



## **Putting Politics Before the Constitution Decisions by the Federal Courts in the Bush Era**

President Bush's appointees have issued constitutional rulings favoring broad executive power for the president and other government actors (like prosecutors and police), limiting Congress's legislative authority, and curbing judicial enforcement of individual rights. They have also written opinions narrowing the protections offered by federal statutes affecting civil rights, workers' rights and the environment. And in fact-intensive cases where the law is clear, they have often denied relief to aggrieved individuals by usurping the jury's constitutionally-prescribed fact-finding responsibilities, either ruling in defendants' favor on summary judgment motions despite the existence of disputed facts, or overturning jury verdicts based on what their colleagues say are their own views of the evidence.

What follows is a discussion of representative split decisions that provide a window into how President Bush's appointees, often in combination with Reagan and George H.W. Bush appointees, are affecting the law.<sup>1</sup> Alliance for Justice previously has written editorial summaries of some of these cases, which can be located at <http://www.afj.org/fullcourtpress.html>.

### **A. Supreme Court**

Although they have been together on the Supreme Court for only half a term, Chief Justice Roberts and Justice Alito are already beginning to make an impact, especially collectively. According to statistics compiled by Georgetown University Law School for the 2005-2006 term, Chief Justice Roberts and Justice Alito voted together more than any other two justices and, as many predicted, they almost always lined up with Justices Scalia and Thomas, even if they did not always embrace the exact same reasoning. The substitution of Justice Alito's vote for Justice O'Connor's, in particular, almost certainly flipped the outcome of at least five major 5-4 cases. One cut back the free speech rights of government workers.<sup>2</sup> The second weakened the Fourth

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<sup>1</sup> This report, with a few exceptions, focuses on split decisions for two reasons: (1) cases resulting in split decisions tend to involve the most closely contested, most difficult issues; and (2) by showing that the law might have compelled different results, they - unlike unanimous decisions - underscore what distinguishes one judge's views from the views of other judges.

<sup>2</sup> *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2005).

Amendment's protection against unreasonable searches and seizures.<sup>3</sup> The third announced a new-found individual right to own handguns under the Constitution's Second Amendment.<sup>4</sup> The fourth dismantled democratically-approved school integration programs, discarding decades of precedent.<sup>5</sup> The fifth eroded recent Supreme Court precedent on the right to privacy, lowering the protection afforded to women's health.<sup>6</sup> In several other key cases, the only obstacle to a more dramatically conservative jurisprudence was the emergent swing vote of Justice Anthony Kennedy, who preserved key wetlands protections under the Clean Water Act, rebuffed the president's expansive claims of executive power, upheld the full scope of the writ of habeas corpus, and directed the EPA to take action on global warming.<sup>7</sup>

- *Boumediene v. Bush*.<sup>8</sup> Striking a huge blow to the Bush administration's aggrandizement of executive power, in this 5-4 decision, the Supreme Court restored the full scope of the ancient writ of *habeas corpus* and reasserted our country's commitment to its core constitutional principals. Writing for the majority, Justice Kennedy struck down the provisions of the Military Commissions Act and the Detainee Treatment Act that purported to strip federal courts of jurisdiction over habeas petitions by non-citizens who have been labeled "enemy combatants" by the executive branch. Citing centuries of legal precedent, beginning with the Magna Carta, the majority rejected the Bush administration's attempt to create a legal black hole at the U.S. Naval Station in Guantanamo Bay, Cuba.<sup>9</sup> The alternative procedure created by the Bush administration, called Combatant Status Review Tribunals (CSRTs), was held to be an inadequate substitute for the constitutional right to *habeas corpus*. Under the CSRTs, the detainee was not given a lawyer, allowed to confront witnesses, or shown much of the evidence against him. And, the CSRT appeals process did not allow a detainee to produce new evidence of his innocence, challenge the legal authority behind his detention, contest the facts as found by the CSRT panel, or give the appeals court authority to order a detainee's release. The Court held that the President may not circumvent the Constitution's requirement that the detainees be given a fair hearing before an impartial judge,<sup>10</sup> and in doing so have paved the way for people who have been held for six years without charge to finally get their day in court. Both Chief Justice Roberts and Justice Alito dissented.

- *District of Columbia v. Heller*.<sup>11</sup> In a striking display of archconservative judicial activism, the Supreme Court narrowly struck down the District of Columbia's gun restrictions, which for over thirty years had played an integral

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<sup>3</sup> *Hudson v Michigan*, CITE.

<sup>4</sup> *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

<sup>5</sup> *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738 (2007).

<sup>6</sup> *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

<sup>7</sup> *Rapanos v. United States*, 126 S.Ct. 2208 (2006); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2009) *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>8</sup> 128 S. Ct. 2229 (2008).

<sup>9</sup> *Id.* at 2244-54.

<sup>10</sup> *Id.* at 2277.

<sup>11</sup> 128 S. Ct. 2783 (2008).

role in the city's fight against urban violence. Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, concluded that the Second Amendment protects an individual right to "keep and bear arms" and interprets its ambiguous text to implicitly enshrine a right of self defense. Justice Scalia displayed indifference toward the reality of urban violence by holding "the right secured by the Second Amendment is not unlimited,"<sup>12</sup> yet refusing to articulate a standard by which other gun restrictions may be judged. Justices Stevens and Breyer both filed dissents, which were joined by the same four Justice minority. Justice Breyer aptly noted that the decision would "throw into doubt the constitutionality of gun laws throughout the United States"<sup>13</sup> and frustrate law enforcement efforts to combat the violence plaguing our nation's cities. Justice Stevens traced the history of the Second Amendment and concluded that the Court's ruling exceeded the framer's intent. He noted that James Madison had "considered and rejected formulations that would have unambiguously protected civilian use of firearms." The Second Amendment was created to prevent oppression from a standing army, he concluded, not to allow unfettered civilian access to weapons.

- *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>14</sup> In one of the worst decisions handed down in 2007, the Supreme Court – under the conservative majority bloc of Roberts, Alito, Thomas, Scalia, plus Kennedy – undercut one of our nation's most cherished precedents and turned the spirit of *Brown v. Board of Education*<sup>15</sup> on its head. By holding that the attempts of democratically elected school boards to racially integrate their schools were unconstitutional, the Court did significant damage to the promise of racially integrated schools and racial equality that were expressed by the Court in *Brown*. During their confirmation hearings before the Senate Judiciary Committee, both Roberts and Alito expressed considerable respect for this important precedent. Yet, at the first opportunity, they undercut the vital promise of achieving diversity in public schools. As Justice Breyer stated in dissent: "what has happened to stare decisis? . . . this is a decision that the Court and the Nation will come to regret."<sup>16</sup>

- *Ledbetter v. Goodyear Tire & Rubber Co.*<sup>17</sup> In an important sex discrimination and employment case, Lilly Ledbetter was denied relief by a 5-4 Supreme Court ruling, with Chief Justice Roberts and Justice Alito once again in the majority – the replacement of Justice O'Connor by Justice Alito probably determining the outcome. Ledbetter worked for Goodyear for nearly twenty years, unaware that she was being paid less than men doing the same job. When she received an anonymous note telling her of the pay

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<sup>12</sup> *Id.* at 2816.

<sup>13</sup> *Id.* at 2870.

<sup>14</sup> 127 S. Ct. 2738 (2007).

<sup>15</sup> 347 U.S. 483(1954).

