CIVIL RIGHTS AND CIVIL LIBERTIES IN THE SUPREME COURT'S 2005-06 TERM

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The 2005-06 term was clearly a period of transition for the Supreme Court, as Chief Justice Roberts replaced Chief Justice Rehnquist, and two justices in a sense replaced Justice O'Connor – Justice Alito took her seat on the Court while Justice Kennedy replaced her as the "swing" vote in a number of closely divided cases. And while a relatively large number of the Court's decisions this term were unanimous (generally where the Court was able to agree on a narrow approach and avoid divisive issues as in the New Hampshire abortion case), the new justices clearly pushed the Court towards the right in several important, closely divided cases. Justice Kennedy played an important role in these cases as well, sometimes restraining the Court majority from adopting more extreme positions. For example:

- a 5-4 majority (including Roberts, Alito, and Kennedy) ruled that the First Amendment does not protect government employee internal whistleblowers

- the same 5-4 majority decided that the exclusionary rule should not apply to violations of the constitutional requirement that police "knock and announce" searches, with Justice Kennedy alone making clear that the decision would not apply more broadly

- the same 5-4 majority limited the scope of the Clean Water Act, with Roberts and Alito joining Scalia and Thomas in arguing for a dramatic cutback in this important environmental law but Kennedy providing the decisive voice for a more restrained approach

- in the Texas redistricting case, where the Court upheld most of the mid-decade redistricting plan inspired by former Rep. Tom DeLay, the same 5-4 majority rejected a challenge by African American voters to the redrawing of a Dallas-area congressional district. Yet Justice Kennedy joined the four moderate members of the Court to rule that carving Hispanic voters out of another district had violated the Voting Rights Act.

Justice Kennedy also provided the crucial fifth vote to rule in the critical *Hamdan* case that the Bush Administration could not unilaterally ignore U.S. law and the Geneva Convention in setting up procedures to decide the fate of detainees in Guantanamo. (Chief Justice Roberts did not participate in that ruling since he had been involved in the case earlier when he was on the D.C. Circuit.)

Voting patterns in 2005-06 confirm the expectations of many about Chief Justice Roberts and Justice Alito. According to an analysis by the Georgetown University Law Center Supreme Court Institute, Roberts and Alito agreed with each other 91 percent of the time. Roberts agreed

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with President Bush's professed models for Supreme Court justices, Justice Scalia and Thomas, 86 and 82 percent of the time, respectively. Alito's statistics reflect only a portion of the term, but he agreed with Thomas and Scalia 77 and 74 percent of the time. In non-unanimous cases, Alito agreed with Roberts 88 percent of the time, but with Stevens only 23 percent of the time; Roberts agreed with Scalia 78 percent of the time, but with Stevens only 35 percent of the time in non-unanimous cases.

The Court's 2006-07 term is already shaping up as presenting clear and dangerous opportunities for the Court's ultraconservative members to move the nation backwards on key civil rights and civil liberties issues. The Court has agreed to consider two cases on the validity of the federal abortion ban that closely resembles the Nebraska so-called "partial birth" abortion ban struck down 5-4 by the Court several years ago, with Justice Kennedy among the dissenters. In addition, the Court will review two decisions concerning the affirmative use of race to promote integration in public schools, which many believe could threaten the Court's recent 5-4 decision upholding affirmative action in higher education, in which Justice Kennedy also dissented. The Court will also hear an important case concerning whether the Clean Air Act requires the EPA to take action on greenhouse gases. The views of Chief Justice Roberts, as well as Justices Alito and Kennedy, will be crucial in these upcoming rulings.

This report summarizes the Court's key decisions in 2005-06 on civil rights, civil liberties, and other non-criminal law subjects discussed in our *Courting Disaster* 2005 report, including cases in which PFAW Foundation filed *amicus curiae* briefs.

Free Expression

The Court issued several troubling decisions this term on free expression and the first amendment. In a 5-4 decision, the Court ruled in ***Garcetti v. Ceballos***, 126 S.Ct. 1951 (2006), that the First Amendment does not protect public employees' speech made pursuant to their duties. Ceballos was an attorney for the LA District Attorney's office. When investigating a case, he determined that there were material misrepresentations in the affidavits submitted by two members of the sheriff's office. After making written and verbal complaints about the conduct, pursuant to his duties, Ceballos was demoted from his position as a calendar deputy and other retaliatory employment actions were taken against him. Ceballos brought suit alleging that the DA's office had violated his First and Fourteenth Amendment rights. The district court decided in favor of the District Attorney's office, but the Ninth Circuit reversed, holding that allegations of wrongdoing by public officials made pursuant to government employment were protected by the First Amendment.

The Supreme Court reversed. The majority acknowledged that public employees' commentary on matters of public concern can be protected by the First Amendment, but the majority found the controlling factor was that the expression was made pursuant to his duties as a calendar deputy. If he did not hold this job, he would not have had occasion to engage in the speech. The majority held that the First Amendment does not apply to speech made by a public employee in the course of public employment, even on issues of public concern.

Justice Souter wrote the principal dissent, joined by Justices Stevens and Ginsburg. To the question of whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties, these justices would have answered that sometimes it does, rather than that it never does, as the majority held. The dissenting justices would adopt the balancing test in *Pickering v. Board of Educ.*, 391 U.S. 563

(1968), which asks first whether the speech is of public concern and second whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public when determining violations of the First Amendment. "The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of speech is no less, and may well be greater when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties." 2006 US LEXIS 4341 at *36-37. However, the balancing must be presumed to heavily favor the government in cases such as this. An employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way that he does it. Justice Souter felt that standard was met here and would have held Ceballos's speech protected by the First Amendment. On narrower grounds, Justice Breyer agreed.

