had "applied an improper legal standard when assessing the 'possibility of irreparable injury'" that a plaintiff must show in order to obtain a preliminary injunction. 2003 U.S. App. LEXIS 24887, at 12. According to the majority, the district court had "place[d] a higher burden of proof on the plaintiffs than is warranted." Id. at 13. Specifically, as the court explained, the environmental groups were required to show only the "possibility of irreparable harm" rather than "actual harm" or a "concrete probability of irreparable harm," the legal standards applied by the district court. Id. at 12.

Judge Clifton dissented, and would have upheld the district court's ruling, making it more difficult for plaintiffs in lawsuits to preserve the status quo and prevent irreparable harm while their claims are being decided. Moreover, although at issue in this particular case was whether the Forest Service had overstated the number of dead trees needing to be cut down following a forest fire and had approved the removal of live trees, Judge Clifton disparaged the lawsuit: "This is not an environmental case where some natural treasure is threatened with extinction because of commercial plans to harvest resources. The reality is that a fire devastated Eldorado National Forest, leaving the Forest Service to decide how to make the best of a bad situation." Id. at 60. The majority, however, held that the district court, while focused on the "loss in value of deteriorating timber," should also have considered "the broader public interest in the preservation of the forest and its resources," specifically noting "the public's interest in preserving precious, unreplenishable resources," which in this case included living trees and the California spotted owl. Id. at 45 (citation omitted).

TENTH CIRCUIT DECISIONS

Harris Hartz, Tenth Circuit

Judge Hartz has a mixed record in divided cases. He dissented from a decision upholding a $755,000 jury verdict for a railroad employee who had suffered brain damage on the job, based on what the majority described as an attempt to improperly "second-guess" expert testimony. He also dissented from the court's ruling in a case concerning the application of the First Amendment "prior restraint" doctrine, contrary to the majority's view of controlling Supreme Court precedent. In another divided ruling, however, he wrote the majority opinion holding that the district court should not have dismissed as frivolous certain claims of a prison inmate that his mail had been improperly censored. Judge Hartz also issued a partial dissent from the court's ruling in favor of the plaintiffs in a defamation case.

- Goebel v. Denver & Rio Grande Western R.R. Co., 346 F.3d 987 (10th Cir. 2003): **liability of railroad for brain damage and other injury to employee on the job**

While on the job, a railroad employee was injured when an accident in a tunnel caused him to be exposed to diesel fumes and oxygen deprivation at a high altitude of more than 9000 feet. An expert testified that the result was swelling of the brain, severe headaches, nausea, tightness in the employee's chest, shortness of breath, significant aches and soreness, and "disorientation that rendered him unable to read." 346 F. 3d at 994, 989. The employee filed suit under the Federal Employers' Liability Act, and a jury awarded him $755,000 in damages.

Because the district court had not applied the proper legal standard in deciding whether to admit the expert's testimony, the appellate court initially remanded the case to the lower court. The trial court then "took pains to 'demonstrate by specific findings on the record that it had performed its duty,'" and there was no dispute that it had followed the correct legal standard. Id. at 990. Nevertheless, the railroad appealed again, claiming that the district court had abused its discretion in allowing the jury even to consider the expert's testimony.

In a dissenting opinion, Judge Hartz accepted the railroad's arguments, undertaking his own detailed analysis of the expert's opinion and concluding that it did not have "adequate scientific support." Id. at 1002. The majority squarely rejected Judge Hartz's method of analysis and conclusion as contrary to the law and the proper role of an appellate judge. "Despite our expertise in the law," the majority pointedly noted, "our role as judges is not to second-guess well qualified and highly trained medical experts on difficult judgment calls within their field of expertise." Id. at 993-94. Instead, the court explained, in the absence of legal error, its role was to defer to the trial court that had heard the testimony and reverse only if that court had abused its discretion and made a "'clear error of judgment or exceeded the bounds of permissible choice.'" Id. at 993. Under that standard, the court ruled, the claims of the railroad and Judge Hartz could not be accepted. If they were, the result would have been not only to reverse the jury verdict for the injured employee, but also to improperly "invest" the appellate court with "plenary review that would displace the discretion" of lower courts and juries in such cases. Id. at 1001.

