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Section 9: Looking Ahead

Institute of Bill of Rights Law, William & Mary Law School

IX. LOOKING AHEAD

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"U.S. Stymies Detainee Access Despite Ruling, Lawyers Say"

Washington Post
October 14, 2004
Carol Leonnig

More than three months after the Supreme Court declared that hundreds of detainees at the military prison at Guantanamo Bay, Cuba, have the right to challenge their imprisonment in U.S. courts, none has appeared in a courtroom.

Of the 68 alleged al Qaeda and Taliban fighters who have so far petitioned for access to federal court in Washington, only a handful have even spoken to their lawyers. With some held for nearly three years on the U.S. Navy base, the detainees remain largely precluded from receiving legal help because of protracted negotiations with the Justice Department over lawyers' security clearances, the government's insistence on monitoring attorney-client conversations and the number of visits lawyers will be allowed, defense attorneys told a U.S. District Court judge yesterday.

Less than half the detainees with lawyers have been given the government's reason for holding them; the government has broken a court-ordered Sept. 30 deadline to justify most of those detentions, the lawyers said. For the 28 detainees who have been informed, the reason is typically that a recent military review—conducted without an attorney or witnesses—has concluded that they are enemy combatants with links to the Taliban or al Qaeda.

The Justice Department, when ordered this month by a federal judge to formally respond to detainees' basic complaint that they are being unfairly imprisoned, filed a 96-page pleading asking the judge to dismiss the case. The document contained some of the same arguments made by government lawyers in their losing case before the Supreme Court.

"The government says it's very complicated, they need security clearance issues worked out, et cetera, et cetera," said Don Rehkopf, a military law expert with the National Association of Criminal Defense Lawyers and the attorney who helped get espionage charges against a serviceman at Guantanamo Bay dismissed. "That's garbage. The government is coming up with more and more excuses, and changing the rules on a daily basis."

Justice Department attorney Terry Henry yesterday told a federal judge overseeing the cases that the government has worked to be "reasonable and fair."

"We think we're making extraordinary strides to have these folks have their day in court," Henry said.

The Supreme Court ruled June 28 that foreign nationals held at a U.S. military prison had some of the same rights as U.S. citizens imprisoned on other charges: to file a habeas petition and demand that the government justify the reason for detaining them.

In habeas cases, legal scholars and criminal defense lawyers said, a person who petitions the court for this information typically receives an answer within 30 days or is released.

Yet that fairly mundane legal step,

conducted hundreds of times every day in courthouses around the country, has been transformed—against the backdrop of a war on terrorism and a presidential campaign focused on the administration's handling of that war—into a conflict that legal scholars call unprecedented.

"It's definitely ugly," said Douglas W. Kmiec, a professor of constitutional law at Pepperdine University Law School and a Justice Department official in the Reagan and George H.W. Bush administrations. "But it seems like the time we live in. It is simultaneously outrageous if it's a time of peace and totally reasonable if it's a time of war."

Hearing the cases is a retired senior judge, U.S. District Judge Joyce Hens Green, who is long on expertise in national security cases but short on time, staff or a clear mandate on how to handle them.

Tom Wilner, an attorney who represents 12 Kuwaitis and who brought the case that led to the Supreme Court decision, complained to Green yesterday that the government has stonewalled, violated her orders and is now in contempt of the nation's highest court. In a letter to Green last month, the detainee lawyers said that efforts to represent their clients had hit a roadblock since she was appointed.

"Why is it after three years, they can't say why they are holding these people?" Wilner asked yesterday. "We've had people rotting in prison, so we don't need any more delay. . . . The Supreme Court has spoken. Nothing has happened yet."

Green disagreed. "I beg your pardon," she said. "Things have happened."

Detainee lawyers said they cannot understand why some apparently dangerous detainees have been released while others who have not shown evidence of violence have not been set free. A former detainee who was recently released from Guantanamo Bay is now believed to be the leader of a militant band that kidnapped two Chinese engineers in a lawless region of Pakistan near the Afghanistan border, according to Pakistani officials.

Experts in military law and habeas cases said the obstacles in the Guantanamo Bay detainee cases stem from three main complications. Most notably, the lawyers do not have access to their clients, particularly in the new, closed military hearings the government inaugurated after the Supreme Court decision to determine whether individuals should continue to be classified as enemy combatants and detained. The plaintiffs do not have the information to make their case to the tribunal, which gives the government a lopsided advantage.

"When the detainees are denied meaningful access to counsel, the adversarial process is lost," said David P. Sheldon, a military law expert.

The U.S. District Court also stumbled for several weeks in deciding whether one judge would oversee the cases or whether some matters should be left to individual judges who initially presided over separate cases. At least three times, judges have decided not to rule on motions filed by lawyers in the detainee cases, saying they were deferring to the coordinating judge, and thus causing additional delay.

Some lawyers also lacked needed security clearances or expertise in military and habeas law, and some only recently began to apply to visit the base. "We're working as fast as we can, given the circumstances,"

Justice Department spokesman Mark Corallo said.

The war on terrorism also prompts the court to move slowly and deferentially when the government says the nation's safety is at stake.

Scholars disagree about how clear the Supreme Court ruling was. Many believe it promised detainees full rights to courts and all the due process the system provides. Kmiec said the decision was not so clear and gave the Justice Department room to argue that closed military review hearings are sufficient to determine the reason to hold detainees.

"They may have a good legal argument," Kmiec said of the government claim that the detainees do not need lawyers at those hearings. "But as a citizen, I always want my government to act on a plane higher than the minimum of what the law requires."

"Guantanamo Trial Is Ruled Unlawful"

Los Angeles Times
November 9, 2004
John Hendren

The first military commission trial at Guantanamo Bay, Cuba, was halted Monday after a federal judge here ruled the proceedings invalid under U.S. and international law—dealing a blow to the legal process set up by the Bush administration to handle accused terrorists.

The case against Salim Ahmed Hamdan was suspended after U.S. District Judge James Robertson ruled that the Yemeni man had been denied due process.

The ruling affects all of the nearly 500 detainees from Afghanistan at Guantanamo.

"The practical outcome of this is that the government is not going to be able to maintain this system," said Eric M. Freedman, a Hofstra University law school professor who has challenged the military commissions in court on behalf of two detainees.

Robertson ruled that the Bush administration had not followed a lawful procedure in declaring Hamdan an "enemy combatant" who was not entitled to protections and privileges under the Geneva Convention. The "combatant status review tribunals"—used by the Pentagon to decide whether to hold detainees—are not a "competent" court to make such a determination, Robertson said. And the military commission process, which prosecutes detainees using secret evidence and unnamed witnesses, "could not be countenanced in any American court," the judge ruled.

"The government has asserted a position starkly different from the positions and behavior of the United States in previous conflicts, one that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad," wrote Robertson, who served as a lieutenant in the Navy between 1959 and 1964 and was appointed a judge in 1994 by President Clinton.

To correct the system, Robertson said, the government must recognize the detainees as prisoners of war under the Geneva Convention until it has a legally valid way to declare they are not.

In order to comply with Robertson's ruling, the government would have to grant Hamdan access to all commission sessions, witnesses and evidence against him. The judge said the government could try detainees in courts-martial, used for crimes involving the military and those held under military control.

The Justice Department, which is handling the administration's case, said it would appeal the ruling. Spokesman Mark Corallo said lawyers would apply for an emergency stay.

The government said Robertson's ruling ran counter to the established war powers of the president and that President Bush had properly determined that the Geneva Convention did not apply to a terrorist organization such as Al Qaeda.

"The process struck down by the district

court today was carefully crafted to protect America from terrorists while affording those charged with violations of the laws of war with fair process, and the department will make every effort to have this process restored through appeal," Corallo said.

Hamdan, captured in Afghanistan in late 2001, was one of Al Qaeda leader Osama bin Laden's drivers. He was sent to the U.S. naval base at Guantanamo Bay in 2002, and contested his detention earlier this year.

Civil rights groups and defendants' lawyers have opposed both forms of justice devised by the administration. The combatant status review tribunals have been widely criticized because they deny the prisoners access to lawyers and use as evidence Bush's determination that all detainees at Guantanamo are enemy combatants.

"The president," Robertson wrote in his opinion, "is not a 'tribunal,' however."

Defense lawyers have complained that the military commission trials allow the use of hearsay evidence not permitted in other courts, and allow the use of secret evidence against defendants.

Some of them predicted that the administration would be forced to alter the system.

"Their practical options are limited to appealing this ruling or abolishing the system of military commissions that they have established to date," Freedman said. "Otherwise we're going to be litigating against them for the next 50 years."

Robertson's ruling added to a growing chorus of judges dissenting from the Bush administration's stance, said Eugene R. Fidell, a Harvard Law School instructor.

"It's potentially a very serious challenge to military commissions," said Fidell, who also is president of the National Assn. of Military Justice, a nonprofit group of lawyers working within the military justice system. "What it is, in fact, is kind of a slow-motion revolt on the part of the district judges. One after another, the district judges have shown impatience with the kinds of positions the government has taken."

Prior to Monday's ruling, the Bush administration's once-ambitious plans to try the detainees already had bogged down.

Fifteen detainees were part of the first group designated to face tribunals; authorities so far have dealt with only four cases.

After the first set of preliminary hearings in August, chief prosecutor Army Col. Robert Swann had predicted charges would be filed against high-profile terrorists.

But those charges—presumably against figures such as Khalid Shaikh Mohammed, the alleged planner of the Sept. 11 attacks, or Ramzi Binalshibh, the Yemeni who allegedly was his accomplice—never materialized.

The process has encountered problems ranging from legal challenges to simple translation difficulties.

The military commission consists of five members and an alternate who serve as both judge and jury.

However, three of the panel members were removed last month after defense lawyers challenged them over apparent conflicts of interest.

Now, proceedings that have faced increasingly intense criticism from human

rights groups and U.S. allies such as Britain and Australia have again been sent back to the drawing board.

A number of advocacy groups praised the ruling.

"Today's decision sends a clear message that the fight against terrorism does not give the government license to disregard domestic and international law," said Anthony D. Romero, executive director of the American Civil Liberties Union.

Jamie Fellner, director of the U.S. program of Human Rights Watch, agreed.

"This ruling should put the final nail into the coffin of the military commissions," Fellner said. "They should never have been created in the first place, and their implementation has been a disaster."

"Gonzales & the War"

National Review
July 8, 2005
Andrew McCarthy

In the wake of the London bombings, we cannot help but remember that our war against Islamofascists will be a long one and that, for us, the main imperatives for the foreseeable future will be (a) neutralizing terrorists so they cannot return to the battle and attack us, and (b) maximizing our ability to reap intelligence—the precious information that is our only hope of preventing future Londons, future Madrids and future 9/11s.

In that light, as President Bush considers candidates for the Supreme Court, it would simply be irresponsible for fans of Attorney General Alberto Gonzales—including NRO and others among us who strongly supported his confirmation (see here and here)—not to take heed of the recusal issue that has been raised with great persuasive force by Ed Whelan and Ramesh Ponnuru. For it is certain that issues crucial to the war on terror are headed straight for the high Court's lap in the very near future, and national security desperately needs a strong voice, not an empty seat.

It was only a little over a year ago that the Supreme Court ruled on two controversial cases involving unlawful enemy combatants: *Hamdi v. Rumsfeld* and *Rasul v. Bush*. (For a full outline, see here.) In *Hamdi,* a bare majority of the justices (including Justice O'Connor, who wrote the Court's opinion) held that the president was empowered to detain without trial as an enemy combatant an American citizen who had taken up arms against the United States, and that, though such a citizen would be permitted to challenge his detention in court, the habeas corpus proceeding at which that would be done could be very deferential to the executive branch. At least four justices (Scalia, Stevens, Souter, and Ginsburg) were prepared to hold the detention illegal and/or to reject deference to the executive branch in the ensuing hearing.

Worse, in *Rasul,* the Court held 6-3 (with Justice O'Connor again in the majority) that the alien enemy combatants detained overseas in wartime and held outside (or what was up until then regarded as outside) the jurisdiction of the U.S. courts were permitted to challenge their detentions in federal court.

Significantly, the Court held that its ruling was based not on the Constitution but on the habeas-corpus statute—which means that this madness could be ended tomorrow if Congress fixed the statute to make clear that it is not intended to allow the enemy to use our own courts against us as a weapon of war. As Congress has contented itself to stay on the sidelines, however, *Rasul* promised to be profoundly troublesome—and it has more than delivered on that promise.

Exactly what kind of procedures and protections are our enemies entitled to in these unprecedented court proceedings? Do they get counsel? Do they get discovery—including battlefield intelligence? Are these to be full-blown trials in which we take soldiers off the battlefield so that they can testify about the circumstances of the particular enemy combatant's apprehension during this firefight or that? How much, in

the middle of a war, should federal judges be able to second-guess commanders in the field? If the jurisdiction of the U.S. courts now extends to Guantanamo Bay, Cuba, why shouldn't it extend to Baghdad, or Kandahar, or anyplace else on the globe where American forces are in de facto control of foreign territory? Are the foreign terrorists entitled to Geneva Convention protections even though they themselves pervert the laws and customs of war?

The answer to these and other questions is: We don't know. The Supreme Court provided precious little guidance in *Hamdi* and *Rasul,* and Congress has not intervened, so the lower courts are on their own: fashioning new procedures and answering legal questions as they arise, ad hoc. Cases are making their way up the system's chain—and they may land in the Supreme Court's lap as early as next term.

As I've previously detailed here, last November a federal district court in Washington, D.C., boldly extended prisoner-of-war safeguards to al Qaeda operative Salim Ahmed Hamdan (reputed to be Osama bin Laden's driver) who is currently being held in Guantanamo Bay. To do so, the judge not only had to rewrite the Geneva Conventions into something vastly different from the treaty ratified by the United States in 1949. He also had to ignore that the U.S. has considered and has—for over a quarter-century—expressly refused to ratify a treaty (the 1977 Protocol I to the Geneva Conventions) that would grant POW protections to non-state militias.

That case is now on appeal, and undoubtedly heading for the Supreme Court—where some of the very justices who seem most comfortable with extending privileges to the enemy during wartime have also recently taken to citing unratified treaties (not to mention other varieties of foreign law) as authority for some of their rulings.

Moreover, in an earlier case that is also part of the *Rasul* fallout, last October another district judge in Washington ruled in *Odah v. United States* that alien enemy combatants—unlike the vast majority of American prisoners who file habeas-corpus petitions—are entitled to have counsel paid for by the U.S. taxpayers they are trying to kill in order to challenge their detention by our military in their war against us.

These cases are immensely important to national security and the war on terror. They may only be the tip of the iceberg. And they will come before a Supreme Court that already sports blocs of justices hospitable to both the notion of enhanced due process for terrorists and the imposition on Americans of elite international sensibilities that have won neither adoption in the manner prescribed by the constitution nor popular favor.

But they would almost certainly not come before a Justice Gonzales. As the president's chief counsel, and now as attorney general, he has, to his great credit, been a key architect of the Bush administration's aggressive policies for combating international terror networks. It is difficult to see how he could avoid having to recuse himself from the resulting cases—not just Hamdan and Odah but the others that are sure to follow.

President Bush has quite appropriately made national security the defining issue of his presidency. It remains the defining issue even as he considers court vacancies. So he must ask himself: Are there five reliable votes on the Supreme Court in favor of national security? Are there five votes against the judicial weaving from whole

cloth of a new set of deferential due-process norms for international terrorists?

The answer is clearly "no." As long as it is, the president needs to choose a justice who will not only stand firm, but one who can actually hear the cases.

"Ruling Lets U.S. Restart Trials at Guantanamo"

New York Times
July 16, 2005
Neil A. Lewis

A federal appeals court ruled unanimously on Friday that the military could resume war crimes trials of terrorism suspects at Guantanamo Bay, Cuba, which were suspended last year.

The decision, by a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, reversed a lower court's ruling that abruptly halted the first war crimes trials conducted by the United States since the aftermath of World War II. The appeals judges said the Bush administration's plan to try some detainees before military commissions did not violate the Constitution, international law or American military law.

Their ruling, in the case of Salim Ahmed Hamdan, a driver for Osama bin Laden, was a significant legal victory for the administration, which has found itself engaged in several court battles over tools that officials say they need to fight terrorist groups.

"The president's authority under the laws of our nation to try enemy combatants is a vital part of the global war on terror," Attorney General Alberto R. Gonzales said on Friday, "and today's decision reaffirms this critical authority."

Neal K. Katyal, a Georgetown University law professor who represented Mr. Hamdan, said he would consider an appeal.

"Today's ruling," Mr. Katyal said, "places absolute trust in the president, unchecked by the Constitution, statutes of Congress and longstanding treaties ratified by the Senate of the United States."

He noted that many retired senior officers who had signed a brief supporting his position maintained that the way detainees at Guantanamo had been treated imperiled American troops who might themselves be captured on the battlefield.

Military officials have said in recent weeks that they are eager and ready to resume the trial of Mr. Hamdan. At a Senate hearing on Thursday, Brig. Gen. Thomas L. Hemingway, the Air Force officer who supervises the military commission process, and Daniel J. Dell'Orto, the Pentagon's principal deputy general counsel, both said they expected war crimes trials to resume within 30 to 45 days if the appeals court ruled in their favor.

Of more than 500 detainees remaining at Guantanamo, Mr. Hamdan is one of four who have so far been charged with war crimes. Twelve others have been designated by President Bush as eligible for trial, and military officials have suggested that they are prepared to bring charges against dozens of other prisoners there should the president designate them as well.

Mr. Hamdan, a 35-year-old Yemeni who was captured in Afghanistan, is charged with conspiracy to commit attacks on civilians, murder and terrorism. He has argued through his lawyers that although he served as a driver for Mr. bin Laden, he was not a member of Al Qaeda and never took up arms against Americans or their allies. He was sitting in a Guantanamo courtroom when the proceedings in his case were

suddenly halted Nov. 8 by the earlier court decision, issued by James Robertson, a federal district judge in Washington.

Judge Robertson ruled that the military commissions violated the Geneva Conventions, the principal international laws of war, to which the United States is a signatory; violated the Constitution, because, he said, the president did not have the necessary authority from Congress; and violated the Uniform Code of Military Justice, which, he said, requires that detainees be tried under the same conditions as American soldiers who are court-martialed.

In Friday's decision, written by Judge A. Raymond Randolph, the appeals court rejected all three rationales, with occasionally disdainful language.

The court said it was well established that the Geneva Conventions "do not create judicially enforceable rights"—that is, accusations of a violation may not be brought in a lawsuit.

The appeals panel also held that Judge Robertson had been incorrect in maintaining that Congress had not authorized Mr. Bush to set up the commissions. Congress gave him the authority to do so, the panel said, in three resolutions dealing with terrorism. In one, the lawmakers authorized the president "to use all necessary and appropriate force" against anyone who had abetted the Sept. 11 attacks, and granted him the authority to act to prevent international acts of terrorism.

In addition, the appeals court said the commissions were not bound by the rules of courts-martial, like allowing for defendants to be present at all times. In the earlier decision, Judge Robertson noted that Mr. Hamdan had been excluded from the Guantanamo courtroom for some of the proceedings after the military commission's chief judge determined that classified information was likely to be exposed.

The three judges who issued the ruling were all nominated to the bench by Republican presidents. Judge Randolph, chosen by the first President Bush, was joined in the decision by Judges John Roberts, nominated by the current president, and Stephen F. Williams, by President Ronald Reagan. Judge Robertson, of the lower court, was nominated by President Bill Clinton.

The war crimes commissions are one of three types of legal bodies created by the military to deal with detainees at Guantanamo.

The first, called combatant status review tribunals, made up of three-officer panels, considered the cases of all the Guantanamo detainees to determine if they had been properly deemed unlawful enemy combatants, who, the military said, could be held there indefinitely. Those tribunals found that all but 33 of more than 560 detainees then at Guantanamo had been properly imprisoned.

This year the military began a second set of proceedings for the remaining detainees, now numbering about 520. In these proceedings, before "administrative review boards," panels of three officers are asked to determine if the detainee is no longer a threat and thus may be eligible for release. No figures from those deliberations have been announced.

Separately, nearly 200 of the Guantanamo prisoners are represented in lawsuits in federal court. Those actions were made possible by a Supreme Court ruling in June 2004 that detainees could use the civilian court system to challenge their imprisonment.

War on Terror

Part II: Hamdi and Padilla

"Bush's Good Day in Court"

Washington Post
August 4, 2004
David B. Rivkin Jr. and Lee A. Casey

The three "war-on-terrorism cases" decided by the Supreme Court at the close of its term in June have been portrayed—especially overseas—as significant defeats for the Bush administration. This is largely because the court ruled, over the administration's strong objections, that the men, now held as al Qaeda and Taliban members at the Guantanamo Bay naval station in Cuba, may challenge their detention through the federal courts.

But in fact, when all these cases are read together—the Guantanamo Bay case, along with the court's decisions in ***Hamdi v. Rumsfeld*** and ***Rumsfeld v. Padilla*** (both involving American citizens held in the United States as captured enemy combatants)—they mark a significant reaffirmation of the president's constitutional authority as commander in chief in time of war.

In the context of these cases, the court accepted the following critical propositions: that the United States is engaged in a legally cognizable armed conflict with al Qaeda and the Taliban, to which the laws of war apply; that "enemy combatants" captured in the context of that conflict can be held "indefinitely" without criminal trial while that conflict continues; that American citizens (at least those captured overseas) can be classified and detained as enemy combatants, confirming the authority of the court's 1942 decision in *Ex Parte Quirin* (the "Nazi saboteur" case); and that the role of the courts in reviewing such designations is limited. All these points had been disputed by one or more of the detainees' lawyers, and all are now settled in the government's favor.