<sup>16</sup> 127 S. Ct. at 2837.

<sup>17</sup> 127 S. Ct. 2162 (2007).

disparity, she sued Goodyear under Title VII for sex discrimination. Her discrimination claim went to trial and a jury found in her favor. Justice Alito, joined by Chief Justice Roberts, and Justices Scalia, Kennedy and Thomas, reasoned that because Ledbetter had not filed a charge within 180 days of the moment at which her employers first decided to pay her less money than her male counterparts – something she had no way of knowing – her claim was barred under the statute. In dissent, Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, noted that the majority's holding contravened past Supreme Court decisions holding that each time an employee is paid a wage based on discrimination, the employer has violated the law.<sup>18</sup> In this regard, an employee has a recurring opportunity to discover the discrimination and file suit.

- *Massachusetts v. EPA*.<sup>19</sup> In yet another 5-4 decision, the Supreme Court rejected the Bush administration's claim that the EPA lacked the authority to regulate carbon dioxide emissions under the Clean Air Act of 1970. The EPA's justification for inaction was that voluntary measures for dealing with greenhouse gases should be adequate, and that mandatory regulation could hamper the president's negotiations with foreign countries. But Justice Stevens, writing for the majority, stated that "[u]nder the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."<sup>20</sup> Chief Justices Robert and Justice Scalia wrote separate dissents, each of which was joined by all four conservatives. According to Roberts, the states suing the EPA failed to show that the regulation – or its lack of enforcement – would have any impact on their land, water or air.<sup>21</sup> Scalia did not think that the Court should second guess the EPA's decision, because of lingering "scientific uncertainties" about the causes of global warming.<sup>22</sup>

- *Gonzales v. Carhart*.<sup>23</sup> In a decision marking the shift under new Roberts Court, a slender majority abandoned the Supreme Court's thirty-year precedent of striking down abortion restrictions that fail to consider women's health and well-being. Instead, the *Carhart* majority threw the Court back into the age of paternalism, where women were viewed not as equals capable of exercising autonomous choice but as second-class citizens who need to be protected from their own choices. Moreover, Justice Kennedy, writing for the majority, held that government's views of morality are a sufficient basis for overriding individual liberties of women and the judgment of doctors regarding how best to treat their patients. In her dissent, Justice Ginsburg, wrote that "[t]he Court's hostility to the right Roe and Casey secured is not concealed."<sup>24</sup> In fact, with this decision, it appears that the Court is just one vote away from overturning the rights and freedoms women had obtained under Roe. Here the

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<sup>18</sup> *Id.* at 2178-88.

<sup>19</sup> 127 S. Ct. 1438 (2007).

<sup>20</sup> *Id.* at 1462.

<sup>21</sup> *Id.* at 1464-71.

<sup>22</sup> *Id.* at 1475.

<sup>23</sup> 127 S. Ct. 1610 (2007).

<sup>24</sup> *Id.* at 1650.

replacement of Justice O'Connor by Justice Alito was critical, because Justice O'Connor had voted to invalidate a similar state statute in 2000.

- *Rapanos v. United States*.<sup>25</sup> This significant case concerned whether, under its Clean Water Act authority, the Army Corps of Engineers has lawfully been protecting the vast majority of the nation's wetlands. A fractured court split 4-1-4, with Justice Kennedy authoring the determinative lone concurrence that constituted the holding. Referring to the Corps as "an enlightened despot," Chief Justice Roberts and Justices Scalia, Thomas and Alito found that the Clean Water Act does not allow the Corps to shield wetlands from development unless they are directly connected to waterways.<sup>26</sup> Contrary to how the Corps has interpreted the Act for 30 years and to what members of Congress said they intended with the Act, the four conservative Justices contended that the Act covers only "continuously present, fixed bodies of water" and those wetlands with a "continuous surface connection" to the "continuously present" waterbodies.<sup>27</sup> Justices Stevens, Ginsburg, Breyer and Souter disagreed. They voted to "respect the work product of the Legislative and Executive Branches of our Government" and uphold the broader view of the Clean Water Act intended by Congress and long applied by the Corps.<sup>28</sup> Taking a middle ground, Justice Kennedy agreed that the opinion of Chief Justice Roberts and Justices Scalia, Thomas and Alito "is inconsistent with the Act's text, structure and purpose" and acknowledged its importance to the environment.<sup>29</sup> But he concluded that the Constitution placed outer limits on the Corps's authority to designate wetlands, saying that a wetland may be protected if the Corps reasonably determines it has a "significant nexus" either to navigable waters or to their tributaries (including intermittent streams).<sup>30</sup> As Justices Stevens, Souter, Ginsburg and Breyer noted, Justice Kennedy's controlling view - unlike the others' - "will probably not do much to diminish the number of wetlands" protected under the Act.<sup>31</sup>

- *Hamdan v. Rumsfeld*.<sup>32</sup> In a landmark decision concerning the president's commander-in-chief powers, a 5-3 majority held that President Bush's military commissions, set up unilaterally to try alleged enemy combatants accused of war crimes, violated both the Uniform Code of Military Justice and the Geneva Conventions. Justice Alito joined Justices Scalia and Thomas in dissent. They first maintained that the Court lacked jurisdiction to hear the case, saying that Congress, in the Detainee Treatment Act of 2005, had stripped detainees of their right to file habeas corpus petitions challenging the commissions. They also concluded that even if the Court had jurisdiction, the procedures attending

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<sup>25</sup> *Rapanos v. United States*, 126 S.Ct. 2208 (2006).

<sup>26</sup> *Id.* at 2214; 2224-25.

<sup>27</sup> *Id.* at 2221, 2226.

<sup>28</sup> *Id.* at 2253.

<sup>29</sup> *Id.* at 2246.

<sup>30</sup> *Id.* at 2249.

<sup>31</sup> *Id.* at 2264.

<sup>32</sup> 126 S.Ct. 2749 (2006).

the commissions were lawful. Chief Justice Roberts did not participate in the case because, prior to his nomination to the Supreme Court, he had joined the D.C. Circuit's decision upholding the commissions.

- *Gonzales v. Oregon*.<sup>33</sup> The state of Oregon passed a law allowing doctors to administer drugs to terminally ill patients wishing to end their lives. U.S. Attorney General John Ashcroft issued a rule interpreting the Controlled Substances Act - which allows for use of regulated drugs only for "legitimate medical purposes" - to forbid doctors in Oregon to act in accordance with the state law. Oregon challenged Ashcroft's interpretation. A 6-3 majority (Justice O'Connor, not Justice Alito, was on the Court at the time) held that the federal law did not permit the Attorney General to overrule state laws in determining whether a particular use of medications is legitimate. Chief Justice Roberts joined Justices Scalia and Thomas in dissent. Despite their ordinary deference to state prerogatives, they asserted that "[i]f the term 'legitimate medical purpose' has any meaning, it surely excludes the prescription of drugs to produce death."<sup>34</sup>

- *Burlington Northern & Santa Fe Railroad v. White*.<sup>35</sup> Eight members of the Court - all except Justice Alito - deferred to the plain language of Title VII's broad anti-retaliation protection for workers who lodge discrimination complaints. In order to trigger Title VII's protections, the Court held, retaliation need not involve termination, formal demotion, or other conditions-of-employment-related adverse actions; rather, it need only be reasonably likely to dissuade a worker from complaining. Accordingly, the Court concluded that Title VII covers retaliatory "lateral" job reassignments, shift changes and negative references for other jobs. Justice Alito did not agree with the Court's reasoning. While concluding that the facts of the case warranted granting relief to Ms. White, he authored a lone concurrence that rejected the plain meaning of Title VII's text. Unlike the anti-discrimination provision of Title VII, the anti-retaliation provision is not, by its words, limited to actions affecting conditions of employment. Nevertheless, Justice Alito maintained that the anti-retaliation provision should be read in harmony with the anti-discrimination provision and, therefore, limited retaliation covered by the law to retaliation affecting conditions of employment.

