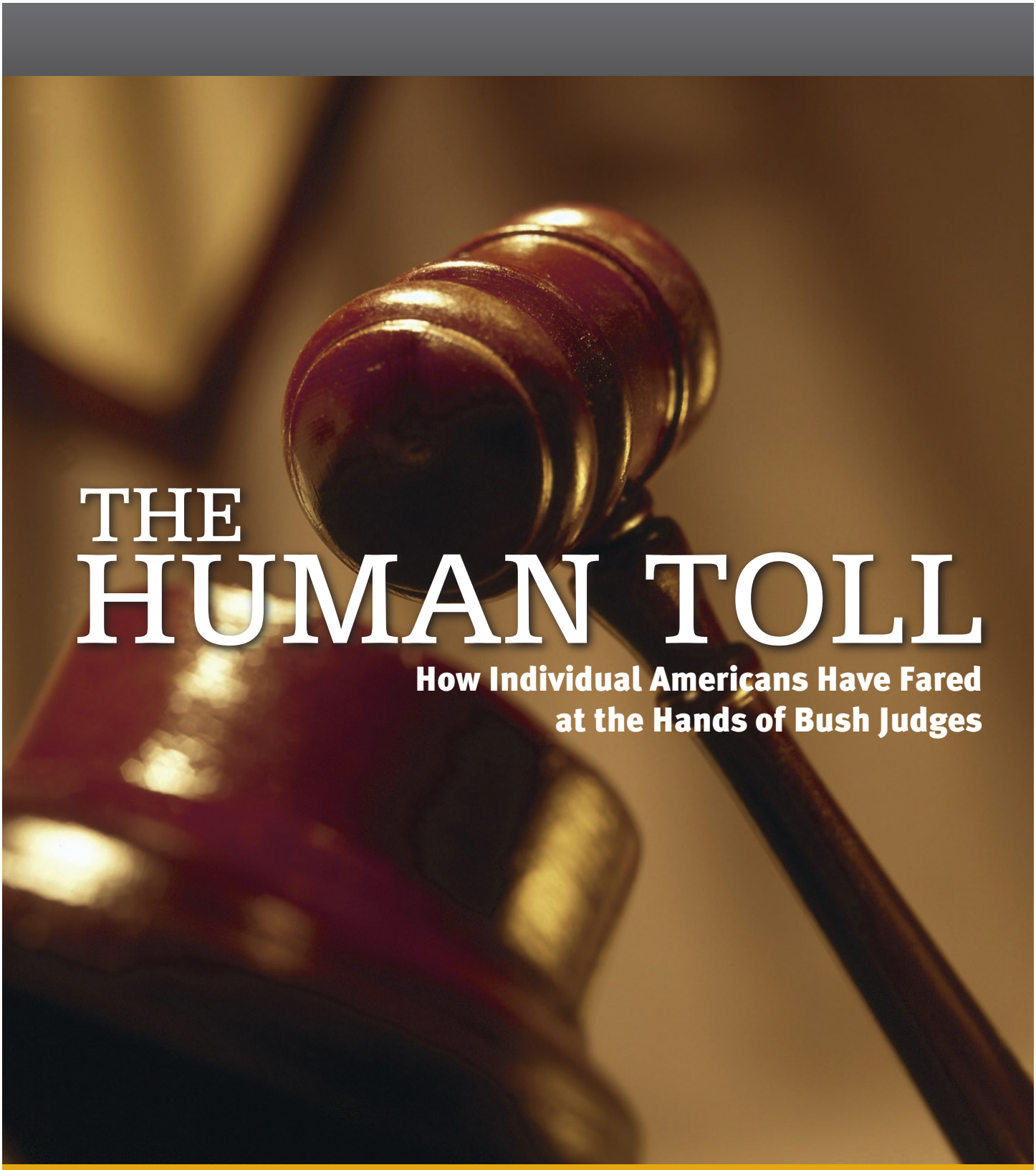

THE HUMAN TOLL

How Individual Americans Have Fared at the Hands of Bush Judges

JUSTICE FOR ALL.
NO EXCEPTIONS.
That's the American Way

People For the American Way Foundation

Introduction

As President Bush nears the end of his second term with record low approval ratings, the American public has rendered a clear verdict: the policies of the Bush administration have largely failed at home and abroad. Yet by one important measure that pollsters and pundits often ignore, Bush has been an over-achiever: during his administration, 314 judges have been confirmed to lifetime appoints to the federal bench, including the two Bush nominees who now sit on the United States Supreme Court, Chief Justice John Roberts and Associate Justice Samuel Alito. The impact that President Bush has had on the federal courts may be his most enduring legacy, at least domestically. After leaders to come have figured out what to do about $4.00 gasoline, $4 trillion in debt, a battered economy and a war that has damaged our standing in the world, Bush's judges will still be safely ensconced on the federal bench, and on the highest court in the land.

What has that meant for individual Americans? And what will that mean in the future?

People For the American Way Foundation has documented in a series of reports the damage that Bush-nominated judges have done to the Constitution – and to Americans' ability to seek and expect justice in the federal courts when challenging unlawful treatment by corporations, government agencies, and other powerful entities. This report looks at a selection of cases with an eye to the human cost of a federal judiciary dominated by an ideology that is all too willing to sacrifice individual rights and legal protections.