Of course, in upholding the executive's actions on these fundamental points, the justices also made clear that from here on out, the courts will have a role, however circumscribed it might be, in individual cases. In this, the recent war-on-terrorism decisions are not unlike the court's groundbreaking case of *Marbury v. Madison* (1803), in which Chief Justice John Marshall avoided an open clash with President Thomas Jefferson (by refusing to order the delivery of a judicial commission signed at the last minute by a departing John Adams), but in doing so established the principle of judicial review. For good or ill, the camel now does not just have its nose under the tent, it is comfortably seated at the table. Whether it will dominate the conversation, however, remains to be seen. Much will depend on the president's future actions.

In a plurality opinion delivered in ***Hamdi v. Rumsfeld,*** the most important of the many opinions and dissents issued in these cases,

Justice Sandra Day O'Connor made clear that although the principles of due process may require that captured al Qaeda and Taliban operatives be given the opportunity to challenge the factual basis of their classification as enemy combatants, this process need not involve the civilian courts. It can take place before a military panel, patterned on the "Article V" procedure established pursuant to the Third Geneva Convention, dealing with the rights of "prisoners of war." Significantly, O'Connor did not suggest that the Geneva Conventions could or should apply in these circumstances but found the U.S. Army regulations implementing this provision to be a useful model.

The Pentagon was quick to accept O'Connor's invitation and has already established a process whereby the Guantanamo detainees can be heard. In this connection, however, it is important to note the burden of proof that the government will have to meet in any further judicial review. This point has received almost no comment, but it is probably the most important practical aspect of the rulings. To "prove" a captive is an enemy combatant, the government need only present "credible evidence." Once this is accomplished, the burden shifts to the detainee—who must then prove that he was not affiliated with either al Qaeda or the Taliban. As all trial lawyers know, cases are won and lost on the burden of proof, and the court has (properly, we believe) given the United States a very considerable advantage here.

There are, of course, many issues that the court did not answer in these cases, including how soon after capture the right to challenge one's enemy combatant classification becomes effective; whether an American citizen captured in the United States, such as the alleged "dirty bomber" Jose Padilla, can be detained as an enemy combatant; and whether enemy combatants can be tried and criminally punished (rather than simply held until the conflict ends) by military commission. The reaffirmation of *Ex Parte Quirin* in Justice O'Connor's opinion, which appears to command at least a five-member majority on this point, suggests that they can be so tried. Nevertheless, because of the shifting nature of the court's majority on many of these issues, there is little doubt there will be more terrorism-related cases in the Supreme Court's next term. Overall, though, the executive branch has done very well so far and, assuming a fair and transparent processing of the detainees by the military justice system, should continue to do so in the future.

The writers are Washington lawyers who served in the Justice Department during the administrations of Ronald Reagan and George H.W. Bush.

"U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant'"

New York Times
September 23, 2004
Eric Lichtblau

Yaser E. Hamdi, an American citizen captured in Afghanistan and once deemed so dangerous that the American military held him incommunicado for more than two years as an enemy combatant, will be freed and allowed to return to Saudi Arabia in the next few days, officials said Wednesday.

After weeks of negotiations over his release, lawyers for the Justice Department and Mr. Hamdi announced an agreement requiring him to renounce his American citizenship. The agreement also bars him from leaving Saudi Arabia for a time and requires him to report possible terrorist activity, his lawyer said, although legal analysts said the arrangement would be difficult for the United States to enforce.

The agreement was driven by a Supreme Court decision in June. In the ruling, a major setback for the Bush administration, the court found that Mr. Hamdi and enemy combatants like him had to be given the chance to challenge their detention. The court declared that "a state of war is not a blank check for the president." The administration decided that rather than give Mr. Hamdi a hearing, it would simply negotiate his release.

Mr. Hamdi will probably be flown back to Saudi Arabia on an American military aircraft by early next week, said a government official who asked not to be identified. Although Mr. Hamdi was born in 1980 in Louisiana, where his father worked for an oil company, the family left the United States when he was a toddler and returned to Saudi Arabia. He lived there most of his life, and most of his family remains there.

The agreement freeing Mr. Hamdi reflects a striking reversal in a hotly debated test case regarding the limits of the Bush administration's powers in its pursuit of terror suspects.

Mr. Hamdi was captured on the battlefield in Afghanistan in late 2001 after the fall of the Taliban and imprisoned by the American military, first at Guantanamo Bay in Cuba and most recently in a Navy brig in South Carolina. But the military gave few details about his suspected links to the Taliban, and the discovery that he was born in Louisiana and retained his American citizenship set off a public debate about his rights to due process and the government's power to incarcerate prisoners in wartime.

The Bush administration declared Mr. Hamdi an enemy combatant and denied him the chance to contest the accusations against him at a judicial hearing. He has been held in solitary confinement and was denied access to a lawyer until recently, in part because of what officials described as national security concerns.

In a statement Wednesday announcing the agreement to free Mr. Hamdi, the Justice Department said: "Like many other enemy combatants captured and detained by U.S. armed forces in Afghanistan who have been subsequently released, the United States has determined that Mr. Hamdi could be transferred out of United States custody subject to strict conditions that ensure the

interests of the United States and our national security. As we have repeatedly stated, the United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S. and our allies."

One final point of discussion resulted in the agreement to have Mr. Hamdi renounce any claims to his American citizenship upon his arrival in Saudi Arabia, where he remains a citizen.

The citizenship issue was not a terribly important one to Mr. Hamdi, his lawyer, Frank W. Dunham Jr., said in an interview. "He has always thought of himself as a Saudi citizen, and he wasn't willing to spend an extra day in jail over it," Mr. Dunham said.

Travel arrangements for Mr. Hamdi's return are still being completed, officials said. But Mr. Dunham said that "as long as they put him in civilian clothes and don't put a bag over his head and give him some ice cream for the ride, I don't care how they get him back there."

When Mr. Hamdi was told in recent days that he was on the verge of release, he smiled and said, "That's what I'm talking about!" Mr. Dunham recounted.

Mr. Hamdi will also have to abide by what the Justice Department described as "strict travel restrictions" in Saudi Arabia. Mr. Dunham said the agreement required Mr. Hamdi to remain within Saudi Arabia for a set period before being allowed to travel outside the country, but he would not discuss precise details because the pact has not yet been filed in federal court. Saudi officials were unavailable for comment on the agreement late Wednesday.

Mr. Hamdi would also be obligated to report certain suspicious activity, Mr. Dunham said. "If somebody recruits him to become a terrorist, he's got to tell somebody that," he said.

Civil liberties advocates and some legal analysts said Mr. Hamdi's release underscored weaknesses in the administration's rationale for locking up terror suspects and could have implications for other suspects held in Cuba and elsewhere.

"It's quite something for the government to declare this person one of the worst of the worst, hold him for almost three years and then, when they're told by the Supreme Court to give him a fair hearing, turn around and give up," said David Cole, a law professor at Georgetown University who has been critical of the administration.

Anthony Romero, executive director of the American Civil Liberties Union, added in an interview that "this clearly shows that the government was not able to meet the burden of proof that the Supreme Court had set for it, and rather than risk further embarrassment in a failed prosecution, they've decided to just send him out of the country."

"The whole case makes you wonder," he added, "why was he really being held in the first place?"

"Logic of Supreme Court's Decisions Says That Alleged 'Dirty Bomber' Must be Charged or Freed"

Legal Times
August 2, 2004
Robert A. Levy

The bottom line is: Jose Padilla has to be released—unless the government somehow conjures up charges of treason or criminal acts.

To be sure, the Supreme Court's June 28 opinion in ***Rumsfeld v. Padilla*** literally said nothing of the sort. In fact, it didn't reach the merits of the case at all. Still, the inescapable conclusion, based on the Court's same-day opinion in ***Hamdi v. Rumsfeld,*** is that Padilla will soon be charged or freed.

Here's what's happening: Jose Padilla is the U.S. citizen who supposedly plotted to detonate a "dirty bomb" and use natural gas to blow up apartment buildings in New York, Florida, and Washington, D.C. Since his capture—not on the battlefields of Afghanistan or Iraq, but at Chicago's O'Hare International Airport—he hasn't been charged with any crime. Yet, since June 2002, Padilla has been held incommunicado in a South Carolina military brig—indefinitely, without access to legal help. [In March 2004, the government did accede to outside pressure to let his lawyer simply talk to him.]

In the short term, the Supreme Court's decision did not change those facts. Essentially, the Court ducked its opportunity to decide whether Padilla's detention is permissible. Chief Justice William Rehnquist, joined by his four conservative allies, held that the head of the military brig in South Carolina, not Defense Secretary Donald Rumsfeld, was the person whom Padilla should have sued. Commander Melanie Marr is Padilla's immediate custodian, and she is not within the jurisdiction of the New York federal courts, where Padilla filed his case. Such niceties of jurisdiction are necessary, wrote Rehnquist, to prevent "forum shopping" by detainees seeking release under the habeas corpus statute.

The result: Padilla had to start over. He has now re-filed his petition in South Carolina.

The Case Against Him

So what happens next? Some news reports indicate that the Justice Department is planning to indict him. After all, the government claims that Padilla was detained because he was an "enemy combatant" who [1] was "closely associated" with al Qaeda; [2] had engaged in "war-like acts, including conduct in preparation for acts of international terrorism"; [3] had intelligence that could assist the United States to ward off future terrorist attacks; and [4] was a continuing threat to U.S. security. The government did not allege, however, that Padilla was actually a member of al Qaeda.

Then, just prior to the Supreme Court's decision, the Justice Department issued a report on Padilla's interrogation. Supposedly, Padilla admitted that he had attended al Qaeda training camps and discussed both the detonation of a dirty bomb and the use of natural gas to blow up apartment buildings. Bear in mind that Padilla had no lawyer present, so the evidence would not be admissible in court.

The government said that he was not mistreated, but would not confirm that the interrogation complied with the Geneva Conventions. Furthermore, the Justice Department presented no indictment that Padilla could challenge.

His appointed lawyer, who met Padilla for the first time in March, was placed under a gag order. She could not even say whether Padilla disputed the allegations. In other words, no defense was possible. But according to a footnote in the report, Padilla denies sworn allegiance to, or being part of, al Qaeda; denies the bomb plot; and says he discussed a plot only to avoid fighting in Afghanistan.

I doubt that the government has a compelling case, or the Justice Department would have filed charges long ago. Still, charges will probably be filed, if only because the logic of the ***Hamdi*** decision suggests that the government's alternative, like it or not, is to release Padilla.

Not Like Hamdi

Yaser Esam Hamdi, of course, is another U.S. citizen, also detained incommunicado without charges for more than two years. The major difference between him and Padilla is that Hamdi was reportedly apprehended on the battlefield in Afghanistan, not at O'Hare Airport.

On June 28, the same day as the *Padilla* decision, Justice Sandra Day O'Connor released her plurality opinion in *Hamdi*. Joined by Justices Rehnquist, Anthony Kennedy, and Stephen Breyer, she held that the government "may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in armed conflict against the United States."

Justice Clarence Thomas joined the plurality with respect to that holding. He actually filed a dissenting opinion, but his conclusion tipped even further toward executive power. He argued that "This detention falls squarely within the federal government's war powers, and we lack the expertise and capacity to second-guess that decision."

Therefore, a majority of the Court clearly authorized Hamdi's detention. Why then do I predict Padilla's release if he is not charged? For four reasons.

First, the implication of the ***Hamdi*** plurality opinion is that the ongoing war on terror would not justify detention once active hostilities in Afghanistan end. Arguably, they have ended.

Second, and more compelling, the ***Hamdi*** plurality said that his detention was permitted to prevent combatants from returning to the battlefield. But Padilla did not come from the battlefield. He was not one of the "Taliban combatants who engaged in armed conflict against the United States."

Third, the ***Hamdi*** plurality allowed executive detention only in light of Congress' post-9/11 Authorization for Use of Military Force, which satisfied the following mandate from a 1971 statute, the Non-Detention Act: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." According to the ***Hamdi*** plurality, the post-9/11 resolution triggered the president's commander-in-chief power to apprehend enemy soldiers in a zone of active combat.

Perhaps so. But it does not follow that the president can order the imprisonment, without charge, of an unarmed civilian far from active combat, especially a U.S. citizen

on our own soil. In fact, Justices David Souter and Ruth Bader Ginsburg filed a separate opinion in ***Hamdi*** concluding that, despite the post-9/11 resolution, even Hamdi's detention violated the Non-Detention Act. A fortiori, so did Padilla's.

Fourth, considering the ***Padilla*** and ***Hamdi*** decisions together, you have to conclude that if Padilla returns to the Supreme Court, he'll have five solid votes for release. One vote would come from Justice Antonin Scalia. He dissented in ***Hamdi,*** joined by Justice John Paul Stevens, to say that even Hamdi is entitled to release unless he is charged with a crime or treason, or unless Congress suspends habeas corpus.

The remaining four votes for Padilla's release would come from the four ***Padilla*** dissenters—Justices Stevens, Breyer, Souter, and Ginsburg—who wanted to reach the merits of that case. They argued that "Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure." Padilla's detention, said the dissenters, was a "form of torture," like the Star Chamber.

An Unpersuaded Court

Interestingly, spokesmen for the Bush administration are spinning the ***Hamdi*** case as a victory for executive power. Nothing could be further from the truth.

Earlier, the U.S. Court of Appeals for the 4th Circuit, in an opinion by conservative Judge J. Harvie Wilkinson III, rejected the government's primary argument: that the courts cannot second-guess the military's enemy combatant determinations. Even the Defense Department has now backed off that argument. In *Rasul v. Bush,* the third war-on-terror case decided by the Supreme Court on June 28, the government conceded that habeas corpus jurisdiction would have existed if any Guantanamo detainee were an American citizen.

Now, in ***Hamdi,*** the Court has rejected the government's fallback argument: that all the government has to produce is "some evidence" to support its enemy combatant designation. According to the ***Hamdi*** plurality, the detainee gets a lawyer and a fair opportunity to rebut the government before a neutral decision-maker. Contrast that with President George W. Bush's executive order on military tribunals, which asserted that a detainee "shall not be privileged to seek any remedy . . . directly or indirectly . . . in any court of the United States."

In its legal briefs, the Defense Department had insisted that the "combat zone" should be interpreted broadly, to include even O'Hare Airport. That idea has seemingly not resonated with the Court. Al Qaeda may have brought its crusade to the United States, but most of the justices, it would appear, do not regard all of America as a battlefield in the war on terror. At least the justices seem unwilling to consider such a notion as the legal foundation for truncating Padilla's civil liberties, or the civil liberties of any other citizens arrested far from the fighting.

The Case for Law

Finally, administration supporters pose this hypothetical: Suppose President Bush had released Padilla, who then proceeded to

blow up parts of New York. No doubt a number of the administration's critics would have sought Bush's impeachment. Obviously, that dilemma exists whenever anybody is released for lack of evidence and then commits a crime. But in the case of suspected terrorists, the stakes are immense.

So a powerful argument can be made for changing the rules—tilting toward national security even though some civil liberties might be compromised. But if we do change the rules, the process cannot be unilaterally implemented by executive edict without congressional or judicial input. And it cannot be law on the fly, with no knowledge of the rules by anyone other than those executive officials who are responsible for their enforcement.

Padilla may deserve the treatment he is receiving—maybe worse. That isn't the point. When American citizens are taken into custody, they have, at a bare minimum, the right to consult an attorney. Then an impartial court, not the president, should make the ultimate decision as to whether the arrest and imprisonment comport with the Constitution.

In Jose Padilla's case, five justices now say his ongoing detention is unacceptable. That's why Padilla must be charged or released.

"Judge Rules Terror Suspect Must Be Charged or Freed"

Los Angeles Times
March 1, 2005
Richard A. Serrano

A federal judge on Monday ordered the Bush administration to either charge or release an American suspected of plotting terrorist attacks with Al Qaeda, saying that his continued confinement after nearly three years would "only offend the rule of law."

The case of Jose Padilla has drawn unusual attention because it pits the rights of a U.S. citizen against the powers of the government to fight the war on terrorism. The government contends that by designating Padilla an "enemy combatant"—not a criminal defendant—and putting him in military custody, it can hold him without charge indefinitely.

He was deemed to be an enemy combatant by President Bush in June 2002, a month after his arrest at Chicago's O'Hare International Airport. Officials accused him of participating in a plan to detonate a radioactive "dirty bomb" in the United States.

Federal prosecutors had hoped to keep the New York native behind bars in an attempt to learn all they could about his reported ties to Al Qaeda and his alleged attempt to scout targets for attack in the U.S.

But Monday's ruling by U.S. District Judge Henry F. Floyd found that Padilla's "indefinite detention without trial" violated his constitutional right to due process and ordered the administration to release him or charge him within 45 days.

"Great decision," said Donna Newman, a New York lawyer representing Padilla. "The Constitution is alive and well and kicking."

Government lawyers, who had no immediate reaction to the order, are likely to appeal the ruling quickly and forestall any immediate release of the man they have portrayed as a grave threat to American security.

The judge noted that prosecutors could either file criminal charges against Padilla within 45 days or declare him a "material witness" to a crime involving other terrorists and hold him in connection with that case.

Floyd, who was appointed by Bush in 2003, rejected the government's position that Padilla was an "enemy combatant" because he was captured during the ongoing war against terrorism.

"The president has no power," the judge said, "neither express nor implied, neither constitutional nor statutory, to hold [Padilla] as an enemy combatant."

Eugene R. Fidell, president of the National Institute of Military Justice, said Monday that Floyd's ruling was illustrative of what he called "the revolt of district judges" who were disturbed by the government's handling of terror suspects.

"District judges are used to dispensing justice to people in front of them," Fidell said. "They are down where the rubber meets the road in the administration of justice in this country, and they bring a

special perspective. And they have found ways to express their discomfort."

Padilla was arrested in May 2002 at O'Hare after returning from Pakistan.

Soon afterward, then-Atty. Gen. John Ashcroft held a news conference during which he labeled Padilla a dedicated soldier for Al Qaeda who had betrayed the U.S. to fight for Osama bin Laden.

Ashcroft said the government had "disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.' "

"Al Qaeda officials knew that as a U.S. citizen holding a valid U.S. passport, [Padilla] would be able to travel freely in the United States without drawing attention to himself," Ashcroft said.

Ashcroft further accused Padilla of returning to the United States to look for targets for a plotted chemical attack.

Padilla was held for a short time on a material witness warrant in connection with the investigation of the Sept. 11, 2001, attacks. In June 2002, Bush designated him an enemy combatant and directed that he be placed in military custody. Padilla then was moved to a military base in Charleston, S.C.

Floyd, who presides in Spartanburg, S.C., heard Padilla's claim that his constitutional rights were being violated. Key to his ruling Monday was the case of another U.S. citizen who had been held as an enemy combatant.

Yaser Esam Hamdi, born in Louisiana to Saudi parents, held dual citizenship. He was detained for several years—first at Guantanamo Bay, Cuba, then at Navy brigs in Norfolk, Va., and Charleston—until his release last year.

Like Padilla, he was designated an enemy combatant and held without criminal charges. But unlike Padilla, Hamdi was captured on the battlefield in Afghanistan, fighting for the Taliban and against the United States.

Hamdi's case made its way last summer to the U.S. Supreme Court, which ruled that the government had to charge him with a crime or release him. The Justice Department decided that he was no longer of value to intelligence officials, and he was allowed to return to Saudi Arabia after forfeiting his U.S. citizenship and agreeing to certain travel restrictions.

In Padilla's case, his lawyers argued before Floyd that the president's inherent constitutional powers did not allow him to subject U.S. citizens who were arrested in the United States to "indefinite military detention."

They also maintained that Congress never authorized that kind of indefinite confinement without trial for U.S. citizens.

Padilla grew up in Chicago, where he was arrested numerous times as a juvenile for gang activity. As an adult, he moved to Florida, married and turned to Islam. He then left his family and traveled throughout the Middle East.

The government told the judge that the president did have "constitutional authority" to detain Padilla, and cited the ***Hamdi*** case as evidence that the Bush administration was within its rights to hold Padilla indefinitely.

But the judge determined that "just because something is sometimes true, [it] does not mean that it is always true." He then cited

major inconsistencies between the ***Hamdi*** and ***Padilla*** cases.

"The differences between the two are striking," he said.

He noted that a federal appellate judge earlier had found that "to compare the battlefield capture [of] Hamdi to the domestic arrest [of] Padilla is to compare apples and oranges."

Padilla, Floyd said, "is an American citizen" and "was captured in a United States airport. He is, in some respects, being held for a crime that he is alleged to have planned to commit in this country."

The judge said that the "president's use of force to capture Hamdi" on the Afghan battlefield "was necessary and appropriate." But, he said, referring to Padilla's arrest in Chicago, "that same use of force was not."

Padilla's "alleged terrorist plans were thwarted at the time of his arrest," Floyd added. "There were no impediments whatsoever to the government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing."

Using that argument, the judge wrote some of the sternest language in his order:

"This court is of the firm opinion that it must reject the position of the [government]. To do otherwise would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."

In the past, the military has stressed that Padilla needed to be locked up indefinitely—and kept from defense lawyers and courtrooms—because intelligence officers were hoping to break him down in interrogations and glean information to prevent future attacks. It is on that basis that the government is likely to appeal the ruling.

But Newman, Padilla's lawyer, said: "We will continue to fight for our rights too, and his."

"U.S. May Still Charge 'Enemy Combatant,' Gonzales Says"

Los Angeles Times
March 8, 2005
Richard B. Schmitt

Atty. Gen. Alberto R. Gonzales indicated Monday that the Justice Department might still file criminal charges against U.S.-born "enemy combatant" Jose Padilla, even if the courts ordered his release.

The Justice Department is appealing last week's decision by a federal judge that the Bush administration's nearly three-year detention of Padilla without charges or regular access to a lawyer violated the law.