- *Garcetti v. Ceballos*.<sup>36</sup> Richard Ceballos, a long-serving state prosecutor, concluded that a police officer lied when applying for a key search warrant. Ceballos wrote a memo to a superior about it, recommending that the case be dismissed. Ceballos was subsequently demoted from supervising deputy to trial attorney, removed from the only murder case he was assigned to, denied a promotion, and transferred to a remote office requiring longer commuting. He

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<sup>33</sup> 126 S.Ct. 904 (2006).

<sup>34</sup> *Id.* at 939 (Scalia, J., dissenting).

<sup>35</sup> 126 S.Ct. 2405 (2006).

<sup>36</sup> 126 S. Ct. 1951 (2006).

claimed these adverse actions constituted retaliation in violation of his First Amendment rights. In a significant decision, Chief Justice Roberts and Justice Alito joined a 5-4 majority that rejected Ceballos's claim. They held the First Amendment offers no protection against retaliation to public employees who, in the course of their duties, blow the whistle on waste, fraud or corruption. In the majority's view, employees who make statements pursuant to their ordinary work duties never speak as private citizens and thus do not possess First Amendment rights. Justices Stevens, Souter, Breyer and Ginsburg dissented. "The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong," Justice Stevens wrote.<sup>37</sup> That view, the dissenters said, neglects the self-evidently personal interest of those who have chosen public service in making sure that the government acts properly, as well as the societal interest in receiving truthful information about important issues from well-informed government workers. The dissenters argued that a court should weigh the interests of both the employee and the general public in exposing misconduct against the government's interest in maintaining a disciplined, efficient workplace. According to Supreme Court watchers, the substitution of Justice Alito for Justice O'Connor almost certainly reversed the result in this case. The case had to be reargued after Justice Alito's confirmation in order to break the 4-4 tie that resulted from Justice O'Connor's stepping down.

- *Hudson v. Michigan*.<sup>38</sup> The Fourth Amendment requires police officers to knock and announce their presence prior to entering a home to execute a warrant. In this case, police officers violated that requirement. Nevertheless, the Court held 5-4 that evidence seized immediately following such violations need not be excluded from evidence at criminal trials. Unsurprisingly given their prior records on the Fourth Amendment, Chief Justice Roberts and Justice Alito joined the majority opinion, the broad language of which not only eliminated the exclusionary rule for knock-and-announce violations, but called into question the reasoning behind all applications of the exclusionary rule. The decision drew a sharply-worded dissent authored by Justice Breyer, as well as a concurring opinion from Justice Kennedy, who said that, despite the decision's rationale, the exclusionary rule remains safe. As in the *Garcetti* case, court watchers concluded that the substitution of Justice Alito for Justice O'Connor flipped the result. This case, too, had to be reargued after Justice O'Connor stepped down.

- *House v. Bell*.<sup>39</sup> Justice Kennedy, writing for a 5-3 majority, held that death row inmate Paul House had brought forward sufficient evidence of his innocence to entitle him to a hearing in federal court. House argued that his showing of actual innocence allowed him to assert otherwise defaulted procedural claims. In dissent, Chief Justice Roberts, joined by Justices Scalia

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<sup>37</sup> *Id.* at 1963 (Stevens, J., dissenting).

<sup>38</sup> 126 S. Ct. 2159 (2006).

<sup>39</sup> 126 S. Ct. 2064 (2006). Justice Alito took no part in this decision.

and Thomas, wrote that all the new evidence - which caused Justice Breyer to exclaim during argument, "my goodness, I don't know who committed this crime"<sup>40</sup> - was not persuasive enough to excuse the failure of House's lawyer to properly raise his constitutional claims at the appropriate time. Justice Alito did not participate in the case.

- *United States v. Gonzalez-Lopez*.<sup>41</sup> Justice Scalia wrote the 5-4 majority opinion, holding that, under the Sixth Amendment, no set of circumstances justifies denying a criminal defendant the paid counsel of his choice. Justice Alito wrote the dissent, joined by Chief Justice Roberts and Justices Thomas and Kennedy. They argued that the Sixth Amendment only guarantees a defendant counsel able to provide the same level of assistance that his counsel of choice is able to provide.
- *Sanchez-Llamas v. Oregon*.<sup>42</sup> In another 5-4 decision, written by Chief Justice Roberts and joined by Justice Alito, the Court held that even if the Vienna Convention gives foreigners a judicially-enforceable right to consult with their U.S. consulate following arrest, violations of that right may not be remedied by the exclusion of evidence.
- *Kansas v. Marsh*.<sup>43</sup> The Court - with the Chief Justice and Justice Alito in the majority - ruled 5-4 that states can require imposition of the death penalty when the jury finds that the aggravating circumstances supporting the punishment and the mitigating circumstances cutting against it are in equal balance. The four dissenters called the Kansas law that the majority upheld "morally absurd" and "obtuse," finding that it violated the constitutional prohibition against irrationally-imposed death sentences.

## **B. Appellate Court Decisions**

### **1. Constitutional Law**

#### **(a) Federalism and Limits on Congressional Power**

- *Rancho Viejo, LLC v. Norton*.<sup>44</sup> A panel of the D.C. Circuit held that applying the Endangered Species Act (ESA) to restrict a development that threatened California's endangered arroyo toad fell within Congress's authority to regulate interstate commerce, reasoning that the activity being regulated - a commercial development - substantially affected commerce. The full D.C.

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<sup>40</sup> Transcript, *House v. Bell*, No. 04-8990, at 47, available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/04-8990.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-8990.pdf) (last visited Oct. 1, 2008).

<sup>41</sup> 126 S. Ct. 2557 (2006).

<sup>42</sup> 126 S. Ct. 2669 (2006).

<sup>43</sup> 126 S. Ct. 2516 (2006).

<sup>44</sup> 334 F.3d 1158 (D.C. Cir. 2003) (denying motion for rehearing *en banc*), *cert. denied*, 124 S. Ct. 2061 (2004).

Circuit, including three conservative Republican appointees, denied rehearing en banc by a 7-2 vote. Then-Judge John Roberts issued a dissent from that denial - his first opinion as a judge. (Judge David Sentelle issued a separate dissent.) Breaking from circuit precedent, Judge Roberts maintained that the panel's rationale was erroneous. No court has ever invalidated an application of the Endangered Species Act.

- *GDF Realty Invs., Ltd. v. Norton*.<sup>45</sup> A panel of the Fifth Circuit upheld the application of the Endangered Species Act to a development that threatened an endangered cave bug. Fifth Circuit appointee Edith Brown Clement and recess-appointee Charles Pickering voted to rehear the case en banc, arguing that the application of ESA at issue exceeded Congress's Commerce Clause power because the bug had no commercial value. Again, to date no court has ever struck down an application of the ESA.

