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MISCELLANEOUS

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NORFOLK SOUTHERN Rwy. CO. V. JAMES N. KIRBY (02-1028)

Ruling Below: James N. Kirby v. Norfolk & Southern Ry., 11th Cir., 300 F.3d 1300, 2002 AMC 2113; 15 Fla. L. Weekly Fed. C 910

Whether a railroad's liability, if any, to a shipper for damage done to goods by the derailment of a train is limited by the "Himalaya clause" in either of two bills of lading that were issued for the transport of the goods. A Himalaya clause is a clause in a bill of lading that extends the carrier's defenses and limitations of liability under the bill to the carrier's agents and subcontractors.

Questions Presented:

1. Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.
2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

COOPER INDUSTRIES V. AVIALL SERVICES (02-1192)

Ruling Below: Aviall Servs. v. Cooper Indus., 5th Cir., 312 F.3d 677

The buyer purchased from the seller property that was contaminated with hazardous substances. To recover some of the millions of dollars it had incurred in cleanup expenses, the buyer sought contribution from the seller. Both parties conceded that they were potentially responsible parties (PRPs) under CERCLA. Holding that the buyer could not yet assert a claim for contribution under CERCLA because it had not been subjected to an action under CERCLA § 106 or 107(a), 42 U.S.C.S. §§ 9606 or 9607(a) (§§ 106 or 107(a)), the district court granted summary judgment for the seller on the buyer's CERCLA claim. On appeal, the en banc majority concluded that CERCLA § 113(f)(1), 42 U.S.C.S. § 9613(f)(1) (§ 113(f)(1)), did not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only during or following litigation commenced under §§ 106 or 107(a). Instead, a PRP could sue at any time for contribution under federal law to recover CERCLA cleanup costs.

Question Presented: Whether a private party who has not been the subject of an underlying civil action pursuant to CERCLA Sections 106 or 107, 42 U.S.C. §§ 9606 or 9607, may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), to recover costs spent voluntarily to clean up properties contaminated by hazardous substances.

CHEROKEE NATION OF OKLAHOMA v. THOMPSON (02-1472)

Ruling Below: Cherokee Nation v. Thompson, 10th Cir., 311 F.3d 1054

The tribes entered into contracts pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C.S. § 450-450(n), to operate IHS programs for their members. Although 25 U.S.C.S. § 450j-1(a) required funding for administration of the programs, including payment of CSC, § 450j-1(b) and the contracts provided that funding was subject to the availability of appropriations. The tribes claimed that they were entitled to full funding of CSC for fiscal years 1996 and 1997, but the appellate court disagreed. With respect to ongoing programs, the tribes failed to show that the IHS's claim that the available funds were exhausted was invalid. As for new or expanded contracts, the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 314, 112 Stat. 2681-288 (1998), capped the available CSC funds at \$ 7.5 million for each of the years in question, and those funds had been disbursed. Section 314 was clearly intended to have a retroactive effect on the availability of funds, and § 314 did not breach any vested rights of the tribes given that the obligation to pay CSC was expressly subject to availability of appropriations.

Questions Presented:

1. Whether the federal government can repudiate, without liability, express contractual commitments for which it has received valuable consideration, either by spending down discretionary agency appropriations otherwise available to pay its contracts, or simply by changing the law and the contracts retroactively.
2. Whether government contract payment rights that are contingent on "the availability of appropriations" vest when an agency receives a lump-sum appropriation that is legally available to pay the contracts (as is the law of the Federal Circuit under *Blackhawk Heating*) or whether the government's liability is calculated only at the end of the year after the agency has spent its appropriations on other activities (as the Tenth Circuit ruled below).

THOMPSON v. CHEROKEE NATION OF OKLAHOMA (03-853)

Ruling Below: Thompson v. Cherokee Nation, Fed. Cir., 334 F.3d 1075

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian Tribes for the administration of programs the Secretary otherwise would administer himself. The ISDA also provides that the Secretary shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other selfdetermination contract costs. 25 U.S.C. 450j-1(b).

Questions Presented:

1. Whether the ISDA requires the Secretary to pay contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were otherwise insufficient to fully fund those costs and would require reprogramming funds needed for noncontractable, inherently federal functions such as having an Indian Health Service.
2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No.105-277, 112 Stat. 2681- 288, bars respondent from recovering its contract support costs.

WILKINSON V. DOTSON (03-287)

Ruling Below: Dotson v. Wilkinson, 6th Cir., 329 F.3d 463, 2003 FED App. 0147P

This petition arises from one of the many cases considering which prisoner claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994). Heck holds that a prisoner cannot advance a claim under 42 U.S.C. § 1983 where success on that claim would “necessarily imply the invalidity of his conviction or sentence...unless...the conviction or sentence has already been invalidated.” This is Heck’s so- called “favorable termination requirement.” The Sixth Circuit concluded below that Heck’s favorable termination requirement does not cover claims challenging parole procedures because success on those claims would not necessarily guarantee speedier release, but instead would provide only a new parole hearing.

Questions Presented:

1. When a prisoner invokes § 1983 to challenge parole proceedings, does Heck v. Humphrey’s favorable termination requirement apply where success by the prisoner on the claim would result only in a new parole hearing and not necessarily guarantee earlier release from prison?
2. Does a federal court judgment ordering a new parole hearing “necessarily imply the invalidity of” the decision at the previous parole hearing for purposes of Heck v. Humphrey?

KOWALSKI V. TESMER (03-407)

Ruling Below: Tesmer v. Granholm, 6th Cir., 333 F.3d 683, 2003 FED App. 0202P, 55 Fed. R. Serv. 3d (Callaghan) 1355

The Michigan Constitution, Mich Const 1963, art I, §20, provides that a criminal defendant who pleads guilty shall not have an appeal of right and shall have a right to appointed appellate counsel “as provided by law.” A Michigan statute, Michigan Compiled Law (MCL) 770.3a, provides, with significant listed exceptions, that criminal defendants who plead guilty shall not have appointed appellate counsel for discretionary appeals for review of the defendant’s conviction or sentence.

Questions Presented:

1. Does the 14th Amendment guarantee a right to an appointed appellate attorney in a discretionary first appeal of an indigent criminal defendant convicted by a guilty plea?
2. Do attorneys have third-party standing on behalf of potential future indigent criminal defendants to make a constitutional challenge to a state statute prohibiting appointment of appellate counsel in discretionary first appeals following convictions by guilty pleas where the federal courts properly abstained from hearing the claims of indigent criminal defendants themselves?

KP PERMANENT MAKE-UP, INC. V. LASTING IMPRESSIONS, INC. (03-409)

Ruling Below: KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 9th Cir., 328 F.3d 1061, 66 U.S.P.Q.2D (BNA) 1509; 2002 Daily Journal DAR 4735

The parties, direct competitors in the permanent makeup industry, sold their pigments to the same end users. The trademark owner's "micro colors" mark, as registered, became incontestable. The district court found that the term "micro colors" was generic or descriptive, the competitor could continue to use the term, and the competitor's use was protected under the "fair use" defense under 15 U.S.C.S. § 1115(b)(4). However, the appellate court determined that defendants were entitled to summary judgment on the issue of genericness because a reasonably minded jury could not conclude from the evidence produced that "micro colors" was a generic term. Also, defendants' incontestable registration was conclusive evidence that the mark was non-descriptive or had acquired secondary meaning. Finally, summary judgment was not appropriate for deciding the fair use defense issue. The case concerned the classic fair use defense and the competitor needed to show that there was no likelihood of confusion between the competitor's use of the term and the mark. Genuine issues of material fact existed as to whether there was a likelihood of confusion.