- The Tool Box v. Ogden City Corp., 316 F.3d 1167 (10th Cir. 2003): **application of First Amendment prior restraint doctrine**

In this First Amendment case, Judge Hartz dissented from the court's 2-1 ruling that reversed the grant of summary judgment in favor of a city whose review board had refused to allow a sexually oriented business to operate in an area that was zoned for such businesses. Because the review board had relied on protective covenants that gave the board "unbridled discretion" to determine whether "a lawful business may open up shop," the majority held that the district court should have applied the doctrine of prior restraint, and that the court had erred in granting summary judgment to the city. 316 F.3d at 1181. Citing Supreme Court precedent, the majority explained that "[a]lthough the government may regulate the time, place or manner of protected expression, the courts will not validate statutes that make protected expression subject to 'prior restraint' — that is, subject to 'official approval under laws that delegate [] standardless discretionary power to local functionaries.'" Id. at 1179 (citations omitted). The appeals court sent the case back to the lower court for further consideration of the business's claims.

Judge Hartz dissented, asserting that the business was improperly challenging on their face the protective covenants, which did not have a "particular nexus to speech." Id. at 1181. As the majority explained, however, the business had properly challenged the actual application of the covenants that "create[d] an impermissible risk of suppression of ideas" under settled Supreme Court First Amendment precedent. Id. at 1174, 1175.

- Elliott v. Cummings, 2002 U.S. App. LEXIS 21524 (10th Cir. 2002): **inmate's right to pursue his constitutional claims**

Judge Hartz wrote the majority opinion in this 2-1 ruling in which the court in part upheld and in part reversed the decision of the district court dismissing as "frivolous" claims brought pro se by a prison inmate concerning the alleged improper censorship and seizure of some of his mail as obscene. In particular, the majority held that there was a factual dispute as to whether certain mail had been censored and returned to the sender, and that the district court had improperly dismissed the inmate's First Amendment claim concerning that mail. Judge Anderson dissented on this point and would have held that the inmate's claim was frivolous and that it had properly been dismissed.

- Quigley v. Rosenthal, 327 F.3d 1044 (10th Cir. 2003): **defamation suit against public interest organization and local director**

This case involved defamation and other claims brought by the Quigley family against the Anti-Defamation League and its Denver director, arising out of the ADL's assistance to neighbors of the Quigleys in bringing a lawsuit against the Quigleys charging that they were conspiring against and harassing the neighbors because they were Jewish. That lawsuit, ultimately settled, was premised in part on information gleaned by the neighbors when they intercepted private telephone conversations that the Quigleys had on cordless phones. The day after the neighbors filed suit, the local ADL director spoke at a press conference and made what the Quigleys alleged in this case were defamatory statements, including an accusation that they had made their neighbors "the targets of a vicious anti-Semitic campaign." 327 F.3d at 1053. The jury found for the Quigleys, and awarded them a total of more than one million dollars in compensatory damages, and a total of $7.5 million in punitive damages under federal law.

On appeal, the defendants contended that the trial court had applied the wrong legal standard for alleged defamation of private individuals. Specifically, they contended that the local ADL director's remarks at the press conference involved matters of "public or general concern," since they pertained to a lawsuit asserting that the Quigleys had conspired to deprive their neighbors of their constitutional rights on the basis of their religion, and therefore the defendants could not have been liable for defamation unless the ADL director's remarks had been made with "actual malice." The trial court had held that the press conference statements did not involve matters of public concern, and in a 2-1 ruling, with Judge Hartz dissenting, the Tenth Circuit agreed, upholding the defamation verdict.

According to the majority, because the ADL knew or should have known that the neighbors' allegations against the Quigleys were "not colorable," the statements to the press did not involve matters of public concern. 327 F.3d at 1061. Judge Hartz disagreed, and would have held that the application of the public-concern doctrine did not turn on the "truthfulness of the allegedly defamatory statements," since truth is always a defense to defamation. Id. at 1075-76. According to Judge Hartz, "[s]urely, faith-based intolerance, particularly when combined with

threats of violence, is a matter of concern to the community at large." Id. at 1076. Accordingly, Judge Hartz would have set aside the judgment on the defamation claim so that an "actual malice" standard could be applied.