- *United States v. Laton*.<sup>46</sup> Sixth Circuit Judge Jeffrey Sutton dissented from a panel decision upholding the federal arson statute. Contrary to the majority, Judge Sutton would have held that the federal arson law does not apply to buildings that are not actively used for commercial purposes. In Judge Sutton's view, arson committed on buildings having no commercial purpose is a local crime that cannot be lawfully regulated by Congress because it does not substantially affect interstate commerce. Judge Sutton's opinion would have narrowed the federal arson law significantly, likely exempting from federal prosecution the arson of most municipal buildings.

(b) Contract Clause

- *RUI One Corp. v. City of Berkeley*.<sup>47</sup> Ninth Circuit Judge Jay Bybee dissented from a panel decision upholding a Berkeley, California law that set a minimum wage for municipal contractors. Judge Bybee argued that the law violated the Contract Clause because it substantially impaired Berkeley's contracts with some businesses. In other words, the right of the employer to set employee wages and benefits was implicitly part of the contract since the contractual fees it assessed against the city were contingent on its ability to control employee costs. The majority held that the mere increase in wage rates did not substantially impair any specific terms of the contract at issue, which did not have any provision concerning employee wages and benefits.

(c) Equal Protection Clause

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<sup>45</sup> 362 F.3d 286 (5th Cir. 2004). (denying motion for rehearing en banc), *cert. denied*, 545 U.S. 1114 (2005).

<sup>46</sup> 352 F.3d 286 (6th Cir. 2003), *cert. denied*, 542 U.S. 937 (2004).

<sup>47</sup> 371 F.3d 1137 (9th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

- *Berkley v. United States*.<sup>48</sup> Writing for a 2-1 majority, Bush appointee Sharon Prost of the Federal Circuit held that an Air Force Memorandum of Instruction (MOI) regarding workforce reduction gave "preferential treatment" to women and minorities and thus was subject to strict scrutiny under the Equal Protection Clause. The MOI required a board charged with reducing the Air Force's workforce to consider the possibility that past discrimination suffered by the women and minorities reviewed for termination may have unfairly tarnished their work records. In a vigorous dissent, Clinton-appointee Judge Dyk condemned Judge Prost for disregarding Supreme Court and circuit precedent and for "caus[ing] enormous mischief by potentially invalidating virtually any governmental directive that cautions against the perpetuation of racial discrimination against minorities and gender discrimination against women."<sup>49</sup>

(d) Free Speech

- *American Civil Liberties Union of Tennessee v. Bredesen*.<sup>50</sup> Tennessee authorizes more than 150 "specialty" license plates requested by private organizations. These plates contain a variety of political and sometimes controversial messages, including one featuring a Confederate flag requested by the Sons of Confederate Veterans. Despite its rather permissive approval practices, the Tennessee legislature refused to authorize a request for a pro-choice license plate proposed by abortion rights supporters, even though it authorized, in the same bill, "Choose Life" plate proposed by anti-abortion groups. In a 2-1 opinion, Bush appointee John M. Rogers, joined by Reagan appointee David Nelson, held that the decision did not constitute unlawful viewpoint discrimination under the First Amendment. The court rejected the view of the conservative Fourth Circuit, which held in *Planned Parenthood of South Carolina v. Rose*,<sup>51</sup> that a South Carolina "Choose Life" license plate was unconstitutional viewpoint discrimination. In the Sixth Circuit case, Judge Rogers found that the plates were not required to be viewpoint neutral, because they reflected the views of the Tennessee government, rather than those of merely private citizens using a government forum. Judge Boyce Martin (Carter) vigorously dissented, arguing that the majority's effort to categorize the plates as government speech ignored how the state had clearly been operating the program to facilitate a diversity of viewpoints from private speakers - and thus one requiring viewpoint neutrality. A prominent case in point, Judge Martin noted, was the Sons of Confederate Veterans specialty plate, which by displaying a confederate flag conveyed a message the state did not claim to promote.

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<sup>48</sup> 287 F.3d 1076 (D.C. Cir. 2003).

<sup>49</sup> *Id.* at 1091 (Dyk, J., dissenting).

<sup>50</sup> 441 F.3d 370 (6th Cir. 2006), *cert. denied*, 548 U.S. 906 (2006).

<sup>51</sup> 361 F.3d 786 (4th Cir. 2004). Interestingly, Bush appointees Dennis Shedd and Karen Williams dissented from the Fourth Circuit's denial of rehearing en banc, 373 F.3d 580 (4th Cir. 2004), in this case.

- *Cook v. Gates*.<sup>52</sup> In light of the Supreme Court’s decision in *Lawrence v. Texas*, Plaintiffs (12 former members of the United States Military who were discharged under Don’t Ask Don’t Tell) challenged the constitutionality of the United States military’s so-called Don’t Ask Don’t Tell policy, which “provides for the separation of members of the military who engage, attempt to engage, intend to engage, or have a propensity to engage in a homosexual act.” Plaintiffs argued that (1) the Act violates their right to substantive due process on its face and as applied; (2) the Act denies them equal protection of the law on the basis of sexual orientation; and (3) the portion of the act that triggers separation proceedings based on a member’s statement that he or she is homosexual violates the right to freedom of speech. Judge Howard (Bush II), in a majority opinion joined by Judge Campbell (Nixon), disagreed and affirmed the dismissal of all of Plaintiff’s claims, reasoning that given the fact that homosexuals are not a protected class for equal protection purposes and in light of the special deference given to the government in matters involving national security, the plaintiffs’ claims could not stand. In reaching this conclusion, Judge Howard interpreted the Supreme Court’s decision in *Lawrence*, asserting that in striking down the Texas sodomy law the court applied something between strict scrutiny and rational basis review and in doing so recognized a “narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one’s own home.”

Judge Saris, a district judge appointed by President Clinton, concurred with the majority’s conclusion as to the Plaintiffs’ due process and equal protection claims but dissented from the majority’s conclusion regarding plaintiffs’ First Amendment claim and would have denied the government’s motion to dismiss. Though Judge Saris acknowledged that plaintiffs’ burden “is a tough one in light of the strong deference owed to Congress and the military seeking to protect unit cohesion,” she believed that the argument that the burden placed on gay and lesbian military members’ speech is greater than is essential to protect the government’s interest meets this high bar. In particular, Judge Saris cited the broad impact of the policy - it applies even to private letters and statements made while off base - and its chilling effect, in that even a member who could rebut the presumption might be afraid to speak out of a fear of triggering discharge proceedings.

(e) Establishment Clause

- *Lakowski v. Spellings*.<sup>53</sup> Taxpayers alleged that a federal grant to the University of Notre Dame, which the university used for a religious program, violated the Establishment Clause. The taxpayers sought to have Notre Dame make restitution to the government for the funds, even though it had already spent the money. Writing for a 2-1 panel majority, Reagan appointee Richard Posner held that the government could seek restitution from Notre Dame for government grants that violated the Establishment Clause, and that the taxpayer plaintiffs had standing to sue under an Establishment Clause

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<sup>52</sup> 528 F.3d 42 (1st Cir. 2008), *reh’g en banc denied* (Aug. 18, 2008).

<sup>53</sup> 443 F.3d 930 (7th Cir.), *reh’g en banc denied*, 456 F.3d 702 (7th Cir. 2006).

exception to the normal rule against taxpayer standing. Bush appointee Diane Sykes would have found the suit moot because the Establishment Clause did not allow for repayment of money that had already been spent. She also believed that the majority had improperly granted standing to the plaintiffs.