Questions Presented:

1. Does the classic fair use defense to trademark infringement require the party asserting the defense to demonstrate an absence of likelihood of confusion, as is the rule in the 9th Circuit, or is Fair Use an absolute defense, irrespective of whether or not confusion may result, as is the rule in other Circuits?
2. Whether the classic "fair use" defense to trademark infringement requires the party asserting the defense to demonstrate an absence of likelihood of confusion (9th Circuit rule) or is "fair use" defense absolute (other circuits)?

DEVENPECK V. ALFORD (03-710)

Ruling Below: Alford v. Haner, 9th Cir., 333 F.3d 972 (2003), 2003 Cal. Daily Op. Service 5407; 2003 Daily Journal DAR 6902

Under the 4th Amendment's objective reasonableness test, an arrest is deemed "reasonable" if there is probable cause to believe that a violation of law has occurred. Two judicial circuits find an arrest reasonable if, based on an objective assessment by a reasonable officer, there is probable cause to arrest for any offense. On the other hand, at least five judicial circuits find an arrest to be reasonable only if there is probable cause to arrest for crimes "closely related" to the crime or crimes articulated by the arresting officer.

Questions Presented:

1. Does an arrest violate the 4th Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest?
2. For the purpose of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the "closely related offense doctrine", the 9th Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

PASQUANTINO V US (03-725)

Ruling Below: US v Pasquantino, 4th Cir., 336 F.3d 321

Defendants were convicted of using interstate wires for the purpose of executing a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues related to imported liquor. Defendants' primary argument was that the district court erred in denying their motion to dismiss because the common law revenue rule precluded their prosecution under the wire fraud statute, 18 U.S.C.S. § 1343. The court affirmed the convictions. The court concluded that it could not presume that when Congress enacted the wire fraud statute in 1952, it did so with the intent that any prosecution thereunder could not involve recognition or observance of the revenue laws of a foreign sovereign. Without such a presumption, the court had no basis upon which to ignore the plain language of § 1343, which language squarely encompassed defendants' conduct. The court rejected defendants' contention that a government's right to collect accrued tax revenue was not a property right for purposes of § 1343. The court also found sufficient evidence to support the convictions. Finally, the court found no error in the district court's calculation of fraud loss for sentencing purposes.

Question Presented: Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the following: (a) the lack of any clear statement by Congress to override the common law revenue rule, (b) the interests of both the Legislative and Executive Branches in guiding foreign affairs, and (c) this Court’s prior rulings concerning the limited scope of the term “property” as used in the wire fraud statute.

SMALL V. UNITED STATES (03-750)

Ruling Below: US v. Small, 3rd Cir., 333 F.3d 425

The statute in question, § 922(g)(1) of Title 18, United States Code, makes it unlawful: (g) . . . for any person (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year: . . . to possess in or affecting commerce, any firearm. In the instant matter, Petitioner’s only conviction occurred in Okinawa, Japan, and it was this Japanese conviction that served as the predicate felony in this § 922(g)(1) prosecution. The Petitioner filed a motion to dismiss the indictment arguing that foreign felonies were not intended to count as the term “in any court” means any court in the United States. The motion was denied. While the 3rd Circuit’s affirmance of the lower court is consistent with a 1989 decision of the 4th Circuit and a 1986 decision of the 6th Circuit, the 10th Circuit in 2000 and the 2nd Circuit, on August 27, 2003, held that foreign convictions do not count. Consequently, a clear conflict exists among the five Circuit Courts which have addressed the issue.

Question Presented: Whether the term “convicted in any court” contained in 18 U.S.C. § 922(g)(i) includes convictions entered in foreign courts.

STEWART V. DUTRA CONSTRUCTION COMPANY (03-814)

Ruling Below: Stewart v. Dutra Constr. Co., 1st Cir., 230 F.3d 461, 2001 AMC 1116

Petitioner Willard Stewart was hurt doing his work as a marine engineer assigned to respondent Dutra Construction Company’s dredge Super Scoop. Stewart seeks personal injury damages from Dutra under the Jones Act, 46 U.S.C. App. § 688(a), which affords “any seaman” a negligence action against his employer. To qualify for “seaman” status under the Jones Act, a worker must have an “employment-related connection to a vessel in navigation.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 357 (1995).

Question Presented: What is the legal standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act “vessel”?

CITY OF SHERRILL, NY v ONEIDA INDIAN NATION OF NEW YORK (03-855)

Ruling Below: Oneida Indian Nation of New York v. City of Sherrill, New York, 2nd Cir., 337 F.3d 139

The city contended that the properties at issue were taxable because they were not currently located within Indian country. The city asserted that the properties were not in Indian country because they were neither set aside by the federal government for Indian use nor placed under federal superintendence. Both of these arguments rested on the claim that the land was no longer in an Indian reservation. This claim was grounded in the 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), which the city contended formally disestablished the tribal reservation. Construing the Buffalo Creek Treaty liberally and resolving all ambiguities in the Indian tribe's favor, the appellate court determined that neither the text nor the circumstances surrounding passage and implementation of the Buffalo Creek Treaty established a clear congressional purpose to disestablish or diminish the Indian tribe's reservation. Because the tribe's reservation was not disestablished and because the contested properties were located within that reservation, the city could neither tax the land nor evict the Indian tribe.

Questions Presented:

1. Whether alleged reservation land is Indian Country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("Venetie") where the land was neither set aside by the federal government nor superintended by the federal government.
2. Whether alleged reservation land was set aside by the federal government for purposes of Indian Country analysis under 18 U.S.C. § 1151 and Venetie where the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment.
3. Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation.
4. Whether alleged reservation land may (i) remain Indian Country or (ii) be subject to the protections of the Non-Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Non-Intercourse Act protection ceases to exist.

COMMISSIONER OF INTERNAL REVENUE V. BANKS¹ (03-892)
COMMISSIONER OF INTERNAL REVENUE V. BANAITIS² (03-907)

Rulings Below: ¹Banks v. Comm’r, 6th Cir., 345 F.3d 373, 2003 FED App. 0347P, 2003-2 U.S. Tax Cas. (CCH) P50,675; ²Banaitis v. Comm’r, 9th Cir., 340 F.3d 1074, 2003-2 U.S. Tax Cas. (CCH) P50,638, 92 A.F.T.R.2d (RIA) 5834

¹The tax court found that the taxpayer could not exclude from gross income money he received pursuant to an out-of-court settlement, including the portion thereof his attorney had received as a contingency fee. The tax court also found that, based upon the “duty of consistency” rule, the taxpayer was not entitled to an income tax deduction for payments made to his former spouse as part of their divorce settlement. The appellate court determined that the taxpayer’s settlement proceeds were not excludable from gross income under 26 U.S.C.S. § 104(a)(2). Although some of the taxpayer’s claims were based upon tort or tort-type rights, the taxpayer failed to meet his burden of showing that his 42 U.S.C.S. §§ 1981 and 1983 claims were settled on account of his personal injuries. However, the portion of the settlement paid to the taxpayer’s attorney under a contingency fee arrangement was excludable from income; the anticipatory assignment of income doctrine did not apply to the fee paid to the attorney. Also, remand was necessary as to application of the “duty of consistency” rule because the tax court made no finding that the taxpayer engaged in a misrepresentation.