As critics across the country have noted, the Court's 5-4 decision significantly harms the First Amendment rights of public employees, and effectively mandates that government whistleblowers go outside government channels to receive any First Amendment protection. In addition, Court observers have indicated that the replacement of Justice O'Connor by Justice Alito may well have made the decisive difference in the case, which was reargued after Alito joined the Court.

In ***Beard v. Banks***, No. 04-1739 (June 28, 2006), the Court reversed a Third Circuit ruling and upheld a Pennsylvania prison policy that denied newspapers, magazines, and photographs to certain of the penal system's most dangerous inmates. (Justice Alito did not participate in the ruling since he had dissented from the ruling when he was on the Third Circuit). Justice Breyer delivered a plurality opinion, joined by Chief Justice Roberts, Justice Kennedy and Justice Souter. The Court applied *Turner v. Safely*, 482 U.S. 78 (1978), and the plurality found that the state's justifications for the policy to provide increased incentives for improving prison behavior and improving prison security were legitimate penological interests and that the policy was reasonably related to those interests. Therefore, the Secretary had shown that he was entitled to summary judgment under *Turner*.

Justice Thomas wrote a concurring opinion, joined by Justice Scalia, that would have gone even further. Thomas disagreed with the application of *Turner*. Instead, Thomas would apply the reasoning he articulated in his concurring opinion in *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003). Justice Thomas would allow states to define the parameters of punishment within their borders, so long as those punishment programs do not violate the Eighth Amendment.

Justice Stevens dissented, joined by Justice Ginsburg. Justice Stevens contended that, as a matter of law, the Secretary had not demonstrated that the challenged rule is related to the policy under *Turner v. Safely*. Taking newspaper, photograph, and magazine privileges away when prisoners are still allowed legal periodicals, books from the library, and writing paper is arbitrary, he explained, and will not substantially serve the goal of rehabilitation. Justice Ginsburg also filed a separate dissent disagreeing with the use of summary judgment in the case. (PFAW Foundation filed an *amicus curiae* brief in support of the Third Circuit's decision).

In another case, the Supreme Court unanimously upheld the constitutionality of the Solomon Amendment in ***Rumsfeld v. Forum for Academic and Institutional Rights***, 126 S.Ct. 1297 (2006). Congress enacted the Solomon Amendment, which stated that if any part of an institution of higher education did not allow equal recruiting opportunities to military recruiters

as it did to all other recruiters, the entire institution could lose certain federal funding. Law schools challenged the amendment as a violation of their First Amendment rights.

The Court acknowledged that Congress may not place unconstitutional conditions upon the receipt of federal funds. The Court ruled that the Solomon Amendment does not restrict what law schools may say, but only places a requirement on what they must do. Schools are still free to voice opposition to military recruiting if they desire, the Court explained, but may not prevent the military from recruiting students at their schools. According to the Court this is a constitutional restriction on the receipt of federal funds, and therefore the Solomon Amendment may be enforced against law schools. (PFAW Foundation filed an *amicus curiae* brief in opposition to the Amendment's constitutionality).

In ***Sorrell v. Randall***, No. 04-1528 (June 26, 2006), a divided Court struck down Vermont's limits on campaign expenditures and contributions for violating the First Amendment. No opinion garnered a majority of votes. Justice Breyer delivered the plurality opinion, joined by Chief Justice Roberts, and Justice Alito. The plurality held that *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), made clear that campaign expenditure limits violate the First Amendment and *Buckley* controlled the Vermont law regarding expenditures in this case. The plurality declined to overrule *Buckley* on the grounds of *stare decisis*. Addressing the limitations on campaign contributions, the plurality again applied *Buckley*, finding that the limitations at issue here are so restrictive that they violate the First Amendment. *Buckley* provides that contribution limits are permissible as long as the limits are "closely drawn" to match a "sufficiently important interest." 424 U.S. at 25. Contribution limits that are too low can hamper a challenger from mounting a campaign against an incumbent. Vermont forbids individual contributions above $200 dollars per person to a candidate per election cycle. It even forbids political parties from contributing more than $200 per candidate per election cycle. The plurality found this to be too restrictive and therefore not closely drawn to meet the limitations' objectives.

Justice Kennedy concurred only in the judgment. He voiced his misgivings about the confusing matrix of campaign finance law which has been "in part created and in part permitted" by the Court's course of decisions. Slip op. at 2. His skepticism regarding the system that has been created prevented him from joining the opinion of the plurality.

Justice Thomas concurred, joined by Justice Scalia. Justice Thomas questioned the reasoning in *Buckley*. He argued that the Court has been unable to apply the standards announced in the decision in a coherent fashion and therefore the decision should be abandoned. Instead, Justice Thomas would hold that contribution limitations infringe just as severely on First Amendment rights as expenditure limitations. He would subject attempts to limit both expenditures and contributions to strict scrutiny, which he said the law in this case clearly fails.

Justice Stevens dissented and would have overruled *Buckley v. Valeo* in a very different way. Adopting Justice White's argument in his concurring and dissenting opinion in *Buckley*, 424 U.S. at 263, he argued that it is wrong to equate money and speech and thus campaign finance laws do not limit speech at all. A candidate may address her potential constituency as freely and as often as she wishes. Limiting her budget does not necessarily limit her ability to campaign, according to Stevens. Furthermore, Justice Stevens found merit in the argument that Vermont wished to deal with the problem of excessive fundraising by lawmakers by limiting the amounts of money they could both spend on a campaign and receive from donors. Many states have acknowledged that their elected representatives need to spend far too much of their time fundraising for the next election and this activity hinders their job performance. Justice Stevens would defer to legislative judgment in dealing with this problem.