(f) Fourth Amendment

- *Smook v. Minnehaha County*.<sup>54</sup> Bush appointees Steven Colloton, Duane Benton and Michael Melloy held that county officials' strip search of a 16-year-old girl, detained for nothing more than a curfew violation, did not violate the Fourth Amendment's prohibition against unreasonable searches, even though there was no reason to believe the girl was concealing anything dangerous. The court reached this decision despite: (1) precedent holding that adults detained for minor infractions may not be strip searched unless they are suspected of possessing contraband; (2) additional precedent holding that bag searches of high school students - clearly less intrusive than strip searches - was unconstitutional absent suspicions of contraband; and (3) the dearth of evidentiary support for the county's assertion that its blanket strip search policy, to which the girl was subjected, was necessary to protect the welfare of minors - a point underscored by the county's subsequent decision to modify the policy and the state's subsequent decision to outlaw altogether strip searches of minors arrested for curfew violations.

(g) Right to Vote

- *Summit County Democratic Cent. & Exec. Comm. v. Blackwell*.<sup>55</sup> In this constitutional voting rights case, Bush appointee John Rogers reversed injunctions issued by two different district judges that barred enforcement of an Ohio law that permitted political partisans to target African-American precincts to challenge voter eligibility. Judge Rogers found that because it was not clear that allowing the challengers into polling places would burden the right to vote, the prospective voters challenging the law had not met the standard for obtaining a preliminary injunction, which required them to show a likelihood of succeeding on their claims after full-blown litigation. Reagan appointee James Ryan concurred, finding that the prospective voters lacked standing to sue. Clinton appointee R. Guy Cole dissented. He urged deference to the district court judges (one a Democratic appointee, the other a Republican appointee), each of whom had made "explicit factual findings" that allowing the challengers into polling places could lead to a "threat of suppression, intimidation or chaos sown by partisan political operatives."

(h) *Habeas corpus*

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<sup>54</sup> 457 F.3d 806 (8th Cir. 2006), *reh'g en banc denied*, 2006 U.S. App. LEXIS 24352 (8th Cir. Sep. 27, 2006), *cert. denied*, 127 S. Ct. 1885 (2007).

<sup>55</sup> 388 F.3d 547 (6th Cir. 2004).

- *Al-Marri v. Pucciarelli*.<sup>56</sup> FBI agents arrested Ali Saleh Kahlah al-Marri, a citizen of Qatar who was legally residing in the United States and pursuing a master's degree at Bradley University in Peoria, Illinois, at his home on December 12, 2001. Mr. al-Marri subsequently pleaded not guilty to several charges relating to credit card fraud. On June 23, 2003, less than one month prior to his scheduled trial date (and after he filed pre-trial motions to suppress evidence allegedly obtained by torture), Mr. al-Marri was transferred to military custody pursuant to a presidential order declaring him an "enemy combatant." The district court dismissed the criminal charges, and Mr. al-Marri was transferred to the Naval Consolidated Brig in South Carolina. Five years later, Mr. al-Marri remains in military custody, where he is kept in solitary confinement and denied contact with his wife and children. He has not been charged, and the Bush Administration maintains that he can be detained indefinitely. The government alleges it has extensive evidence that Mr. al-Marri is an al-Qaeda operative who volunteered for a "martyr mission" and entered the country to engage in various financial operations for al-Qaeda. However, vigorously asserting the "national security" mantra, the government disclosed to Mr. al-Marri and the court only an affidavit of an intelligence operative who claimed to be "familiar with the interviews" conducted by FBI and Department of Defense personnel.

In reviewing his detention on appeal from denial of *habeas corpus*, a majority of the *en banc* Fourth Circuit – consisting of all five Clinton appointees – acknowledged that Mr. al-Marri must be given a meaningful opportunity to challenge his classification as an "enemy combatant." But a different majority – composed of the four Republican appointees and Clinton appointee Judge William Traxler (originally appointed as a district judge by George H.W. Bush) -- also held that Congress granted the president virtually unlimited authority to place legal residents and U.S. citizens in indefinite military detention, even based on a single hearsay affidavit, by enacting the Authorization for Use of Military Force (AUMF).

The AUMF was passed shortly after the September 11, 2001, attacks and was the legal basis on which President Bush ordered the invasion of Afghanistan and overthrow of the Taliban government. The conservative majority concluded that Congress intended the AUMF to authorize military detention of alleged al-Qaeda operatives on United States soil. Ignoring the extensive evidence highlighted by Judge Diana Motz's dissent that Congress considered, and expressly rejected, granting the President such authority (and subsequently authorized specific procedures for prosecuting al-Qaeda operatives present on U.S. soil in the Patriot Act), the conservatives instead drew their conclusion from three cases. They assert that these cases – *Ex parte Quirin*, *Hamdi v. Rumsfeld* and *Padilla v. Hanft* – stand for the proposition that the traditional definition of enemy combatant includes persons such as Mr. al-Marri, and that the AUMF accordingly authorized detention of legal residents and citizens allegedly affiliated with al-Qaeda. Judge Motz, however, would find that the law of war, as relied upon in *Quirin*, *Hamdi*, and *Padilla*, limit the classification of "enemy combatant" to those affiliated "with the military arm of the enemy government" and who were "armed and present in a combat zone." *Quirin* and his seven co-conspirators were members of the German military;

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<sup>56</sup> 534 F.3d 213 (4th Cir. 2008) (*en banc*), *petition for cert. filed*, No. 08-369 (U.S. Sept. 19, 2008).

Hamdi and Padilla were affiliated with the Taliban and captured in Afghanistan. At the same time, the conservative majority ignores *Ex parte Milligan*, on which Judge Motz and the other three dissenting judges heavily rely. In that Civil-War-era case, the Supreme Court held that Milligan, accused of conspiring to attack Union prisoner of war camps, could not be held in military custody as an enemy combatant because he was a civilian rather than a confederate soldier. Though *Milligan* is clearly relevant (if not dispositive), it is cited but once in the conservatives' opinion, saying nothing more than it has "carefully considered" that decision.

## 2. Statutory Interpretation

### (a) Civil Rights

- *Jones v. City of Monroe*.<sup>57</sup> The plaintiff, who suffered from multiple sclerosis, requested permission to park in one of the "one-hour limit" spaces near her place of employment without being ticketed, since the parking provided by her job was too far for her to walk. Bush appointee Julia Smith Gibbons, joined by Reagan appointee Alice Batchelder, found that the Americans with Disabilities Act did not require the city to accommodate the plaintiff. Clinton appointee R. Guy Cole dissented, maintaining that Judge Gibbons's decision "essentially eviscerates the ADA's purpose and renders the ADA impotent in its ability to provide recourse for disabled individuals ... who face a form of discrimination which Congress has explicitly prohibited."<sup>58</sup> He went on to say that the majority opinion "is in direct conflict with the intent of Congress, the text of the statutes, and the corresponding regulations, and the decision also violates binding Supreme Court precedent."<sup>59</sup>
- *Laird v. Redwood Trust, LLC*.<sup>60</sup> In an opinion authored by Nixon appointee Emory Widener and joined by controversial Bush appointee Dennis Shedd, the Fourth Circuit found that a nightclub was exempt from the elevator requirement of the ADA because it did not travel the minimum of three stories. According to the majority, one of the levels in the nightclub was a "mezzanine," as defined by the ADA, and did not count toward the requirement. In dissent, consensus Bush appointee Alyson Duncan found the majority's interpretation of the statute to "undermine the purposes of the ADA" and "render[] the ADA's elevator requirement a virtual nullity...."<sup>61</sup>
- *Lutkewitte v. Gonzales*.<sup>62</sup> Judge Janice Rogers Brown wrote a concurring opinion, which took the position that an employer may not be held strictly liable under Title VII when an employee submits to a supervisor's sexual

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<sup>57</sup> 341 F.3d 474 (6th Cir. 2003).