²The taxpayer’s settlement arose from his employers’ improper termination of his employment and interference with his employment relationship. The “economic” damage portion and the punitive damage portion of the settlement recovery did not satisfy both aspects of the conjunctive test under § 104(a)(2), and 26 C.F.R. § 1.104-1(c) (1999). Under Oregon law, the claims sounded in tort, but the economic and punitive damages were not awarded “on account of” personal injuries. The personal injuries alleged did not cause the taxpayer’s wage loss. Rather, his wage loss was caused by the improper termination and interference. The punitive damage award was not causally related to his personal injuries; rather, it was predicated on the defendants’ tortious conduct. Thus, the economic and punitive damage awards should have been included in his gross income. But, under Oregon law, contingent attorney’s fees paid directly to the attorney by the employers did not constitute a part of the taxpayer’s gross income. The application of the alternative minimum tax did not violate the taxpayer’s right to due process; it did not nullify the outcome of the jury trial.

Question Presented: Whether, under Section 61(a) of the Internal Revenue Code, 26 U.S.C. 61(a), a taxpayer’s gross income from the proceeds of litigation includes the portion of his damages recovery that is paid to his attorneys pursuant to a contingent fee agreement.

WHITFIELD V US (03-1293)

HALL V US (03-1294)

Ruling Below: US v. Hall, 11th Cir., 349 F.3d 1320, 17 Fla. L. Weekly Fed. C 34

Given the absence of any language in 18 U.S.C.S. § 1956(h) requiring proof of an overt act, the court found that an overt act was not an essential element for conviction of conspiracy to commit money laundering. Accordingly, the jury instructions approved by the district court were proper. The court found that the evidence in the record to be insufficient to support a finding that the relationships, if any, between defendant and the victims were of the type to put defendant in any position of trust under the U.S. Sentencing Guidelines Manual. Defendant's status as a pastor did not necessarily create a personal trust relationship between himself and the victims. None of the victims came to defendant's roadshows for spiritual guidance; rather, all of them testified that they came to invest money, not because defendant was a pastor, but because they wanted to "double their money." Therefore the two-level enhancement under U.S. Sentencing Guidelines Manual § 3B1.3 was in error.

Question Presented: Whether the Supreme Court should resolve the split between the federal circuit courts on the issue of whether the commission of an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h), conspiracy to commit money laundering?

ROUSEY V JACOWAY (03-1407)

Ruling Below: Rousey v. Jacoway (In re Rousey), 8th Cir., 347 F.3d 689, 31 Employee Benefits Cas. (BNA) 1622, Bankr. L. Rep. (CCH) P78,934

The debtors filed a voluntary petition for relief under Chapter 7 of the U.S. Bankruptcy Code. Before the petition was filed, the debtors had established IRAs in the form of deposit accounts from funds rolled over from former employers' pension plans. Neither debtor had deposited additional funds into the IRAs and the debtors had the option of withdrawing funds at any time subject to early withdrawal tax penalties. Although appellee trustee did not object to a portion of the IRAs being categorized as exempt under 11 U.S.C.S. § 522(d)(5), the bankruptcy court sustained the trustee's objections to the remaining portions of the IRAs being categorized as exempt under 11 U.S.C.S. § 522(d)(10)(E) and the Panel affirmed. Affirming, the court held that the IRA funds could not be considered exempt under 11 U.S.C.S. § 522(d)(10)(E), under the law of the Eighth Circuit, when the debtors admitted to having unlimited access to the funds, and the fund withdrawals were thus not limited to circumstances of illness, disability, death, age, or length of service, as required by § 522(d)(10)(E).

Question Presented: Should this Court grant certiorari to resolve the three-way circuit conflict over whether and to what extent Individual Retirement Accounts (IRAs) are exempt from a bankruptcy estate under 11 U.S.C. 522(d)(10)(E)?

MUEHLER V MENA (03-1423)

Ruling Below: Mena v. City of Simi Valley, 9th Cir., 332 F.3d 1255, 2003 Cal. Daily Op. Service 5412, 2003 Daily Journal DAR 6892

The jury found that the officers used excessive force and that they restrained the citizen for an unreasonable period of time during the search of her home. The officers argued that the district court erred in ruling that they were not entitled to qualified immunity. The court affirmed the judgment, finding that a U.S. Supreme Court decision rendered during trial did not change the qualified immunity law with respect to the facts in the instant case. The court determined that the citizen alleged a violation of her constitutional right under the Fourth Amendment to be free from unreasonable government seizures. The court found that the detention was objectively unreasonable and that it was unnecessarily degrading and prolonged. Further, the officers' questions regarding citizenship status and the search of the citizen's purse constituted an undue invasion of privacy. The court also concluded that the right to be free from such type of search was clearly established at the time of the search. The court found no error in the jury instruction on the claim of unlawful detention. Finally, the court found substantial evidence to support the jury's award of punitive damages.

Questions Presented:

1. Whether, in light of this Court's repeated holdings that mere police questioning does not constitute a seizure, the 9th Circuit erred in ruling that law enforcement officers who have lawfully detained an individual pursuant to a valid search warrant engage in an additional, unconstitutional "seizure" if they ask that person questions about criminal activity without probable cause to believe that the person is or has engaged in such activity.
2. Whether, in light of this Court's ruling in *Michigan v. Summers*, 452 U.S. 692 (1981), that a valid search warrant carries with it the implicit authority to detain occupants while the search is conducted, the 9th Circuit erred in ruling that a two to three hour detention of the occupant of a suspected gang safe-house while officers searched for concealed weapons and other evidence of a gang-related drive-by shooting was unconstitutional because the occupant was initially detained at gun-point and handcuffed for the duration of the search.

MELVIN T SMITH V COMMONWEALTH OF MASSACHUSETTS (03-8661)

Ruling Below: Commonwealth v. Smith, Mass. App. Ct., 58 Mass. App. Ct. 166, 788 N.E. 2d 977

Defendant argued that the trial judge erred by reconsidering his ruling on defendant's motion for a required finding of not guilty after granting it because jeopardy terminated as to that charge and thus, the decision could not be reversed regardless of whether the judge was factually or legally in error. The appellate court concluded that double jeopardy protections were not violated because the judge's correction did not require a second proceeding. In addition, the court noted that the requirement that the Commonwealth present proof of every element of the crime prior to

deciding whether to rest or introduce other evidence was protected since no additional evidence was produced by the Commonwealth after defendant's motion was made. The court also noted that defendant was not prejudiced by the change in ruling since the jury was not aware of the prior ruling. Next, the appellate court disagreed with defendant that Mass. Gen. Laws ch. 269, §10(d) did not permit convictions from other jurisdictions to serve as predicate offenses for his possession offense. Finally, as to defendant's claims of prosecutorial misconduct, the appellate court concluded that they were unwarranted.