Rhetoric vs. Real Harm

Our reports and studies done by others make clear the emptiness of the jargon used by the Bush Administration, its allies in Congress and right-wing legal groups, who say they favor judges who "will interpret the law, not make it" and won't "legislate from the bench." In fact, in many cases judges nominated by President Bush have written or joined opinions seeking to limit congressional authority and the protection of individual rights.

Bush-nominated judges are also far too willing to close the courthouse doors to ordinary Americans, so much so that Yale Law School Professor Judith Resnik labeled the Supreme Court's 2006-2007 term "the year they closed the courts." Bush-nominated appeals court judges have written or joined opinions that have sought to:

- prevent a female worker from attempting to prove that significant disparities between her salary and the salaries of male employees violated the Equal Pay Act. *Ambrose v. Summit Polymers, Inc.*, 6th Cir. (Judge Jeffrey Sutton)
- deny the family of a murdered 8-year-old girl the opportunity to try to prove in court that local officials had helped put her in danger. *Bright v. Westmoreland County*, 3d Cir. (Judge D. Brooks Smith)
- stop an African American man from pursuing a claim that his constitutional rights had been violated by state troopers engaged in racial profiling. *Gibson v. Superintendent*, 3d Cir. (Judge Van Franklin Van Antwerpen)

- overturn a lower court decision that a female sheriff department employee who had been sexually harassed by the sheriff (who, among other things, called her vagina a "snapper" and stroked "his mustache while telling [her] he was clearing off her seat'") could pursue a claim that she had effectively been forced to resign. *Wright v. Rolette County*, 8th Cir. (Judge Michael Melloy)

- prevent an African American employee fired from a Wal-Mart store, who had been called a "lawn jockey" by his supervisor, from trying to prove he had suffered illegal racial discrimination and harassment. *Canady v. Wal-Mart Stores. Inc.*, 8th Cir. (Judge William Riley)

- stop a Wal-Mart employee at another store from even presenting to a jury her claim that she had been fired because of illegal pregnancy-based employment discrimination. *Quick v. Wal-Mart Stores, Inc.*, 8th Cir. (Judge William Riley)

Trouble at the Top

The damage is most visible and consequential at the Supreme Court, where Chief Justice Roberts and Justice Alito have joined Justices Antonin Scalia and Clarence Thomas to form a right-wing voting bloc. When joined, as they often have been, by the more moderate conservative Justice Anthony Kennedy and occasionally other justices, the result has been a series of destructive rulings.

During the last two full terms with Roberts and Alito on the bench, the Court:

- severely limited the ability of victims of pay discrimination to obtain compensation for the discrimination (*Ledbetter v. Goodyear Tire and Rubber Co.*)
- gave a green light to Indiana's voter ID law, the most restrictive in the nation, which has already kept eligible voters from being able to exercise their right to vote (*Crawford v. Marion County Election Bd.)*
- overturned two of its own precedents in order to hold that a person who filed his appeal within the time given by a federal district court judge was out of luck — with no legal recourse — when it turned out that the judge had given him the wrong date (*Bowles v. Russell*)
- chipped away at the constitutional protection for women's reproductive freedom by upholding a federal ban on a vaguely defined abortion procedure, despite the absence of an exception in the law to protect a woman's health (*Gonzales v. Carhart*)

- limited the ability of federal taxpayers to challenge government expenditures that violate the Establishment Clause, undermining the separation of church and state (*Hein v. Freedom From Religion Foundation*)

"Repealing the 20th Century"

Efforts to push the judiciary to the right did not begin with the Bush Administration. The successful campaigns to win confirmation for John Roberts and Samuel Alito were a continuation, and in some ways a culmination, of a decades-long effort by the far-right that had already begun to bear fruit. In a December 12, 2007 article in *The American Prospect*, attorney Simon Lazarus documented that "the conservative-activist threat to judicially repeal the economic protections that Congress and state legislatures have enacted since the New Deal" made significant strides under the Rehnquist Court, leaving Americans with fewer legal protections, and fewer legal remedies. Thanks to the second President Bush, Americans now have a Roberts Court – and a federal judiciary – that is furthering this destructive work.

The Future of the Judiciary: a Threat to Americans' Rights, Safety, and Welfare?

The next U.S. president will likely have the opportunity to nominate two or three Supreme Court justices. If those new justices share the judicial ideology of President Bush's nominees, Americans will see their protections by the federal courts deteriorate even further. That's especially true if, as seems likely, at least some of those nominees replace more moderate Supreme Court justices who have resisted the Court's damaging ideological shift.

The hundreds of other lower federal court judges likely to be nominated by the next president will also have an immense impact on individual Americans, as this report and other studies of the federal judiciary make clear. Because the Supreme Court agrees to hear only a tiny fraction of cases, the appeals courts are typically the courts of last resort for most Americans. Of the 13 federal circuit courts of appeals, 10 now have a majority of judges who were nominated by Republican presidents, in some cases, a super-majority. Two are evenly divided, and only one has a majority of judges nominated by Democratic presidents.

We urge all Americans to consider the extraordinary power and impact that the next president's ability to nominate hundreds of federal judges, including possibly two, three or more Supreme Court justices, could have on their rights and their lives.

Note:

All the judges whose names appear in boldface below were nominated to the federal bench by President George W. Bush and confirmed by the United States Senate.

For more information, see People For the American Way Foundation's reports, including "Confirmed Judges, Confirmed Fears" and annual End-of-Term reports, at www.PFAW.org.