Justice Souter dissented, joined by Justices Ginsburg and Stevens. Justice Souter agreed with the Second Circuit's decision to remand the case for further consideration. First, Justice Souter noted that *Buckley* did not hold that all expenditure limitations violated the First Amendment. Among the issues the district court was instructed to consider was whether the expenditure limitations could survive exacting scrutiny under *Buckley*. To answer the question required further record development in Justice Souter's opinion. Second, Justice Souter refused to find that Vermont's contribution limitations were so low that they "render political association ineffective, drive the sound of a candidate's voice below the level of notice and render contributions pointless." Slip op. at 4 (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Nor did Justice Souter find it prudent to second guess the legislature on this matter without further inquiry. The dissenters would have affirmed the decision of the Second Circuit to remand to the District Court for further consideration.

Civil Rights/Voting Rights

The Court's civil rights decisions this term were mixed. In ***League of United Latin American Citizens v. Perry***, No. 05-204 (June 28, 2006), an important voting rights and partisan gerrymandering case, a divided Court mostly upheld a Tom Delay-inspired Texas redistricting plan but required the redrawing of one district to remedy harm to Hispanic voters. Justice Kennedy delivered the lead opinion which, joined in different parts by different justices, effectively became the opinion of the Court in many respects. On the issue of improper partisan gerrymandering, Kennedy and the four moderate justices agreed that such a claim could be considered by the courts, but he and Justices Alito, Thomas, Scalia and Chief Justice Roberts agreed, for different reasons, that no such claim was proven in this case. Even Justices Souter and Ginsburg agreed that the fact that the redistricting was done in mid-decade, after the usual time following the decennial census, was not sufficient. Justices Scalia and Thomas adhered to their view that claims of partisan gerrymandering should never be considered by the courts; Chief Justice Roberts and Justice Alito did not reach that question, and only Justices Stevens and Roberts believed that the claim of improper partisan gerrymandering should have been upheld in this case. For practical purposes, many observers believe it unlikely that future claims of improper partisan gerrymandering can succeed in the Court.

On the issue of voting rights, Justice Kennedy and the four moderate justices agreed that the redrawing of District 23 in Texas to reduce the Latino share of the voting age population violated Section 2 of the Voting Rights Act, based on the standards of *Thornburgh v. Gingles*, 478 U.S. 30 (1989). Justice Kennedy and the four most conservative Justices, however, formed a different 5-4 majority and ruled that changes to district lines in the Dallas area did not violate the Voting Rights Act, explaining that African Americans did not constitute a high enough percentage of the voting population in the challenged district to exhibit a possibility of effective control of the challenged district.

In ***Burlington Northern v. White***, No. 05-259, 2006 U.S. LEXIS 4895, eight justices, in an opinion written by Justice Breyer, made it easier for those who have suffered retaliatory actions at the hands of their employers under Title VII of the Civil Rights Act to sue their employers. The courts of appeals were split on which test should be applied to situations involving retaliatory actions. Some required that the retaliatory action affect a materially adverse change in the terms and conditions of employment. Others required only that the plaintiff show that the employer's action would have been material to a reasonable employee such that the action would likely have dissuaded a reasonable worker from making or supporting a charge of

discrimination. The Supreme Court adopted the latter, more expansive interpretation. Because retaliation can occur in many forms, even affecting the employee outside the workplace, and this provision within the statute was specifically designed to guarantee employees unfettered access to Title VII, the Court held that the more expansive interpretation was consistent with Congress' purpose and directed that interpretation to be applied uniformly.

Justice Alito concurred. Under his more narrow reading, discrimination for the purposes of retaliatory actions refers only to discriminatory acts in connection with the nature of employment, referring mainly to discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." 2006 U.S. LEXIS 4895, at *39. In his view, the majority's interpretation was too expansive and would burden the federal courts with suits for the most minor workplace slights. However, the facts of this case met even his more restrictive view of retaliatory actions and he concurred in the judgment.

The Court also issued a number of unanimous rulings in civil rights and related cases. In ***IBP, Inc. v. Alvarez***, 126 S.Ct. 514 (2005), the Court decided that walking time must be compensated under the Fair Labor Standards Act (FLSA) when complex protective gear must be worn in conjunction with a job and gear must be donned and doffed in a locker room some distance from the principal place of performance of that job. In *Arbaugh v. Y&H Corp.*, 126 S.Ct. 1235 (2006), the Court found that the requirement that an employer have a minimum number of employees to be covered by Title VII does not authorize a court to dismiss a job bias suit because of lack of jurisdiction. Finally, in *Domino's Pizza v. McDonald*, 126 S. Ct. 1246 (2006), the Court ruled unanimously that in order to bring a civil rights claim under 42 U.S.C.§1981, a plaintiff must claim injuries flowing from a racially motivated breach of his own contractual relationship, not the contractual relationship of his corporation.

States' Rights / Federalism

In an important ruling, the Supreme Court decided 6-3 in ***Gonzales v. Oregon***, 126 S.Ct. 904 (2006) that the Controlled Substances Act could not be used against physicians practicing in Oregon who prescribe Schedule II narcotics to assist suicide. Oregon enacted a law which, pursuant to strict guidelines, permits physicians to prescribe a lethal dose of schedule II narcotics for terminally ill patients. Attorney General John Ashcroft issued an interpretive rule under the federal Controlled Substances Act (CSA) that determined that using a controlled substance to assist suicide is not a legitimate medical practice and that prescribing them for this purpose is unlawful under the CSA. Therefore, any licensed physician complying with the Oregon statute ran the risk of losing her license or worse. The District Court entered a permanent injunction against the interpretive rule's enforcement. A divided panel of the Ninth Circuit granted review and held the interpretive rule invalid.

The majority of six justices, which included Justice O'Connor, found that the Attorney General did not have the authority under the CSA to bar dispensing controlled substances for assisting suicide in the face of a state regime which permits the conduct. Unlike other statutes which delegate broad power to agencies to promulgate rules having the force and effect of law, the majority explained the CSA delegates powers to the Attorney General in specific ways that prevent the AG from infringing on the rights of states to regulate the medical profession within each state. The Court determined that the Ashcroft regulation was not reasonable because the Attorney General never consulted a medical professional or the Secretary of Health and Human Services about the interpretation; rather he relied on a memo solicited from his staff. The Court

declined to accord respect to this interpretation and found it unenforceable against the state of Oregon.