Questions Presented:

1. Should this Court grant certiorari to directly review Smith's case and decide the question that, constrained by the habeas corpus standard of review, it did not reach in the recent case of Price v. Vincent? That is, whether the double jeopardy clause's prohibition against successive prosecutions is violated where the judge unequivocally rules that the defendant is not guilty because the government's evidence is insufficient but later reverses her finding of not guilty?
2. There is a split of opinion among the United States Courts of Appeals and among the state courts on the question of whether, in similar situations, trial judges violate the double jeopardy protection against successive prosecution by withdrawing an alreadygranted verdict of not guilty. Should this Court grant certiorari to clarify its jurisprudence?

RHINES V WEBER (03-9046)

Ruling Below: Rhines v. Weber, 8th Cir., 346 F.3d 799

South Dakota inmate Charles Russell Rhines filed this petition for a writ of habeas corpus, alleging that numerous constitutional errors infected his 1993 first degree murder conviction. The district court entered an order declaring that Rhines failed to exhaust some federal claims and that non-futile state court remedies may still be available to him. The court stayed all claims pending exhaustion of state court remedies for the unexhausted claims. Warden Douglas Weber appeals. We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas [**2] petition in abeyance pending exhaustion of state court remedies. *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998). This court has recently addressed the question whether habeas claims may be stayed while the habeas petitioner seeks state court remedies on claims that may be unexhausted. *Akins v. Kenney*, 341 F.3d 681, slip op. at 7-9 (8th Cir. 2003). *Akins* precludes the district court from staying Rhines's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted. However, *Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted. Nor did *Akins* preclude a petitioner from electing to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by respondent that the unexhausted claims are procedurally barred. These issues are better addressed initially in the district court. Accordingly, the district court's order of July 3, 2002 is vacated, and the case is remanded for further consideration.

Questions Presented:

1. Can a federal court stay a section 2254 habeas corpus petition which includes exhausted and unexhausted claims, when the stay is necessary to permit a petitioner to exhaust claims in state court without having the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA) bar the right to a federal petition?
2. Is the 8th Circuit correct that the dismissal of a mixed section 2254 petition is mandated by *Rose v. Lundy*, or are the appeals courts for the 1st, 2nd, 6th, 7th and 9th circuits correct in following the separate concurrences of Justices Souter and Stevens in *Duncan v. Walker* that a stay of an otherwise timely-filed federal petition is permissible in light of the AEDPA?

SHEPARD V US (03-9168)

Ruling Below: US v. Shepard, 1st Cir., 348 F.3d 308

The Armed Career Criminal Act [18 U.S.C. §924(e)] imposes a mandatory minimum sentence of 15 years imprisonment for a person convicted of being a felon in possession of a firearm [18 U.S.C. § 922(g)] where that person has previously been convicted of three violent felonies or serious drug offenses or both. *United States v. Taylor*, 495 U.S. 575 (1990) held that Congress intended a sentencing court to employ a categorical approach to determine whether a defendant's prior convictions qualify as predicates for this sentence enhancement, looking only to the fact of conviction and the elements of the statute of conviction, or to the charging document and the jury instructions to determine whether all of the elements of generic burglary (an enumerated violent felony) were necessarily adjudicated in the state court.

Questions Presented:

1. Whether, where the defendant has pleaded guilty to a nongeneric charge of burglary brought under a nongeneric statute, there is no contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by Taylor's categorical method of application or may instead be required to conduct an inquiry - including an evidentiary hearing - into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed that generic burglary was at issue?
2. If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

HOWELL V MISSISSIPPI (03-9560)

Ruling Below: Howell v. State, Miss., 860 So. 2d 704

Defendant raised 27 issues for review. The supreme court found that defendant did not demonstrate an abuse of discretion by the trial court's denial of the motion for change of venue. Nor did it err in denying defendant funds for his defense to hire an investigator, a jury consultant, limited daily transcripts, additional counsel, and additional psychiatric evaluation. The circuit clerk complied with the statutory requirements in drawing and selecting the jury. The trial court did not err by allowing the State to exercise its peremptory challenges on two black members of the venire as race neutral reasons for striking them were provided. Denial of defendant's request to conduct individual sequestered voir dire was proper. The eyewitness identification was properly not suppressed, as the lineup was not suggestive. The death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence was more than sufficient to support the jury's finding of the two statutory aggravating circumstances: a capital offense committed in the course of a robbery for pecuniary gain and by person under a sentence of imprisonment, probation, or parole.

Question Presented: Whether defendant's death sentence should be overturned?

The Year Rehnquist May Have Lost His Court

The New York Times

July 5, 2004

Linda Greenhouse

Although it has been 10 years since its membership last changed, the Supreme Court that concluded its term last week was, surprisingly and in important ways, a new court.

It is too soon to say for sure, but it is possible that the 2003-4 term may go down in history as the one when Chief Justice William H. Rehnquist lost his court.

The cases decided in the term's closing days on the rights of the detainees labeled "enemy combatants" by the Bush administration provided striking evidence for this appraisal. The court ruled that foreigners imprisoned at Guantanamo Bay, Cuba, as well as American citizens held in the United States are entitled to contest their classification before an impartial judge.

The surprise lay not in the outcome: it was scarcely a great shock, except perhaps to the administration, that a court preoccupied in recent years with preserving judicial authority would reject the bold claim of unreviewable executive power at the core of the administration's legal arguments. Rather, what was most unexpected about the outcome of the cases was the invisibility of Chief Justice Rehnquist.

It is a remarkable development. Since his promotion to chief justice 18 years ago, his tenure has been notable for the sure hand with which he has led the court, marshaling fractious colleagues not only to advance his own agenda but also to protect the court's institutional prerogatives.

Four years ago, for example, the court reviewed a law by which Congress had purported to overrule the Miranda decision, a precedent Chief Justice Rehnquist disliked and had criticized for years. But in the face of Congress's defiance, he wrote a cryptic opinion for a 7-to-2 majority that said no more than necessary about Miranda itself but found common ground in making clear that it was the court, not Congress, that has the last word on what the Constitution means.

This year, there was every reason to suppose the chief justice would want to shape the court's response to the war on terrorism. His 1998 book on the history of civil liberties in wartime reflected his extensive knowledge and evident fascination with the subject by which the term, if not his entire tenure, was likely to be known. If there was a message to be delivered from one branch of government to another, Chief Justice Rehnquist figured to be the one to deliver it.

Yet the Guantanamo case found him silently joining Justice Antonin Scalia's dissenting opinion as Justice John Paul Stevens explained for the 6-to-3 majority why the federal courts have jurisdiction to review the status of the hundreds of foreigners detained there.