Judge Hartz also dissented from the majority's ruling upholding the punitive damages award against the ADL under the federal wiretap law. The majority upheld the award on the ground that the ADL should have known at the time suit was filed against the Quigleys that it was unlawful to use intercepted cordless telephone communications. Judge Hartz would have reversed the award, because the standard for punitive damages required that the ADL have acted with knowledge that, or reckless disregard of whether, it was violating federal law, whereas the trial judge instructed the jury that the ADL was presumed to know the law. According to Hartz, because it had been lawful to intercept cordless telephone conversations when the ADL first became involved in this matter and research on the issue was done by attorneys on whom the ADL relied, the ADL could not have been presumed to know of a change in the law a mere several weeks later.[4]

Michael McConnell, Tenth Circuit

- National Labor Relations Board v. Interstate Builders, Inc., 2003 U.S. App. LEXIS 24153 (10th Cir. 2003): **firing and refusing to hire workers because of anti-union bias**

In this case, the court upheld a National Labor Relations Board (NLRB) finding that Interstate Builders was guilty of illegal unfair labor practices against employees trying to form a union. Interstate did not contest the NLRB's determination that it had "coercively interrogated applicants and employees" about union activities and membership, "created the impression that employees' union activities were under surveillance, threatened to impose more onerous working conditions if the employees unionized," and undertaken other anti-union activity. 2003 U.S. App. LEXIS 24153, at 2. The company claimed, however, that there was no substantial evidence for the NLRB's conclusion that it had improperly fired employee John Norman and refused to hire four other union members, at least in part because of anti-union bias. In a partial dissent, Judge McConnell agreed with Interstate. He accepted Interstate's claims that it had fired Norman because he had induced another employee to leave Interstate as part of his union organizing activity, and that it had refused to hire the other union members because of a policy against dealing with prospective employees through unions.

In an opinion by Chief Judge Tacha joined by Judge McWilliams, the court squarely rejected these claims. The majority explained that substantial evidence clearly supported the conclusion that anti-union bias played a role in the decision to fire Norman, including the facts that Interstate initially refused to hire him because he was a "union organizer," later gave false reasons for his dismissal, and that just before Norman was dismissed, a company official complained that if he hired an additional worker in Norman's area as requested, Norman would "just organize whoever he hired." Id. at 6, 34. The court explained that the company had completely failed to meet its burden to prove, in light of those facts, that it actually would have fired Norman "regardless" of his union activities. Id. at 37-38. Similarly, the majority found "plentiful" evidence to support the NLRB conclusion that anti-union bias, not simply the stated

policy against dealing through unions, motivated Interstate's refusal to hire the four union members. Id. at 42. This included the facts that they applied for the jobs in person, that Interstate "interrogated" them about their union status, that it refused to even accept their applications, that it gave the applicants a "false explanation" for its refusal, and that in refusing to accept the applications, an Interstate official told the applicants to "file another goddamn [NLRB] complaint." Id. at 42-43. As the majority pointedly noted, a court "may not overturn a Board decision just because we might have decided the matter differently" if there is substantial evidence of anti-union bias, which it clearly found in this case. Id. at 16. McConnell's dissent would have reversed the NLRB's order and prevented enforcement of its findings of unfair labor practices with respect to the five union members.

Terrence O'Brien, Tenth Circuit

Judge O'Brien has written or joined troubling opinions in several divided rulings in cases concerning civil and constitutional rights. This included a dissent in one case in which he would have refused to allow a civil rights plaintiff without an attorney to amend his complaint. In another case, however, Judge O'Brien joined the majority in upholding a district court ruling in favor of employees of a car dealership who contended that they were entitled to be paid overtime under federal labor law.

- Sanders v. Yeager, 57 Fed. Appx. 381 (10th Cir. 2003): **allowing pro se civil rights plaintiff to amend his complaint**

In this civil rights suit brought pro se (without a lawyer) by a former prisoner in a county jail, the panel unanimously affirmed the district court's grant of summary judgment in favor of the defendant sheriff as to the inmate's claims regarding unsafe and unsanitary conditions of confinement, lack of medical care, and interference with his mail. However, by a 2-1 vote, with Judge O'Brien dissenting, the court reversed the district court's refusal to allow the plaintiff to amend his complaint to add claims for compensatory and punitive damages he had allegedly suffered in the jail. The majority held that while the plaintiff had not stated a claim for damages in his complaint, he had stated one in his own motion for summary judgment. Specifically citing Fed. R. Civ. P. 8(f), which requires "all pleadings" to be "so construed as to do substantial justice," the majority held that the district court "should have given the plaintiff an opportunity to amend his complaint to add claims for compensatory and punitive damages before entering summary judgment against him." 57 Fed. Appx. at 382. The majority further noted the right of every plaintiff under Fed. R. Civ. P. 15(a) to amend the complaint once as a matter of right before the defendant files a responsive pleading, and after that by leave of the court, which leave "shall be freely given when justice so requires." 57 Fed. Appx. at 383. In addition, the majority further noted that when a plaintiff appears pro se, "his pleadings must be read liberally." Id. at 382.