Padilla has been in a military brig almost continuously since his May 2002 arrest by federal authorities in Chicago in connection with a suspected plot to launch a radioactive "dirty bomb" attack on the U.S.

The administration has argued in court that it has the right to detain Padilla indefinitely based on the inherent power of the president as commander in chief. But the court ordered the government to charge him, name him as a material witness or release him within 45 days.

"Certainly, pursuing criminal charges would be an option that the United States would have," Gonzales said in a meeting with reporters. "That decision has not been made yet."

But whether federal officials can build a criminal case against Padilla has been in doubt. The government has obtained a wealth of information about his activities. Much of it, however, was obtained from Padilla when he was in military custody and did not have access to a lawyer—raising questions about the admissibility of such evidence in court.

The department in June aired a detailed accounting of how Padilla had befriended Al Qaeda leaders and plotted to blow up high-rise apartment buildings in the U.S.

The public disclosure of that information, Justice Department officials said, was done in part to defuse criticism that Padilla was being held unjustly.

Justice Department officials at the time said it would be difficult to bring criminal charges against Padilla.

"We obviously can't use any of the statements he's made in military custody, which will make that option challenging," James Comey, the deputy attorney general, said in making the Padilla report in June.

Gonzales said Monday that another concern was whether the government could make a case against Padilla without jeopardizing "sensitive intelligence collection sources" that provided information about him. Court rules normally would give Padilla the right to challenge his accusers.

Gonzales also said he would continue many of the policies of his predecessor, John Ashcroft, including aggressively enforcing and defending the Patriot Act, passed after the Sept. 11 terrorist attacks.

Portions of the law expire at the end of this year, and the administration is gearing up for a fight to renew them. But critics say the Patriot Act has sometimes been used to

violate the rights of citizens.

"I want everyone to understand that I think the Patriot Act has served its purpose in protecting America in a way that has been consistent with our values," Gonzales said, adding that although he favored a debate about the law, he did not believe it had caused any abuses.

"I have yet to hear strong arguments as to why the Patriot Act should not be reauthorized," Gonzales said. He said critics of the law had spread "a lot of misinformation and disinformation" about its effect.

Gonzales also said he had commissioned an internal review to study how the department might further tighten enforcement of federal obscenity laws—another Ashcroft priority.

He said he had requested a "full briefing and report" on U.S. government efforts to address prisoner abuse by U.S. troops or agents in Cuba and Iraq. The Justice Department has received a number of criminal referrals involving allegations of prisoner mistreatment by CIA operatives.

Gonzales declined to discuss the cases, noting that they involved continuing investigations, but said the department would aggressively pursue allegations of criminal wrongdoing.

He said that he thought the department could better use faith-based organizations to administer Justice Department programs such as job training and education for prisoners.

He said that although he embraced an Ashcroft-era legal opinion broadly defining the 2nd Amendment right to bear arms, he did not view the opinion as prohibiting reasonable gun control efforts, such as barring former felons from owning firearms.

Gonzales also said that, while working in the White House, he did not recall being aware of an alleged assassination plot against President Bush, mentioned in the indictment of a former Virginia high school valedictorian last month.

According to the indictment, Ahmed Omar Abu Ali planned in 2002 and 2003 to kill Bush either by shooting him or by detonating a car bomb.

"I don't know if the president was ever briefed on this," Gonzales said. "I don't remember that I was ever briefed."

"Padilla's Case Returns to Supreme Court"

Legal Times
June 6, 2005
Bethany Broida

Jose Padilla, the U.S. citizen and accused "dirty bomber" who has been detained as an enemy combatant for the past three years, is making another bid for freedom.

Padilla was arrested in May 2002 on a material witness warrant when he arrived in the United States from Pakistan via Zurich, Switzerland. At the time, the government alleged that Padilla was involved in a plot to detonate a dirty bomb on U.S. soil. A month later, President George W. Bush declared Padilla an enemy combatant and he was moved to a military brig in South Carolina, where he remains today.

The president cited Padilla's close association with al Qaeda as reason for the designation, saying Padilla "possesses intelligence" that "would aid U.S. efforts to prevent attacks by al Qaeda on the United States" and that he "engaged in hostile and warlike acts" in preparation for attacks against America. Padilla, Bush said, "represents a continuing, present, and grave danger to the national security of the United States."

The alleged al Qaeda loyalist's case already has wound its way once through the federal courts, landing before the Supreme Court in 2004. The justices voted 5-4 not to decide the merits of Padilla's case and instead ruled that the case had been filed in the wrong court—it had been filed in New York—and against the wrong person.

Padilla's lawyers immediately refiled his case in the U.S. District Court for the District of South Carolina and named Cmdr. C.T. Hanft, the commander of the Navy brig where Padilla is being held, as the defendant.

In February 2005, the U.S. District Court in South Carolina agreed with an earlier ruling by the U.S. Court of Appeals for the 2nd Circuit in New York and found that the government had no grounds to hold Padilla indefinitely, ruling that he must either be charged with a crime or released. The government appealed to the 4th Circuit, the court that reviews decisions from the South Carolina federal trial court. The 4th Circuit agreed to an expedited hearing, but Padilla's lawyers petitioned the Supreme Court to take up the case without waiting for the 4th Circuit to act.

The case, now called ***Padilla v. Hanft,*** is set for review at the Supreme Court's June 9 conference and asks the justices to consider whether the president has the power to seize U.S. citizens on American soil and subject them to indefinite military detention without filing formal charges.

"Here we have an American citizen who has been detained without trial for three years," says Jenny Martinez, the counsel of record for Padilla and an assistant professor at Stanford Law School. "At some level there is something fundamentally unfair with the government saying, 'We can keep you locked up forever and we can keep changing [the charges].' "

Martinez, a former clerk to Justice Stephen Breyer, says she is hopeful the justices will again grant certiorari, since they are familiar

with the briefs and the merits of the case were argued last year.

In its briefs, the government argues that Padilla's continued detention is lawful under the resolution passed by Congress shortly after the Sept. 11, 2001, terrorist attacks that allows the president to use "all necessary and appropriate force" against those "he determines planned, authorized, committed, or aided the terrorist attacks."

The government also argues that Supreme Court involvement at this point would be premature, since the government's appeal to the 4th Circuit is still pending.

"It looks more like an effort to avoid the 4th Circuit," says Richard Samp, chief counsel for the Washington Legal Foundation, which filed an amicus brief supporting the government in the 4th Circuit, but is not involved in the Supreme Court appeal.

Even if the high court expedited the case, the justices would not hear arguments until the fall, Samp says; litigating the case first at the 4th Circuit would only add a few months.

But in their brief, Padilla's lawyers—Michael O'Connell of Stirling & O'Connell in Charleston, S.C.; New York solos Andrew Patel and Donna Newman; Jonathan Freiman of Wiggin and Dana in New Haven, Conn.; and Martinez—argue that three years of confinement and prolonged uncertainty is long enough."[A]ny benefit that an opinion from the 4th Circuit might provide is more than outweighed by the costs of any further delay in the Court's final adjudication of this issue," they write.

"Appeal of Detained Terrorism Suspect to Be Heard Today"

Washington Post
July 19, 2005
Jerry Markon

For more than three years, Jose Padilla, an alleged al Qaeda operative, has been held without trial, much of the time without access to a lawyer.

A former Chicago gang member and Muslim convert, Padilla was arrested at O'Hare International Airport in May 2002. A month later, he was designated an "enemy combatant" by President Bush and sent to a naval brig in South Carolina.

Today, the U.S. Court of Appeals for the 4th Circuit will convene in Richmond to consider a question with vast implications for civil liberties and the fight against terrorism: whether in the absence of criminal charges the president can indefinitely detain a U.S. citizen captured on U.S. soil.

Federal prosecutors assert that Bush not only had the authority to order Padilla's detention but that such power is essential to preventing attacks.

"In the war against terrorists of global reach, as the Nation learned all too well on Sept. 11, 2001, the territory of the United States is part of the battlefield," prosecutors argued in legal briefs. The government contends that Padilla trained at al Qaeda camps and was planning to blow up apartment buildings in the United States.

Attorneys for Padilla, joined by a host of civil liberties organizations, say that his detention is illegal. If not constrained by the courts, they argue, it could lead to the military being allowed to hold anyone, from protesters to people who check out what the government considers the wrong books from the library.

"Once you open the door to a power like that, where does it end?" Andrew Patel, one of Padilla's attorneys, asked in an interview. "There is a certain bedrock way we do things as Americans. If we believe someone has done something bad, we take them to court and prove it. It's a grade-school civics thing."

The debate has featured the unusual spectacle of former attorney general Janet Reno, whose Justice Department prosecuted major terrorism cases during the Clinton administration, weighing in legally on behalf of someone the Bush administration calls a notorious terrorist. She and several other former Justice officials filed a brief supporting Padilla's effort to challenge his detention.

The Bush administration "claims a virtually unlimited right to ignore Congress's judgment about what powers are necessary to protect the country against terrorist attack," the brief said, arguing that Padilla could be charged under a variety of laws in the criminal justice system.

Padilla is one of two U.S. citizens held as enemy combatants since the terrorist attacks on the World Trade Center and Pentagon. The other, Yaser Esam Hamdi, was released and flown to Saudi Arabia last year after the Supreme Court upheld the government's power to detain him but said he could challenge that detention in U.S. courts.

Hamdi's and Padilla's cases are two among several recent ones that have raised the most

significant wartime civil liberties issues since World War II and that are gradually clarifying presidential powers to fight the war on terrorism. But there is a key difference between the two: Hamdi was captured on a battlefield in Afghanistan with forces loyal to that country's former Taliban rulers, while Padilla was arrested in the United States.

With the Justice Department seeking to extend the detention power it won in the ***Hamdi*** case to U.S. citizens captured domestically, legal experts are closely watching the appeals court's decision, along with a likely Supreme Court review after that.

"I think ***Padilla*** is mighty important. This is the case that really matters most," said Stephen A. Saltzburg, a law professor at George Washington University.

The government originally described Padilla as plotting with al Qaeda to detonate a radioactive "dirty bomb" but has since focused on allegations that he planned to blow up apartment buildings by filling them with natural gas.

In briefs filed with the 4th Circuit, prosecutors say Padilla researched building an atomic bomb but that al Qaeda leaders thought that the operation was too complicated. Al Qaeda operations chief Khalid Sheik Mohammed suggested that Padilla instead focus on the apartment building plan, the briefs say.

Padilla "accepted the assignment," the court papers say, and departed for the United States with $10,500 in al Qaeda cash, along with travel documents and a cell phone. His journey through the U.S. legal system began when he was arrested by the FBI on a material witness warrant in connection with a terrorism investigation in New York.

Bush designated Padilla an enemy combatant on June 9, 2002, and Padilla's attorneys challenged his detention in federal court in New York. In 2003, the U.S. Court of Appeals for the 2nd Circuit ruled for Padilla.

The government then appealed to the Supreme Court, and the court ruled that Padilla's petition should have been filed in South Carolina. After Padilla refiled there, a federal judge this year ordered the government to charge Padilla with a crime or release him within 45 days.

"To do otherwise," the judge wrote, "would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."

The government is now appealing that decision to the Richmond-based 4th Circuit, which is generally regarded as the nation's most conservative appellate court. The 4th Circuit ruled in the government's favor in the ***Hamdi*** case, saying that the military—not the courts—had sole authority to wage war and that courts should defer to battlefield judgments. The names of the three 4th Circuit judges who will hear Padilla's case will not be announced until today.

Donald G. Rehkopf Jr., co-chairman of the military law committee of the National Association of Criminal Defense Lawyers, which filed a brief on Padilla's behalf, said the president is seeking "the kind of executive power that the king of England had, which is why we had the Revolution in the first place."

That would mean, he said in an interview, that "they can arrest you in the middle of the

night and take you away."

But Richard A. Samp, chief counsel for the Washington Legal Foundation, a conservative public-interest law firm that intervened for the government, said the enemy combatant designation is needed in situations where investigators know someone is a threat but can't make a case in a traditional criminal court.

If the government loses the argument on Padilla, Samp said, "I think public safety would be endangered."

Defense of Marriage Act

"Judge Calls Defense of Marriage Act Legally Sound"

San Francisco Chronicle
June 17, 2005
Bob Egelko

The federal law that excludes same-sex couples from the benefits of marriage is constitutionally sound, a federal judge in Southern California declared Thursday in a case that could reach the U.S. Supreme Court.

Ruling in a suit by two gay men who were denied a marriage license in Orange County, U.S. District Judge Gary Taylor said the 1996 federal Defense of Marriage Act promotes "the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents."

Taylor declined the couple's request to rule on the constitutionality of California's law, which—like laws in effect in every state except Massachusetts—allows only opposite-sex couples to marry. He noted that a San Francisco judge's ruling in March, which found that the law violates the rights of gays and lesbians to marry the partner of their choice, was based entirely on the California Constitution. That ruling is on hold during the state's appeal.

But the significance of Taylor's decision is that it was only the third in the nation to address the validity of the Defense of Marriage Act, and the only one headed for appeal to higher courts. Rulings in Washington state and Florida, upholding other aspects of the law, have not been appealed.

To some gay-rights advocates' dismay, the couple's lawyer, Richard Gilbert, said he will ask the Ninth U.S. Circuit Court of Appeals in San Francisco to overturn Taylor's ruling.

"You don't tell a slave that it's not a good time to bring a case to be freed, to just remain as a slave until some political action committee feels it's a good time," Gilbert said. "You'd never say to a victim of civil rights abuse that this isn't a convenient time to address your rights. It's like telling a person in a burning building that this isn't a convenient time to exit."

But lawyers who challenged the California marriage law in the San Francisco case said it's too early to take the marriage issue to federal courts and risk an unfavorable ruling by an appeals court or the U.S. Supreme Court.

"We wish this case had not gone forward," said attorney Shannon Minter of the National Center for Lesbian Rights, which represents 12 same-sex couples. The inability of gays and lesbians to marry makes it difficult to bring the human impact of laws like these before the court and makes it more likely that the federal law will be upheld, Minter said.

San Francisco City Attorney Dennis Herrera, who is contesting California's marriage law in state court, joined Minter's group in asking Taylor to dismiss the federal case on the grounds that an unmarried couple isn't affected by the federal law. The

judge disagreed, saying registered domestic partners like the plaintiffs in this case might qualify for federal marriage benefits if the federal law didn't exclude them. Chief Deputy City Attorney Therese Stewart said the office would probably renew the argument before the appeals court.

The law, signed by then-President Bill Clinton, reserved federal benefits—joint tax filing, Social Security survivors' rights, immigration status and numerous other marital privileges—to opposite-sex couples. Another provision of the law, not involved in this case, allows states to refuse to recognize same-sex marriages performed in another state or nation.

The suit was filed in September by Christopher Hammer and Arthur Smelt of Mission Viejo after they were twice denied a marriage license in Orange County. They have been a committed couple since 1997.

The argument that prevailed in the state case—that the marriage restriction violates the fundamental right to marry the partner of one's choice—was rejected by Taylor.

Fundamental rights under the U.S. Constitution are limited to those that are "deeply rooted in this nation's history and tradition" for at least a half century, he said, quoting a Supreme Court ruling, adding that no such tradition exists for same-sex marriage.

Congress could have plausibly believed that allowing only opposite-sex couples to marry would encourage the best environment for raising children, Taylor said.

The U.S. Justice Department, which defended the law, was pleased by Taylor's ruling, said spokesman Charles Miller. The decision was also praised by the Alliance Defense Fund, a conservative organization that is taking part in the defense of both the state and the federal marriage laws.

"Defining marriage as one man and one woman is not only constitutional, it is common sense," said Byron Babione, a lawyer for the group.

"Backing Two-Sex Marriage Is Upheld by Federal Judge"

New York Times
August 19, 2004
Adam Liptak

A 1996 federal law that defines marriage as "a legal union between one man and one woman" is constitutional, a federal judge in Tacoma, Wash., ruled Tuesday. It is the first decision of a federal court to address the constitutionality of the law, the Defense of Marriage Act.

The decision is not binding on other courts, and the question of the constitutionality of the marriage law is likely to give rise to many decisions in coming years.

The Tacoma decision arose from a bankruptcy filing. Lee and Ann Kandu, two American women, were married in British Columbia in August 2003 and filed a joint bankruptcy petition in Tacoma two months later. The Justice Department opposed the joint filing, saying the federal marriage law forbade it.

The Defense of Marriage Act, signed into law by President Bill Clinton in 1996, has two significant provisions. One says that only married couples made up of a man and a woman can qualify for rights and benefits under federal programs that take marital status into account. A report by the General Accounting Office in 1997 said more than 1,000 federal laws were affected.

The second significant provision of the marriage law allows states to decline to recognize same-sex marriages from other states. That aspect of the law was not an issue in Tacoma.

In that decision, Judge Paul B. Snyder of Federal Bankruptcy Court considered the interaction of the marriage law and the bankruptcy code. A bankruptcy law allows spouses to file joint petitions. But the marriage law specifies that "the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

Judge Snyder ruled that there was no fundamental constitutional right to marry someone of the same sex and that it did not violate the equal-protection clause of the Constitution to allow opposite-sex couples to marry but to prohibit same-sex couples from doing so.

The government argued that the differing treatment was justified as "rationally related to the legitimate government interest in encouraging the development of relationships optimal for procreating and childrearing."

Judge Snyder accepted that rationale, but reluctantly.

"This court's personal view," he wrote, is "that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples."

He said he was required to give Congress great deference in reviewing the marriage law.

"This court cannot say," Judge Snyder continued, that the "limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government's interest."

Contact information was not available for

the petitioner in the bankruptcy case, Lee Kandu, who represented herself without a lawyer. Ann C. Kandu died in March.

Susan Sommer, a lawyer with Lambda Legal Defense and Education Fund, said Judge Snyder should have been more skeptical.

"The judge applied a sort of rubber-stamp approach," Ms. Sommer said. "There is a fundamental right to marry that applies without exception to all people. You can't dole out fundamental rights only to some."

This month, a state court judge in Seattle ruled that same-sex couples were entitled to marry under the state's Constitution. Though that case did not involve the federal marriage law, its reasoning about whether the state's interest in promoting procreation can justify a ban on same-sex marriages was sharply at odds with that of Judge Snyder.

"The precise question," the judge in the Seattle case, William L. Downing of King County Superior Court, wrote, "is whether barring committed same-sex couples from the benefits of the civil marriage laws somehow serves the interest of encouraging procreation. There is no logical way in which it does so."

Judge Downing stayed his decision pending review by the Washington Supreme Court.

The sole state in which same-sex couples can marry is Massachusetts, under decisions of its Supreme Judicial Court. Yesterday, a trial judge in Boston upheld a 1913 state law that prevents marriage licenses from being issued to couples from outside the state if their marriages would be illegal where they live.

"Supreme Court Paved Way forMarriage Ruling with Sodomy Law Decision"

New York Times
November 19, 2003
Linda Greenhouse

In its gay rights decision five months ago striking down a Texas criminal sodomy law, the Supreme Court said gay people were entitled to freedom, dignity and "respect for their private lives." It pointedly did not say they were entitled to marry.

In fact, both Justice Anthony M. Kennedy, in his majority opinion for five justices, and Justice Sandra Day O'Connor, in her separate concurring opinion, took pains to demonstrate that overturning a law that sent consenting adults to jail for their private sexual behavior did not imply recognition of same-sex marriage, despite Justice Antonin Scalia's apocalyptic statements to the contrary in an angry dissent proclaiming that all was lost in the culture wars.

The Texas case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," Justice Kennedy wrote. And Justice O'Connor wrote: "Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."

And yet, despite the majority's disclaimers, it is indisputable that the Supreme Court's decision in *Lawrence v. Texas* also struck much deeper chords. It was a strikingly inclusive decision that both apologized for the past and, looking to the future, anchored the gay-rights claim at issue in the case firmly in the tradition of human rights at the broadest level.

And it was this background music that suffused the decision Tuesday by the Massachusetts Supreme Judicial Court that same-sex couples have a state constitutional right to the "protections, benefits, and obligations of civil marriage." The second paragraph of Chief Justice Margaret Marshall's majority opinion included this quotation from the Lawrence decision: "Our obligation is to define the liberty of all, not to mandate our own moral code."

"You'd have to be tone deaf not to get the message from Lawrence that anything that invites people to give same-sex couples less than full respect is constitutionally suspect," Professor Laurence H. Tribe of Harvard Law School said in an interview. Professor Tribe said that had the Texas case been decided differently—or not at all—"the odds that this cautious, basically conservative state court would have decided the case this way would have been considerably less."

The Massachusetts decision was based on the state's Constitution, which Chief Justice Marshall described as "if anything, more protective of individual liberty and equality than the federal Constitution." She said the Massachusetts Constitution "may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life."

Clearly, the state ruling, *Goodridge v. Department of Public Health,* was not

compelled by the Supreme Court's decision in *Lawrence v. Texas* and, given its basis in state law, cannot be appealed to the Supreme Court. Whether it will influence other state high courts remains to be seen. A similar case in the New Jersey state courts was dismissed this month at the trial level and is now on appeal.

Yet just as clearly, the Massachusetts decision and the *Lawrence* ruling were linked in spirit even if not as formal doctrine. The *Goodridge* decision "is absolutely consistent with and responsive to *Lawrence,*" Suzanne Goldberg, a professor at Rutgers University Law School who represented the two men who challenged the Texas sodomy law in the initial stages of the Lawrence case, said in an interview. Ms. Goldberg added: "It's impossible to overestimate how profoundly Lawrence changed the landscape for gay men and lesbians."

Professor Goldberg said that sodomy laws, even if not often enforced, had the effect of labeling gays as "criminals who deserved unequal treatment." With that argument removed, discriminatory laws have little left to stand on, she said, adding that the Supreme Court "gave state courts not only cover but strength to respond to unequal treatment of lesbians and gay men."