In the case of Yaser Esam Hamdi, the American-born Saudi taken from the battlefield in Afghanistan and held since 2002 in a military prison, Chief Justice Rehnquist was among the eight justices who found the open-ended detention improper for either constitutional or statutory reasons.

But his was not among the several voices with which the court spoke. He was a silent member – perhaps even a late-arriving one – of Justice Sandra Day O'Connor's plurality opinion.

The implication is not that Chief Justice Rehnquist, who turns 80 on Oct. 1, has lost a step. Nor does he show any interest in leaving the court, which he joined in 1972 at the age of 47. A few days ago, in fact, he hired law clerks for the term beginning in October 2005, and some people believe he is aiming to top the record of 36 years set by Justice William O. Douglas, or at least to equal the 34-year tenure of his judicial hero, Chief Justice John Marshall.

Rather, it appears that while he has stood still, the court's center of gravity has moved away from him. One statistic is particularly telling. There were 18 cases this term decided by five-member majorities (17 were 5-to-4 decisions and one, the Pledge of Allegiance case, was 5 to 3 but would surely have been 5 to 4 had Justice Scalia participated; he would certainly have agreed with Chief Justice Rehnquist, in the minority, that the court should rule that "under God" posed no constitutional problem). Of the 18 cases, Chief Justice Rehnquist was in the majority in only eight.

That contrasts sharply with the chief justice's notably successful term two years ago, when he was in the majority in 15 of 21 5-to-4 decisions. A year ago, he was in the majority half the time, in 7 of 14 cases with 5-to-4 votes, and was on the losing side in the most important of those cases, the decision that upheld affirmative action at the University of Michigan. He was also on the losing side in the Texas gay rights case, in which the court voted 6 to 3 to overturn the state's criminal sodomy law.

Those were the first stirrings of what accelerated during the term that began Oct. 6. The chief justice was in dissent in most major cases, from the expedited ruling in December that upheld major provisions of the new campaign finance law, until the two decisions last Tuesday, the term's final day, blocking enforcement of an Internet pornography law and taking a generous view of federal court jurisdiction under the Alien Tort Statute to hear foreign human rights cases. Also last week, he dissented from the court's refusal to authorize a police interrogation tactic designed to induce suspects to confess despite receiving their Miranda warnings.

Further, the Rehnquist court's federalism revolution, with its expansive approach to state sovereignty and correspondingly limited view of Congressional power, appeared this term to stall in its tracks. The chief justice was on the losing side in the term's major federalism case, the 5-to-4 decision in *Tennessee v. Lane* rejecting state immunity from suit under a provision of the Americans With Disabilities Act.

A number of other cases had federalism overtones that a majority of the court either rejected or ignored. In the case that struck down the sentencing guidelines in the state of Washington, Justice Anthony M. Kennedy objected in dissent that the court was failing to give the states proper respect for their legislative choices on criminal justice. Chief Justice Rehnquist also dissented in that case, which although just over a week old has already left criminal sentencing in turmoil around the country.

Opponents of the McCain-Feingold campaign finance law objected on state's rights grounds to limits on the fund-raising abilities of political parties at the state level. In upholding the law, over Chief Justice

Rehnquist's dissent, the court barely acknowledged the federalism argument.

The chief justice tried and failed to use a Pennsylvania redistricting case this term to overturn a 1986 precedent, to which he had strongly objected at the time, that gave courts authority to review claims of partisan gerrymandering. While there were five votes to reject the particular gerrymander complaint, one of the five, Justice Kennedy, refused to go along completely, instead writing a concurring opinion that kept the prospect of a successful gerrymander suit alive for future cases.

The court decided 73 cases with full opinions during the term. Of the major cases, Chief Justice Rehnquist wrote the majority opinion in two. One was the third of the terrorism detainee cases, that of Jose Padilla, an American arrested at O'Hare International Airport in Chicago on suspicion of being part of a terrorist plot, who has been held in a military prison for the last two years without access to court. The decision postponed resolution of the case by holding that Mr. Padilla's lawyer should have filed his habeas corpus petition in South Carolina rather than in New York.

The second of the chief justice's major opinions came in an important church-state case, *Locke v. Davey*. The question was whether a state that underwrites college scholarships for secular study must also subsidize students who want to study for the ministry. The argument for the religious subsidies built on Chief Justice Rehnquist's opinion for the court two years ago in a school voucher case from Ohio, holding that it did not violate the Constitution for states to give parents vouchers for religious school tuition as part of a general "school choice" plan.

As a practical matter, the future of the school-choice movement depended on the answer to the question *Locke v. Davey* brought to the court: if vouchers were permissible, were they also constitutionally required? Writing for a 7-to-2 majority, the chief justice's answer was no. "The state has merely chosen not to fund a distinct category of instruction," one that was "not fungible" with ordinary secular studies, he said over biting dissents from Justices Scalia and Clarence Thomas.

Largely overlooked in the drama of the term's higher-profile cases, *Locke v. Davey* was an important decision, indicative of the struggle now going on within the court over how far to push some of the principles that the conservative majority has established over the last 10 years or so.

In this instance, although the consequences of turning permissible vouchers into required vouchers would have been profoundly unsettling, the court's recent insistence on an equal place for religion at the public table provided at least a plausible basis for that outcome. Instead, the majority looked at the consequences of carrying the recent precedents to their logical conclusion, and stopped short.

In fact, as *Locke v. Davey* demonstrates, the most consequential debate on the court today may be not so much over first principles, but over how far to carry those principles. That the chief justice was so often on the losing side this term may not mean that those who once agreed with him have changed their minds, but that they disagree over what to do next.

In *Locke v. Davey*, the stopping point appeared clear to a broad majority of the court. In the Tennessee federalism case, by contrast, while the chief justice wanted to

continue pressing the boundaries of state sovereignty to immunize the state from a lawsuit by a man who could not reach a second-floor county courtroom in his wheelchair, Justice O'Connor decided that *Tennessee v. Lane* was not the case in which to push sovereign immunity to its logical conclusion.

The outcome was reminiscent of the court's decision a year ago in the Michigan affirmative action case. Justice O'Connor, long skeptical of all official policies that take account of race, joined Justices Stevens, Ruth Bader Ginsburg, David H. Souter and Stephen G. Breyer to uphold the law school's admissions plan, essentially on the ground that diversity was good for the country.

Pragmatism rather than doctrine seems to be the order of the day at the court now. Justice O'Connor, perhaps the court's leading pragmatist, cast only five dissenting votes in the entire term, far fewer than anyone else, and was in the majority in 13 of the 18 most closely decided cases, more often than any other justice. She formed strategic alliances with other justices, for example writing an

unusual joint opinion with Justice Stevens that upheld the central portions of the campaign finance law.

Justice Stevens displayed his own strategic skills, finely honed during a 29-year tenure that has made him the senior associate justice, in a position to assign the majority opinion in all cases where the chief justice is in dissent. He tailored his majority opinion in *Tennessee v. Lane* to Justice O'Connor's comfort level, for example, and crafted a procedural opinion that removed the highly sensitive Pledge of Allegiance case from the court's docket with surgical precision, leaving no precedent behind. At 84, his intellectual energy appears undimmed, and he told a gathering of his former law clerks a few weeks ago that he has no retirement plans.