<sup>58</sup> *Id.* at 481 (Cole, J., dissenting).

<sup>59</sup> *Id.* at 491 (Cole, J., dissenting).

<sup>60</sup> 392 F.3d 661 (4th Cir. 2004).

<sup>61</sup> *Id.* at 668 (Duncan, J., dissenting).

<sup>62</sup> 436 F.3d 248 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 846 (2006).

demands, even if the supervisor coerced the employee by threatening adverse action or otherwise using his supervisory authority coercively. Rather, Judge Brown argued that strict liability should attach only when a supervisor actually takes an adverse employment action - that is, adversely changes salary, schedule, benefits, etc. - in order to coerce an employee to submit. As Judge Brown conceded, her view contradicts the holdings of the two other circuits to have reached the issue, and is in conflict - and would therefore nullify - the opinion of the EEOC, the government agency responsible for enforcing Title VII.

- *Dunn v. Washington County Hospital*.<sup>63</sup> Nurse Dunn alleged that Dr. Coy, an OB/Gyn at the hospital where she worked, made life miserable for her and other women in the department. She further alleged that after nurses filed statements in confidence with a hospital attorney during investigation of Dr. Coy's conduct, the hospital commission made the statements available to Dr. Coy, who then pressured the nurses to change their statements by employing threats and even physically assaulting Nurse Dunn. Nurse Dunn sued, alleging sex discrimination and retaliation under Title VII, as well as other state and federal claims. While remanding for reconsideration of some of Nurse Dunn's claims, a majority of the Seventh Circuit Judge Easterbrook (Reagan), together with Bush appointee Judge Sykes, upheld summary judgment for the hospital on Nurse Dunn's Title VII retaliation claim. The majority found no retaliation on the theory that Dr. Coy's conduct consisted of threats and an assault, conduct that Judges Easterbrook and Sykes said did not "materially affect" Nurse Dunn's employment terms and was therefore insufficient to trigger Title VII protection. Judge Rovner (H.W. Bush) dissented from the majority's retaliation ruling, finding that a reasonable jury might conclude that the severity of Dr. Coy's threats and assault created a hostile work environment that, in fact, materially affected Nurse Dunn's employment terms. The Supreme Court's recent decision in *Burlington North*<sup>64</sup> appears to have undermined Judge Easterbrook's ruling. As described above, all members of the Court, save Justice Alito, held that any action - whether materially related to employment conditions or not - that would reasonably deter an employee from complaining about discrimination is prohibited under the statute.

- *Johnson v. Governor of Fla.*<sup>65</sup> Bush appointee William Pryor concurred with the *en banc* majority, which held that Florida's law disenfranchising felons did not violate the Voting Rights Act. The Court found that although the Florida law had a disparate effect on minorities, the Voting Rights Act was not intended to apply to felon-exclusion practices. Significantly, Judge Gerald Tjoflat's concurring opinion, which Judge Pryor joined, argued that the Voting Rights Act should never be held to ban a voting practice merely because of the practice's discriminatory effects. According to Judges Tjoflat and Pryor, proof

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<sup>63</sup> 429 F.3d 689 (7th Cir. 2005).

<sup>64</sup> 548 U.S. 53 (2006).

<sup>65</sup> 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 546 U.S. 1015 (2005).

of intent is always necessary. This view contradicts existing Supreme Court authority holding that proof of disparate effect may be sufficient to make out a prima facie Voting Rights Act claim.

- *Arraleh v. County of Ramsey*.<sup>66</sup> Plaintiff (Arraleh, a Black Muslim and former employee of the county) claimed the County unlawfully discriminated against him on the basis of race and national origin when it denied him a permanent position. In an opinion written by Judge Smith (Bush II) and joined by Judge Gruender (Bush II), the appeals court dismissed Plaintiff's claims, stating that Arraleh failed to present adequate evidence that the County's stated reasons for dismissing him were pretextual. Judge Heaney (Johnson) dissented emphasizing that during the six months Arraleh worked for the county he endured a steady stream of insensitive comments including being called "Mr. Cocoa," being asked if his hair was "for real," and being told that blacks are "very difficult to work with" because they are "very emotional" and "take things too personally." Moreover, Plaintiff put forth evidence that his co-workers scrutinized his activities more closely than other workers and were quick to report even slight errors. Indeed, two uninvolved co-workers came forward to testify about the disparate treatment endured by Mr. Arraleh. In Judge Heaney's opinion, such evidence raised a genuine issue of fact as to whether the county's reasons for refusing Plaintiff's application for a permanent position were actually just pretext for discrimination.

- *Standridge v. Union Pacific R.R. Co.*<sup>67</sup> Plaintiffs Brandi Standridge and Kenya Phillips, as class representatives, claimed that Union Pacific Railroad's refusal to cover contraception costs for employees enrolled in the company's health plan constituted sex discrimination under Title VII as amended by the pregnancy discrimination act (PDA). The district court agreed, citing EEOC opinions and the holdings of other courts, finding that Defendants violated Title VII, as amended by the PDA, because their health plan "treats medical care women need to prevent pregnancy less favorably than it treats medical care needed to prevent other medical conditions that are no greater threat to employee's health than is pregnancy." The appeals court reversed. In an opinion written by Judge Gruender (Bush II) and joined by Judge Bowman (Reagan), the court rejected the EEOC's interpretation of the PDA, holding that the plan does not unlawfully discriminate against women because it excludes all contraception, whether for men or for women. Moreover, Judges Gruender and Bowman concluded that the PDA does not require coverage of contraception because contraception is not "related to" pregnancy (as it prevents pregnancy from ever occurring.) In his dissent, in which he emphasized the reality that women alone bear the health consequences of unintended pregnancy, Judge Bye (Clinton) voted to affirm the lower court. In his dissent he states, "An insurance policy providing comprehensive coverage for preventative medical care, including coverage for preventative prescription drugs used exclusively by males, but fails to cover prescription contraception used exclusively by females, can hardly be called equal. It just isn't so."

(b) Immigration Rights

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<sup>66</sup> 461 F.3d 967 (8th Cir. 2007).

<sup>67</sup> 479 F.3d 936 (8th Cir. 2007).