The Massachusetts court considered and rejected the various rationales the state put forward to defend opposition to same-sex marriage. These included providing a "favorable setting for procreation" and child-rearing and defending the institution of marriage.

"It is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage," Chief Justice Marshall said. Noting that the plaintiffs in this case "seek only to be married, not to undermine the institution of civil marriage," she said, "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."

The decision will usher in a new round of litigation. The federal Defense of Marriage Act anticipated this development by providing that no state shall be required to give effect to another state's recognition of same-sex marriage.

On the books since 1996, the law has gone untested in the absence of any state's endorsement of same-sex marriage. With 37 states having adopted laws or constitutional provisions defining marriage as between a man and a woman, same-sex couples with Massachusetts marriage licenses may soon find themselves with the next Supreme Court case in the making.

"States' Recognition of Same-Sex Unions May Be Tested"

Washington Post
November 19, 2003
Charles Lane

Alarmed by a 1996 Hawaii court case that raised the prospect of legalized same-sex marriage, Congress and 37 states enacted laws designed to keep the phenomenon from spreading across the country.

It was a kind of legal flood-control system, built from statutes that defined marriage as the union of one man and one woman, designed so that no state would have to recognize a same-sex marriage from another state.

Now, because of the Supreme Judicial Court of Massachusetts, Americans are about to find out whether this containment structure can stand up under pressure.

If the ruling goes into effect six months from now as the court envisions, and if same-sex couples carrying Massachusetts marriage licenses settle in other states, it probably will be only a matter of time before someone goes to court claiming the right to have a same-sex marriage recognized outside the Bay State, legal analysts on both sides of the issue said.

"The floodgates will be tested," said Dale Carpenter, a law professor at the University of Minnesota.

It is likely they will hold, at least initially, legal analysts said. Hawaii's ruling was never put into practice because the state's voters adopted a constitutional amendment permitting a ban on same-sex marriages. Supreme courts in states where the legislature has spoken only recently against same-sex marriage probably would not strike down those laws.

The U.S. Supreme Court's landmark decision in June to overturn state same-sex sodomy laws, *Lawrence v. Texas,* celebrated the dignity of same-sex relationships and clearly helped inspire yesterday's Massachusetts decision. But the court said in *Lawrence* that it was not expressing a view on same-sex marriage, and few believe that the justices are eager to take on the issue soon.

Still, the impact of the Massachusetts ruling is not only legal but also emotional and political. It could ultimately reverberate in ways that may not be apparent from a reading of black-letter law as it exists today.

"I very much feel this case has a lot of resonance with what the California Supreme Court did in 1948 when it became the first to strike down a ban on interracial marriage," said Mary L. Bonauto, the lawyer who represented the seven same-sex couples who won in Massachusetts yesterday. "That was at a time when nine out of 10 Americans still opposed interracial marriage and no court had ever ruled in favor of it."

The post-1996 legislation, known in its federal version as the Defense of Marriage Act (DOMA), reinforced Supreme Court doctrine, which interprets the U.S. Constitution to require states to give "full faith and credit" to one another's court judgments—but not necessarily to their legislative or administrative acts. If Kansas started issuing driver's licenses to 14-year-olds, for example, police in next-door

Missouri still could order drivers younger than 16 off the roads.

"It is settled that states are not required to recognize every marriage performed in every other state," Carpenter said. "And they're not required to do so when they have a public policy contrary to recognizing that marriage."

This is why most of the state versions of DOMA include explicit language declaring that same-sex marriage is contrary to their public policy.

Still, it is possible that at least one state, Vermont, which has a law recognizing civil unions, would recognize a Massachusetts marriage, and the same might happen in California, which recently adopted a domestic partnership law that gives same-sex couples marriage-like status.

And in the states that do not have DOMAs yet, said Matthew Coles, director of the American Civil Liberties Union's Lesbian and Gay Rights Project, "courts are likely to find an absence of public policy."

Another line of attack against the federal and state DOMA legislation would be to argue that, by denying those who wish to form same-sex couples a right that is enjoyed by opposite-sex couples, they violate the constitutional guarantee of equal treatment under the law.

The ACLU is currently pressing such a claim in a Nebraska federal court, arguing against the state's constitutional amendment on marriage, adopted by referendum in 2000, which prohibits the legislature from adopting any measure that would recognize same-sex marriage, civil unions or domestic partnerships.

The ACLU believes it has a strong case based on a 1996 Supreme Court ruling that invalidated a Colorado constitutional amendment. The amendment would have abolished state anti-discrimination laws benefiting gay men and lesbians, Coles said.

Still, in most cases, the equal protection argument would require advocates to convince courts that opposition to same-sex marriage is so irrational that no reasonable legislator could have voted for it, legal analysts noted. That argument won in Massachusetts but probably would not in, say, Alabama.

Mathew D. Staver, president and general counsel of Liberty Counsel, which opposes same-sex marriage in courts and legislatures nationwide, noted that trial and appeals courts in Arizona, New Jersey and Indiana have recently dismissed equal-protection claims in same-sex marriage cases. But those cases will be appealed.

Still well over the horizon is the question of what states would do in the case of a same-sex couple that had married and then divorced in Massachusetts. If the divorce court awarded one member of the couple some of their property in another state, would he have a right to expect that state's courts to enforce the judgment?

The answer is probably yes, said William Eskridge, a law professor at Yale University. Though the second state would not have to recognize the marriage license, a divorce decree—resulting from an adversarial judicial proceeding—is the kind of action that the Supreme Court has required the states to recognize mutually, he said.

"Bush Has the Wrong Remedy to Court-Imposed Gay Marriage"

National Journal
March 13, 2004
Stuart Taylor Jr.

"Because of the full faith and credit clause of the Constitution (which makes every state accept 'the public Acts, Records, and judicial Proceedings of every other State'), gay marriage can be imposed on the entire country by a bare majority of the state supreme court of but one state [. . .] The 1996 Defense of Marriage Act? Nonsense. It pretends to allow the states to reject marriage licenses issued in other states. But there is not a chance in hell that the Supreme Court will uphold it."

So says columnist Charles Krauthammer. Not so fast, contends my colleague Jonathan Rauch: "The U.S. Supreme Court is unlikely to impose one state's gay marriages on the whole country."

Since columnists disagree, let's go to the scholars. Professor Lea Brilmayer of Yale Law School sides with Rauch: "Marriages have never received the automatic effect given to judicial decisions. They can be refused recognition in other states without offending full faith and credit," she said in congressional testimony on March 3. But others agree with professor Larry Kramer of New York University's law school, who wrote in 1997, "States cannot selectively discriminate against each other's laws, [and] Congress cannot authorize them to do so."

This debate is of more than academic interest. Much of the energy behind the Bush-backed proposal to ban gay marriage by constitutional amendment comes from fear of nationwide imposition of gay marriage by a kind of judicial chain reaction. The same fear gave birth to the federal Defense of Marriage Act of 1996, known as DOMA, which authorizes states to ignore gay marriages performed in other states, and the "little DOMA" laws in 38 states, which declare their intent to do just that.

Is this fear of a nationwide, judicially engineered redefinition of marriage plausible? Yes, somewhat, although it's likely to take several years if it happens at all. Is the proposed constitutional ban on gay marriage a justifiable response? No, emphatically. There are ways to get the courts out of the gay-marriage business without tying the hands of future voting majorities who may—and, I hope, will—eventually come to see gay marriage as good for us all.

The most direct and sweeping way for the Supreme Court to impose gay marriage is also the least likely. That would be to legalize gay marriage everywhere by announcing that the 14th Amendment's equal protection clause (or the due process clause, or both), which the Court used in 1967 to strike down laws against interracial marriage, can no longer tolerate the man-woman definition of marriage that has been a cornerstone of civilization for the past few thousand years.

Last June's decision in *Lawrence v. Texas,* which used the due process clause to strike down all state laws making it a crime to have gay sex, led Justice Antonin Scalia to suggest in a bitter dissent that the Court had set the stage to declare a right to gay

marriage. But there is a big difference between ruling that gays cannot be branded criminals and ruling that they must be given the privileges of marriage. Few serious analysts expect the justices to take that big a leap unless and until public opposition to gay marriage softens to the point that they could pull it off without provoking a firestorm.

The stealthier way to promote gay marriage, and the way that is most feared by opponents, would be the full-faith-and-credit two-step: Step one is for the justices to watch from the sidelines while state courts in Massachusetts and perhaps elsewhere use their state constitutions to impose gay marriage upon their own electorates. Step two would be for the Court to require that other states recognize those marriages and, in the process, to strike down all of the defense-of-marriage acts.

Brilmayer and some others say the justices will not take step two. And the traditional judicial interpretation of the full faith and credit clause is on their side. While the norm has always been for states to recognize marriages celebrated in other states, "the full faith and credit clause has never been understood to require recognition of marriages entered into in other states that are contrary to local 'public policy' [representing] deeply held local values," as Brilmayer testified. Under this "public policy" doctrine, states have been free to disregard marriages in other states between first cousins, people too young to marry in their home states, people who remarried after quickie Nevada divorces, and (before 1967) people of different races.

But Brilmayer's views are disputed by dozens of law review articles arguing that DOMA, the 38 state DOMAs, and (many add) even the long-standing "public policy" doctrine, are all unconstitutional, at least in the gay-marriage context. Gay-advocacy groups have prepared a well-orchestrated litigation campaign to use the full faith and credit clause to force recognition of gay marriages across the country. And Justice Anthony M. Kennedy has provided them with powerful ammunition with his majority opinions in both *Lawrence* and the 1996 decision in *Romer v. Evans,* which used the equal protection clause to strike down a Colorado referendum barring adoption of gay-rights laws anywhere in the state. Both decisions held that animus against homosexuals—which Scalia called "moral disapprobation"—is an irrational and illegitimate basis for some, if not necessarily all, anti-gay laws. It would not be a great leap to extend this logic to strike down DOMA and its state-law clones, and then to carve a gay-marriage exception into the public policy doctrine.

"The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," Justice Oliver Wendell Holmes Jr. once said. In that spirit, I prophesy that Kennedy, his four more-liberal colleagues, and possibly Justice Sandra Day O'Connor, will seek to promote gay marriage but will proceed cautiously, with their fingers to the winds of public opinion. They may begin by issuing narrowly drawn decisions enforcing state court judgments—which other states have almost always been required to honor – such as judicially approved property settlements in divorce decrees growing out of Massachusetts gay marriages. And when these justices sense that the time is ripe—assuming that those who remain on the Court have the votes—they will apply the full-faith-and-credit two-step to ban states from discriminating against other states' gay marriages in any way.

This prospect leaves me quite conflicted. While I strongly support gay marriage, I

oppose its imposition by judicial fiat. And while judicial activism at its best can build public consensus for long-overdue reforms, I am concerned that the courts have increasingly crossed the line from exercising healthy activism into usurping legislative powers, disdaining representative government, and casually casting aside tradition in the guise of interpreting the Constitution.

So I have some sympathy for the idea of amending the Constitution to prohibit any judicial decision construing that document to require recognition of any gay marriage. (The problem of state courts in Massachusetts and elsewhere inventing state constitutional rights can and should be handled at the state level.) Because amending the Constitution is a grave step that risks unintended consequences, I am not yet ready to support that approach, as long as the Supreme Court proceeds cautiously and incrementally on gay marriage. But a sudden, broad decision requiring all other states to honor Massachusetts' gay marriages, for example, might persuade me that the time has come to reclaim some of the rights of the people to govern themselves.

By no stretch of the imagination, however, is the proposed amendment behind which Bush has placed his prestige an appropriate way to protect representative government. Quite the contrary. The first clause of the so-called Musgrave amendment (sponsored by Rep. Marilyn Musgrave, R-Colo.) would impose a uniform federal definition of marriage upon the whole country: "Marriage in the United States shall consist only of the union of a man and a woman." This amounts to an anti-democratic, anti-federalist effort to ban all state legislatures, for all time, from experimenting with gay marriage—even if and when most voters in most states come to support gays' right to wed. And public opinion appears to be headed in that direction: Although polls still show voters opposing gay marriage by a ratio of about 2-to-1, the numbers appear to be softening over time. Especially significant is that young voters are far more open to gay marriage than old ones.

In this sense, the president's position on gay marriage has something in common with that of the Massachusetts court: Neither is willing to defer to democratic governance. While the court has imposed its definition of marriage on today's voters, Bush seeks to impose his own definition on their children and grandchildren.

"Vote on Defense of Marriage Act Provision Treads Tricky Legal Ground in Limiting Courts' Jurisdiction"

CQ Weekly
July 24, 2004
Seth Stern

One week after the Senate rejected a proposal to take up a constitutional amendment barring same-sex marriages, the House passed a different measure designed to limit gay and lesbian unions.

The House on July 22 bolstered a 1996 law defining marriage as a heterosexual union by passing legislation designed to bar federal courts from hearing challenges to a provision in the statute, known as the Defense of Marriage Act (PL 104-199). The bill (HR 3313) passed 233-194, though it stands little chance of passage in the Senate. *(House Vote 410, p. 1832)*

House Republicans defended the bill as an urgent necessity, particularly after the Senate refused to limit debate and vote on a motion to take up the proposed constitutional amendment to bar same-sex marriage (S J Res 40, H J Res 56). GOP lawmakers said the House bill would ensure that states remain the final arbiter over laws concerning marriage.

But Democrats decried the measure as a back-door attempt to amend the Constitution. They also said the bill would undermine the federal judiciary by stripping courts' ability to rule on the 1996 law's constitutionality.

"This is about whether the third branch of government, the judiciary . . . will continue to be the arbiter of what is constitutional in the American system," said John Conyers, Jr. of Michigan, the ranking Democrat on the House Judiciary Committee.

Conservatives fear that the 1996 statute could be undermined by the Massachusetts Supreme Judicial Court's ruling in November that held same-sex marriage legal under that state's constitution. On July 20, a lesbian couple married in Massachusetts filed suit in U.S. District Court in Tampa after Florida did not recognize their marriage license.

"This is an issue thrust upon us by rogue mayors and rogue courts," said Republican Steve Chabot of Ohio.

The bill, sponsored by John Hostettler, R-Ind., would prevent all federal courts, including the Supreme Court, from having jurisdiction over a provision in the 1996 law that gave states the option of not recognizing same-sex marriages performed in other states. The law also defined marriage as the union of a man and a woman.

"This legislation ensures the people and the states will have a say in marriage policy," said House Judiciary Committee Chairman F. James Sensenbrenner Jr., R-Wis.

Constitutional Law Basics

Under the bill, each state court would determine the constitutionality of the federal 1996 law. Republicans argued it would ensure same-sex couples have access to judicial review. However, opponents said it is a recipe for chaos because states could

wind up interpreting the U.S. Constitution in conflicting ways.

The bill attracted the support of 27 Democrats; 17 Republicans voted against it. Among the opponents of the legislation is former Rep. Bob Barr, R-Ga. (1995-2003), chief sponsor of the 1996 law, who said the bill would set a "dangerous precedent for future Congresses" that could find it tempting to insert similar language in other bills.

The debate on the House floor had the flavor of a constitutional law school class, as each side lectured the other on historical precedents.

Bill supporters say Article III of the Constitution gives Congress authority to regulate federal court jurisdiction. They cite a series of recently enacted laws that limit judicial review on issues ranging from the construction of the World War II memorial to fighting forest fires.

"If limiting federal court jurisdiction is good enough to protect trees, it sure ought to be good enough to protect state marriage policies," Sensenbrenner said. In recent decades, Republicans have unsuccessfully pushed similar proposals to limit federal court jurisdiction over abortion, recitation of the Pledge of Allegiance and school prayer.

But Democratic opponents contend that such measures amount to unprecedented attempts at "court stripping" that would undermine the separation of powers. Congress has rarely, if ever, passed laws that would bar all federal courts from reviewing the constitutionality of a statute, according to many constitutional scholars. And with so few precedents, the constitutionality of such a measure remains an open question, the Congressional Research Service concluded.

Opponents—including the American Civil Liberties Union—say this specific bill also would be an infringement on gay and lesbian couples' right to equal protection under the Constitution.

Regardless of the measure's fate, the House is expected to take up the issue of gay marriage again after the summer recess when it debates the proposed same-sex marriage constitutional amendment.

Partial Birth Abortion

"'Partial-Birth' Abortion Case Advances"

SCOTUSblog
July 8, 2005
Lyle Denniston

Moving the heated controversy over a ban on so-called "partial-birth" abortion closer to the Supreme Court, the Eighth Circuit on Friday ruled that Congress acted unconstitutionally in 2003 in outlawing such abortions nationwide. This was the first of three expected decisions by Circuit Courts on an issue that almost certainly will go to the Supreme Court to be decided finally. The Eighth Circuit ruled in *LeRoy Carhart, et al., v. Gonzales* (docket 04-3379). Similar test cases are pending in the Second and Ninth Circuits.

The three-judge panel disposed of the case in a fairly complex yet still compact 21-page ruling—a judicial effort far less strenuous than the 444-page decision by U.S. District Judge Richard G. Kopf of Lincoln, Neb., striking down the law last September 8. The Circuit Court upheld one of Judge Kopf's conclusions: that the federal "Partial-Birth Abortion Ban Act" was invalid because it lacked an exception to the ban that would permit the procedure when necessary to protect a pregnant woman's health.

A significant feature of the Circuit Court's decision was that it nullified the federal law without second-guessing the factual conclusions in which Congress had declared that there would never be a "medical necessity" for use of the "partial-birth" abortion method. The court declared: "We need not address the government's assertions that federal courts must defer to congressional fact-finding." The approach it took thus put aside the primary argument the Justice Department had made in defending the law—that is, Congress' finding of a total lack of medical necessity was entitled to deference by the courts.

After the Supreme Court had ruled in 2000 that a Nebraska state law banning the procedure was invalid in part because it lacked a health exception (*Stenberg v. Carhart*), Congress sought to get around that decision by passing a federal law, concluding as a fact that the particular procedure was never medically necessary. Like the case decided by the Justices in 2000, the new Eighth Circuit case came from Nebraska and, indeed, the lead challenger in the case to the federal law—Dr. LeRoy Carhart—is the same doctor who won the Supreme Court case against the state law five years ago.

It is possible that the new decision could make the Nebraska case the first to reach the Supreme Court as a sequel testing anew the power of legislatures, national and state, to ban the abortions at issue. Another significant test case, involving a state ban enacted in Virginia, has been struck down by a divided panel of the Fourth Circuit, but that court has shown an interest in a motion for rehearing *en banc*—an issue that won't be fully briefed until later this month. (That case is *Richmond Medical Center for Women, et al., v. Hicks, et al.*, docket 03-1821.)

In the Nebraska case involving the federal ban, the Circuit Court said that the Justice

Department had made its plea for deference to Congress upon "an erroneous assumption"—that is, that the key question in the case was a factual question about the medical necessity of the procedure. The ultimate factual conclusion the lawmakers made on that point, the court said, "is irrelevant."

The "precise question that must be answered," it added, is "whether substantial medical authority supports the medical necessity of the banned procedure." That, it said, cannot be answered by looking at what Congress thought was a purely factual determination about a consensus in the medical community. Rather, it said, the question is "whether there is a certain quantum of evidence" to support the legal conclusion that there is a medical need for the method. That approach is called for, it said, in order to "achieve constitutional uniformity" across the nation, instead of leaving it to individual judges to determine case by case whether there is a factual need for the procedure.

The Supreme Court, the Eighth Circuit ultimately concluded, already had settled that core issue in its 2000 decision in the *Stenberg* case. The highest court, the Circuit judges concluded, had determined that "substantial medical authority supported the need for a health exception" to a ban on partial-birth abortions. "The government," it said, "has not adduced evidence distinguishing this case from *Stenberg*."

The Supreme Court, it said, had drawn a legal—a constitutional—conclusion that will stand unless and until medical technology and medical knowledge advance to the point that the particular procedure became obsolete. "Should that day come, legislatures might then be able to rely on this new evidence to prohibit partial-birth abortions without providing a health exception," it commented. (The Supreme Court, of course, could change its mind about its constitutional conclusion if it takes up the issue again, but the Circuit Court was bound by the 2000 decision.)

"The Next Abortion Case?"

SCOTUSblog
June 3, 2005
Lyle Denniston

A decision by the Fourth Circuit on Friday may set the stage for the next test in the Supreme Court of the constitutionality of laws that ban so-called "partial birth" abortions. By a 2-1 vote, the Circuit Court nullified Virginia's 2003 law seeking to outlaw that form of medical practice for terminating pregnancy. A strongly worded dissent by a conservative member of the Fourth Circuit panel, Circuit Judge Paul V. Niemeyer, could embolden Virginia state officials to take the case on to the Supreme Court—very likely reaching it ahead of other "partial birth" cases, now awaiting rulings in three federal circuit courts, that test the federal ban on such abortions.

The main point of dispute between the majority ruling, written by Circuit Judge M. Blane Michael, and Judge Niemeyer's dissent is the conclusion of the court that the Supreme Court has laid down a "per se" constitutional rule that an attempt to ban the "partial-birth" abortion method must always contain an exception to protect the health of the pregnant woman when her doctor decides the method is medically necessary for her. That is the interpretation Judge Michael (joined by Circuit Judge Diana Gribbon Motz) gives to the Supreme Court's 2000 decision in *Stenberg v. Carhart*, striking down Nebraska's "partial birth" abortion law.

Virginia had argued, unsuccessfully as it turned out, that the Virginia law was sufficiently different from the Nebraska ban that its statute's lack of a health exception should not doom it. Virginia also had argued that the challengers to the Virginia law had not put on sufficient medical evidence to show that a health exception was necessary in the "partial-birth" context. The majority rejected both arguments. It was not necessary to prove, with evidence, that some women would have a medical need for a "partial-birth" procedure, the court said, because "*Carhart* established the health exception requirement as a *per se* constitutional rule." Judge Niemeyer protested that the ruling created "a bold, new law." Nothing in the *Carhart* decision, he argued, "indicates that the Court was creating a per se constitutional rule."