So when the new term begins on Oct. 4, the same justices will reassemble for a highly unusual 11th year together. The juvenile death penalty and medical marijuana are among the cases already on a docket that may continue pushing these nine people, so familiar to each other, in new directions.

All Hail the Supreme Court: The Nine Justices Agree That They Know What is Best

Legal Times
July 19, 2004
Stuart Taylor, Jr.

Liberals say the Supreme Court is too conservative. Conservatives say it's too liberal. But many experts in both camps agree that the nine current justices have taken us too far down the road of judicial supremacy.

In an end-of-term speech on July 9, outgoing Solicitor General Theodore Olson told the conservative Federalist Society that this may be "the most powerful Court in the nation's history." While the justices "have deep disagreements about how the country should be governed," observed D.C. appellate lawyer Miguel Estrada at a July 12 Heritage Foundation forum, "they all agree that they should be governing the country." The Court "seems incapable of admitting that some matters – any matters – are none of its business," complained Justice Antonin Scalia in a June 29 dissent.

Nor is this just conservative sour grapes. At the same Heritage forum, Walter Dellinger III, a leading Democratic scholar who was President Bill Clinton's acting solicitor general in 1996 and 1997, enthusiastically seconded Scalia's complaint and added, "This Court puts itself at the center of the constitutional universe.... It's rather striking, the Court's lack of deference to anyone else."

No Deference to Congress. Especially striking is the Court's pattern of treating Congress, in which the Constitution vests "all legislative powers," as a junior partner in the law-making process.

Take the June 29 decision in *Ashcroft v. American Civil Liberties Union*, barring enforcement for now [and probably forever] of the Child Online Protection Act of 1998, in which Congress required Internet sellers of hard-core commercial pornography to verify that each online visitor was 18 or older before letting the visitor see their smut. The criminal statute was adopted after the justices in 1997 had struck down the much broader Communications Decency Act of 1996. The 1998 law reflected Congress' painstaking effort to "meet each and every criticism of the predecessor statute that this Court set forth, [and] protect children from exposure to obscene professional pornography without obstructing adult access to material that the First Amendment protects," in the words of Justice Stephen Breyer's dissent.

But that did not stop the majority, in an opinion by Justice Anthony Kennedy, from nullifying the 1998 law unless and until the government can prove that no "less restrictive" protections for children could possibly be devised. "The Court in effect gave Congress the finger," observes Paul Rosenzweig of the Heritage Foundation.

The same day, the justices ruled 6-3 that federal courts may entertain lawsuits by foreigners claiming to be victims of severe human rights violations anywhere in the world. Justice David Souter's majority opinion in *Sosa v. Alvarez-Machain* styled this as an interpretation of the long-dormant Alien Tort Statute of 1789. He followed the reasoning [while disapproving of some results] of lower courts that, since about

1980, have read the statute as authorizing international human rights suits – even though Congress clearly had no such intent, either in 1789 or since. Scalia’s dissent called this “the latest victory for [the Court’s] ‘Never Say Never’ Jurisprudence.”

No Deference to the President. The Court on June 28 rejected by a stunning 8-1 vote President George W. Bush’s claim of power to hold U.S. citizens suspected of being “enemy combatants” incommunicado for years, perhaps decades, with no meaningful judicial review.

The decision in *Hamdi v. Rumsfeld* was basically right, in my view. But the justices gave disturbingly short shrift to the government’s argument against giving such detainees immediate access to lawyers, lest the attorneys disrupt interrogations and thus “interfere with the military’s compelling interest in gathering intelligence to further the war effort.”

In *Rasul v. Bush*, handed down the same day, the Court squashed by 6-3 Bush’s argument that no court could question his detention of non-American prisoners overseas, including the hundreds held at the Guantanamo Bay naval base. This prompted Scalia to complain in dissent that the Court had extended its powers “to the four corners of the Earth,” risking “conflict between judicial and military opinion highly comforting to enemies of the United States.”

No Deference to the States. Scalia broke some furniture himself in a 5-4 decision on June 24 that threw the sentencing systems of about a dozen states into chaos, along with the federal government’s own congressionally ordained sentencing guidelines. Scalia’s opinion in *Blakely v. Washington* held that the Sixth Amendment right to trial by jury bars use of judicial fact-

findings to increase any defendant’s sentence beyond the ordinary range for his crime.

This time it was Kennedy’s turn to accuse Scalia of dissing democracy, by engineering “the destruction of a sentencing scheme devised by democratically elected legislators.” Justice Sandra Day O’Connor’s separate dissent attacked the potentially “disastrous” Scalia opinion for imposing a “rigid rule that destroys everything in its path,” including “over 20 years of sentencing reform” by states and Congress. So much for judicial restraint.

No Deference to the Court’s Own Precedents. Administration lawyers had initially been confident of winning the Guantanamo case because under a 1950 Supreme Court precedent, *Johnson v. Eisentrager*, federal courts lacked jurisdiction to hear petitions from foreigners held by the government outside the United States. But the administration underestimated the ingenuity of Justice John Paul Stevens. He wrote for the majority that *Eisentrager* had been effectively overruled by a 1973 decision, *Braden v. 30th Judicial Circuit Court of Kentucky*, which did not even mention it. This was, as Scalia wrote for the dissenters, “implausible in the extreme.”

All nine justices complain when high court precedents that they like are disregarded. But not one is consistently willing to “accept legal precedent as binding” when it stands in the way of what he or she wants to do, Estrada said at the Heritage forum. They “really don’t care about acting like a court [and thus are] not really doing [their] job,” he asserted. Other experts add that by deciding many cases on such narrow grounds as to leave unclear what the Court will do when facing similar issues in the

future, the justices shirk their cardinal duty to tell litigants and lower courts what the law is.

Touch Not The Pledge

In short, none of the nine consistently practices judicial restraint. And when the justices do invoke that ideal, it is often an exercise in disingenuousness. Take the 5-3 decision on June 14 in *Elk Grove Unified School District v. Newdow*, which ducked the merits of the case in which the U.S. Court of Appeals for the 9th Circuit had ruled that “under God” must be dropped when the Pledge of Allegiance is recited in public schools.

The case presented a dilemma for the four liberals and Kennedy. A decision striking out “under God” would have provoked an election-year firestorm, perhaps even a constitutional amendment. But that was the outcome required by any honest reading of the most relevant precedent, a 1992 decision titled *Lee v. Weisman*, in which Kennedy had tortured language and logic to find that a brief, nondenominational, nonparticipatory prayer by a rabbi at a middle-school graduation amounted to unconstitutional “compulsion” of all students to “participate in a religious exercise.”

Stevens escaped this box by seizing upon a dispute between the atheist father, who had brought the lawsuit to bar his daughter’s school from reciting “under God,” and the girl’s mother, who disagreed. To avoid intruding into this family law dispute, wrote Stevens for the majority, the lower courts should have invoked the “prudential standing” doctrine to dismiss the case. The Stevens twist on this doctrine was so

contrived that it’s hard to imagine any of the majority justices taking it seriously had they not been so desperate to hide the radical implications of their own graduation-prayer precedent.