Turning Back the Clock on Equality and Justice for All

Judges nominated by President Bush have consistently sought to reverse the progress of the last half-century in combating discrimination. Time and again, they have voted to dismiss cases before trial and refused to allow victims of alleged discrimination to have their day in court, placing stringent burdens of proof on these plaintiffs, or closing the courthouse doors altogether. In cases ranging from gender discrimination and sexual harassment to race- and age-based discrimination, Bush judges have interpreted the law to the detriment of plaintiffs.

Gender and sexual orientation discrimination

***Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007)**

Lilly Ledbetter worked as a supervisor at a Goodyear plant in Gadsden, Alabama, for almost twenty years. Late in her career, she received an anonymous tip that she had been paid much less than her male colleagues for years. Because of performance evaluations that she claimed were skewed based on sex, Ledbetter did not get the pay raises that her male colleagues received, creating a wider and wider pay disparity. A jury ruled for Ledbetter and awarded her back pay, but Goodyear appealed and the case eventually reached the Supreme Court, which ruled against her, 5-4. In a majority opinion written by Justice **Samuel Alito** and joined by Chief Justice **Roberts** and Justices Scalia, Thomas, and Kennedy, the Court held that Ledbetter's lawsuit was too late she had not filed her claim within 180 days of the very first discriminatory action, and that the discriminatory paychecks that Ledbetter had received over the years did not start the clock running again. Thus, the majority held that Ledbetter was not entitled to any compensation for the unequal pay. In a sharp dissent, Justice Ginsburg explained that the nature of pay discrimination renders it different from other forms of employment discrimination due to its "incremental" nature, which is generally only recognized by the victim over a longer period of time, as the differences in pay become more apparent. According to Justice Ginsburg, discriminatory pay is often hidden by employers and is not as easy to identify as a single, overt act of discrimination, such as a discriminatory firing or hiring.

***Birch v. Cuyahoga County Probate Court*, 392 F.3d 151 (6th Cir. 2004)**

Wanda Birch worked as a court magistrate in Cuyahoga County, Ohio. In 1998, her colleagues conducted a wage study of Cuyahoga County magistrates. The troubling results showed that all female magistrates were paid less than all male magistrates and that the highest-paid woman earned less than the lowest-paid man. Earning $39,000 a year, Birch had the lowest salary of all. She and some of the other female magistrates met with the Presiding Judge to discuss the salary discrepancies. During the meeting, the judge allegedly told them, "I don't have to hire women" and "I don't know how I would make these salaries fair. I rely on the men to do the important work of the Court." When Birch asked the judge why she was paid the least, he told her that he "did not trust her work" and "would prefer that you not work here." The Sixth Circuit majority ruled that Birch had provided enough evidence to prove that her salary "was set lower than it would have been had she been a man." However, Judge **Julia Smith Gibbons** dissented. To prove pay discrimination, Judge Gibbons argued, Birch needed to prove that the magistrates had all done equal work.

***Harrison-Pepper v. Miami University*, 103 Fed. Appx. 596 (6th Cir. 2004)**

Sally Harrison-Pepper, a full professor at Miami University, was hired in 1988. Of the eight full professors in the Interdisciplinary Studies department, she was paid the least. Another woman in the department was paid the second-least. As a result of a series of unequal raises, Harrison-Pepper earned some $13,000 less a year than a male colleague who was hired the same year. When she discovered the problem and brought it to the attention of administrators, the university initially agreed to put her on a payment track that would eventually catch her up to her male colleagues. Several years later, however, Harrison-Pepper's salary and raises were not what the university had promised, and she sued. The district court granted the university's motion for summary judgment, and the Sixth Circuit upheld that ruling in an opinion authored by Judge **Deborah Cook**. Judge Cook's ruling prevented Harrison-Pepper from proceeding with her case and having a finder of fact determine whether the salary disparities to which she had been subjected stemmed from unlawful sex discrimination. Judge Ronald Lee Gilman dissented, and criticized the majority for acting as a fact-finder rather than applying the appropriate summary judgment standard.

***Lofton v. Secretary of the Department of Children and Family Services*, 377 F.3d 1275 (11th Cir. 2004).**

Steven Lofton was a pediatric nurse and a foster parent who had raised three HIV-positive children from birth. In 1994, Lofton sought to adopt one of his foster children, a 3-year-old boy who had tested positive for HIV and cocaine at birth. Lofton had been recognized for outstanding foster parenting by the Children's Home Society, and the child he wanted to adopt had since tested HIV-negative under his care. Florida did not allow Lofton to adopt his foster child because Lofton is gay. When Lofton and several others challenged the 1977 Florida law that bars gay men and lesbians from adopting children, a three-judge panel of the 11th Circuit upheld the law, claiming that "dual-gender parenting plays [a critical role] in shaping sexual and gender identity and in providing heterosexual role modeling." All of the 11th Circuit judges were later asked whether the entire court should rehear the case, including Judge **William Pryor,** whose decision not to have the court rehear the case was determinative**,** since the court's 6-6 decision on re-hearing left the panel ruling upholding the law intact. In 2003, as Attorney General of Alabama, Pryor had equated consensual sex between same-sex adults with prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia (if the child should credibly claim to be 'willing')."