Another significant facet of the majority ruling was that it made clear, for the first time, that the Fourth Circuit does not apply in the abortion context the normal rule for judging facial challenges to statutes. The so-called "*Salerno*" rule says that a facial challenge may succeed only if there is proof that in no set of circumstances can a law be applied constitutionally. There is a split in the circuits on whether the *Salerno* approach does govern in cases involving facial challenges to abortion laws, and some analysts had counted the Fourth Circuit among the minority of courts applying *Salerno* to such cases. Friday's ruling concludes just the opposite. (This is an issue the Supreme Court itself will be confronting in its next Term, because the Justices on May 23 agreed to hear it in the New Hampshire abortion case, *Ayotte v. Planned Parenthood of Northern New England* [04-1144]. That case, however, involves a parental notice abortion law, not a "partial-birth" statute.)

Three U.S. District Courts have struck down the federal ban on the "partial-birth"

method, and all three cases have been appealed by the Justice Department to circuit courts. None, however, has yet ruled on the federal statute. (The three circuits are the 2d, 8th and 9th.)

"Federal Ban on Partial Birth Abortion: Court Rules That Governments Can't Outlaw Type of Abortion"

New York Times
June 29, 2000
Linda Greenhouse

The Supreme Court ruled by a 5-to-4 vote today that the government cannot prohibit doctors from performing a procedure that opponents call partial-birth abortion because it may be the most medically appropriate way of terminating some pregnancies.

The decision declared unconstitutional the Nebraska law before the court and, in effect, the laws of 30 other states. In addition, the bill to create a federal ban on the procedure, which President Clinton has vetoed twice and which may reach his desk again this year, would also be unconstitutional under the court's analysis: like all the other laws, it does not contain an exception for the health of the pregnant woman.

The decision, with a majority opinion by Justice Stephen G. Breyer, was analytically broader than many people expected, finding fault not only with the law's concededly imprecise language, but with the absence of an exception for women's health. At the same time, the 5-to-4 vote was unexpectedly close for a court where support for the underlying right to abortion has been counted as 6 to 3.

The combination of the broad ruling and the close vote led Janet Benshoof, president of the Center for Reproductive Law and Policy, which represented the Nebraska doctor who challenged the law, to describe the day as one for "Champagne and shivers." The immediate reaction from politicians and advocates on both sides of the abortion debate made it likely that the court's future composition would be the subject of greater than usual focus during the remainder of this election year.

The decision, one of four today that totaled 391 pages, came on the final day of the court's term.

"Partial-birth abortion" is the term opponents of abortion use to describe a method that doctors use infrequently to terminate pregnancies after about 16 weeks. Anti-abortion forces coined the term in the mid-1990's and have focused on graphic descriptions of the procedure as a way of undermining public support for abortion. The ruling today represents a significant setback to that strategy.

Justice Anthony M. Kennedy's dissenting opinion was a major surprise to both sides of the abortion debate. Not only his disagreement with the majority, but also the terms in which he expressed his views both in this case and in a second abortion-related decision today indicated Justice Kennedy's deep unease with a 1992 decision, of which he was a joint author, that had reaffirmed the right to abortion. The second decision upheld restrictions on demonstrations outside abortion clinics.

Emphasizing what he described as the "consequential moral difference" between the "partial-birth" method and other abortion procedures, Justice Kennedy said that in its 1997 law, Nebraska "chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life."

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg in an opinion concurring with the majority, said it was "simply irrational" to find a fundamental difference in one procedure over another. Justice Stevens said it was "impossible for me to understand how a state has any legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect the woman" in exercising the constitutional right to obtain an abortion.

Eight of the nine justices—all but David H. Souter, who joined Justice Breyer's majority opinion—wrote opinions in the case, *Stenberg v. Carhart,* No. 99-830. In addition to Justices Souter, Stevens and Ginsburg, Justice Sandra Day O'Connor joined the majority opinion. In addition to Justice Kennedy, Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas wrote dissenting opinions.

In striking down the Nebraska law, the majority went further than the federal appeals court whose decision the court upheld today. The United States Court of Appeals for the Eighth Circuit, in St. Louis, had found Nebraska's law unconstitutional because, while it was ostensibly aimed only at a particular type of late-term abortion, its vague wording would chill doctors in performing a common second-trimester abortion procedure that undoubtedly had constitutional protection under the Supreme Court's precedents.

The Supreme Court agreed with that analysis but went on to rule that even a more precisely worded statute that avoided that problem would still be unconstitutional in the absence of a health exception.

Surveying medical opinion on the subject, Justice Breyer said there was a "substantial likelihood" that the method at issue was "a safer abortion method in certain circumstances." He added, "If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."

Justice Breyer called the ruling "a straightforward application" of the court's 1992 ruling in *Planned Parenthood v. Casey,* which reaffirmed the 1973 ruling in *Roe v. Wade.* But the dissenters disagreed and said the decision went further in the direction of protecting an unqualified right to abortion. Justice Kennedy, an author of the Casey decision, said the ruling today was based on a "misunderstanding" of that decision and "contradicts Casey's assurance that the state's constitutional position in the realm of promoting respect for life is more than marginal."

James Bopp, general counsel of the National Right to Life Committee, which drafted the model law on which the Nebraska statute and many of the others were based, called the decision a "radical expansion of the right to abortion."

Under the Nebraska law, a doctor who performed a "partial-birth abortion" that was not necessary to save a woman's life faced a sentence of up to 20 years in prison. The law was successfully challenged in Federal District Court in Omaha by Dr. Leroy Carhart and has never taken effect. Dr. Carhart and his wife, Mary, were in the courtroom today.

The statute defined the procedure as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." That was defined further to mean "deliberately and intentionally delivering

into the vagina a living unborn child, or a substantial portion thereof" before terminating the pregnancy.

Nebraska's attorney general, Don Stenberg, argued that the state Legislature meant to ban one specific procedure, known in the medical profession as dilation and extraction, or D & X. In that procedure, used beginning in about 16 weeks of pregnancy when the fetus's head has grown too big to pass safely through an undilated cervix, doctors seeking to keep the fetus as intact as possible for various reasons extract it feet first and then use a sharp instrument to collapse the fetal skull.

But the lower courts found, and the majority today agreed, that the statutory definition of what Nebraska was prohibiting also applied to a procedure known as dilation and evacuation, or D & E, which is used much more commonly for abortions after the first trimester of pregnancy. In this procedure, the fetus is dismembered during the abortion, meaning that a "substantial portion" of it may be pulled into the vagina while the fetus is still alive.

In his opinion, Justice Breyer said the court had to review the statute as it was written, and did not have authority to accept the attorney general's invitation to make it narrower. Consequently, Justice Breyer said, all doctors using the D & E method "must fear prosecution, conviction and imprisonment," making the law an "undue burden upon a woman's right to make an abortion decision."

To that extent, the decision tracked the ruling last year by the Eighth Circuit. Where the majority today went further was in its insistence that even a more precisely written law needed to have an exception to protect women's health, in addition to the provision to save the life of the mother, which Nebraska's law and the other states' laws have.

Further, Justice Breyer made it clear that the health exception had to go beyond "situations where the pregnancy itself creates a threat to health." He said that although the medical testimony was somewhat equivocal, the court accepted the view that "a statute that altogether forbids D & X creates a significant health risk" and would be unconstitutional for that reason alone.

In the second abortion decision today, the court ruled 6-to-3 that a Colorado law aimed at protecting abortion clinic patients and doctors from harassment by protesters did not violate the protesters' First Amendment rights. The decision, *Hill v. Colorado,* No. 98-1856, upheld a ruling by the Colorado Supreme Court. Within 100 feet of the entrance to any health care facility, no one may make an unwanted approach within eight feet of another to talk or pass out a leaflet.

Justice Stevens wrote the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Souter, Ginsburg and Breyer. Justices Scalia, Thomas and Kennedy dissented. Justice Scalia and Justice Kennedy read their impassioned dissenting opinions in the courtroom this morning for more than half an hour, making clear that this First Amendment debate was in many respects a proxy for the court's ongoing abortion debate.

"Senate Passes Ban on Abortion Procedure"

Washington Post
October 22, 2003
Helen Dewar

In a major victory for anti-abortion forces after an eight-year struggle, Congress yesterday gave final approval to legislation banning a particularly controversial procedure for ending pregnancies, ensuring a legal showdown that could help define the scope—and limits—of abortion rights in the United States.

Voting 64 to 34, the Senate joined the House in passing the measure to prohibit what abortion foes call a "partial-birth" procedure and to punish doctors who violate the ban with fines and as many as two years in prison.

The bill, which the House approved 281 to 142 earlier this month, now goes to President Bush, who has indicated that he is eager to sign it into law. But opponents plan to challenge the measure in court and to seek an injunction to bar its enforcement, relying in part on the legislation's failure to allow such an abortion to protect a woman's health, as required by earlier court decisions.

As described in the bill, the procedure, generally performed during a pregnancy's second or third trimester, involves a physician puncturing the skull of a fetus and removing its brain after it is partially delivered.

Sen. Sam Brownback (R-Kan.), a leader in the fight for the bill, said after the vote: "This is an enormous day" for the country. But Sen. Barbara Boxer (D-Calif.), an opposition leader, called it "a very sad day for the women of America."

Bush said in a statement: "This is very important legislation that will end an abhorrent practice and continue to build a culture of life in America."

In the 30 years since the Supreme Court's *Roe v. Wade* decision, which established a woman's constitutional right to have an abortion, Congress has never banned a specific procedure, although it has repeatedly restricted federal funding for abortions, including barring payments to Medicaid patients.

Sponsors said the legislation was designed to end an especially brutal procedure that Sen. Jeff Sessions (R-Ala.) described as "a stain on the conscience of America."

But foes of the measure said its language is broad enough to cast legal doubt over other, more common abortion procedures. They said the bill is "step one," as Sen. Tom Harkin (D-Iowa) put it, toward the eventual destruction of abortion rights in this country.

In part because of such disagreements, there are no reliable figures on how many abortions might be banned under the new law. Critics of the procedure say thousands of such abortions are performed annually; its defenders say they are relatively rare.

As they did in earlier debates, the bill's sponsors surrounded themselves with large, made-for-television sketches of fetuses. Supporters focused on the procedure, while opponents emphasized the broader issue of abortion rights.

"We cannot allow this kind of brutality to corrupt us," said Sen. Rick Santorum (R-Pa.), who led the fight for the bill.

"Women's right to choose is in greater danger now than it has been at any time since the Supreme Court issued the *Roe v. Wade* decision 30 years ago," said Sen. Frank Lautenberg (D-N.J.).

In yesterday's vote, 17 Democrats joined 47 Republicans in backing the legislation, while 30 Democrats, three Republicans and one independent voted against it. Virginia's senators voted for it; Maryland's senators opposed it.

The first "partial-birth" abortion bill was introduced in 1995, after Republicans won control of both houses of Congress. It was passed twice in the late 1990s but was vetoed by President Bill Clinton.

Another effort stalled in 2000 after the Supreme Court, in a 5 to 4 decision, struck down a Nebraska statute that was similar in most respects to the bill that Congress was considering. The court found the Nebraska law insufficiently specific in defining the procedure to be banned and flawed because it did not include an exception for protecting a woman's health. The bill got another chance this year after Republicans regained the Senate majority, putting them in control of both houses and the White House.

The key legal question is whether the current bill's drafters have changed the measure enough to pass muster with the Supreme Court.

Backers of the legislation say they defined the procedure with all the specificity that the court might require and addressed the health issue by asserting in a series of findings that such an abortion is never needed for health reasons.

But critics said the bill fell short on the grounds of both specificity and health. They predicted that the Supreme Court will strike it down.

Three separate lawsuits against the measure are planned by the Planned Parenthood Federation of America, the Center for Reproductive Rights and the National Abortion Federation. The latter will be represented by the American Civil Liberties Union.

"Next on Abortion: Supreme Collision"

Washington Post
November 23, 2003
Simon Lazarus

Abortion opponents won a major victory recently by pushing a "partial-birth" abortion ban through Congress, but that victory could turn sour when the case reaches the Supreme Court.

Why? First, because a 5-4 court struck down a similar Nebraska law three years ago. But there's another, far more consequential reason: Over the past decade, a different majority—led by conservatives Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas—has struck down other federal laws that attempted to regulate activities traditionally left to the states. This majority has also held Congress to a strict interpretation when it used constitutional language such as the Interstate Commerce Clause to claim federal jurisdiction, which is exactly what Congress did in enacting the abortion ban. Ironically, these are the same three justices who have reliably supported abortion opponents in defending state anti-abortion laws. And now the court will have to choose.

In keeping with its pattern of decisions that enhance states' rights and curtail federal power in the name of "federalism," the court may well decide that Congress lacks the authority to pass any law banning or regulating abortions. That result would not only extinguish the new law, it would decimate much of the rest of the "pro-life" agenda, in particular the wish to secure nationwide bans on such practices as euthanasia, cloning and stem-cell research. So the question is: Will Rehnquist, Scalia and Thomas keep their federalism faith, even if that requires betraying political allies on the religious right?

Their quandary does not revolve around an abstract philosophical tension between states' rights and big government, but rather around a specific matter of law. Congress justified the new abortion law on the basis of the commerce clause, the constitutional provision that authorizes it to "regulate commerce among the states." The law imposes criminal sanctions on practitioners who, "in or affecting interstate or foreign commerce," perform the banned procedure. Until recently, this drafting technique might have raised no eyebrows. Beginning in the New Deal era, Congress reflexively invoked the commerce clause as a catch-all to legitimize laws which, like the new abortion ban, address activity that is neither "interstate" nor "commerce." The Supreme Court went along, never once overturning a federal statute on the grounds that it exceeded Congress's commerce clause power.

But in 1995, in a case known as *United States v. Lopez,* the court canceled its blank check to Congress. With great rhetorical fanfare, a 5-4 court majority led by Rehnquist struck down the 1990 Gun Free School Zones Act, which made it a federal crime to possess a firearm within 1,000 feet of a school, as outside the bounds of the commerce clause. And in 2000, in *United States v. Morrison,* the same majority, using the same grounds, invalidated the 1994 Violence Against Women Act, which

authorized federal civil lawsuits to redress gender-based violence against women.

Rehnquist prescribed two new rules in his landmark opinions: First, that Congress cannot regulate activities merely because they "affect" interstate commerce, but only if they "substantially affect" it; second, if an activity is not commercial or economic in nature, its effects on interstate commerce will not be considered "substantial" merely because, if repeated many times over, the aggregate effect might arguably be substantial. In *Morrison,* Rehnquist made clear that he and his allies meant business, brusquely dismissing voluminous congressional findings that the aggregate impact of gender-motivated violence damaged the national economy. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so," he wrote.

If Rehnquist and his four colleagues (Justices Anthony Kennedy and Sandra Day O'Connor often join Thomas and Scalia to form this majority) take to heart what the chief justice wrote in *Lopez* and *Morrison,* they will have two options when the latest abortion law reaches them. They can take the high ground and strike the law down on the basis that it addresses activity which, in line with the spirit as well as the letter of those cases, "the states may regulate and Congress may not." Or in deference to Congress, they can construe the statute narrowly to avoid (technically) invalidating it altogether, by strictly limiting its scope to activities that actually occur in interstate commerce. In that event, as veteran Supreme Court litigator Alan Morrison has observed, the long and bitter struggle for this law could end up barring late-term abortions on interstate flights, train trips and highways, but not much else.

The three most ardent champions of states' rights—Rehnquist, Scalia and Thomas—are passionate critics of Supreme Court decisions that invalidated state anti-abortion laws. If they join the majority from the Nebraska case and reject the new federal law, the movement that calls itself "pro-life" will be hard-pressed to blame rejection of abortion bans on an arrogant band of liberal ideologues. More importantly, however, the movement's other major targets—euthanasia, cloning and stem-cell research—are inherently no more "in or affecting interstate commerce" than is abortion. Except to the extent that such practices can be curbed by cut-offs of federal funding, they, too, could be beyond Congress's grasp.

Of course, the conservative justices could suspend their distaste for untethered federal power, which they displayed not only by striking down the Gun Free School Zones law and the Violence Against Women Act, but by limiting other social legislation as well, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act. They could recycle any number of once-commonly used artifices, such as positing that late-term abortions are performed with instruments previously circulated in interstate commerce. But if they strain to distinguish recent precedents in order to save legislative artifacts of the religious right, they will sorely wound their federalism crusade, validating liberal charges that it is a selectively applied sham.

Logically, abortion rights advocates should jump at the chance to confront their judicial adversaries with so painful a dilemma. Why have they not done so? Perhaps because they and their political allies abhor the Rehnquist court's restrictions on federal civil rights, environmental, health care and other major 20th-century social legislation. Their failure to unsheathe this weapon may

stem from a wish to avoid bolstering the legitimacy of the still-fragile federalism jurisprudence. Their judicial allies—Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer—continue to dissent from the majority's incursions on federal power. They continue to assert that the new doctrinal protections for states' rights are incorrect and "not the law."

But whatever discomfort abortion rights advocates may feel about a states' rights assault on the latest abortion law, sooner or later the issue will arise. For one thing, their litigators have a professional, ethical obligation to make every reasonable argument available to advance the goals of their clients who, as medical practitioners, seek to perform abortions without exposure to liability or litigation. When the hands of abortion rights advocates are forced, all parties may feel that they have been put on the spot. Their mutual unease could reinforce criticisms that the court's federalism campaign is a solution without a problem, and certainly without a constituency.

"U.S. Judge in San Francisco Strikes Down Federal Law Banning Form of Abortion"

New York Times
June 2, 2004
Adam Liptak; Carolyn Marshall contributing

A federal judge in San Francisco yesterday struck down a federal law that banned a form of abortion, saying it created a risk of criminal liability for virtually all abortions performed after the first trimester. The law, the Partial Birth Abortion Ban Act, enacted in November, makes it a crime for doctors to perform any "overt act" to "kill the partially delivered living fetus."

In a 117-page decision, the judge, Phyllis J. Hamilton, ruled that the law was unconstitutional in three ways. She said that it placed an undue burden on women seeking abortions, that its language was dangerously vague and that it lacked a required exception for medical actions needed to preserve the woman's health.

The decision was the first ruling on the merits of the law. Two other cases, in Nebraska and New York, are pending. All three judges had halted enforcement of the law while they conducted trials.

The federal law is similar to a Nebraska law struck down by the Supreme Court in 2000, and yesterday's decision did not surprise legal experts. Groups opposing abortion said yesterday that they hoped the new cases would give the Supreme Court an opportunity to reconsider.

The White House said it would continue to fight for the law.

"The president strongly disagrees with today's California court ruling, which overturns the overwhelming bipartisan majority in Congress that voted to pass this important legislation," the president's press secretary, Scott McClellan, said in a statement. "The president is committed to building a culture of life in America, and the administration will take every necessary step to defend this law in the courts."

A Justice Department spokesman said that lawyers were studying Judge Hamilton's decision and that the department would continue to litigate the other two cases vigorously.

The California case was brought by the Planned Parenthood Federation of America and a local affiliate, and they were later joined as plaintiffs by the city and county of San Francisco. Yesterday's decision follows a three-week trial in March and April before Judge Hamilton, who was appointed by President Bill Clinton.

Beth H. Parker, a San Francisco lawyer who represented Planned Parenthood, said the decision was "an enormous victory."

"It reaffirms that the government has no role in this very intimate decision between the woman and her physician," Ms. Parker added. "Today's decision also gives physicians the comfort that they don't have to be concerned that the procedures performed can expose them to two years in prison for violating the act."

Ms. Parker, of the San Francisco law firm Bingham McCutchen, said the decision would protect doctors who work for local

governments, as well as doctors affiliated with Planned Parenthood clinics around the nation. Judge Hamilton declined, however, to issue a broader nationwide injunction, in deference, she said, to the Nebraska and New York courts.

Dennis Herrera, the city attorney in San Francisco, said the decision would allow the city to deliver a complete array of health care options.

"The population that we service at San Francisco General Hospital," Mr. Herrera said, "many of them indigent and from the minority communities, will continue to have services and counseling available to them with respect to their reproductive rights."

Substantial passages in Judge Hamilton's decision concerned nomenclature. "The term 'partial-birth abortion,'" she wrote, "is neither recognized in the medical literature nor used by physicians who routinely perform second trimester abortions." She referred to the procedure as intact dilation and evacuation. It is also sometimes called dilation and extraction. The law defines the procedure as one in which the doctor "deliberately and intentionally vaginally delivers a living fetus" until either the head or the body up to the navel is "outside the body of the mother" and then kills it.

Judge Hamilton's ruling turned largely on the testimony of medical experts. She said they had demonstrated that the contested procedure was a variant of and in some ways safer than the most common form of abortion used in the second trimester of pregnancy, which she called dilation and evacuation by disarticulation, in which the fetus is typically not removed intact.

In that and other forms of abortion, Judge Hamilton found, "the fetus may still have a detectable heartbeat or pulsating umbilical cord when uterine evacuation begins" and thus "may be considered a 'living fetus.'" That means, she wrote, that the law could apply to ban such abortions as well.

In the 2000 Supreme Court decision concerning the Nebraska law, the court ruled that the Constitution forbids placing "undue burdens" on the right to abortion.

The California plaintiffs said the 2003 law created a burden because common abortion methods could violate the law. The government said the law was meant to apply only to the disfavored procedure.

Judge Hamilton, relying on the Supreme Court decision, agreed with the plaintiffs. She also noted that the law did not distinguish between procedures used before fetal viability and those used after, when the government may regulate or ban abortion except where it is necessary for the preservation of the life or health of the woman.