Despite his opinions in other cases limiting federal ability to overrule states, Justice Scalia wrote a dissent, joined by Justices Roberts and Thomas, and claimed that the Attorney General's interpretation of a "legitimate medical purpose" was valid. Scalia argued that Ashcroft's rule should be given deference and was reasonable. Justice Thomas also wrote a separate dissent claiming that the Court's ruling in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), which decided that the CSA could be used to prosecute those who use marijuana for medicinal purposes in California, contradicted the majority's decision.

In ***Central Virginia Community College v. Katz***, 126 S.Ct. 990 (2006), a 5-4 decision, the majority opinion, written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and Breyer, held that sovereign immunity does not bar Chapter 11 bankruptcy trustees from initiating suit against a state to set aside preferential transfers. The majority traced the history of bankruptcy law in the United States, beginning with the Constitution, and came to the conclusion that the intent behind these laws was to create a uniform bankruptcy system to which states must submit regardless of sovereign immunity.

The dissent, written by Justice Thomas and joined by Justices Roberts, Scalia, and Kennedy, argued that states cannot be sued for monetary relief absent valid Congressional abrogation or their consent. Because nothing in the Constitution's Bankruptcy Clause, nor any other source indicated that Congress had abrogated sovereign immunity, nor had the state consented to waive immunity, the dissenters would have held Central Virginia Community College immune from suit. The deciding vote of Justice O'Connor, since replaced by Justice Alito, prevented the creation of a Judge-made exception for state government entities from federal bankruptcy laws.

In ***US v. Georgia***, 126 S.Ct. 877 (2006) a unanimous Court held Tony Goodman, a paraplegic inmate, could sue the state of Georgia for monetary damages under Title II of the Americans with Disabilities Act ("ADA") at least insofar as he claimed under Tile II that the state's conduct constituted a violation of the Fourteenth Amendment. The Court thus sidestepped the question of whether state governments can be liable in such cases where their conduct violates Title II of the ADA but does not amount to a constitutional violation.

Religious Liberty

A unanimous court in ***Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal***, 126 S.Ct. 1211 (2006) upheld a preliminary injunction preventing criminal prosecution of a religious sect that uses a hallucinogenic tea in a religious ceremony. UDV is a church which uses a tea called hoasca to receive communion. Hoasca contains a hallucinogen known as DMT, which is prohibited under the federal Controlled Substances Act (CSA). The UDV sought and obtained a preliminary injunction under the Religious Freedom Restoration Act (RFRA) preventing the government from enforcing the CSA against the church for its use of hoasca.

The Court upheld the preliminary injunction, rejecting each of the government's arguments. The Court noted that the RFRA exempts religious adherents from laws of general applicability if their religious practices would be substantially burdened by complying with the law, unless the government can show a compelling interest in applying the law to that situation. The Court drew an analogy between an exception for DMT and the well-known exception for peyote use by Native Americans. The government did not advance a satisfactory distinction

between why peyote may be allowed for religious use while DMT should not. The Court concluded by reiterating that in drafting the RFRA, Congress recognized that laws of general applicability could substantially burden religious exercise and therefore required the government to show a compelling interest in applying the law to religious practices and that the government had failed to do so at this stage in the case. (PFAW Foundation filed an *amicus curiae* brief in support of the result in this case.)

Immigrants' Rights / Detainees' Rights

In a stinging rebuke to the Bush Administration's unilateral tactics in the war on terror, a 5-3 Court ruled in ***Hamdan v. Rumsfeld***, No. 05-184, that the military tribunals that the administration has attempted to use to prosecute detainees in Guantanamo violate federal law and the Geneva Convention and are illegal. Justice Stevens delivered the Court's opinion, joined by Justices Souter, Breyer, Ginsburg and Kennedy. Chief Justice Roberts did not participate, since he had voted to uphold the tribunals when he was on the D.C. Circuit, in a decision reversed by the Court.

The majority explained that under the Constitution and as provided by Congress, the President is authorized to create military tribunals only to the extent that they comply with federal law and the law of war, as elaborated by the Geneva Convention, at least part of which applies even to conflicts with non-governmental entities like Al-Qaeda under U.S. law. But the Bush Administration's tribunals, the majority concluded, violate these laws by, for example, allowing an accused and his civilian counsel to be barred from even learning what evidence is presented against him and allowing the use of absolutely any evidence, even if not authenticated, that the presiding officer thinks is relevant. Four justices (excluding Kennedy) went further and maintained that conspiracy charges against Hamdan were invalid and that he could not be excluded from being present at his hearing. The majority firmly rejected claims that the post-9/11 Authorization for the Use of Military Force or the Detainee Treatment Act authorized the President's actions or deprived the Court of the ability to review them. As Justices Breyer, Kennedy, Souter, and Ginsburg pointedly noted in a brief concurring opinion "Congress has not issued the Executive a 'blank check.'"

Justices Scalia, Thomas and Alito vigorously dissented. They argued that the Court should not even be able to review the case, based largely on the claim that the Court should apply retroactively the Detainee Treatment Act that limited judicial review in such cases. They maintained that Congress had authorized the President to create such tribunals and that the Court should defer to the President, and asserted that the ruling would "sorely hamper the President's ability to confront and defeat a deadly enemy" (Thomas, J. dissenting at 29). As the majority pointedly concluded, however, even assuming the truth of all the government's charges against Hamdan, in seeking to try him and subject him to criminal punishment, "the Executive is bound to comply with the Rule of Law" (Maj. Op. at 72). Indeed, by explaining that at least part of the Geneva Convention applies in the war on terror, the Court has made clear that the President's actions in that conflict are limited by law. (PFAW Foundation filed an *amicus curiae* brief in support of the result reached by the Court).