Sexual harassment

***Lutkewitte v. Gonzales*, 436 F.3d 248 (D.C. Cir. 2006)**

Janet Lutkewitte was repeatedly sexually harassed by her boss at the FBI, David Ehemann, over a period of almost two years. Lutkewitte claimed that Ehemann had repeatedly made unwanted sexual advances to her, and that she ultimately submitted to having sex with him out of a fear of losing her job. Lutkewitte claimed that after she submitted to Ehemann's sexual demands, he provided her with favorable job benefits, including overtime pay and a new car for her personal use. Lutkewitte settled her case against Ehemann, leaving only her claim against the FBI to be tried. The jury found that although Lutkewitte had proven a hostile work environment, the FBI had acted with reasonable care to prevent the harassment and to promptly correct the situation, and entered a verdict for the FBI. Lutkewitte appealed, and a three-judge panel of the D.C. Circuit unanimously affirmed the verdict against her. The panel majority upheld the verdict on the basis of the facts, ruling that there was insufficient evidence to support Lutkewitte's claim that a tangible employment action had been take as the result of her submission to Ehehmann's sexual demands. Thus, she was not entitled to a jury

instruction that the FBI was strictly liable for the harassment. Judge **Janice Rogers Brown**, in a concurring opinion, laid out her personal vision of Title VII, explaining that employers should never be held strictly liable in sexual submission cases when the victim of harassment has not suffered an *adverse* employment consequence. Judge Brown expressly acknowledged, however, that her approach was contrary to that of two Circuits, as well as "at odds with the stance adopted by the EEOC."

***Wright v. Rolette County*, 417 F.3d 879 (8th Cir. 2005)**

Brigitte Wright worked as a deputy in the Rolette County Sheriff's Department. Her boss, Tony Sims, the elected sheriff, sexually harassed Wright. Sims had made numerous "unwelcome comments of a sexual nature that would be offensive to any reasonable person," including calling Wright's vagina a "snapper" and "stroking his mustache while telling Wright he was 'clearing off her seat.'" Wright complained about the sheriff's behavior to a County Commissioner and the County Attorney, yet nothing was done. After Wright made a formal complaint that the sheriff's behavior had created a hostile work environment, the County hired an attorney to investigate Wright's claim, but placed Wright on administrative leave during the investigation. The county appointed an investigator, who concluded that the comments were "inappropriate", but "not unwelcome." Wright returned to work, where the harassment continued and she soon quit and filed suit, claiming that Sims had constructively discharged her. Judge **Michael Melloy**, writing for the Eighth Circuit majority, agreed that Wright had been subjected to a hostile work environment. However, the majority held that Wright had not "shown that her work conditions would be intolerable to a reasonable person," and rejected her claim of constructive discharge. A dissenting judge would have held that Wright should have been allowed to present her claim to a jury.

***Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006)**

Christopher Vickers worked as a private police officer at the Fairfield Medical Center, where, he claimed, other hospital police officers had harassed him. According to Vickers, other officers called him "fag" and other slurs, put irritants in his food, impressed "FAG" on his report forms, and touched his crotch with a tape measure. During police handcuff training, one of the other officers handcuffed Vickers and simulated sex with him. Writing for the Sixth Circuit majority, Judge **Julia Smith Gibbons** ruled that Vickers had no discrimination claim. Although Judge Gibbons acknowledged that Title VII does protect individuals from "sex stereotyping," she wrote that Vickers had been discriminated against on the basis of perceived homosexuality, not failure to conform to a certain role. According to Judge Gibbons, ruling in Vickers' favor would "have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination," because "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." A dissenting judge would have allowed Vickers to proceed with his sex stereotyping claims, explaining that Vickers had alleged sufficient facts and dismissal of his case was improper.

***Brown v. Snow*, 440 F.3d 1259 (11th Cir. 2006)**

Mason Brown worked for the IRS as a tax examiner. In 2000, he was given a performance review of 3.67 out of 5 and rated "Fully Successful." An interim manager, Dolores Bagley, made sexual comments towards Brown and attempted to have physical contact with him. After he rejected her advances, she reduced his performance review score to 3.33 and promised to "get [him] back" for rejecting her. Brown complained about Bagley to several supervisors, but reported that none of them took any action. He later applied for several promotions with the IRS, but received none of them. Brown claimed that the lower performance review given to him by Bagley had prevented him from getting promotions. Writing for the Eleventh Circuit, Judge **William Pryor** ruled against Brown. According to Judge Pryor, lower scores on performance evaluations are not sufficient for

sexual harassment claims under Title VII. To proceed with his case, Brown needed to prove that the lower performance ratings were the reason he had not been promoted.

Racial discrimination

***Jackson v. Flint Ink N. Am. Corp.*, 370 F.3d 791 (8th Cir. 2004)**

Herman Jackson, an African American, had worked for Flint Ink for seventeen months in what he characterized as a racially hostile work environment. Jackson testified that his supervisor and plant manager had referred to him as "that damn nigger" and "damn black," respectively. Jackson alleged that a co-worker had expressed his disapproval of Jackson's musical tastes by telling him, "We don't listen to that damn black music around here, nigger shit, radio." The same co-worker allegedly called him a "fucking nigger." Judge **William Riley** joined another judge in upholding a lower court ruling dismissing Jackson's case on summary judgment, preventing Jackson from even presenting his case to a jury. According to the majority, what they characterized as "six isolated incidents" were not sufficient to raise a hostile environment claim. A dissenting judge would have held that the lower court was clearly wrong in taking Jackson's case away from a jury because issues of fact existed and criticized the majority for having "take[n] on the jury's job . . . ."