In ruling that the law is unconstitutionally vague, Judge Hamilton wrote, "It deprives physicians of fair notice and encourages arbitrary enforcement." She objected in particular to what she said were the ambiguous terms "partial-birth abortion" and "overt act."

Finally, Judge Hamilton said that the law did not include a crucial exception required by the Supreme Court. In the Nebraska case, the court ruled that such laws must include an exception for the preservation of the life or health of the woman. The federal law provides an exception for the woman's life but not for her health.

Government lawyers said this was defensible, since, they said, the procedure is

never medically necessary.

Judge Hamilton disagreed, ruling that the procedure is sometimes required and can be safer than other forms of abortion. In those other procedures, she wrote, fetal parts are sometimes left in the uterus, creating a risk to the woman's health. The contested procedure is typically shorter, reducing the risk for complications from anesthesia. And relatively intact fetuses can be used in autopsies, which can help in the planning of further pregnancies.

The government suggested that doctors fearful of prosecution under the law "could simply effect fetal demise before performing the procedure to escape liability under the act," Judge Hamilton wrote. The plaintiffs responded that they should not be required to perform an additional medical procedure "that poses some risk and no benefit to the patient solely to protect themselves from liability."

"U.S. Court in New York Rejects Partial-Birth Abortion Ban"

New York Times
August 27, 2004
Julia Preston

A federal judge in New York ruled yesterday that a federal law banning a rarely used method of abortion was unconstitutional because it did not exempt cases where the procedure might be necessary to protect a woman's health.

The ruling, by Judge Richard Conway Casey, came in a challenge brought by the National Abortion Federation and seven doctors to a November 2003 law that bans the method known as partial-birth abortion.

Judge Casey determined that the Supreme Court required, in a decision four years ago, that any law limiting abortion must have a clause permitting doctors to use a banned procedure if they determine that the risk to a woman's health would be greater without it.

The Supreme Court ruling "informed us that this gruesome procedure may be outlawed only if there exists a medical consensus that there is no circumstance in which any women could potentially benefit from it," Judge Casey wrote. The Supreme Court's opinion struck down a state law in Nebraska.

The New York case, which was argued by lawyers from the American Civil Liberties Union, was one of three cases challenging the partial-birth abortion law. On June 1, a federal judge in California ruled the law unconstitutional on similar but broader grounds than Judge Casey cited. The Justice Department has appealed that decision. A challenge in Nebraska is still in federal court there.

The ruling is a new blow to legislation that abortion opponents have hailed as one of their most significant victories. President Bush strongly backed the bill.

Attorney General John Ashcroft said in Washington yesterday that the Justice Department would continue to defend the law vigorously and would appeal the ruling. A department statement quoted President Bush, who had said the law would "end an abhorrent practice and continue to build a culture of life in America."

The ruling by Judge Casey, in United States District Court for the Southern District of New York, makes it considerably less likely that the Bush administration will be able to implement the law as it is currently written. It also will shift the focus of the abortion debate back to the Supreme Court and its cornerstone 1973 ruling in *Roe v. Wade* upholding a women's broad right to abortion.

At issue is a procedure, generally used in the second or third trimester of pregnancy, that involves partially extracting an intact fetus from a woman's uterus and then killing it by emptying the brain from the skull. Also known as D and X, for dilation and extraction, it has been used in cases of rare or unanticipated severe medical complications of pregnancy.

After listening to doctors describe the procedure in detail during 16 days of hearings this spring, Judge Casey wrote that

it is "gruesome, brutal, barbaric and uncivilized." He cited medical experts' testimony that the procedure subjects the fetus to "severe pain."

He also dismissed much of the testimony by A.C.L.U. witnesses, saying he did not believe that many of their "purported reasons for why DandX is medically necessary are credible; rather they are theoretical or false."

But Judge Casey was even more pointedly critical of Congress, saying that it had voted for the law without seriously examining the medical issues. "This court heard more evidence during its trial than Congress heard over the span of eight years," the judge wrote.

He found that Congress, in writing the law, had ignored furious dissension among doctors over the safety and necessity of the disputed abortion. The lawmakers had overlooked testimony in their own hearings, he said, and based the bill on the conclusion that partial-birth abortion is "never necessary."

The law includes an exception if there is a risk to a woman's life, but not a broader exception if a doctor decides that there is a risk to a patient's health. A violation is a felony punished with up to two years in jail and fines up to $250,000.

The A.C.L.U. suit did not center on defending the procedure, but on contesting the limitations in the law on doctors' and women's ability to determine medical care.

"This is a great day for women's health, because it means the Constitution holds that doctors will treat women's health and not Congress," said Talcott Camp, an A.C.L.U. lawyer in the case.

"Partial Birth is First Hurdle"

National Law Journal
November 29, 2004
Jay Sekulow

With a number of retirements likely at the U.S. Supreme Court, the speculation begins about whether a shift in the court would result in overturning long-standing decisions like *Roe v. Wade.*

To many it is clear that Roe was wrongly decided nearly 32 years ago. The high court declared that human children prior to birth are not "persons" for purposes of the 14th Amendment. Many believe the ruling itself is unconstitutional because it drives a wedge between biological humanity [which prenatal human offspring definitely have] and legal personhood [i.e., the right to the equal protection of the law]. Born human children, by contrast, indisputably enjoy the basic rights secured to all persons under the 14th Amendment. Consider, for example, *Levy v. Louisiana* [1968].

What is not so clear, though, is whether *Roe* could be overturned during the next four years as new appointments to the court are made.

First, overturning *Roe* is a worthy goal. It is bad law. It is legally flawed. However, it would take a major shift on the court for that to happen. Looking into the crystal ball at the Supreme Court does not always produce a clear picture. To overturn *Roe,* there would need to be numerous retirements-and replacements with justices who believe *Roe* was wrongly decided. All complicated and unpredictable scenarios.

Is it possible? Yes. Probable? Hard to tell.

What is probable, though, is a court that is reshaped and likely to embrace additional, reasonable restrictions on abortion-most significantly, upholding the national ban on partial-birth abortion.

A ban on partial-birth abortion operates at the borderline between prenatal and postnatal life. As a consequence of *Roe,* this border separates, in the eyes of the federal judiciary, human nonpersons from human persons.

Partial-birth procedures represent the beachhead of abortion's assault on postnatal life, the bridge between abortion and infanticide. Partial-birth procedures open the way to legal infanticide.

When the Supreme Court considered the issue in *Stenberg v. Carhart* in 2000, the court declared Nebraska's ban on partial-birth abortion unconstitutional. But the issue was decided by the slimmest of margins [5-4]. The four dissenting justices-Chief Justice William Rehnquist and justices Antonin Scalia, Clarence Thomas and Anthony Kennedy-took the opportunity to speak about their decision-and their pronouncements sent shock waves well beyond the legal community.

An outspoken dissent

In an unusual move, several of the justices who dissented spoke from the bench, highlighting this gruesome procedure. Kennedy criticized the majority, saying "the majority views the [partial-birth abortion] procedures from the perspective of the abortionist, rather than from the perspective

of a society shocked when confronted with a new method of ending human life."

Thomas was even more pointed: "The court," he said, "inexplicably holds that the states cannot constitutionally prohibit a method of abortion that millions find hard to distinguish from infanticide."

And Scalia said, "the method of killing a human child-one cannot even accurately say an entirely unborn human child-proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion."

The procedure itself brought sharp reaction from the dissenters. In the words of Thomas: "The physician literally sucks the fetus' brain from the skull."

Now, four years later, this issue is on the fast track to the Supreme Court once again. The Partial-Birth Abortion Ban Act of 2003 was declared unconstitutional by federal courts in New York, Nebraska and California. The cases are now before the 2d, 8th and 9th U.S. circuit courts of appeal. Those cases could end up at the Supreme Court next term.

And with a number of replacements likely at the high court, a one-vote swing could result in a decision that allows some modicum of legal protections for the most vulnerable among us.

It is certainly possible that a reshaped court could conclude that a human being who is partially outside the mother's body is a person entitled to the equal protection of the law under the 14th and Fifth amendments. These amendments secure protection for the basic, minimum human rights any government must respect. At the same time, governments, and all their people, have a tremendously important stake in the unqualified prohibition of partial-birth abortion. The child who "crosses the goal line," by foot or head, into the realm of judicially recognized "personhood" must receive the full protection of the law if we are not to abandon, inexorably, the sanctity of postnatal life as well.

President George W. Bush has repeatedly said he has no litmus test for nominees, including those for the Supreme Court. In a post-election news conference, Bush said when there is a vacancy on the high court, he would select someone "who knows the difference between personal opinion and the strict interpretation of the law." We take Bush's pledge seriously.

Affirmative Action

"Judges Back Jefferson Desegregation Plan"

Courier-Journal
July 22, 2005
Chris Kenning

Jefferson County Public Schools' racial desegregation plan has survived another legal challenge—and appears headed to the U.S. Supreme Court.

The 6th U.S. Circuit Court of Appeals yesterday affirmed a federal judge's 2004 ruling upholding the district's racial guidelines, which maintain black student enrollment at most of its 153 schools between 15 percent and 50 percent.

About 35 percent of the district's 97,000 students are black.

"This is a strong endorsement," said Pat Todd, district director of student assignment. "It puts us in a good position for any appeal to the Supreme Court."

That likely will happen, said Ted Gordon, attorney for Jefferson County parent Crystal Meredith, who sued the district over its desegregation plan.

"I will consult with my client and in all likelihood look forward to proceeding with an appeal to the Supreme Court," Gordon said.

Meredith said her son, Joshua, was denied a transfer to another school because of his race, and his education suffered because he remained in the lower-performing school.

Jefferson County's case is one of several working their way through the nation's federal courts that ultimately may determine whether schools, in the absence of a court order, can promote diversity by voluntarily considering race when assigning students.

No such cases have yet reached the Supreme Court, and Louisville's could be among the first.

School plans changing

More school districts are abandoning their desegregation plans, including in Charlotte, N.C., where parents sued in the late 1990s and forced the school system to dismantle its busing program.

"The nation has seen a waning of court-ordered desegregation," said Chinh Quang Le, assistant counsel for the NAACP Legal Defense and Educational Fund. The latest cases, he said, will address the question of "what's the next chapter?"

Last month, the 1st U.S. Circuit Court of Appeals upheld a Lynn, Mass., school desegregation plan that bars transfers that harm racial diversity. That case could also be appealed, Le said.

Maintaining diversity

Jefferson County has continued to desegregate its schools since a 1974 federal decree was lifted in 2000. The district's policy was intended to keep schools diverse in the face of persistent neighborhood segregation.

It uses a system that allows parents some choice among schools while using the 15-50 racial guidelines to maintain diversity. Most

students are placed in schools of their choice, district officials say, although the guidelines can lead to some children being bused long distances.

The Jefferson County district is considered a model of desegregation at a time when most of the nation's African-American students attend predominantly black schools that are beset by high poverty, less experienced teachers, fewer resources and lower expectations, according to experts.

And a 2001 district survey found that more than 80 percent of parents supported the desegregation plan.

"Most parents value the diversity," said Paula Wolf , who has two children in Jefferson County high schools.

All schools equal?

But Gordon says that the district's schools are not all equal and that denying students admission to a school because of their race is unconstitutional.

Meredith was among four white parents who in 2002 sued over the plan's use at traditional magnet and other schools.

The district argued that removing racial guidelines would resegregate many schools and especially hurt black students, because they're most likely to attend schools beset by poverty. They also said that all students have benefited academically and socially by attending desegregated schools.

U.S. District Judge John Heyburn II agreed, ruling last June that the district can justify maintaining desegregated schools because it improves education and tolerance. He said the district's plan doesn't unduly harm any group, since all its schools basically have the same funding and curriculum.

But Heyburn did order the district to drop an admission system for its nine traditional magnet schools that separated applicants by race and sex before they were chosen.

That change takes effect this school year.

Because Meredith was the only parent whose child attended a non-traditional, regular program school, she alone proceeded with the appeal.

'Well-reasoned opinion'

Yesterday, the 6th Circuit appeals court concurred with Heyburn, writing that Heyburn's ruling was a "well-reasoned opinion" and therefore did not warrant a full written opinion.

The 6th Circuit judges agreed with Heyburn that the student-assignment plan was constitutionally sound because the district had a "compelling interest to use the racial guidelines" and "applied them in a manner that was narrowly tailored to realize its goals."

At a Glance

Jefferson County's desegregation plan has evolved from mandatory busing to "managed choice," which allows most parents to choose from among groups of schools.

School choices are granted on several conditions, including that schools maintain a black student enrollment that is at least 15 percent and no more than 50 percent.
Four schools are exempted from the guidelines because they offer unique programs: Central High, Manual High, The Brown School and Brandeis Elementary.

"Jefferson Suit Is Expected to Proceed"

Courier-Journal
June 24, 2003
Chris Kenning

The U.S. Supreme Court decision yesterday allowing colleges and universities to admit students based partly on race clears the way for five Louisville parents to continue their lawsuit challenging Jefferson County Public Schools' desegregation policy.

The University of Michigan affirmative-action case covered issues similar to those in the Louisville lawsuit ; that prompted the judge and attorneys for both sides to agree to put the Louisville lawsuit on hold until a Supreme Court ruling was issued.

In two decisions involving the University of Michigan, the Supreme Court underscored that racial quotas are unconstitutional but left room for public universities—and by extension other public and private institutions—to seek ways to take race into account.

The ruling failed to give either Jefferson County school officials or the white parents challenging the district's desegregation policy the clear victory they had hoped for, lawyers for both sides said.

As a result, the lawsuit likely will go to trial to determine whether the district must dismantle its 25-year-old diversity policy. The district buses thousands of students to keep African-American enrollment between 15 percent and 50 percent at all but four of its 152 schools.

"The district's use of race was unconstitutional before this ruling, and it's unconstitutional afterward," said attorney Ted Gordon, who represents five parents who say the district relies on race to unconstitutionally deny their children enrollment in the schools they wanted to attend.

District officials have said race is only one of many factors they consider in assigning students to schools.

Plaintiff Teresa Hartnett said she's relieved that the trial can go forward. Hartnett said her children—Jaclyn, 5, and Jessica, 8—were denied entry to Audubon Traditional Elementary School because of their race, which she thinks is illegal.

"It's hard to tell your children why they can't get into a school," she said yesterday. "What do you say, 'I'm sorry, you're not the right color?'"

Gordon said the ruling could improve his clients' case because the justices signaled that race can't be the determining factor for admission. That is what is happening in Jefferson County, he said.

But Byron Leet, an attorney contracted to represent the Jefferson County school district, said the Supreme Court's ruling isn't directly applicable to the Jefferson County lawsuit because admission to an elite university is far different from assignments to public schools that generally are equal.

The U.S. Supreme Court in 1978 struck down racial quotas in schools but said race can be one factor in determining admission. But as legal challenges have mounted nationwide in recent years, some schools

have abandoned their diversity policies.

Experts had said that the Michigan case's outcome, depending on how broadly it was worded, could affect K-12 education policies.

The high court's ruling yesterday affirmed the less-structured use of race in admissions at the University of Michigan law school but struck down an undergraduate policy that awarded minority applicants 20 points on a 150-point index toward admittance. Justices said it was tantamount to a quota and violated the equal-protection clause of the 14th Amendment.

Michael Simpson, assistant general counsel for the National Education Association, said yesterday that although uncertainties remain, the ruling means that school districts probably can craft race-related policies as long as they aren't quotas.

U.S. District Judge John G. Heyburn II likely will hold a conference with the attorneys before determining the next step in the lawsuit, lawyers said. Heyburn could not be reached yesterday afternoon for comment.

The Jefferson County lawsuit was filed last fall on behalf of David McFarland, who argued that his sons, ages 11 and 6 at the time, were denied enrollment at Jefferson County Traditional Middle School and Schaffner Traditional Elementary School because of their race. McFarland, who is white, argued that the denial violated the U.S. Constitution and a previous federal court ruling because Jefferson County's traditional schools offer special benefits that students can't receive in non traditional public schools.

Heyburn ruled in 2000 that the school district had to stop considering race when assigning students to four magnet schools, which he said offered students special benefits. Gordon also was the attorney in the magnet school case, representing parents of five black students who were denied entry to Central High School.

Four more parents joined McFarland's lawsuit earlier this year, including one from a school with a regular program. That broadened the scope of the case to include racial guidelines at all Jefferson County public schools, which serve 96,000 students.

Last month, the parents filed for an injunction asking Heyburn to temporarily halt the use of race in school assignments until the case is decided. Even if the case goes their way, they argued, their children wouldn't see benefits until the fall of 2004. Heyburn hasn't ruled on the injunction request.

Officials with the district say racial guidelines provide critical educational benefits, including improved academic performance for both black and white students and better race relations.

Pat Todd, director of student assignment, has said drawing up an alternative student-assignment plan would take at least a year.

"Court Backs Lynn Use of Race in School Plan"

Boston Globe
June 17, 2005
Shelley Murphy and Maria Sacchetti

A federal appeals court yesterday ruled that the Lynn public schools could continue using race as a factor in student transfers, opening the door for other school systems to devise similar ways to guarantee diversity in schools.

The 3-to-2 decision on Lynn's voluntary desegregation plan offers an alternative for school systems at a time when most courts have eliminated busing and other mandatory race-based policies for assigning students. Lynn chose to create its own desegregation plan in the 1980s, hoping to prevent racial strife and segregation. Its case is one of a few nationwide that could redefine the role race could play in assigning students to schools.

But the ruling is not necessarily the final word on the issue. The plaintiffs in the Lynn case, a group of white and minority parents, say they will appeal to the US Supreme Court, which has never weighed in on voluntary desegregation plans in public schools.

Lynn lets students attend their neighborhood schools, regardless of race, but students cannot change schools if their departure would make either school more racially imbalanced. The plaintiffs complained that the student assignment system was discriminatory and denied their children a place in schools because of race.

"This is precedent-making," said Gary Orfield, a Harvard education professor and director of the Civil Rights Project, who testified in support of Lynn during the federal trial. "It could be the beginning of a reopening of a desegregation effort. It recognizes the very positive benefits of something that has been attacked widely."

The US Court of Appeals for the First Circuit, in the majority opinion written by Judge Kermit V. Lipez, said race relations and academic achievement in Lynn improved under the policy.

"We are persuaded by the extensive expert testimony in the record, rooted in observations specific to Lynn, that there are significant educational benefits to be derived from a racially diverse student body in the K-12 context," the court wrote. "Lynn has a compelling interest in obtaining those benefits."

Judge Bruce M. Selya, who was on a three-judge appeals court panel that found the Lynn plan unconstitutional in October, wrote the dissent.

"The majority's eagerness to justify departing from precedent frees it to strike out on its own, fashioning a rule that flies in the teeth of the Supreme Court's stalwart opposition to the use of inflexible, race-determinative methods in granting or denying benefits to citizens," Selya wrote.

Lynn crafted its voluntary desegregation plan in the late 1980s. Students are not required to move to another school to achieve racial balance, but beginning in 1989, if they wanted to switch schools, they could be denied a transfer if it would upset the racial balance.

A school is considered balanced if its nonwhite enrollment is close to the district average, 47 to 77 percent of an elementary school's student body. Roughly a third of Lynn's students choose to attend a school other than their neighborhood school.

In Massachusetts, the ruling allowing Lynn to keep race as a factor will help 21 other school systems with voluntary desegregation plans, educators say. The point, they say, is that the judges have said that race can be used in some fashion.

"This decision allows cities like us and Lynn and other cities to do what we think is best for education," said Salem School Superintendent Herb Levine. "Some people would call it social engineering, and so be it. But what it really is is that segregated schools don't work for minority kids. They don't work for white kids either, especially in the world as it is today."

Boston attorney Michael Williams, who represents families in the suit against Lynn, said students in Lynn and elsewhere can achieve academically without any specific racial mix. He said the system has improved because of a change in demographics.

Chester Darling, an attorney who also represents the plaintiffs, said yesterday's ruling "grates against improved race relations" by allowing Lynn to keep a plan that rejects transfers based solely on race. "What this case says is people are defined by their color," he said. "And you don't define people by their color."

Since the early 1990s, courts have released many school systems from court-ordered desegregation plans, leading to complaints that many schools have become predominantly minority again, said Chinh Le, a lawyer with the NAACP Legal Defense Fund in New York. In 1998, a federal court threw out the use of race in admissions to Boston's exam schools.

Yesterday's decision offers the highest judicial endorsement of a voluntary effort to desegregate schools, Le said.

"There have been a number of cases that have led to resegregation, and this case may be an antidote for that," said Le.

The ruling while it only affects states under the First Circuit: Massachusetts, Maine, Rhode Island, and New Hampshire, plus Puerto Rico could also influence pending legal battles elsewhere in the nation, he and Orfield said. Last year, the Ninth Circuit Court of Appeals threw out the Seattle public schools' high school assignment policy, which used race as a factor.

But, as occurred in the Lynn case, Seattle school officials have been granted a rehearing, scheduled for next week, before a larger panel of appeals court judges. Louisville, Ky., school officials, meanwhile, argued before the Sixth Circuit Court of Appeals last week and are awaiting a ruling on whether their voluntary plan is constitutional.

Massachusetts Attorney General Thomas F. Reilly, whose office had defended Lynn's plan in court, said the voluntary system works and "its goal is to prepare the children of Lynn for the world they will live in and work in."

The 14,300-student school system is 62 percent minority, and many credit the voluntary plan with striking a compromise on integration that averted the racial tensions that shattered Boston in the mid-1970s with court-ordered busing. But in 1999, a group of white, black, and Hispanic parents filed a

lawsuit asserting that the policy was discriminatory.