The other decisions this term were not favorable to foreign nationals' rights. In ***Sanchez-Llamas v. Oregon***, No. 04-10566 (June 28. 2006), the Court was asked whether Article 36 of the Vienna Convention, which provides foreign nationals the right to contact with consular offices of their home country when arrested abroad, may be invoked during a judicial proceeding, whether violations of Article 36 require the application of the exclusionary rule, and whether regular state

court waiver rules could be applied to claims of Article 36 violations. In a joint opinion delivered by Chief Justice Roberts, joined by Justices Scalia, Thomas, Kennedy, and Alito, the Court concluded that the defendants in these combined cases were not entitled to relief even if the Vienna Convention applied to their cases. Therefore, the majority did not decide whether Article 36 grants rights that may be invoked during a judicial proceeding. The majority concluded that the exclusionary rule was inappropriate for violations of Article 36, because the exclusionary rule is generally reserved for constitutional violations of the Fourth and Fifth Amendments and is closely guarded as a remedy of last resort by the Court. As to whether procedural rules may bar raising an Article 36 claim, the majority applied the Court's reasoning in *Breard v. Greene*, 523 U.S. 371 (1978) (*per curiam*), holding that the procedural rules of the forum State govern the implementation of a treaty in that State, and while treaty protections do constitute supreme federal law, procedural default rules still apply. Justice Ginsburg concurred in the judgment, agreeing with the dissent that Article 36 of the Vienna Convention created rights which may be invoked during judicial proceedings, but agreeing with the majority on the other two issues as applied in these cases.

Justices Breyer, Stevens, and Souter dissented, joined in part by Justice Ginsburg. In addition to explaining that Article 36 creates judicially enforceable rights, they maintained that there are some situations where the exclusionary rule could be the only effective remedy for violations of Article 36 and where state procedural waiver rules should not apply. The dissent thus maintained that the cases before the Court should be sent back to the lower courts to apply these principles.

In ***Fernandez-Vargas v. Gonzales***, No. 04-1376, 2006 U.S. LEXIS 4892, an eight-justice majority decided that 8 USC 1231(a)(5) applies to aliens whose illegal reentry predated the statute's effective date. Justice Souter delivered the opinion of the Court. In 1996 Congress enacted a new reinstatement provision for orders of removal of illegal aliens who had previously been removed from the country for being present illegally. The new provision reinstates the previous order of removal from the original date of issue and removes all eligibility for relief from the order of removal. Fernandez-Vargas argued that, because he had reentered the country before the effective date of this legislation, the statute should not be retroactively applied to him. The majority disagreed. The conduct to which the statute refers is not the illegal reentry itself, the Court explained, but the illegal continued presence in this country. The statute punishes an indefinitely continuing violation, rather than some act in the distant past which the alien cannot correct. For that reason, it is the alien's choice to remain in the country following the change in law and there is no retroactivity problem in its application to Fernandez-Vargas. This ruling affirmed Fernandez-Vargas' removal order, even though Fernandez-Vargas had been living in Utah for more than twenty years. He owned a trucking business, is married to a United States citizen, and has a child who is a United States citizen.

Justice Stevens dissented. He argued that the new statute was silent as to Congress' intent regarding retroactivity. He contended that, under the statute's natural interpretation, Congress intended the statute to apply to pre-enactment deportations, but not to pre-enactment reentries. It is paradoxical, under Justice Stevens' view, that the continuing violation which the majority cites as precisely what makes Fernandez-Vargas eligible for deportation, also should argue in favor of allowing him to challenge the order of removal. The longer he remains in the country, maintaining good moral character, the greater the hardship his removal would impose on him and his family and the stronger his argument for relief from the removal order. Yet, his continued presence in the country is precisely what the majority argued was the basis of his

removal. Justices Stevens would have applied the presumption against retroactivity in this case and held that the 1996 reinstatement provisions did not apply to Fernandez-Vargas.

Economic and Environmental Regulation / Takings

In ***Rapanos v. U.S.*** 2006 U.S. LEXIS 4887, the Supreme Court limited the scope of the Clean Water act, remanding two cases in which lower courts had agreed that wetlands were covered by the Act. Four justices would have restricted the law severely by according an extremely narrow interpretation to the phrase "waters of the United States" as used within the Clean Water Act.

Justice Scalia delivered the plurality opinion and was joined by Justices Thomas, Alito, and Chief Justice Roberts. He would limit the definition of waters of the United States to those bodies of water that are "permanent, standing, or continuously flowing." He refused to hold, as the Army Corps of Engineers encouraged, that waters of the United States encompassed areas which intermittently experience water flow, however great or small, and accused the Corps' of stretching the definition of the term "beyond parody." The Corps' definition, in his opinion, would entitle the Corps to regulate immense expanses of intrastate terrain, something the CWA was never meant to do. Secondly, Scalia answered the question of when a wetland may be considered adjacent to remote waters of the United States. The Corps argued that when a wetland had a hydrologic connection to waters of the United States, meaning waters from the wetlands flowed into waters of the United States, the Corps should have the ability to regulate those wetlands. Scalia disagreed. There must be some point where waters end and land begins. For that reason, in his opinion, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is not clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act." 2006 U.S. LEXIS 4887, at *44.

Justice Kennedy did not join Justice Scalia's opinion, but he did provide the crucial fifth vote for remand. Kennedy criticized the plurality opinion, noting that under Justice Scalia's interpretation of "waters of the United States" even the Los Angeles River might not be covered by the CWA, and arguing that the interpretation is inconsistent with the text and purpose of the Act. He voted to remand, however, because he argued that a determination was needed under precedent set in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) as to whether a "significant nexus" exists between the wetlands at issue and traditional navigable waters.