- *Silva v. U.S. Attorney General*.<sup>68</sup> Luz Marina Silva was a Colombian seeking asylum in the United States. In Colombia, she had been verbally threatened, trailed and shot at while engaged in political campaigning. Because she was unable to decisively identify the people who menaced her, the immigration judge found that she could not attribute the threats against her to political opponents. As a result, he denied her asylum claim. Writing for a 2-1 majority, Bush appointee William Pryor upheld the immigration judge's decision, agreeing that Ms. Silva had not shown the attack was a form of political persecution. He noted that, absent being able to identify the attackers as political opponents, the existence of widespread terror in Colombia undercut her claim that the attacks on her were politically motivated. In a stinging dissent, conservative Reagan appointee Ed Carnes held that "it is not realistic to expect the targets of political assassinations to know the identity of the gunmen who shoot at them."<sup>69</sup> Harshly criticizing Judge Pryor's reasoning, he further explained that, viewed as a whole, the circumstantial evidence showed overwhelmingly that Ms. Silva was targeted for political reasons.
- *Garcia-Martinez v. Denver*.<sup>70</sup> Bush II appointee Timothy Tymkovich, joined by Reagan appointee Bobby Baldock, held that a deported Honduran was not "unavailable" within the meaning of the Rules of Evidence and thus was not allowed to submit deposition testimony as a substitute for live testimony in his lawsuit alleging excessive use of force against him by Denver police. The majority reasoned that Mr. Garcia-Martinez was not "unavailable" because he had voluntarily gone to Honduras and because he did not seek a re-entry visa. Judge Carlos Lucero pointed out in dissent that Mr. Garcia-Martinez was forced to leave the country pursuant to a deportation order - thus his departure, was not voluntary. And Judge Lucero noted that there was no doubt he would have been denied a reentry visa had he applied for one and thus he should not have been faulted for his failure to make a fruitless application for one.
- *Chedad v. Gonzalez*.<sup>71</sup> Petitioner, Adil Chedad, faced deportation and a ten-year ban on reapplying to return to the United States after he failed to leave the country within the 60-day deadline of being granted a voluntary departure. Chedad argued that his timely filing of a motion to reopen tolled the 60-day deadline, meaning he was not in violation of immigration rules and was entitled to remain in the country pending additional review of his status (complying with the voluntary departure order's 60-day deadline would have led to the dismissal of his motion to reopen- which he was statutorily entitled to file.) In an opinion written by Judge Howard (Bush II) and joined by Judge Selya (Reagan), the court denied Chedad's petition for review. Reading to the statute literally, the court concluded that Chedad's motion to reopen did not toll the 60-day deadline on his

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<sup>68</sup> 448 F.3d 1229 (11th Cir. 2006).

<sup>69</sup> *Id.* at 1246 (Carnes, J., dissenting).

<sup>70</sup> 392 F.3d 1187 (10th Cir. 2004).

<sup>71</sup> 497 F.3d 57 (1st Cir. 2007).

voluntary departure order and that, because he was now in violation of immigration law, he was subject to deportation and not entitled to any additional relief. Judge Lipez (Clinton) dissented. In his dissent, Judge Lipez emphasized the unfairness of the majority's decision: because of a minor mistake, Chedad, who showed good faith in trying to comply with immigration laws, had demonstrated good moral character for 5 years, was married to a US citizen, but will, after a decade of navigating the system, be forced to leave the country and precluded from returning for at least ten years. Moreover, Judge Lipez criticized the majority's literal statutory interpretation, arguing that by failing to look at the statute as a whole and by enforcing a literal reading of the voluntary departure provision the court effectively rewrote the plain text of the motion to reopen provision and failed to solve the inescapable conflict between the two statutory provisions. He would have "followed the majority of circuit courts and [held] that a motion to reopen, filed before the expiration of the voluntary departure period, automatically tolls the running of that period until the BIA resolves the motion."

(c) Workers' Rights

- *Anheuser-Busch, Inc. v. NLRB*.<sup>72</sup> The National Labor Relations Board found that Anheuser-Busch violated the National Labor Relations Act (NLRA) by failing to provide an employee with the union representative of his choice when it questioned him about alleged misconduct, instead providing an alternate, even though his first choice was reasonably available. A panel of the Fourth Circuit affirmed the NLRB's determination, which was based on an NLRB rule guaranteeing employees the union representative of their choice at disciplinary hearings, absent extenuating circumstances. The panel concluded that the rule was a reasonable - and thus lawful - interpretation of the NLRA, one consistent with the NLRA's purpose of giving employees the right to seek mutual aid and protection without undue employer interference. Bush appointee Dennis Shedd dissented. He found that the NLRB rule exceeded the NLRB's authority under the NLRA and would have reversed the NLRB's decision against Anheuser-Busch.

(d) Private Right of Action

- *Wisniewski v. Rodale Inc.*<sup>73</sup> Plaintiff Wisniewski sued Defendant Rodale (a book company) because Rodale sent him books he never ordered and then demanded payment for the merchandise in violation of §3009 of the Postal Reorganization Act. Rodale was forced to pay for some of the merchandise to avoid damage to his credit rating. The issue on appeal was whether §3009 contained a private right of action, i.e. can aggrieved persons use the court to enforce their right to be free from receiving unsolicited material, or can the statute only be enforced by the appropriate government agency. This issue had not been addressed by any court other than the district court in this case. In an opinion written by Judge Smith (Bush II) and joined by Judge Weis (Nixon),

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<sup>72</sup> 338 F.3d 267 (4th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004).

<sup>73</sup> 510 F.3d 294 (3d Cir. 2007).

the majority concluded that Congress did not intend §3009 to include a private right of action, ending Wisniewski's case and leaving him with no remedy. Judge Sloviter (Carter) dissented. Under her analysis, the language of §3009, which deems any unsolicited merchandise a "gift," i.e. the receiver's property, implies that an individual also receives all the other rights associated with ownership. Specifically, property rights include the right to use the courts to defend your right to that property. Plaintiff thus should have the right to seek a remedy for his losses by bringing a private right of action under §3009.

### 3. Failure to Defer to Jury Fact-Finding

- *Brown v. Parker Drilling Offshore Corp.*<sup>74</sup> Brown, a seaman, severely injured his back while working for Parker Drilling and sued for "maintenance and cure." Parker Drilling contended that recovery was barred by a legal theory requiring, among other things, proof that Brown had "intentionally concealed" medical facts - here, prior minor back strains - in his job application. A jury rejected Parker Drilling's contentions and found for Brown. On appeal, Bush appointee Edith Clement wrote for a 2-1 panel majority that overturned the verdict, essentially rejecting the jury's finding that Brown had not, in fact, willfully hidden prior, minor back strains. Clinton appointee Carl Stewart dissented. When the full Fifth Circuit declined to rehear the case en banc, Judge Stewart "vehemently" dissented again, joined by five other judges.<sup>75</sup> He called the panel opinion "an audacious exercise in violating the Seventh Amendment [which guarantees the right to trial by jury],"<sup>76</sup> that the full court's acceptance of "the panel majority's usurpation of the jury's and said constitutionally defined role as fact-finder irreparably harms the jury system in this circuit."<sup>77</sup> In a separate dissent from the denial of rehearing, Judges Wiener, King, Higginbotham, Benavides, Stewart, and Dennis, condemned both the panel majority and the full court (including not only Judge Clement, but fellow Bush appointee Priscilla Owen) in equally candid terms. They concluded that the panel "conduct[ed] a constitutionally impermissible appellate review of the facts ... despite our long-settled and well-established standard of appellate review under these circumstances."<sup>78</sup>

- *Poppy v. City of Willoughby Hills.*<sup>79</sup> City counsel employee Terri Poppy alleged that the city's mayor violated her First Amendment rights by denying her full-time employment status and taking other actions against her after she supported the mayor's opponent. Bush appointees Deborah Cook and John Rogers formed a 2-1 majority holding that the mayor could not be held liable and thus refused to allow the case to go to a jury. Since the city council

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<sup>74</sup> 410 F.3d 166 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 457 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 382 (2006).

<sup>75</sup> 444 F.3d 457 (5th Cir. 2006).