Lynn's voluntary plan has not achieved balance in all schools. About half of the elementary schools and most middle schools have reached district averages for racial balance. The high schools are more diverse, and students can more easily transfer from one to the other, according to the court ruling. But Lynn officials say most schools are more diverse than they would have been if the school system didn't use race as a factor. Shoemaker Elementary School is 70 percent white, but would be almost all-white without the plan.

Barbara George, Shoemaker's PTA president, said she wanted her children to grow up in a diverse school, even if her neighborhood is largely white.

"I'm grateful for diversity," said George, who is white. "It enhances my children's experiences."

In last October's ruling against Lynn, the judges said racial distinctions should always be a last resort. They cited a 2003 decision by the US Supreme Court that upheld the University of Michigan's law school admissions policy, ruling that universities may use race as a factor, but not the sole factor, in admissions to achieve a diverse student body.

Yesterday's ruling upheld a 2003 decision by US District Judge Nancy Gertner, who found Lynn's plan was constitutional.

"Judge OK's Use of Race in School Assigning"

Boston Globe
June 7, 2003
Thanassis Cambanis

A US District Court judge yesterday upheld Lynn's school desegregation plan, ruling it does not violate the Constitution—the first federal case in the country to deal with voluntary, rather than court-ordered, race-conscious school assignment plans.

Judge Nancy Gertner issued a 156-page decision on the eve of an expected US Supreme Court ruling on whether universities may consider race in the admissions process.

She ruled that race may be considered when assigning students in grades kindergarten through 12, so long as the school system can demonstrate a compelling interest and tailors its program narrowly enough to minimize any disruption to students.

The decision lends protection to the 22 school districts in Massachusetts that have voluntary desegregation plans, and could affect race-based public school assignment programs across the country. Lawyers say the ruling is likely to be contested up to the US Supreme Court.

"The issues raised in this litigation are critically important, not just for the parties, but for the nation," Gertner wrote. "The Lynn plan does not entail coercive assignments or forced busing; nor does it prefer one race over another. The message it conveys to the students is that our society is heterogeneous, that racial harmony matters—a message that cannot be conveyed meaningfully in segregated schools."

At stake is whether school districts such as Lynn, which are under no court order to do so, can take race into account when they assign students.

Her ruling—which the plaintiffs plan to appeal—carves out a rationale for school districts to create desegregation programs. It also upholds the state's Racial Imbalance Act, a law dating to 1965 that provides additional funding to districts with desegregation plans.

Lawyers for the seven families who challenged Lynn's desegregation plan said they would appeal the decision.

The judge "can deploy all of the perfumed politically correct language she wants in this decision, but the reality is that these kids are being pushed around because of their race," said Chester Darling, who is president of Citizens for the Preservation of Constitutional Rights and one of the plaintiffs' lawyers.

Over the last 15 years, federal courts have consistently dissolved forced desegregation orders and have struck down policies that require students to attend schools far from their homes for the sake of racial diversity.

A series of court decisions has also struck down university admissions policies that provide advantages to minority groups. The Supreme Court is expected to issue a ruling by the end of June in two cases against the University of Michigan, which challenge

that institution's race-conscious admissions policies.

Richard Cole, who is the senior counsel for civil rights in the Massachusetts attorney general's office and represents the Lynn school system, said, "There is potential that this could be the ground-breaking test case before the US Supreme Court on how important it is to have children of all different ethnic groups educated together."

Gertner ruled that decisions about affirmative action in higher education or the job market—where people are competing for a limited number of positions—do not apply to public K-12 education, where the government has a "compelling interest" in teaching citizenship.

Lynn—encouraged by the state government—crafted its current voluntary desegregation program in September 1989 because the school district was suffering from white flight from predominantly minority schools, plummeting performance, and racial and ethnic violence.

Under the plan, Lynn students are guaranteed placement in their neighborhood school. But they may not transfer to a school outside their neighborhood if it upsets the racial balance at either school.

Tom Hutton, a staff attorney for the National School Boards Association, said public school officials across the country would take heart from Gertner's decision, which protects for the time being at least one strategy school systems have used to maintain racial balance.

"The problem of de facto segregation in our schools is worsening, and lots of school districts are grappling with it," Hutton said. "Schools need to have tools to deal with it."

Chinh Quang Le, assistant counsel for the NAACP Legal Defense Fund, said the Supreme Court's ruling in the Michigan cases should not affect Gertner's ruling, due to the differences between the competitive market for higher education and the inclusive and universal nature of primary and secondary schooling.

"Our hope is that this opinion will encourage more school districts to seek proactively to address issues of isolation and diversity in their schools," Le said.

Yesterday's decision is only binding in Massachusetts, but since it marks the first time a federal district judge has ruled on voluntary desegregation plans, it will be closely watched across the country.

"This is a great victory for public school students and for civil rights," Massachusetts Attorney General Thomas Reilly said yesterday.

"Lynn's integrated elementary schools have allowed Lynn's youngest students to develop a deep appreciation and respect for people of different races, promoting tolerance among Lynn students," he said.

The US Court of Appeals for the First Circuit will have to decide whether Gertner's distinction between K-12 education and higher education is appropriate.

At an 11-day trial before Gertner last summer, parents, educators, and specialists testified about whether the Lynn program had successfully remedied problems in the school system, and about the costs and benefits of the program for its students.

"It's time to go back to neighborhood schools, where you don't use race in placement," said Christine H. Rossell, a

political science professor at Boston University who testified for the plaintiffs.

"Our goal is supposed to be a color-blind society," Rossell said, adding that she believed the Appeals Court would overturn Gertner's decision because the Lynn school system could maintain a racially harmonious environment without the existing school assignment plan.

In 1974, nearly a decade after Massachusetts passed the Racial Imbalance Act, US District Judge W. Arthur Garrity Jr. ordered Boston to desegregate its school system, a decision followed by widespread strife. Boston has now abandoned race as a factor in school assignments.

Still, many education specialists who followed the Lynn trial said yesterday that public school integration was still a live issue.

"Affirmative action is under attack nationwide," said Gary Orfield, a professor of education and social policy at Harvard University who testified for the Lynn schools. "The decision is a very strong affirmation of integration as a goal that can be reasonably achieved with voluntary techniques."

"A World Without Color; Segregation Deprives White Children Too"

Boston Herald
March 27, 2005
Howard Manly

Given all the talk about a ``New Boston'' and a majority-minority city, it's probably a good time to take a look at a segment of Boston that is rarely discussed—white students.

By all accounts, they are performing better than minorities on standardized tests, graduating at higher rates, attending colleges and finding jobs. The one thing they are not receiving is any sense of cultural diversity.

Despite the last 50 years of courageous effort to racially balance public schools, a goal consistently upheld by the U.S. Supreme Court as a compelling national interest, Boston's schools are more racially isolated than ever. Although much has been made of increasing the quality of education that all children receive, racial diversity and the benefits of understanding different cultures and ethnicities barely receives a mention.

But public education is not just about reading, writing and arithmetic. As noted Harvard scholar Gary Orfield explains, "The vast majority of white students are isolated from students of color, depriving them of the experience of interacting with those of different racial and ethnic backgrounds, skills that will become even more critical as Metro Boston and the nation as a whole become increasingly multiracial."

The numbers documenting the racial isolation tell part of the story. During the 2001-2002 school year, seven in 10 white students attended schools in the suburbs that were more than 90 percent white. The Boston Public Schools, for instance, enrolled just 2 percent of the area's white students.

Of white students living in Boston, about 44 percent attended private schools—schools that are largely white.

In stark contrast, one of every five black or Latino students attend schools in urban poverty-stricken areas. According to a recent study by the Civil Rights Project at Harvard University, 97 percent of the intensely segregated minority schools (those more than 90 percent minority) have a majority of students who are eligible for free or reduced-price lunch, compared to only 1 percent of schools composed of more than 90 percent white students.

Some 61 percent of black students in Boston Public Schools attend schools that are more than 90 percent nonwhite. For Latino students, that number is 54 percent who attend schools that are more than 90 percent nonwhite.

Based on standardized test results, separate schools clearly are not equal. About 96 percent of students attending majority white schools pass the English language arts portion of the MCAS. Only 61 percent of the students attending majority-minority schools passed that portion of the exam. As the Civil Rights project reported, ``Children in segregated schools often experience conditions of concentrated disadvantage, including less-experienced or unqualified

teachers, fewer demanding pre-collegiate courses and more remedial courses, and higher teacher turnover."

The majority of white students don't face those sorts of problems. Nor should their parents be blamed for wanting the best for their children, and that usually means not attending public schools in the inner city. But what those white students face is a deficiency of cultural knowledge that the U.S. Supreme Court deemed vital to the national interest. In its 2003 ruling upholding the use of race in college admissions, U.S. Supreme Court Justice Sandra Day O'Connor concluded that ``numerous studies show that student body diversity promotes learning outcomes and better prepares students for an increasingly diverse work force and society, and better prepares them as professionals."

O'Connor went on: ``These benefits are not theoretical but real, as major American businesses have made clear that skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints. . . ."

Though that might be happening at the University of Michigan and other colleges across the country, it is not happening in Boston-area public schools. Based on housing patterns coupled with the apparent reluctance of white parents to send their children to public schools, there is precious little that school officials can do to lure white students back to urban school settings. That means more racial isolation, less understanding and a ``New Boston" that is almost worse than the ``Old Boston."

Court challenges, such as the one against the city of Lynn's voluntary desegregation program, are only part of the problem. It's nearly impossible these days to solve a race-based problem with a race-neutral policy, and though other factors such as poverty and English-language skills should be considered, the argument for diversity is relatively simple. Diversity is a good thing, largely because it helps eliminate ignorance and damaging racial stereotypes in the minds of both whites and blacks and, increasingly, Latinos and Asians.

Integrated schools are not simply about minority schoolchildren sitting next to white students, and receiving the benefits that accrue from attending schools with better resources, better teachers, more challenging classes and an academically competitive atmosphere.

It's about producing future leaders who are able to function across racial lines. Of course, balancing public schools along racial and ethnic lines does not ignore the inequalities of society as a whole. But that has been the challenge of public schools not just since the days of busing in the 1970s but since the 1850s when the city received its first legal challenge to integrate its school system.

U.S. Supreme Court Justice Lewis Powell recognized the importance of racial diversity 26 years ago in his opinion in the Bakke case that upheld affirmative action. Though taking great pains to emphasize that race was only one factor that should be used in admissions policies and that everyone was entitled to equal protection, Powell argued that nothing less than the ``nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."

It was a worthy goal then and it's even a worthier goal now. It's unfortunate that very few really believe it.

Felon Voting Rights

"Supreme Court Declines to Hear Two Cases Weighing the Right of Felons to Vote"

New York Times
November 9, 2004
Linda Greenhouse

The Supreme Court on Monday declined to hear cases from New York and Washington State on whether states violate the federal Voting Rights Act when they strip felons of the right to vote. But with 48 states, all except Maine and Vermont, disenfranchising millions of people who have been convicted of crimes, the issue remains very much alive in the lower courts, and the justices' action did not foreclose accepting a future case.

The Voting Rights Act prohibits states from applying any "voting qualification or prerequisite" in a manner that has a racially discriminatory effect. Inmates and their advocates who are bringing the lawsuits point out that the impact of the felon-disenfranchisement laws falls disproportionately on members of minority groups, particularly on black men. The number of people barred from voting under the state laws is estimated to be 3.9 million, with more than one-third of them black men.

The statistics are not disputed. But whether Congress intended the Voting Rights Act to apply to this situation is very much in dispute. Congress passed the original Voting Rights Act in 1965 and amended it in 1982 to make clear that it barred voting policies that had not only the intent but also the effect of discriminating by race.

Two federal appeals courts differed on the question in the cases that the justices considered and turned down on Monday. In the case from Washington State, the United States Court of Appeals for the Ninth Circuit permitted a lawsuit by six felons to go forward. In a similar case brought by a New York inmate serving a life sentence for murder, the United States Court of Appeals for the Second Circuit dismissed the lawsuit on the ground that the Voting Rights Act did not apply.

The Washington case, *Locke v. Farrakhan,* No. 03-1597, was filed by four black men, one Hispanic man, and one American Indian. All were in prison on felony convictions or had recently been released. Washington has stripped felons of their right to vote since before it became a state, and the prohibition against voting by "all persons convicted of an infamous crime" is part of its constitution. The prohibition is lifelong unless lifted by a pardon, clemency or by a sentencing review board.

The Federal District Court in Seattle dismissed the lawsuit, but the Ninth Circuit, which sits in San Francisco, reinstated it, sending the case back to the District Court for further examination of racial bias in Washington's criminal justice system. The state appealed to the Supreme Court.

In the New York case, *Muntaqim v. Coombe,* No. 04-175, a black man, Jalil Abdul Muntaqim, serving a life sentence for murder, filed his own lawsuit in challenging New York's law, which is less extensive than Washington's and applies only to those

who are in prison or on parole. The Federal District Court in Syracuse dismissed the case. The United States Court of Appeals for the Second Circuit, in Manhattan, also ruled against him, finding that in the absence of a "clear statement" from Congress, the Voting Rights Act should not be interpreted to apply to the disenfranchisement of felons.

The inmate, now represented by a team of lawyers, appealed to the Supreme Court. Now that the justices have denied review, it is likely that the appeals court will revisit the issue. A majority of the circuit's judges have indicated that they would grant a request to rehear the case, which was decided by a three-judge panel, if the Supreme Court turned down the appeal.

Last month, the 11 judges of the full United States Court of Appeals for the 11th Circuit, which sits in Atlanta, heard arguments in a case challenging Florida's life-long felon disenfranchisement law, which bans an estimated 600,000 state residents from voting. The plaintiffs presented evidence that Florida's law, which dates to 1868, was enacted with the intention of keeping the newly enfranchised blacks from voting.

A three-judge panel of the 11th Circuit had ruled that the lawsuit could go to trial, but the full court vacated that decision and granted Florida's request for re-argument. Lawyers for the plaintiffs in the Florida case filed a brief with the Supreme Court in the Washington case to make sure the justices were aware of the Florida lawsuit.

Many lawyers following the issue believe that the Florida case, which is being handled by lawyers from the University of North Carolina School of Law and the Brennan Center for Justice at New York University, is the strongest of the lawsuits because the facts have been extensively developed and the state's history of discrimination is clear. The brief urged the justices not to grant the Washington case but to wait for the Florida case.

"11th Circuit Upholds Ban on Felon Voting"

Fulton County Daily Report
April 14, 2005
Dan Christensen

MIAMI—In a decision fraught with partisan political overtones, the full 11th U.S. Circuit Court of Appeals in Atlanta has upheld an 1868 Florida law that generally bars felons from voting even after they've finished serving their prison sentences. Tuesday's 10-2 ruling widens an existing split of opinion on the issue among the federal appellate courts across the country, and could set the stage for the U.S. Supreme Court to resolve the issue. The decision affirmed a 2002 summary judgment by U.S. District Senior Judge James Lawrence King in Miami. In September 2000, in the midst of the Bush-Gore presidential election campaign, Thomas Johnson and six other ex-felons sued Gov. Jeb Bush and his cabinet in U.S. District Court in Miami, claiming the anti-felon law was a form of illegal discrimination. They argued that it violated the Equal Protection Clause of the 14th Amendment and the federal Voting Rights Act. The defendants are all members of Florida's Clemency Board. The plaintiffs, represented by attorneys from the Brennan Center for Justice at the New York University School of Law, filed the class action on behalf of an estimated 600,000 Florida felons who have completed their prison sentences but cannot vote. Under the law, felons can't "vote or hold office" until they convince the clemency board to restore their civil rights. Felons must petition for that status. There is no automatic review. The issue has been especially controversial in Florida, where the purging of felons from voter roles in 2000 and 2004 was widely seen as flawed, resulting in the mistaken exclusion of non-felon voters.

In addition, Gov. Bush and legislative Republican leaders have resisted growing calls for easing the restoration of voting and other civil rights to felons after they complete their sentences. There also is a major partisan factor involved in the issue. A disproportionate percentage of felons in Florida are African-Americans, and blacks vote heavily Democratic. In a state where 7.6 million Floridians cast ballots in last year's presidential election, the possible inclusion of 600,000 felon voters could swing close races. But the 11th Circuit, in an opinion noting that approximately 70 percent of the plaintiff class is white, tossed the case out of court in a 79-page ruling. Eleven judges rejected the first prong of the plaintiffs' attack, that Florida's current felon disenfranchisement law was motivated by intentional discrimination. Ten judges also rejected the plaintiffs' argument that Section 2 of the Voting Rights Act extended to considering claims of racial discrimination regarding the disenfranchisement of felons. There were two dissenters. Judge Rosemary Barkett dissented from both findings. Judge Charles R. Wilson agreed with the majority that there was no evidence of intentional discrimination. But he disagreed with its conclusion that claims of racial discrimination in felon disenfranchisement laws "are not cognizable" under the act. Judge Stanley Marcus, a former U.S. attorney in Miami, recused himself from the case. Critics of the Florida law vowed to fight on to win voting rights for felons. "This is a terribly unjust law that needs to be fixed," said Jessie Allen, lead attorney for the plaintiffs and associate counsel at the

Brennan Center. "The law's undemocratic consequences are creating a civil rights crisis in the state of Florida." Legal and political battles have raged for years across the country over felon disenfranchisement. According to the Sentencing Project, a Washington-based nonprofit group, most states have laws disenfranchising felons and ex-felons. But only Florida, Alabama, Iowa, Kentucky and Virginia provide no automatic process for restoration of civil rights. While the 11th Circuit majority said it had little doubt that racial bigotry motivated some provisions of Florida's Reconstruction-era constitution, the majority found that such discrimination does not "establish that racial animus motivated the criminal disenfranchisement provision, particularly given Florida's long-standing tradition of criminal disenfranchisement. "Besides, the court said, the law was re-enacted in 1968 during a general revision of the state's constitution. Similarly, the judges ruled that the plaintiffs failed to provide any "contemporaneous evidence" from 1868 to prove discrimination. The plaintiffs' reference to racist remarks made by a white delegate to the 1868 Constitutional Convention about keeping blacks from taking over the state were rejected by the full court as unconvincing. Those remarks had helped persuade a three-judge panel of the 11th Circuit not to dismiss the suit in December 2003.

Headed to High Court? The plaintiffs' claim that Florida's law violates the Voting Rights Act also was found wanting by the full court Tuesday. The legislative history of the act shows that "Congress never intended" it to reach state laws regarding felon disenfranchisement, the opinion says Loyola University (Los Angeles) law professor Richard L. Hasen, who specializes in election law, said the 11th Circuit's ruling once again raises the question of whether the Voting Rights Act reaches felon discrimination claims when it can be shown that such laws have a greater impact on minorities. Hasen said the U.S. Supreme Court declined last fall to hear cases involving a split of opinion between the 2nd Circuit, which held that New York's felon disenfranchisement law did not violate the act, and the 9th Circuit in San Francisco, which held that a trial should be held to determine whether a similar law in Washington state violated the act. The Loyola law professor noted that the plaintiffs in the Florida case filed a friend-of-the-court brief to the Supreme Court at that time. "The plaintiffs in the Florida suit told the Supreme Court, "Wait, don't take those cases. We've got a case with a better factual record,'" Hasen said. "I think the stars are lined up now for a likely Supreme Court review. "The case is *Johnson v. Bush,* No. 02-14469 (11th Cir. April 12, 2005).

"Disenfranchised Without Recourse?"

National Law Journal
Gary Young
May 31, 2004

A handful of decisions dealing with felon disenfranchisement statutes show continuing uncertainty about the extent of Congress' authority to dictate anti-discrimination policy to the states.

In April, the Second U.S. Circuit Court of Appeals ruled that a New York state law depriving felons of the right to vote while their sentences are running could not be challenged under the Voting Rights Act even if it has a disproportionate effect on the African-American community. *Muntaqim v. Coombe,* No. 01-7260.

In contrast, last year the ninth and eleventh circuits ruled that such challenges should not be dismissed out of hand, but require an inquiry into "the totality of the circumstances," particularly into possible carry-over effects of discrimination in the criminal justice system.

Two other circuits, the fourth and sixth-in 2000 and 1986 decisions, respectively-assumed without discussion that felon disenfranchisement statutes must pass muster under the Voting Rights Act. But since they ultimately found that the statutes at issue were blameless, they may have assumed so merely "for the sake of argument."

Tea leaves

Although the Supreme Court has not spoken on the precise issue at hand, it has looked at related questions. In 1974's *Richardson v. Ramirez,* 418 U.S. 24, the court held that felon disenfranchisement statutes do not on their face violate the equal protection clause because another section of the 14th Amendment expressly exempted the states from punishment for felon disenfranchisement.

However, in 1984's *Hunter v. Underwood,* 471 U.S. 222, the court said that a facially neutral Alabama felon disenfranchisement law violated the 14th Amendment because of evidence it was enacted after the Civil War for the express purpose of depriving African-Americans of the vote. [Neither Richardson nor Hunter dealt with the Voting Rights Act.]

In a 1980 case dealing with at-large election systems, not felon disenfranchisement, a plurality of the court said that the Voting Rights Act is violated only when intent to discriminate is proven. *City of Mobile v. Bolden,* 446 U.S. 55. Congress responded to Bolden by amending §[2 of the act, codified at 42 U.S.C. 1973, to encompass not only intentional discrimination, but also state action that "results" in an abridgement of the right to vote on the basis of race. The amendment also instructed courts to look at the "totality of the circumstances."

Also relevant are a string of cases, including *Bd. of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 [2001], in which the Supreme Court has held that Congress' 14th Amendment enforcement powers vis-a-vis the states do not come into play unless it makes formal findings of a history of discrimination.