Justice Stevens, with whom Justices Ginsburg, Souter, and Breyer joined, dissented. Congress created the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's water," he explained, and the plurality opinion is unquestionably at odds with this purpose. Congress defined "navigable waters" to mean waters of the United States and left it to the agency, in this case the Army Corps of Engineers, to further interpret the meaning of waters of the United States. The Corps' interpretation of this term is entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-45 (1984). Furthermore, Stevens argued that the Court's unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) was controlling in this case. In *Riverside Bayview*, the Court held that an interpretation of "waters of the United States" to include tributaries of these waters, and wetlands adjacent to traditionally navigable waters or their tributaries was reasonable. Nowhere in that decision did the Court require that those wetlands share a continuous surface connection with these waters. Rather, the Court chose to defer to the Corps on such a complicated question and noted that Congress has had the

opportunity to narrow the scope of the Corps' definition of navigable waters, with specific reference to wetlands preservation in the debate, and has chosen not to do so. The wetlands in this case have a demonstrated connection to navigable waters though perhaps the connection is not visible on the surface. For these reasons, the dissenters argued that the Corps' interpretation should be accorded substantial deference under *Chevron* so that Justice Kennedy's proposed "significant nexus" test need not be applied, and the decisions of the lower courts should be affirmed. Justice Breyer also wrote a separate dissent.

In ***Jones v. Flowers***, 126 S.Ct. 1708 (2006) Chief Justice Roberts wrote an opinion joined by Justices Ginsburg, Stevens, Souter and Breyer. The majority held that when selling a property for back taxes, notice served through certified mail that was returned, though reasonably calculated to reach the owner, was not sufficient notice to the property owner because the state had no reason to believe that the owner was any better off than if the notice had never been sent. The government's knowledge that the notice was likely ineffective triggered an obligation to take additional steps to ensure notice of the impending sale.

Justice Thomas dissented, joined by Justices Scalia and Kennedy. Justice Thomas argued that due process required nothing more than the efforts the State made in this case. The State sent a letter no less than three times to the address provided to the State by the property owner. The State also published notice publicly. Furthermore, the property owner had a statutory duty to both pay his taxes and inform the State of any change in address. For those reasons, Justice Thomas argued that the sale was valid.

In ***S.D. Warren Co. v. Me. Bd. Of Envtl. Prot.***, 2006 U.S. LEXIS 3955 (2006), the Court unanimously decided that the definition of "discharge" under the Clean Water Act takes on its ordinary meaning and the statute requiring state certification of activities involving discharge is not limited to the addition of pollutants to the water but includes any human-induced alteration of the chemical, physical, biological, or radiological integrity of the water.

Privacy and Abortion Rights

In ***Ayotte v. Planned Parenthood of Northern New England***, 126 S.Ct. 961 (2006), a unanimous Court issued a narrow ruling in a potentially far-reaching case on reproductive rights. The lower court held that a New Hampshire law that required parental notification for a minor's abortion was unconstitutional because it did not allow exceptions for the health of the mother**.** In an opinion written by Justice O'Connor, a unanimous court found that it is not always necessary or justifiable to invalidate a statute which could have unconstitutional ramifications. Occasionally, lower courts may be able to render narrower declaratory and injunctive relief.

New Hampshire had enacted the Parental Notification Prior to Abortion Act, which allowed for three circumstances in which a physician may perform an abortion without notifying the minor's parent. The first provided an exception for circumstances in which the health care provider certifies that the minor's abortion is necessary to prevent her death and there is insufficient time to provide the required notice. Secondly, the physician does not have to provide notice when a person entitled to receive notification certifies that he or she has already been notified. The third circumstance provides for a judicial bypass exception where a minor may apply to a court which may determine her ability to make this choice without parental notification. The district court declared the Act unconstitutional and permanently enjoined its enforcement because it failed to comply with the constitutional requirement that laws restricting abortion must provide a health exception. The First Circuit affirmed.

In an opinion by Justice O'Connor, the Court ruled that the lower court should not have issued such a broad injunction based on the record before it. Justice O'Connor wrote that, when confronted with legislation which has both constitutional and unconstitutional applications, courts should limit the solution to the problem. First, courts should "try not to nullify more of a legislature's work than is necessary." Second, courts should restrain themselves from "rewriting state law to conform to constitutional requirements' even as courts strive to salvage it. Third, all decisions regarding remedies should take into account the legislative intent. According to the Court, regarding this statute, as long as the lower court when issuing its remedy is faithful to the legislative intent an injunction prohibiting only the unconstitutional applications of this statute would be permissible. Consequently, declaring the entire statute invalid may have been unnecessary. The Court thus vacated and remanded the case to the district court for a decision providing "an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute *in toto*." 126 S.Ct. at 969.

In ***Scheidler v. NOW, Inc***., 126 S.Ct. 1264 (2006), the Court held unanimously that the federal Hobbs Act does not apply to abortion clinic protesters' conduct. The National Organization of Women (NOW) brought civil suits against a number of abortion clinic protesters, claiming that they had used violence and other means to disrupt clinics and deprive women of the right to seek an abortion. The case had been to the Court several times before and the question now before the Court was whether or not the Hobbs Act applied to the defendants' conduct. The Court ruled that extortion under the Act did not encompass seeking to deprive women of their right to seek medical services and thus did not apply to the clinic members' conduct. The Court also ruled that the Act does not apply to violent conduct unrelated to extortion or robbery.