Yet We Listen

Given all these complaints from critics across the ideological spectrum, why do we put up with these self-aggrandizing judicial legislators? Why do they outpoll Congress and the executive in terms of public confidence? Why has no modern president ever dared defy them?

One reason is that all nine justices are credited, even by critics, with being highly capable and honorably motivated by their visions of the public good, rather than by pursuit of votes, campaign money, or self-enrichment. A second reason is that the two who control the outcomes of the biggest cases, O’Connor and Kennedy, have moderate political philosophies and never stray very far from the mainstream of public opinion – or, at least, of elite opinion. A third reason is that the justices provide an indispensable check against abuses by the states and the elected branches.

Congress has largely abdicated its own duty to restrain the wartime president. So the Court stood alone against Bush’s frightening claim of power to seize anyone in the world, at any time, and hold him incommunicado, perhaps for decades, with no semblance of due process. A more restrained or timid group of justices might have acquiesced.

For myself, I hate the Court’s relentless aggrandizement of its own powers – except when I like it.

Off the Bench

The New York Times

August 29, 2004

Dahlia Lithwick

And with a blink, summer's over. A chill touches the air, sunlight softens to gold, and brightly colored war protesters begin to drop from the trees in Central Park.

Presidential candidates are everywhere – in our stadiums and town halls, clogging up our parks and porches, our televisions and our computer screens. Every baby is kissed; every hand shaken. They beg us to know them, to peer inside their hearts and really understand who they are.

Which makes it all the more arresting that nine Supreme Court justices have just spent another summer like vacationing Greek gods, frolicking among us, blending right in.

“What do U.S. Supreme Court justices do each summer?” you ask. A good question, raising, implicitly, a better question: What do they do, ever? Where do they live? What do they read? What are their favorite shows? Do they speak in declarative sentences around the dinner table – or only in strings of Socratic hypotheticals?

The Supreme Court is by far the most mysterious branch of government – its members glimpsed only rarely, like Bigfoot, crashing through the forest at twilight. The court is the one branch that operates in near secrecy – no cameras, no tape recorders, no explanations, no press conferences, rare interviews, no review by other branches. The most powerful branch is also the most enigmatic. They love it that way.

So how do the justices spend their summers? Some travel to exotic locales, where they get

paid lots of money to teach at fabulous seaside summer law school programs. Justice Ruth Bader Ginsburg taught at Hofstra University law school's program in Nice, France, this summer, while Chief Justice William H. Rehnquist taught at Tulane's program at Cambridge.

What else do they do with their summers? Since all four justices over age 70 are hostages to their mutually-assured-destruction refusal to retire (each unwilling to give an opposing president the chance to fill a seat), they probably do lots of resting. Even one extra day on that court may mean casting the deciding vote in *Bush v. Kerry* – a case poised to detonate over the legal landscape this winter, the moment the recount starts in Ohio.

Shunning travel and speeches, Justice David Souter – the man who says cameras will be rolled into the Supreme Court only over his dead body – hightails it home to New Hampshire each summer, where, like Punxsutawney Phil's New England cousin, he'll hide out until the first Monday in October. Justice Souter will under no circumstances be found in a Louisiana duck blind, where Justice Antonin Scalia is rumored to spend his summers hunting with his pal Dick Cheney.

Moreover, that rumor is totally unfair to Justice Scalia.

Duck season in Louisiana doesn't start until November.

Perhaps the most emblematic justice is Clarence Thomas, who spends much of his summer touring the country in a used bus that's been converted into a luxury motor home. That bus is the perfect symbol for a man who won't read newspapers, or engage audiences that don't share his ideology. It allows him to roam the country, hermetically sealed and unreachable inside a moving fortress.

Ultimately, that's what members of the Supreme Court do each summer – they roam the world, safe with their secrets, secure in their lifetime appointments, unaccountable and unavailable to voters or presidents.

And just as the presidential candidates beg you to know them – to look deep in their eyes and see their souls – the Supreme Court justices beg to be forgotten. They still

believe that their sole authority rests in the myth that they are oracles. That's why it's not in their interest to remind you that you'll be picking the next Supreme Court with your vote come November. We forget that appointing judges may be the single most important thing a president does – it's easy to forget it when they've fixed it so you can't even pick Anthony Kennedy out of a lineup.

(He's the guy who looks like Ken Starr.)

Trust me, beneath their sunblock, and their duck hats, sit the nine most powerful, secretive public officials in this land. And whether you can name them or not is immaterial. Because after November, that president whose soul you've come to know so well is going to start naming a whole lot of their successors.

O'Connor Not Confined by Conservatism

USA Today

June 24, 2004

Joan Biskupic

She is an enduring part of Ronald Reagan's legacy, the first woman justice on the U.S. Supreme Court. But for years, Sandra Day O'Connor has confounded many of the conservatives for whom the late president is an icon.

On a divided, nine-member court, O'Connor is a conservative with an asterisk: a pragmatic jurist who, when she sees fit, will vote with the four liberal justices. Particularly galling to some conservative Republicans has been O'Connor's retreat from initial stands against abortion rights and some affirmative action policies.

Lately, the 23-year veteran of the high court has been giving such critics more reasons to gripe. Although O'Connor usually votes with the court's conservative wing, she increasingly has sided with the liberals in significant cases that have been decided by 5-4 votes. It's led some conservative observers of the court to wonder whether O'Connor, at 74, is turning more to the left.

In May, she broke with her conservative brethren to cast a decisive vote to let disabled people sue states for access to courthouses. Earlier this term, she joined the court's liberals – John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer – to preserve key parts of the McCain-Feingold campaign-finance limits, which ban unlimited donations from corporations and unions to national political parties.

She also joined the liberals in 5-4 rulings that enhanced the U.S. government's power

to enforce the Clean Air Act on states, and that allowed taxpayers to sue states to challenge tax credits that benefit religious schools.

That all followed a landmark ruling last summer, when O'Connor's opinion upheld the use of affirmative action in college admissions.

Many legal analysts see such votes by O'Connor as signs of her tendency to view each case along narrow legal lines. But some conservatives say she seems to be enticed more by the left, and that unlike Souter – an appointee of the first President Bush who has become a consistent vote for the liberal wing – they never know when O'Connor will be with them or against them.

Reagan would be disappointed

With several major rulings due in the next week as the high court wraps up this term – including key tests of the Bush administration's legal strategies in dealing with suspected terrorists – O'Connor is being viewed warily by some supporters of the administration.

"Reagan would be disappointed in her recent rulings," says Charles Cooper, a Washington lawyer who was an assistant U.S. attorney general under Reagan. "It is difficult to reconcile some of her recent cases and things she said in the past."

So is O'Connor really showing signs of latent liberalism after nearly a quarter-century on the nation's highest court?

A closer look at O'Connor's recent decisions – and at others throughout her tenure – suggests that she often is driven not by ideology, but by general pragmatism and life experiences that are atypical among the current justices.