<sup>76</sup> *Id.* at 458 (Stewart, J., dissenting).

<sup>77</sup> *Id.* at 457 (Stewart, J., dissenting).

<sup>78</sup> *Id.* at 461 (Stewart, J., dissenting).

<sup>79</sup> 96 Fed. Appx. 292 (6th Cir. Apr. 8, 2004).

exercised authority over the terms and conditions of Poppy's employment, they found, the mayor could not have been responsible for Poppy's failure to receive full-time status. Nor, they said, did other "childish[]" behavior by the mayor amount to adverse employment actions sufficient to support a retaliation claim. In dissent, District Court Judge William Schwarzer (sitting by designation) disagreed, contending that the question was not whether the mayor took actions against her that adversely affected her employment, but rather whether his conduct would deter a reasonable person from engaging in protected free speech. Based on the available evidence, Judge Schwarzer concluded that a jury could find that the mayor's course of conduct might reasonably deter a person from exercising the right of free speech. This course of conduct included lobbying the city council to deny her full-time status, limiting her reimbursement for her continuing education course, instructing the finance director not to process her purchase order and to withhold her pay for time spent attending a seminar, reviewing her time sheets, demanding keys to her office, forbidding her from using the City's credit card, installing a surveillance camera outside her office, and allegedly distributing to the media an embarrassing videotape of her.

- *Canady v. Wal-Mart Stores, Inc.*<sup>80</sup> An African-American employee of Wal-Mart alleged he was subjected to racial harassment and fired because of his race. In support of his claims, he asserted that, over a short period of time, a supervisor called him a "lawn jockey," told him a black man's skin color rubs off on a towel when he sweats, and said "African-Americans all look alike." The district court granted summary judgment to Wal-Mart. Bush appointee William Riley joined Reagan appointee Roger Wollman to affirm. They held that the supervisor's conduct was not sufficiently pervasive to amount to harassment and that the employer's claim that the employee had been insubordinate showed that it was not firing him for discriminatory reasons. In dissent, Judge Lay rejected those conclusions. He concluded that the supervisor's harsh comments, coupled with the fact that the employee denied having been insubordinate, were sufficient to warrant a jury trial. Judge Lay accused the majority of "overlook[ing] that summary judgment is a disfavored standard which should seldom be utilized in employment discrimination cases. As long as a reasonable jury could find that Canady was the victim of a racially hostile work environment and was terminated under circumstances that create an inference of unlawful discrimination, we are obligated to allow both his claims to be submitted to a jury. In this case, there is more than ample evidence to submit both claims to a jury."<sup>81</sup>

Judge Lay has dissented ten times in the last two years in other recent cases dismissed before reaching a jury. In one of them, *Melvin v. Car-Freshener Corp.*, a Title VII case, he took the rare step of criticizing not only the majority's decision, but what he sees as a disconcerting circuit-wide trend:

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<sup>80</sup> 440 F.3d 1031 (8th Cir. 2006), *reh'g en banc denied*, 452 F. 3d 1020 (8th Cir. 2006).

<sup>81</sup> *Id.* at 1035 (Lay, J., dissenting) (internal citations omitted).

"Too many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain."<sup>82</sup> In another case, *Quick v. Wal-Mart Stores, Inc.*, Judge Lay similarly lamented, "Once again, our court is faced with an employment discrimination case where there are facts in dispute. Rather than submitting this conflict to a jury, the majority decides the facts as a matter of law."<sup>83</sup>

- *Wright v. Rolette County*.<sup>84</sup> Brigitte Wright, an office deputy, alleged she was forced to resign because of pervasive sexual harassment by the county sheriff, Tony Sims. Over the two year period of her employment, men in the office called Wright a "big-breasted Canadian secretary," a "dizzy bitch," and "Canadian bacon." Sheriff Sims admits to participating in this name calling and doing it in front of others. On one occasion, Sheriff Sims referred to Ms. Wright as "Canadian bacon" at a Peace Officer's Association meeting, and all in attendance heard the comment. In another incident, Sheriff Sims told Ms. Wright he could use a "blow job" after hearing her explain that some police training she had received allowed her to knock somebody out with one blow. Sheriff Sims made other comments to Wright about "rubbing [her] tits with toilet paper" and referred to her vagina as a "snapper." Sims also stroked his mustache while telling Wright he was "clearing off her seat." Ms. Wright alleged in part that the sheriff violated her rights under the Equal Protection Clause by forcing her to resign through his campaign of harassment. Despite the egregiousness of the sheriff's actions, Bush II appointee Michael Melloy, writing for a 2-1 majority, reversed the district court and granted summary judgment for the sheriff, holding that the sheriff could not be held liable because he did not create conditions that were so intolerable as to force a reasonable person to resign. Johnson appointee Gerald Heaney, writing in dissent, argued that summary judgment was improper, "due to the extreme, harassment-based humiliation she was forced to endure. ... [in] an office in which sexually explicit and offensive conduct was the order of the day."<sup>85</sup>

- *Ambrose v. Summit Polymers*.<sup>86</sup> Lisa Ambrose complained that her employer violated the Equal Pay Act. Reagan appointee David Nelson and Bush II appointee Jeffrey Sutton found that summary judgment against her was proper. They asserted that although the evidence did show that Ambrose was paid less than men with similar job duties, the employer did so due only to her less advanced job skills. In dissent, Judge Martha Craig Daughtrey argued that the case should have gone to a jury because there were inconsistencies in the employer's claim that it had no control over which employees possessed

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<sup>82</sup> 453 F.3d 1000, at 1003 (8th Cir. 2006) (Lay, J., dissenting).

<sup>83</sup> 441 F.3d 606, at 610 (8th Cir. 2006) (Lay, J., dissenting).

<sup>84</sup> 417 F.3d 879 (8th Cir. 2005), *reh'g en banc denied*, 2005 U.S. App. LEXIS 19813 (8th Cir. Sep. 14, 2005), *cert. denied*, 546 U.S. 1173 (2006).

<sup>85</sup> *Id.* at 889 (Heaney, J., dissenting).

<sup>86</sup> 172 Fed. Appx. 130 (6th Cir. Mar. 24, 2006).

better skills; and because a male employee with vastly less job experience was making about as much as Ms. Ambrose.

- *Wallace v. City of San Diego*.<sup>87</sup> Sgt. James Wallace of the San Diego Police Department sued his employer under the Uniformed Services Employment and Reemployment Rights Act (USERRA), alleging that the Department forced him to quit by repeatedly discriminating him because of his taking military leave in connection with his Navy reservist duties. It did so through a series of investigations, disciplinary proceedings, adverse actions, negative performance evaluations, supplemental performance reviews, denials of standard requests, and ultimately a termination proceeding. A jury agreed with Sgt. Wallace. The court of appeals panel upheld the jury verdict, but Bush appointee Jay Bybee dissented, arguing that no reasonable jury could have found that the police department's conduct could have forced Sgt. Wallace to quit. The majority admonished Judge Bybee several times for drawing "impermissible inference[s] from the evidence ... in favor of the SDPD,"<sup>88</sup> in violation of the legal rule that a judge should not overturn any verdict on the basis of "evidence favorable to the [defendant] that the jury [was] not required to believe."<sup>89</sup>

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<sup>87</sup> 460 F.3d 1181 (9th Cir. 2007).

<sup>88</sup> *Id.* at 1192 n.5.

<sup>89</sup> *Id.* at 1188.