The Right to Privacy and the Fourth Amendment

A 5-3 majority of the court decided in ***Georgia v. Randolph***, 126 S.Ct. 1515 (2006) that when one lawful occupant was present and unequivocally did not consent to a search of his apartment, but another lawful occupant present on the scene did consent, the search was invalid as to the person who denied consent to the search. Police were called to a home because of a domestic dispute. While there, police asked to search the premises. The wife consented, but the husband, unequivocally, did not. The police searched and found evidence of cocaine use. The husband argued that this search violated his Fourth Amendment rights. Justice Souter, joined by Justices Stevens, Kennedy, Ginsburg and Breyer, agreed. The majority held that when a physically present occupant refuses to allow the authorities to search his home without a valid warrant, the search is unreasonable and invalid as to that person. The majority recognized that in a living situation where both members of the household are on equal footing, the rights of one co-tenant to allow entry to an outsider cannot trump the rights of the other to deny that entry. Justice Breyer concurred. Justice Stevens also concurred in order to emphasize that he believed that a "totality of the circumstances" test should be applied to these cases. If the circumstances were manipulated to make the situation more exigent, Stevens would have held the search to be reasonable. But on the facts of this case, Stevens agreed with the outcome.

Chief Justice Roberts dissented, joined by Justices Scalia and Thomas. The Chief Justice accused the majority of creating a confusing precedent that will have an uncertain application and therefore random results. Roberts, Scalia, and Thomas would have cut back individual privacy rights and held that "a warrantless search is reasonable if police obtain the voluntary consent of a person authorized to give it," regardless of the presence of another lawful resident

vocally denying permission to search. Justice Scalia wrote a separate dissent solely to criticize Justice Stevens' concurrence.

Joined by Justice Alito and in part by Justice Kennedy, the dissenters in *Randolph* became the majority in ***Hudson v. Michigan***, 2006 U.S. LEXIS 4677, for a 5-4 decision written by Justice Scalia, the Court held that the exclusionary rule does not apply to evidence seized in violation of the knock and announce rule. According to Justice Scalia, the knock and announce rule protects human life because an unannounced entry may provoke violence, protects property from the damage of the police breaking into a home, and it gives those who are about to be lawfully searched the ability to collect themselves prior to allowing the police entry. In the majority's view, the knock and announce rule has never protected a person's interest in preventing the government from seeing or taking evidence described in a warrant. Furthermore, if the knock and announce rule is violated; those suffering injury now have civil remedies. Because other effective remedies for violations of the knock and announce rule are available, and the rule itself does not protect people from the seizure of evidence described in a valid warrant, the majority held that the exclusionary rule should not apply to the knock and announce rule.

Justice Kennedy concurred to underline that violations of the knock and announce rule are not trivial and remedy for the violation still exists. He also emphasized, in an important difference from the rest of the majority, that this decision in no way endangers the continued operation of the exclusionary rule, defined by the Court's precedent in other Fourth Amendment cases.

Justice Breyer strongly dissented, joined by Justices Souter, Stevens, and Ginsburg. Justice Breyer criticized the majority decision as representing a significant departure from the Court's precedent and weakening, perhaps destroying, much of the practical value of the Constitution's knock and announce protection. Breyer explained that the Court has only declined to apply the exclusionary rule in two specific instances: (1) where there is a specific reason to believe that application of the rule would not result in appreciable deterrence and (2) where admissibility in proceeding other than criminal trials was at issue. Neither of those situations is present in this case, he noted. Justice Breyer accused the majority of fundamentally misunderstanding Court precedent. Fourth Amendment case law places a high value on privacy in the home, precisely what the knock and announce rule was designed to protect. In order to assure that its constitutional protections are effective, Breyer maintained, the exclusionary rule is necessary.

In ***US v. Grubbs***, 126 S.Ct. 1494 (2006), the Court, in an 8-0 ruling written by Justice Scalia, held that anticipatory warrants (warrants based on the establishment of probable cause that evidence of a certain crime will be present in a certain location at the time the warrant is to be executed, though it is not present at the time the warrant is issued by the magistrate) are constitutional. Grubbs had ordered a tape containing child pornography. The police obtained a warrant based on this information with the stipulation that the warrant would not be executed unless the tape was delivered. The warrant did not list the triggering event, nor was this prerequisite explained to Grubbs. The Court reasoned that anticipatory warrants are not presumptively unconstitutional and the triggering information was not required because the Fourth Amendment provides that warrants need only contain the place to be searched and the person or things to be seized.

Justice Souter concurred, joined by Justices Ginsburg and Stevens. Justice Souter agreed that failure to include the person or things to be seized and the place to be searched on a warrant

is a specific textual violation of the Fourth Amendment. However, silence as to requiring the inclusion of the triggering event for the validity of an anticipatory warrant is no authority for neglecting to specify the triggering event. He cautioned law enforcement to err on the side of inclusion of the triggering event because he foresaw circumstances in which a failure to include such information could subject the subsequent search to serious constitutional challenge.

In ***Samson v. California***, a 6-3 decision written by Justice Thomas and joined by Justices Roberts, Scalia, Alito, and Ginsburg, the Court decided that where state statutes provided for warrantless searches of parolees, these searches do not violate the Fourth Amendment. Justice Thomas reasoned that because parole is a punishment enforced by states in lieu of prison, parolees have a vastly diminished expectation of privacy. Violation of parole may result in prison and the majority felt this was another justification for limiting the rights of parolees. Furthermore, the state's interest in preventing recidivism amongst this population is very high. States have the discretion to police this population more closely. According to the majority, this discretion apparently includes giving officers the ability to stop someone, with absolutely no suspicion of wrongdoing, to search him fully, not only for weapons, and use any evidence they find against him in court.

Justice Stevens, joined by Justices Souter and Breyer, vigorously dissented. Stevens argued that this decision equated the rights of a parolee with those of a prisoner. Stevens would have equated the status of a parolee with that of someone on probation and therefore required reasonable suspicion for the search rather than no suspicion at all.