***Hood v. Midwest Savings Bank*, 95 Fed. Appx. 768 (6th Cir. 2004)**

George Hood, an African American, was certified as a home builder by the Federal Housing Administration. He wanted to build a house in a primarily black neighborhood in Columbus, Ohio, and needed a loan. Hood was initially denied the loan by Midwest Savings Bank, but was later given a loan on considerably less favorable terms. Later, he defaulted on his loan and sued the bank, claimed that he had been the victim of "redlining" and race discrimination. Sixth Circuit Judge **Julia Smith Gibbons** wrote the majority opinion upholding a grant of summary judgment against Hood, an opinion that essentially required Hood to present evidence that non-minority applicants with his qualifications were awarded loans after he was denied one. A dissenting judge criticized Judge Gibbons' opinion for articulating "an unduly burdensome standard" for establishing a prima facie case of discrimination under the federal civil rights laws in question.

***Hillig v. Rumsfeld*, 381 F.3d 1028 (10th Cir. 2004)**

Terrie Hillig, an African American, had worked for the Defense Finance Accounting Service (DFAS) for five years. She claimed that her two supervisors had given her discriminatory approval ratings and had stalled her request for annual leave, while white men received prompt confirmations. Hillig filed two racel discrimination complaints with the Equal Employment Opportunity office with the Department of Defense. Several years after these claims were settled to Hillig's benefit, she applied for a job as a Personnel Clerk/Assistant at the Department of Justice. Her interviewer told her she would be "a perfect fit" for the position, but he ultimately hired a caucasian woman who had never filed a discrimination complaint. Hillig believed she had not gotten the job because her supervisors at DFAS had given negative references about to her to the Department of Justice, a suspicion later confirmed by an Equal Employment Opportunity office investigation, in which one of Hillig's supervisors told the investigator Hillig was "a shitty employee." The DOJ interviewer denied that his choice had anything to do with any of that; instead, he claimed that he had not hired Hillig because he thought her long fingernails would make her type too slowly. Hillig claimed she never had long fingernails. The Tenth Circuit ruled in Hillig's favor, but Judge **Terrence O'Brien** dissented. According to Judge O'Brien, the negative evaluations were not the reason Hillig was not hired, and they did not constitute an "adverse employment action."

***Overton v. New York State Div. of Military and Naval Affairs*, 373 F.3d 83 (2d. Cir. 2004)**

William Overton was an airplane technician who worked for the New York Air National Guard, in a military capacity, as well as for the Air Force, in a civilian capacity. Overton contended that, during the course of his civilian employment, his civilian co-worker and later supervisor, who was also his military superior, had created a hostile work environment "by making racially offensive remarks and threatening Overton in a racially offensive manner." According to Overton, the conduct included such egregious statements as "'Niggers belong on the basketball court rather than working on C5 aircraft.'" Overton also maintained that he had been transferred in retaliation for filing discrimination complaints. He later left the Guard and sued in civilian court. At issue was whether Overton could proceed with his case under a doctrine that prohibits suits against the military for injuries that "'arise out of or are in the course of activity incident to [the plaintiff's military] service.'" Even though the alleged racially offensive comments were made when Overton was working in a civilian capacity, Judge **Richard Wesley** joined the majority in ruling that Overton could not bring his suit on the ground that, "if permitted to proceed, [it] would likely affect [Overton's] military relationship with" his supervisor.

Age Discrimination

***Rosso v. The A.I. Root Company*, 97 Fed. Appx. 517 (6th Cir. 2004)**

When he was 61, Anthony Rosso was fired from his job at the A.I. Root Company. In court, Rosso's former supervisor testified that the president of the company had told him to fire Rosso because "Tony's old, and I've got reports that he has a severe memory loss . . . sounds like early Alzheimer's disease to me." The president denied making the statement. Judge **Jeffrey Sutton** joined the Sixth Circuit majority, which threw out Rosso's case on the ground that he had not presented enough evidence of direct discrimination. A dissenting judge disagreed, stating "[i]t is difficult to imagine more explicit direct evidence of age and disability discrimination than the direct statement by a supervisor that he wished to fire an employee, based partially on age, memory loss, and supposed early-onset of Alzheimer's disease."

***Cichewicz v. UNOVA Industrial Automotive Sys., Inc.*, 92 Fed. Appx. 215 (6th Cir. 2004)**

Daniel Cichewicz had worked for UNOVA as a salesman for twenty years when he was laid off. He was told that his position was being eliminated not because of poor job performance but because he did not "fit in." Cichewicz was 53, and another salesman over 50 had also been fired. In court, Cichewicz's supervisor testified that the company had used "the 'reorganization' and 'economic necessity' explanation . . . as the tool to explain the systematic removal of employees in their 50s in order to replace them with substantially younger employees." Over several years, UNOVA had reduced the size of its workforce by letting a string of employees go, all over 40. The majority considered this sufficient evidence to allow Cichewicz's age discrimination case to go forward, but Judge **Deborah Cook** dissented, claiming that Cichewicz needed to prove that he had been replaced by someone younger.

Americans with Disabilities Act

***Laird v. Redwood Trust LLC*, 392 F.3d 661 (4th Cir. 2004)**

Carolee Laird suffers from spina bifida and uses a wheelchair. One night, she visited the Redwood Trust Nightclub in Baltimore. Because the nightclub had not installed an elevator, Laird could not get to two of its three floors. Laird sued under the Americans with Disabilities Act. Judge **Dennis Shedd** joined the majority, which ruled that the top floor of the nightclub was a "mezzanine" rather than a "floor," a critical distinction

in this case. Because the ADA only requires elevators in buildings with at least three floors, the court's ruling meant that the nightclub had no obligation to install an elevator for the benefit of its disabled guests. According to a dissenting judge, this interpretation of the ADA "creates a loophole that could swallow the rule and ultimately stymie the purpose of the ADA - to integrate individuals with disabilities into mainstream life by guaranteeing them reasonable access to places of public accommodation."