She was a rancher's daughter who was taught the virtues of rugged individualism; a woman lawyer who had trouble finding work in a profession dominated by men; an elected Arizona legislator familiar with the relationship between money and politics, and a state trial judge who sees access to courts as fundamental.

Several of O'Connor's recent votes seemed to reflect those experiences, particularly as the only current justice who has raised campaign money and run for public office.

During the past six months, O'Connor was the only justice who was in the majority to uphold the new campaign-finance law (a move that infuriated conservatives) and in the majority to prevent voting rights lawsuits against partisan gerrymanders (a move that irritated liberals).

"Perhaps I am swayed by my own experience as a legislator," she said in a note to a fellow justice when the court first reviewed partisan gerrymanders in 1986, and she urged her colleagues to leave them alone. Such oddly shaped congressional districts, drawn by the party controlling a statehouse to favor its candidates, have become more common in recent years as parties have used computer programs to reshape districts.

"There is no question that she has a distinctive world orientation from the other justices," says Cardozo Law School professor Marci Hamilton, a former law clerk to O'Connor. "But it's more than that.

She is the anti-ideologue. She will never let theory trump reality."

Other legal analysts say O'Connor has resisted taking positions that she believes most Americans would not accept – most notably on abortion.

"This is a justice who is tempted by analytical consistency," says David Garrow, a law professor at Emory University in Atlanta. "But when analytical consistency seems to be carrying her to an outcome that would draw widespread denunciation, she draws back."

Overall, O'Connor votes most often with Chief Justice William Rehnquist (80% of the time during the past four years), and least often with senior liberal Justice John Paul Stevens (58% of the time during the same period).

In most 5-4 rulings, O'Connor votes with the court's conservatives – Rehnquist, Antonin Scalia, Anthony Kennedy and Clarence Thomas. But the percentage of 5-4 rulings in which O'Connor has joined the liberals has risen in recent years, from 5.6% in the 1999-2000 term to 28.6% in 2002-2003.

To many Americans, O'Connor is a symbol of women's rights because of her historic ascension to the court. Among Republicans she forever will be linked to Reagan, who in 1981 fulfilled a campaign promise when he tapped her as the first woman justice. Today, her stature is such that few in the GOP dare to openly criticize her.

At the former president's funeral June 11, O'Connor, as Reagan requested, read part of the 1630 sermon by Massachusetts Puritan John Winthrop expressing the ideals of a "city on a hill."

Immediately afterward she flew to Phoenix, where she received a “distinguished career” award that night from the State Bar of Arizona. Looking out at the crowd of 350 who had paid \$ 150 a plate to attend a dinner saluting her, O’Connor praised Reagan for “opening countless doors to women.”

Early lessons in Arizona

O’Connor grew up on a ranch on the Arizona-New Mexico border, the daughter of a man who preached individual initiative and resented the New Deal welfare of Democrat Franklin D. Roosevelt. When she became a judge, she would show a similar distaste for the U.S. government’s intervention in local affairs and would emphasize states’ rights, a frequent theme on today’s Supreme Court.

At age 16 in 1946, she entered Stanford University, where, she has said, she thrived and became interested in notions of community and the power of the law.

But O’Connor has said that when she graduated from law school in 1952 she was rejected by every law firm to which she applied. One firm offered her a job as a legal secretary – “depending on my typing,” O’Connor recalled at the Phoenix dinner. She declined it.

O’Connor wound up working in a county attorney’s office. She eventually returned to Arizona and quickly rose through the ranks of state politics.

A Republican loyalist, O’Connor worked on Barry Goldwater’s Senate re-election bid in 1958, passing out bumper stickers and stuffing envelopes. In 1972, she was an Arizona co-chairman of Richard Nixon’s presidential re-election campaign.

From 1969-1975, she was a state senator. For two of those years, she was Senate majority leader, the first woman to hold such a post in the nation. Under the copper dome of Arizona’s capitol, O’Connor learned to maneuver for her legislative priorities and to build consensus – experience that now seems to help her negotiate with justices who are more conservative or more liberal than she is.

During her first several years on the Supreme Court, O’Connor regularly lined up with fellow conservatives Warren Burger (who was then the chief justice) and Rehnquist, a classmate of O’Connor’s from Stanford who became the chief after Burger retired in 1986.

But even in her first term, she broke from the right in a major case involving a Mississippi man who had been rejected by a state-run nursing school.

O’Connor cast the fifth vote in favor of Joe Hogan, who claimed that the state-run school violated the Constitution’s guarantee of equal protection under the law by excluding men. In the opinion she wrote for the court, she said excluding men from nurse training “tends to perpetuate the stereotyped view of nursing as an exclusively women’s job.”

Her move away from conservatives on abortion was gradual.

In opinions in 1983 and 1986, she said the legal rationale of *Roe vs. Wade*, the 1973 ruling that made abortion legal nationwide, was “unworkable.” In dissenting opinions with other conservatives, she backed state abortion limits.

But in 1989, O'Connor appeared to have misgivings about where the court – with the addition of more conservative jurists – was headed on abortion, and she softened her criticism of *Roe*. In 1992, she voted to uphold a woman's right to end a pregnancy and emphasized, in an opinion with Kennedy and Souter, how long women had relied on the *Roe* ruling.

Embracing affirmative action

A case last June that challenged racial preferences in college admissions played to O'Connor's experience as a young lawyer and her willingness to back away from a legal principle for pragmatic reasons.

Before the University of Michigan case, O'Connor generally had opposed government policies that favored minorities because of their race.

But arguments about the value of diversity in education won O'Connor's vote in the Michigan dispute, and she joined the majority in a 5-4 ruling in favor of affirmative action. The justice who has said she felt poorly prepared for college but then blossomed at Stanford wrote that the "path to leadership" offered by education must be open to all qualified students.

Last December, O'Connor again was the fifth vote, joining the liberals to uphold the campaign-finance overhaul named for Sens. John McCain, R-Ariz., and Russ Feingold, D-Wis. The law banned unregulated contributions from corporations and labor

groups to political parties, and restricted political ads on TV.

The opinion she wrote with Stevens acknowledged that "money, like water, will always find an outlet" to influence politics. It also emphasized deference to elected lawmakers.

Last month, O'Connor was back with the court's liberal wing as she broke with her usual pattern of protecting states from lawsuits based on federal civil rights laws. In a case brought by a man in a wheelchair who had to crawl up courthouse steps to get to a hearing, the court voted 5-4 to allow people to sue states under the Americans with Disabilities Act for access to courthouses.

O'Connor is familiar with the gritty side of local courts. She first donned a black robe for trials in a dingy Phoenix courtroom where she kept a can of bug spray to fight off cockroaches. In the ADA case, she joined an opinion by Stevens that stressed the importance of allowing people to participate in the judicial process.

Todd Gaziano, legal director of the conservative Heritage Foundation and a former Reagan administration lawyer, says O'Connor's vote in the disability case undermined earlier decisions in which she joined the court's conservatives. He says she deviated from rulings that set a high standard for when federal civil rights laws should be imposed on the states.

"She's certainly a disappointment" to conservatives, he says.