Dissenting, Judge O'Brien would have precluded the pro se plaintiff from amending his complaint, and accused the majority of "accommodating him too much" and of "selectively" looking at the record. Id. at 384. Had Judge O'Brien's view prevailed, the plaintiff would have been prohibited from amending his complaint to add a claim for damages.

- Phillips v. Public Service Company of New Mexico, 58 Fed. Appx. 407 (10th Cir. 2003): **propriety of lower court dismissing Title VII claim on its own initiative**

In this 2-1 decision, Judge O'Brien was one of the two judges who issued a per curiam (unsigned) ruling affirming the district court's dismissal of the plaintiff's Title VII complaint. The case was brought pro se, without the assistance of a lawyer, and was dismissed by the district court on its own initiative, or sua sponte. The majority agreed with the district court that the plaintiff's complaint, which charged that his supervisor had engaged in a number of acts of violence against him, including trying to run him down with a company pickup truck, "has made no allegation that would support a Title VII claim." 58 Fed. Appx. at 409. According to the majority, the plaintiff's complaint "lacks even the faintest suggestion that his treatment by his employer is in any way related to his membership in a protected group." Id. Although the majority acknowledged that the district court had failed to address whether allowing the plaintiff to amend his complaint would be futile, it concluded that the plaintiff had suffered "no real disadvantage" by the dismissal of his complaint because he was "free to file another complaint" if he had "a good faith basis to do so." Id.

Judge Lucero dissented, noting that under Tenth Circuit precedent, a district court's sua sponte dismissal of a complaint is reversible error unless it is plainly obvious that the plaintiff could not prevail on the facts alleged and that it would be futile to allow the plaintiff an opportunity to amend his complaint. Here, as the majority acknowledged, the district court never addressed the futility issue. Lucero further noted that the plaintiff was African American and therefore within the class of people protected by Title VII, "indicating that it is not facially obvious that allowing him to amend his complaint would have been futile." Id. at 410. While the plaintiff could have filed a new lawsuit as the majority stated, Judge Lucero observed that "the time and expense involved in forcing litigants to file new lawsuits, should they have a good faith basis to do so, can be obviated by the approach we established" in prior precedent, requiring the district court to consider the futility of giving the plaintiff the opportunity to amend his complaint. Id. In conclusion, Judge Lucero also observed that the plaintiff was a pro se litigant, and that, under Tenth Circuit precedent, such litigants "are generally 'to be given reasonable opportunity to amend defects in their pleadings.'" Id. (citation omitted).

- Chao v. Rocky's Auto, Inc., 2003 U.S. App. LEXIS 8057 (10th Cir. 2003): **entitlement of employees to overtime under the Fair Labor Standards Act**

Judge O'Brien was in the majority in the court's 2-1 ruling upholding the district court's decision in favor of employees of a car dealership who contended that they were entitled to overtime pay under the federal Fair Labor Standards Act. Under that law, salesmen who are primarily engaged in selling cars for car dealerships are exempt from the requirement that they be paid overtime. Here, the dealership had argued that the employees, who worked as "finance managers," were "salesmen" within the meaning of the statute. The district court and the Tenth Circuit disagreed, and ordered the dealership to pay the employees overtime.

[1] Specifically, we reviewed those cases in which Bush-nominated appellate judges have participated through Dec. 31, 2003 that raise issues concerning congressional authority, as well as all civil cases raising significant issues of constitutional liberties, civil rights, employment discrimination, consumer rights, privacy, environmental protection, congressional authority, access to justice, and similar matters involving the rights and interests of ordinary Americans. (We did not include habeas corpus cases raising individual criminal law claims or immigration cases involving the status of individual immigrants.) Because the purpose of this preliminary look at President Bush's appellate judges was to determine whether and to what extent those judges are having an impact on these significant areas of the law, we focused our review on those cases in which the court's decision was divided, making the role of individual judges potentially decisive. Because these judges have been on the federal courts for a short period of time, because most appellate decisions are unanimous, and because cases are assigned randomly, some of the Bush-nominated judges have not participated in divided cases in these areas of concern.

[2] According to Rhode Island policy, "these searches included a 'visual examination of [the] groin and rectum.' Male arrestees were required to 'lift their penises and testicles on the officer's command to provide a clear view of the groin area.' Both male and female arrestees were required 'to bend over and spread the rectum to provide a clear view of the area.'" Id. at 34.

[3] People For the American Way Foundation joined an *amicus curiae* brief in this case in support of the position adopted by the majority.

[4] People For the American Way Foundation joined an *amicus curiae* brief in support of the Anti-Defamation League in this case.