Favoring Government and Corporations over Individuals

As the following examples show, judges nominated by President Bush have shown a striking deference to the government and to corporations, often issuing opinions or seeking to rule in favor of the powerful at the expense of individuals.

Pro-corporate rulings

***Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007)**

In 2001, Exxon Mobil employed a security detail of Indonesian soldiers to protect its natural gas facility in the district of Aceh, Indonesia. Eleven Indonesian villagers alleged that these soldiers had committed human rights violations against them, including torture, sexual assault, and murder, and sued Exxon. Exxon filed a motion to dismiss the suit as presenting "nonjusticiable political question[s]." The district court asked the State Department's opinion on whether hearing the case would interfere with any U.S. foreign policy goals. The Department replied with two letters expressing concern about damage to U.S. relations with Indonesia, a key ally in the war on terror. The district court, however, declined to dismiss the Indonesians' common law tort claims, and Exxon appealed, asking the D.C. Circuit to order that the case be dismissed. A majority of the D.C. Circuit panel ruled that the case could proceed. Judge **Brett Kavanaugh**, a former Senior Associate Counsel to President Bush, would have dismissed the case and denied the plaintiffs any opportunity for recovery.

***Ileto v. GlocInc.*, 370 F.3d 860 (9th Cir. 2004)**

A mentally unstable man named Buford Furrow burst into a Jewish Community Center (JCC) in Granada Hills, California, and shot six-year-old Joshua Stepakoff, five-year-old Benjamin Kadish, and Mindy Finkelstein, a sixteen-year-old camp counselor. He fled the scene and soon shot and killed Joseph Ileto, a postal worker who was delivering mail nearby. Although he had been convicted of a felony, had spent time in a mental institution, and could not legally buy guns, Furrow had at least six guns in his possession at the time of the shootings. Ileto's mother and the children injured in the JCC shooting sued Glock, the company that had manufactured and distributed several of the guns. The families claimed that the manufacturer had "intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market." A panel of the Ninth Circuit allowed the victims' case to proceed, and the full court decline to re-hear the case. However, Judges **Consuelo Maria Callahan**, **Carlos Bea**, and **Jay Bybee** dissented from the denial of re-hearing by the full court. According to these three Bush appointees, the panel's ruling would allow "[a]ny manufacturer of an arguably dangerous product that finds its way into California [to] be hauled into court."

***Merrill v. Arch Coal, Inc.*, 118 Fed. Appx. 37 (6th Cir. 2004)**

The widow and child of a coal miner killed at work filed a wrongful death suit against the parent company of the mine, and the Sixth Circuit allowed the case to proceed. Dissenting Judge **Deborah Cook** would have dismissed the case on the ground that a parent company has no obligation to protect the safety of its subsidiary company's miners.

No Justice for the Powerless

***Collins v. Pond Creek Mining Co.*, 468 F,3d 213 (4th Cir. 2006)**

Johnny Collins was a coal miner for 36 years. He suffered from pneumoconiosis, also known as black lung disease, and was designated as "totally disabled" by the disease. Thanks to the Black Lung Benefits Act, he received approximately $575 a month in government benefits. After Johnny died, his wife, Nora, applied for survivor's benefits under the same law. Although the Fourth Circuit ruled that Mrs. Collins was entitled to rely on the prior finding that her husband had black lung disease and pursue her claim for benefits, Judge **Dennis Shedd** disagreed. Judge Shedd would have upheld an administrative ruling that Mrs. Collins had failed to prove that her husband had suffered from black lung disease as well as failed to prove that the disease had caused his death.

***Wooten v. Logan*, 92 Fed. Appx. 143 (6th Cir. 2004)**

A county sheriff conspired with another man to pull over a car and lure one of its passengers, a mentally handicapped girl, into a police car. He then proceeded to rape her with his uniform, badge, and gun on. Judge **John Rogers**, writing for the Sixth Circuit, ruled that the county was not liable because the sheriff had not been setting "official policy" during the rape. The dissenting judge argued that if one of the sheriff's subordinates had been the rapist and the sheriff had approved it, he would have been creating "official policy," and that the fact that the sheriff committed the act himself should make no difference.

***Helms v. General Dynamics Corp.*, 222 Fed. Appx. 821 (11th Cir. 2007)**

George Helms worked as a functional analyst for General Dynamics Corporation. Helms had a number of past health problems, including a rotator cuff injury, insomnia, and a history of lymphoma. He also suffered from chronic headaches that were so painful he could not work, so his doctor prescribed him several medications that left him sedated and unable to drive or concentrate. Aetna, his health insurance company, denied Helms' application for short-term disability because he had not provided evidence that he could not work, despite multiple letters from his doctor, who "totally supported" Helms' disability claim. One such letter read:

> Mr. Helms suffers from daily chronic headaches of a debilitating nature. He is presently taking medication to control the severity of the headache episodes. These medications, neurontin and methadone, cause sedation interfering with his ability to work or drive a vehicle and numerous other daily activities. Mr. Helms is unable to work while taking the medications required for his condition. He must have the medication to control the pain.