In ***Brigham City v. Stuart***, 2006 US LEXIS 4155, a unanimous court decided that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Access to Justice and Due Process

In ***Schaffer v. Weast***, 126 S.Ct. 528 (2005), a 6-2 majority decided, in an opinion by Justice Sandra Day O'Connor, that in a hearing brought by parents of a disabled child to challenge the child's individualized educational program (IEP) under the Individuals with Disabilities Education Act (IDEA), the burden of proof lies with the party seeking relief. The IDEA is silent as to where the burden of proof lies in IEP due process hearings, which are often held when a parent disagrees with the school district's determination of what placement is appropriate for a disabled student. The majority declined to place the burden of proof on the school district. The Schaffers argued that the facts to be proven at the hearing, particularly the adequacy of a scholastic program, lie peculiarly within the knowledge of the school districts and therefore the districts should bear the burden of persuasion. The Court declined to accept this argument, because the IDEA grants parents access to information regarding the education of their child. In fact, the Court explained, the IDEA requires districts to organize hearings in a way that guarantees parents and children the procedural protections of the act. The Court also noted that during IEP due process hearings, Congress had enacted a stay put provision which kept the student in the challenged program until the hearing was decided. This tended to suggest that Congress assumes the validity of IEP programs until one who would challenge the program proves otherwise. For those reasons, the Court was not persuaded to place the burden of proof in IEP due process hearings upon the party defending the program being implemented.

Justice Ginsburg dissented. She argued that the school district was "in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's

parents are in to show that the school district has failed to do so." *Id.* at 538 (citing *Weast v. Schaeffer*, 377 F.3d 449, 458 (4th Cir. Md. 2004) (Luttig, J., dissenting). She also maintained that it would strengthen school officials' "resolve to choose a course genuinely tailored to the child's individual needs" if the officials knew that they would bear the burden of defending the program when brought before an Administrative Law Judge ("ALJ"). *Id.* at 539. Furthermore, she noted that many parents whose children require protection under the IDEA lack the resources and skills necessary to mount an effective challenge to a proposed IEP program.

Justice Breyer, also dissenting, would have left the decision of who bears the burden of persuasion up to the individual states. He argued that, although Maryland did not have a rule specifically regarding IEP due process cases, the ALJ should have looked to broader Maryland administrative law and applied the burden of proof rule that comported with state precedent.

In ***Hill v. McDonough***, 2006 U.S. LEXIS 4674, a unanimous court decided that Hill could challenge the lethal injection method of execution through a Section 1983 claim. The Court deemed *Nelson v. Campbell*, 541 US 477 (1994) to be controlling. Because Hill was not challenging the sentence itself, merely the method of imposing it, this challenge did not imply the underlying invalidity of his sentence. The Court therefore allowed a stay of execution to continue to allow Hill's challenge to the constitutionality of the particular method of execution by lethal injection used in Florida.

In ***Hartman v. Moore***, 126 S.Ct. 1695 (2006), the Court held that plaintiffs in a *Bivens* action, claiming damages for violations of constitutional rights, must plead and show the absence of probable cause for pressing the underlying criminal charges. Moore brought a case alleging that his First Amendment rights were violated by investigators who, with little evidence, aided in his prosecution essentially in retaliation for his criticism of the Postal Service. The inspectors against whom the action was brought argued that Moore needed to plead and to prove a lack of probable cause for pressing the underlying charges in order to prevail on his *Bivens* action. Five members of the Court agreed.

Justice Ginsburg dissented, joined by Justice Breyer. She reasoned that the majority's analysis would only allow punishment for *entirely* baseless prosecutions. The majority acknowledged situations in which weak probable cause for pressing the underlying charges might exist and yet prosecution would not have occurred without the officials' retaliatory animus. Justice Ginsburg stated that while those situations may be rare she did not see a reason to structure the cause of action to completely preclude such situations from giving rise to a remedy. The decision in this case was 5-2. Chief Justice Roberts and Justice Alito took no part in the decision.

In ***Arlington Central School Dist. v. Murphy***, No. 05-18 (June 26, 2006), the Supreme Court held, 6-3, that parents who sue successfully under the Individuals with Disabilities Education Act ("IDEA") cannot recover expenses for experts used in support of their case. Justice Alito delivered the opinion of the Court in which Justices Scalia, Thomas, and Chief Justice Roberts joined. Alito argued that because the IDEA was passed pursuant to the Spending Clause of the Constitution, possible awards of expert fees required clear notice in the statute. The IDEA makes no mention of allowing recovery for expert fees, only reasonable attorney's fees as a part of more general costs. Secondly, Alito argued that Supreme Court precedent in *Crawford Fitting*, 482 U.S. 487, and *Casey*, 499 U.S. 83 dictate the finding in this case. *Crawford Fitting* serves to bolster the Court's finding that the term "costs" is not an open-ended

reference to prevailing parents' expenses and recognizes that no statute will be construed as authorizing the taxation of witness fees unless the costs in the statute specifically refer to witness fees. Id. at 8-9. In *Casey*, when interpreting an attorneys-fees provision much like the one at issue here, the Court denied an award of expert fees to the prevailing party under that statute. The majority rejected the parents' argument that the legislative history of the Act compels awarding expert fees. Though the Court acknowledged that the history indicated a possible intent to include expert fees, the plain language of the IDEA did not.

Justice Ginsburg concurred. She disagreed with the majority's reliance on the requirement for "clear notice" under the Spending Clause and did not join that part of the opinion. She argued that the result in this case was supported by the other two arguments the majority advanced. In this respect, the decision may signal the opening of a new front in the federalism/states' rights battles, to the extent that a majority of the Court is willing to rely on the Spending Clause to limit the reach of congressional law. Ginsburg took the opportunity to agree with the dissenters that it would make good sense to require an award of attorneys' fees in this instance. She concluded that the ball "is properly left in Congress' court to provide" for these fees. Id. at 4.

Justice Breyer dissented, joined by Justices Souter and Stevens. Justice Breyer traced the history of the IDEA, citing numerous indications that Congress intended to include expert fees when awarding the prevailing parents. Also, such an interpretation furthers the purpose of the statute. Without such an interpretation, many parents, who have the statutory right to participate in their child's free and adequate education, may find it impossible to challenge programs designed by the State for their children. For those reasons, the dissenters would have awarded expert fees.