Aetna reasoned that since Helms had found a combination of medications that reduced his pain, he had not proven that he still qualified for short-term disability benefits. Although the Eleventh Circuit ruled for Helms, Judge **William Pryor** agreed with the insurance company that Helms had not proven that he could not work.

***Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003)**

Becky Vogler and her three-year-old daughter, Kallie, were driving north on Highway 69 in Texas when a tractor-trailer heading south swerved from the opposite shoulder into their lane. The truck slammed into the front of their Honda Accord, spun it around and struck the passenger's side, and finally ran over the roof of the car from front to back. Both Becky and Kallie Vogler were killed. A jury found the trucker and trucking company liable and awarded $200,000 each to the estates of Becky and Kallie Vogler for the mental anguish they suffered before death, as well as more than $3 million total for the plaintiff, Frank Vogler, who had lost both his wife and his child in the accident. Judge **Edith Brown Clement** authored the Fifth Circuit's opinion, which upheld the awards for Mr. Vogler, but reduced the award for Mrs. Vogler's estate to $30,000 and struck down the award for Kallie's estate on the grounds that Vogler had not provided evidence that his daughter had any "awareness of the impending collision" before "her portion of the car was crushed."

***Huss v. Gayden*, 465 F.3d 201, 208-09 (5th Cir. 2006)**

Barbara Huss, a pregnant woman, had had three previous miscarriages, prior ovarian cysts, and a child delivered by C-section, and was a diabetic. When she went into early labor, doctors at the Memphis OB/GYN practice where Huss was a patient prescribed Terbutaline to stop her contractions. The medication was successful, but Huss needed frequent medical care during the remainder of her pregnancy. Two months after her early labor, she was in such poor condition that her doctors attempted to induce labor and failed. The baby was delivered by C-section. The day after she left the hospital, Huss was back in the emergency room with troubled breathing and was diagnosed with cardiomyopathy, pulmonary edema, and congestive heart failure. When Huss brought a medical malpractice lawsuit against the doctors who had prescribed Terbutaline, a jury awarded her $3.5 million dollars. On appeal, Judge **Priscilla Owen** voted to overturn the jury award on the ground that Huss had brought her lawsuit too late. According to Owen, Huss should have known sooner that Terbutaline could have caused her serious heart and lung problems even though her doctors themselves claimed that the drug did nothing to cause her injuries. In dissent, Judge Patrick Higginbotham (a Reagan appointee) accused Owen of trying to impose "tort reform by decree, not ballot."

Eroding Individual Rights and Freedoms

President Bush's judicial nominees have demonstrated a troubling lack of respect for Americans' constitutional rights and liberties. Among other things, and as the following examples show, they have curtailed or tried to curtail First Amendment protections, protections for voting rights, women's reproductive freedoms, and protections against unreasonable searches.

First Amendment Rights

***Planned Parenthood of South Carolina v. Rose*, 373 F.3d 580 (4th Cir. 2004)**

A South Carolina statute allowed drivers in the state to buy a "Choose Life" specialty license plate, but a similar plate with a pro-choice message was not available. The district court ruled that that the statute authorizing the "Choose Life" license plate violated the First Amendment, and the Fourth Circuit majority agreed. However, in a dissenting opinion, Judge **Dennis Shedd** claimed that the First Amendment did not apply. According to Judge Shedd, the state was not favoring one private opinion over another, but was "the literal speaker of the 'Choose Life' message," and the majority had "unduly restrict[ed] the ability of elected officials to express the

views of their constituents on any issue, however controversial." The only way for citizens of South Carolina to change the license plate situation, said Shedd, was to elect a sufficiently pro-choice legislature.

***Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589 (4th Cir. 2004):**

The Child Evangelism Fellowship, a group that describes itself as a "Bible-centered, worldwide organization composed of born-again believers whose purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (disciple) them in the local church for Christian living" ran a "Good News Club" for children after school. At the Good News Club, "children recite Bible verses, sing songs, play games, learn Bible stories, and pray." In order to spread the word about their ministry, the Child Evangelism Fellowship wanted to include their flyers along with other take-home flyers at public schools. Concerned about First Amendment issues, the Montgomery County school department refused to allow this. Judge **Dennis Shedd** joined the majority that ruled against the Montgomery County Public Schools. According to the majority, "Requiring students to carry home, among other items, a flyer containing an invitation to participate in a religious activity – an invitation that cannot be accepted absent parental consent – does not coerce religious activity" and does not violate the First Amendment.

***Garcetti v. Ceballos*, 547 U.S. 410 (2006)**

Richard Ceballos was a deputy district attorney. After he reviewed a search warrant and traveled to the site of the search, he became concerned about false information in the warrant. The warrant had described as a "driveway" what Ceballos considered a full-fledged road, and claimed that there had been tire tracks in a road where tire tracks could not have been noticeable. Ceballos wrote a memo to his supervisors about his concerns and suggested that the case be dropped. Instead, the supervisors proceeded with the case, transferred Ceballos to another position in another courthouse, and denied him a promotion. Ceballos claimed that his First Amendment rights had been violated. In a 5-4 ruling, Chief Justice **Roberts**, and Justices **Alito**, Scalia, Thomas, and Kennedy held that Ceballos, as a public employee acting in his official capacity, was not entitled to First Amendment protections, even though he would have had no ability to blow the whistle on alleged police and DA misconduct had he not worked in the district attorney's office.

***Monteiro v. City of Elizabeth*, 436 F.3d 397 (3d Cir. 2006)**

Armenio Monteiro was a City Council member in Elizabeth, New Jersey. Patricia Perkins-Auguste, the chair of the City Council, verbally attacked Monteiro "for what she perceived to be his role in the distribution of a pamphlet protesting the budget and inviting citizens to attend the meeting." During the meeting, she confronted Monteiro verbally, and when he defended himself, she had him arrested for disorderly conduct and hauled out of the meeting. Monteiro sued, claiming his First Amendment rights had been violated, but Perkins-Auguste argued that she was immune because of her status as chairperson. The Third Circuit ruled against her, but Judge **D. Michael Fisher** dissented. Perkins-Auguste was not liable, Judge Fisher argued, because a "reasonable person" in her shoes would not have "recognized a constitutional infringement."

Fourth Amendment Rights

***Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005) (*en banc*), *cert. denied*, 126 S. Ct. 736 (2005)**

Kansas City Police received an anonymous tip that David Doran was manufacturing methamphetamine and selling drugs from his house. A police officer searched Doran's trash cans and found cold medicine, which

can be used to manufacture meth, plastic bags with the corners cut out, and some methamphetamine residue. Relying on this evidence, the police obtained a search warrant. The search warrant was not a "no-knock" warrant and required officers to knock and announce their presence before entering. In a "dynamic entry," the police arrived at 10:00 PM, shouted, "Police, search warrant," and then immediately rammed the door open. Doran had been asleep; when he woke up, he thought the noise was a break-in, and he rushed downstairs with a pistol. When he saw the laser lights, he realized it was the police and bent over to set his gun down. Before he could do so, he was shot twice by a police officer. During the search, the police found only a small amount of marijuana and no evidence of a meth lab or drug dealing. Doran claimed that the officers had violated his civil rights and sued. A jury awarded him $2 million. On appeal, the Eighth Circuit ruled against Doran. In an 8-6 decision, five Bush judges, **Duane Benton**, **Steven Colloton**, **Raymond Gruender**, **Michael Melloy**, and **William Riley**, joined the majority.

Reproductive Rights

***Gonzales v. Carhart*, 127 S. Ct. 1610 (2007)**

In 2000, the Supreme Court, in a 5-4 ruling in *Stenberg v. Carhart*, struck down a Nebraska law banning a specific abortion procedure that did not contain an exception to protect a woman's health. In 2003, the Republican-controlled Congress passed a substantially identical law. When a challenge to this law came before the Supreme Court in 2007, the Court in a 5-4 ruling *upheld* the law (*Gonzales v. Carhart).* The only thing that had changed between the two decisions was the makeup of the Court: Justice Sandra Day O'Connor, who had been in the majority in the first ruling, had since been replaced by Justice **Samuel Alito**. The majority in *Gonzales* expounded on what it called the government's duty to protect "the bond of love the mother has for her child" and the personal consequences of abortions, in what dissenting Justice Ruth Bader Ginsburg described as an "antiabortion shibboleth."

Right to asylum

***Kornetskyi v. Gonzales*, 129 Fed. Appx. 254 (6th Cir. 2005)**

Igor Kornetskyi, a Ukrainian radiologist, had treated victims of the Chernobyl disaster. Kornetskyi spent so much time exposed to radiation that he became a radiation "carrier" and threatened his family's health. He then began to speak out against Soviet handling of nuclear issues and claimed that because of his open criticism of the state, the Soviet secret police and KGB searched his home, kept him under surveillance, and interrogated him and his family. Several times, they threatened to kill Kornetskyi and his wife or put them in a mental institution. Finally, Kornetskyi and his family applied for visitor visas and immigrated to the United States. When their visas expired, the INS arranged for them to be deported. Kornetskyi argued that he was entitled to asylum in the United States because he had been persecuted by the Soviets. Both the Immigration Judge and the Board of Immigration Appeals ruled against Kornetskyi. On appeal, Sixth Circuit Judge **Deborah Cook** wrote the majority opinion denying asylum and stating that "[t]he Kornetskyis' claim that the KGB and Secret Police searched their home, interrogated them, and verbally threatened them amounts to 'harassment,' not 'persecution.'"

Right to vote

***Summit County Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004)**

The Summit County Democratic Party filed suit to strike down an Ohio law that permitted political parties to send "challengers" to polling places. The challengers targeted districts that were heavily African American. Sixth Circuit Judge **John Rogers** wrote the majority opinion holding that the presence of challengers did not constitute a "severe burden" on the right to vote, and that it was in "the public interest" for them to be there in order to keep people who shouldn't vote from voting.

***Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006)**

Martin, South Dakota, is a city in which Native Americans make up 45% of the population and 36% of the voting age population. Whites are in the majority. For years, Martin had been the site of racial tension between Native Americans and whites. The city was divided into three wards, each of which elected two aldermen. Despite the city's sizable Native American population, only two Native-American-preferred alderman candidates had been elected since 1984, and both of the successful candidates were running unopposed. The plaintiffs, two Native Americans, claimed that the way the wards had been drawn violated their rights under the Voting Rights Act and the 14th and 15th Amendments. The Eighth Circuit agreed and ordered the voting districts to be redrawn. Judge **Steven Colloton** dissented, arguing that the plaintiffs had not provided evidence that the white majority usually voted in such a way that the Indian-preferred candidates lost.

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