In *Muntaqim,* the Second Circuit said that

the act could not be extended to felon disenfranchisement statutes in the absence of Congress' express authorization, but also hinted that Congress might then be overstepping the line drawn in *Garrett.*

The Eleventh Circuit, in Johnson v. Gov. of Fla., 353 F.3d 1287, and the 9th Circuit, in *Farrakhan v. Washington,* 338 F.3d 1009, both pointed to the results-oriented language of the 1982 amendments, but also seemed to hedge their bets by pointing to possible intentional discrimination at one step removed [i.e., in the criminal justice system].

Dissenters in both courts argued that the majority opinions ignored the federal-state line drawn in *Garrett.*

"Felony Disenfranchisement in the United States"

The Sentencing Project

Overview

Since the founding of the country, most states in the U.S. have enacted laws disenfranchising convicted felons and ex-felons. Today, almost all states have disenfranchisement laws. In the last 30 years, due to the dramatic increased use and expansion of the criminal justice system, these laws have significantly affected the political voice of many American communities.

State Disenfranchisement Laws

48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense.

Only two states—Maine and Vermont—permit inmates to vote.

35 states prohibit felons from voting while they are on parole and 31 of these states exclude felony probationers as well.

Seven states deny the right to vote to all ex-offenders who have completed their sentences. Seven others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a waiting period (e.g., five years in Delaware and Wyoming, and three years in Maryland).

Each state has developed its own process of restoring voting rights to ex-offenders but most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them.

Impact of Felony Disenfranchisement

An estimated 4.7 million Americans, or one in forty-three adults, have currently or permanently lost their voting rights as a result of a felony conviction.

1.4 million African American men, or 13% of black men, are disenfranchised, a rate seven times the national average.

An estimated 676,730 women are currently ineligible to vote as a result of a felony conviction.

More than 2 million white Americans (Hispanic and non-Hispanic) are disenfranchised.

Over half a million women have lost their right to vote.

In six states that deny the vote to ex-offenders, one in four black men is *permanently* disenfranchised.

Given current rates of incarceration, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime. In states that disenfranchise ex-offenders, as many as 40% of black men may permanently lose their right to vote.

1.7 million disenfranchised persons are ex-offenders who have completed their sentences. The state of Florida had an estimated 600,000 ex-felons who were unable to vote in the 2000 presidential election.

Policy Changes

Alabama: In 2003, Governor Riley signed into law a bill that permits most felons to apply for a certificate of eligibility to register to vote after completing their sentence.

Connecticut: In May 2001, Governor Rowland signed into law a bill that extends voting rights to felons on probation. The law is expected to make 36,000 persons eligible to vote.

Delaware: Until recently, Delaware imposed a lifetime voting ban for felons. In June 2000, the General Assembly passed a constitutional amendment restoring voting rights to some ex-felons five years after the completion of their sentence.

Florida: The Brennan Center and the Lawyers' Committee for Civil Rights Under Law have a voting rights case pending in the US District Court for the Southern District of Florida challenging the constitutionality of the voting laws that disenfranchise ex-felons. Separate litigation filed by the ACLU contends that the state Department of Corrections is not fulfilling its obligation under current law to aid ex-felons in seeking clemency.

Kansas: In 2002, the legislature added probationers to the category of excluded felons.

Kentucky: In 2001, the legislature passed a bill that requires that the Department of Corrections inform and aid eligible offenders in completing the restoration process to regain their civil rights.

Maryland: In 2002, the legislature repealed its lifetime ban on two-time ex-felons (with the exception of felons with two violent convictions) and imposed a three-year waiting period after completion of sentence before rights can be restored.

Massachusetts: Until the 2000 presidential election, Massachusetts was one of three states that allowed inmates to vote. On November 7, 2000, the Massachusetts electorate voted in favor of a constitutional amendment, which strips persons incarcerated for a felony offense of their right to vote.

Nevada: In 2003, the state approved a provision to automatically restore voting rights for first-time nonviolent felons immediately after completion of sentence.

New Mexico: In March 2001, the Legislature adopted a bill repealing the state's lifetime ban on ex-felon voting.

Pennsylvania: A Commonwealth Court restored the right to vote to thousands of ex-felons who, as a result, were entitled to vote in the 2000 presidential election.

Virginia: The Virginia legislature passed a law in 2000 enabling certain ex-felons to apply to the circuit court for the restoration of their voting rights five years after the completion of their sentence; those convicted of felony drug offenses must wait seven years after completion. The circuit court's decisions are subject to the Governor's approval.

Wyoming: In March 2003, Governor Freudenthal signed a bill to allow people convicted of a nonviolent first-time felony to apply for restoration of voting rights five years after completion of sentence.

Categories of Felons Disenfranchised Under State Law

STATE	PRISON	PROBATION	PAROLE	EX-FELONS	
				All*	Partial
Alabama	X	X	X	X	
Alaska	X	X	X		
Arizona	X	X	X		X (2nd felony)
Arkansas	X	X	X		
California	X		X		
Colorado	X		X		
Connecticut	X		X		
Delaware	X	X	X		X (5 years)
District of Columbia	X				
Florida	X	X	X	X	
Georgia	X	X	X		
Hawaii	X				
Idaho	X	X	X		
Illinois	X				
Indiana	X				
Iowa	X	X	X	X	
Kansas	X	X	X		
Kentucky	X	X	X	X	
Louisiana	X	X	X		
Maine					
Maryland	X	X	X		X (2nd felony, 3 years)
Massachusetts	X				
Michigan	X				
Minnesota	X	X	X		
Mississippi	X	X	X	X	
Missouri	X	X	X		
Montana	X				
Nebraska	X	X	X	X	
Nevada	X	X	X		X (except first-time nonviolent)
New Hampshire	X				
New Jersey	X	X	X		
New Mexico	X	X	X		
New York	X		X		
North Carolina	X	X	X		
North Dakota	X				
Ohio	X				
Oklahoma	X	X	X		
Oregon	X				
Pennsylvania	X				
Rhode Island	X	X	X		
South Carolina	X	X	X		
South Dakota	X				
Tennessee	X	X	X		X (pre-1986)
Texas	X	X	X		
Utah	X				
Vermont					
Virginia	X	X	X	X	
Washington	X	X	X		X (pre-1984)
West Virginia	X	X	X		
Wisconsin	X	X	X		
Wyoming	X	X	X		X (5 years)
U.S. Total	49	31	33	7	7

"Once a Felon, Never a Voter?"

National Journal
Megan Twohey
January 6, 2000

Thomas Johnson is a black resident of Florida who was eager to vote for George W. Bush for President. Johnson, who lives in Gainesville with his wife and five children, is executive director of a nonprofit Christian residential program that helps recently released state prison inmates re-enter society. Johnson likes the Republican principle of self-help, and supports the party's stance against abortion rights.

But on Election Day, Johnson was unable to vote. In 1992, he was convicted in New York City of selling cocaine and carrying a firearm without a license. When he moved to Florida in 1996, he learned, much to his dismay, that the state bans anyone convicted of a felony from ever voting in any kind of election unless he or she applies for and receives an exemption from the state clemency board-an arduous task.

"I've been in this community for five years," he said. "I'm a taxpayer. I help mold this community through my work. The sheriff is a friend of mine. But voting is the power by which you truly shape and mold, and I'm being denied that. I watch my sons see me stay home when my wife goes off to vote. I'm appalled by it."

Johnson has plenty of company. Altogether, 500,000 Florida residents—4.6 percent of the state's voting-age population—have served time behind bars for various crimes and thus are unable to vote because of the ban, which has been on the law books since 1868. A disproportionate number of those residents are black. Nearly 170,000 black adult men in Florida—roughly 25 percent of the state's black male residents—can't vote because of a current or past conviction.

In September, the Brennan Center for Justice at New York University School of Law and the Lawyers' Committee for Civil Rights Under Law, based in Washington, filed a suit on behalf of Johnson and the state's ex-felon population in U.S. District Court for the Southern District of Florida. Like many Southern states, Florida during Reconstruction adopted a ban on a former felon's right to vote, which was aimed in part at disenfranchising former slaves. White lawmakers wrote those laws to include what were then regarded as mainly "black" crimes, such as rape and theft. The civil rights lawyers assert that the ban violates the 14th Amendment's equal-protection clause, as well as the federal 1965 Voting Rights Act.

The Florida case highlights a growing national concern: The increasing number of disenfranchised Americans who are current or former members of the exploding prison population. More than 4 million Americans—36 percent of whom are African-American men—couldn't vote this year as a result of state laws that ban voting by convicted felons, according to the Sentencing Project, a nonprofit, nonpartisan organization in Washington that's pressing for an overhaul of sentencing laws and guidelines and conducts research on criminal justice issues. Nearly three-quarters of those felons are on probation or parole; one-third have completed sentences.

Convicted felons and their allies in the civil

rights community are challenging the laws in state legislatures, Congress, and the courts. They maintain that the bans are racist, unconstitutional, and simply irrational. These critics, who began their effort in earnest two years ago, are encountering formidable obstacles—politicians of both major parties who are uninterested in tinkering with the laws for fear of appearing soft on crime, and supporters of the restrictions, who insist that the bans are legally secure and just. As a result, advocates of change have made little headway.

The disenfranchisement laws have surfaced in waves over the past two centuries. Some of the restrictions date to the first half of the 19th century, when society viewed voting as a privilege, not a right. State and national lawmakers at that time believed that disenfranchising people who committed serious crimes was a fair part of punishment. After the Civil War, many Southern states included criminal disenfranchisement, along with poll taxes and literacy tests, in their voting laws as a way of denying blacks the vote. At the turn of the century, during the Progressive era, a new logic emerged. States outside of the South used disenfranchisement laws as a way of protecting the purity of the ballot box-or so legislators said. Politicians assumed that criminals would be more inclined to engage in electoral fraud or to band together to rewrite electoral laws even though, analysts say, there was no empirical evidence to support those assumptions.

During the civil rights movement of the 1960s and '70s, a few states relaxed their restrictions. Then, in the 1980s, as crime rates started to climb, many states revived or broadened their bans.

Today, 48 states and the District of Columbia have laws on the books that, in one way or another, disenfranchise people who've been convicted of felonies. Thirty-two states deprive convicted offenders of the vote while they're on parole, and 29 prohibit offenders on probation from voting. In addition to Florida, 12 states disenfranchise for life ex-offenders who have completed their sentences.

Yet certain states held out. Until recently, four states-Maine, Massachusetts, Utah, and Vermont-allowed all felons, even those in prison, to vote. In a 1998 ballot initiative in Utah, however, 80 percent voted to disenfranchise felony inmates. Massachusetts' voters did the same in November.

Those who support voting bans insist that people who are not willing to follow the law should not be given the power to make the law. "We don't let everyone vote," said Roger Clegg, vice president and general counsel for the Center for Equal Opportunity, a conservative organization based in Washington. "We require that people meet a minimum level of trustworthiness and loyalty to our system of government. Consequently, we don't let children, non-citizens, or people who are certifiably insane vote. Just as these groups don't meet the basic requirements, those people who commit serious crimes don't either."

In general, Republicans are not eager to restore voting rights to ex-felons because most of them are likely to vote for Democrats. Jeff Manza, an associate professor of sociology at Northwestern University, has been studying hypothetical voting habits of felons. "A large portion of the current disenfranchised population is low-income, has a low level of education, and is single," Manza said. "And more than

40 percent is black. When you take all of these pieces of information and put them together, you have a demographic group that is inclined to be more favorable to the Democrats."

Voting-rights advocates, however, argue that, in addition to undermining the nation's democratic principles, the restriction prevents former offenders from fully rejoining society. They say the bans are particularly damaging today because more and more people-especially blacks-are being locked up for nonviolent drug offenses that are classified as felonies.

These advocates are turning to state legislatures to press for changes. Despite only minor success, their cause may be gaining momentum. Felon advocates scored their biggest victory of the year in Delaware, where the Legislature voted to scale back the state's lifetime ban on voting; now former offenders can vote again five years after they have completed their sentences. In Alabama and Connecticut, measures that would shorten voting bans passed in the House but were not taken up in the Senate. "Some of the (Connecticut) senators were concerned that they'd be perceived as soft on crime," said Miles Rapoport, a former secretary of state in Connecticut who is executive director of Democracy Works, a coalition of organizations that pushed for changes.

"Gaining the franchise for any group is a tricky thing," said Alexander Keyssar, a professor of history and public policy at Duke University and the author of The Right to Vote: The Contested History of Democracy in the United States. "No group has been able to do so until it reaches that historical moment in time when it has political leverage or political allies. Felons have neither. No one wants to run for office saying, 'I gave the vote to the Boston Strangler.'"

Frustrated by the slow pace of change, John Conyers, Jr. of Michigan, the senior Democrat on the House Judiciary Committee, and 37 co-sponsors proposed legislation in March 1999 that would restore the right to vote in federal elections to all people convicted of a criminal offense who are not behind bars. The Judiciary Committee's Constitution Subcommittee held hearings on the bill later in the year. Despite compelling testimony on the negative impact of disenfranchisement laws on the black community, critics had a strong hand to play: Article I, Section 2 of the Constitution, which grants states the authority to set voting requirements for federal elections, and Section 2 of the 14th Amendment, which explicitly allows states to deny voting rights to people who commit treason and other crimes. Conyers' bill has remained stuck in committee. Challenging the restrictive laws in the courts can be tricky. Take the Florida case. In their federal District Court case, attorneys for ex-felons argue that the state's 1868 law was intended to specifically disenfranchise blacks and thus collides with the 14th Amendment's equal-protection clause. They also maintain that the law has had a racially discriminatory impact, and therefore violates the 1965 Voting Rights Act.

In a 1985 ruling, *Hunter vs. Underwood,* the Supreme Court struck down an Alabama disenfranchisement law because, the Justices said, it had been created for purposes of discrimination. In its 1974 *Richardson vs. Ramirez* decision, however, the Court said that such discriminatory intent must be proven before felon disenfranchisement laws can be struck down.

Because that intent was rooted in only a

handful of Southern laws, conservative legal scholars say that the majority of disenfranchisement laws are legally secure.

Still, civil rights lawyers hope that the laws' disproportionate impact on the black community will become legal grounds for striking them down. The case in Florida-which is still pending-tests that claim. The outcome could strengthen, or erode, the underpinnings of other states' disenfranchisement laws.

"Perps and Politics"

National Review
October 18, 2004
Roger Clegg

In the overwhelming majority of our states, you lose your right to vote, to one degree or another, if you commit a felony. Brent Staples, the "Editorial Observer" for the *New York Times,* wrote recently that "legal scholars attribute [felon disenfranchisement] to this country's difficulties with race." This summer the *Washington Post* said these laws "are a vestige of a time when states sought to discourage blacks from voting." *USA Today* had earlier editorialized, "Voting bans are rooted in the nation's racist past." And recently a Reuters story (corrected after I talked with them) asserted that these laws "have roots in the post-Civil War 19th century and were aimed at preventing black Americans from voting."

But it is simply not true that the reason felons are disenfranchised in the United States is because of a desire to keep blacks from voting. The reason our *bien pensants* are making assertions to the contrary is perhaps because they are being misled by the well-funded and ubiquitous felon-reenfranchisement movement. Yet the falsity of these statements can be demonstrated by simply reading the studies published and relied on by the movement itself.

In a joint publication, "Losing the Vote," the Sentencing Project and the Human Rights Watch have acknowledged that "disenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe." In Europe (including England), the civil disabilities attached to conviction for a felony were severe, and "English colonists brought these concepts with them to North America."

We can continue the historical narrative by consulting another key source for the felon-voting proponents: an article by professors Christopher Uggen and Jeff Manza in the American Sociological Review. It concedes, "Restrictions [on felon voting] were first adopted by some states in the post-Revolutionary era, and by the eve of the Civil War some two dozen states had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions." That means that over 70 percent of the states had these laws by 1861—when most blacks couldn't vote in any case because they were still enslaved.

It is true that five southern states passed race-targeted felon-disenfranchisement laws in the post-Reconstruction period from 1890 to 1910, according to an article in the *Yale Law Journal,* another key movement source. But by that time, according to a graphic in the American Sociological Review article, over 80 percent of the states in the U.S. already had felon-disenfranchisement laws. Alexander Keyssar's book *The Right to Vote*—cited in the Uggen and Manza piece—says that, outside the south, the disenfranchisement laws "lacked socially distinct targets and generally were passed in a matter-of-fact fashion."

The five southern state laws that were race-targeted are no longer on the books. Today, most of the old Confederacy allows at least some felons the vote and, conversely, many of the states that disenfranchise all felons are non-southern (for example, Iowa, Nevada,

and Wyoming). Indeed, to quote Uggen and Manza, "In general, some type of restriction on felons' voting rights gradually came to be adopted by almost every state, and at present 48 of the 50 states bar felons—in most cases including those on probation or parole—from voting."

The reason we don't let felons vote has nothing to do with race and everything to do with common sense. Individuals who have shown they are unwilling too follow the law cannot claim the right to make laws for the rest of us. We don't let everyone vote—not children, for instance, or noncitizens, or the mentally incompetent. We have certain minimum standards of trustworthiness before we let people participate in the serious business of self-government, and people who commit serious crimes don't meet those standards.

It is frequently asserted that felons released from prison should be able to vote because they have "paid their debt to society." But the felon-vote movement will, if pressed, admit that they think felons in prison should be allowed to vote, too. And society is not obliged to ignore someone's criminal record just because he has been released from prison. Felons are barred by federal law from possessing firearms, for example.

It is true that some felons—say, someone who wrote a bad check decades ago and has led an exemplary life since then—ought to have their voting rights restored, but these determinations should be made on a case-by-case, not a wholesale, basis. It is also true that these laws have come to have a disproportionate impact on blacks, but this was not deliberate and will cease once a disproportionate number of felonies are no longer committed by blacks.

The irony is that the people whose votes will be diluted the most if felons are re-enfranchised are the law-abiding citizens in communities with a high proportion of felons in them. These citizens, who are also most frequently the victims of crime, are of course themselves disproportionately poor and minority. But somehow the *bien pensants* always forget them.

"Re-Enfranchising Felons"

American Spectator
March 2, 2005
Shawn Macomber

If the price of getting a bill that addresses some Republican concerns about voter fraud (most notably an ID requirement) is the re-enfranchisement of felons who have completed their sentences, it should be paid gladly—and not simply because it's some Machiavellian bargaining chip. It also happens to be the right thing to do.

Close to five million Americans are currently barred from voting because of felony convictions. Of this number, nearly two million have completely paid their debt to society in the form of time served behind bars, parole, and probation. There is no legitimate moral argument for denying those who have regained their status as free citizens through public penance the most basic right of a citizen.

It has been made painfully obvious both why Democrats are pushing re-enfranchisement as well as why Republicans oppose it. Two of the Democratic senators who walked the Count Every Vote Act of 2005 to the Senate floor last week—John Kerry and Hillary Clinton—both desperately want to be president and believe there is a Democratic advantage inherent in the felon vote.

Clearly, Republicans have sensed this as well. Dave Gibson, writing for American Daily, noted that Clinton is pushing this bill primarily "because she knows that 99.9 percent of [felons] would vote Democratic and would be just the boost she needs for her 2008 Presidential bid." Further, and larger in scope, when the Chairman of the Alabama Republican Party, Marty Connors, got wind of a 2003 bill to loosen restrictions on felons' voting rights he was quite forthright as to why he opposed such a measure.

"There's no more anti-Republican bill than this," Connors said. "As frank as I can be, we're opposed to it because felons don't tend to vote Republican."

Well, allow me to engage in a bit of frankness myself: That is nothing approaching a good enough reason to disenfranchise a sizable chunk of the American population. The true measure of a principled person or party is not and will never be determined by its willingness to take only those actions from which they themselves benefit. It is measured by standing up for what is right whatever the consequences may be.

If Republicans can get a few of their own ballot box reforms instituted through Democratic efforts to re-enfranchise ex-felons, great. If not, it needs to be done anyway.

Further, there is evidence suggesting that the American public at large does not take such a political view of the issue. A July 2002 Harris poll found that 80 percent of Americans believe that all ex-felons who have completed their sentences should be allowed to vote. Sixty percent believed that felons finished with their sentence but on probation or parole likewise should have the right to vote.

Aside from the political implications,

opposition to re-enfranchisement seems to rest on two foundations. The first is tradition. Felons have been disenfranchised since the birth of the republic, so why change things up now? And it's true. But it is also worth remembering that these restrictions were first instituted during a time when only somewhere in the neighborhood of six percent of the citizenry could vote. (Obviously, this does not include the one million slaves held at the time could not even claim their own bodies as property, never mind the sort of property that "earned" you voting rights back then.) Voting laws have changed considerably since then, with barely any other restriction left standing.

It's also true that we restrict gun rights for ex-felons—something that is much more popular but likewise of dubious value with regard to nonviolent offenders. Nevertheless, these restrictions are not one and the same. A gun is not a ballot, and confusing the two is not helpful in facilitating an honest debate on the issue.

The second foundation is a disturbing element of dehumanization which turns every felon into something more akin to a vile lecherous beast than a human being. As noted above, this is not the view of anything approaching the majority of Americans. Still, there's a dripping sarcasm that runs through nearly every polemic issued against re-enfranchisement suggesting that those who support such a policy want to aid and abet child molesters, terrorists, and murderers.

But a felony is not what it once was in America, as is made painfully obvious by the 600 percent jump in incarceration rates over the last 30 years. Indeed, it can and should be argued that a standard which permanently disenfranchises anyone who commits a non-violent felony—of which there are now legion—is cruel and unusual. Can any reasonable person say a non-violent drug offender should have his voting rights curtailed for the rest of his life? How about someone who once wrote a series of bad checks? Or even on the violent end of things, once engaged in an ill advised bar fight? Are we really ready to tell these people no matter what they do they can never be trusted by society again? That there is no way to reform after even a minor youthful indiscretion?

Hyperbolically screaming, opponents of re-enfranchisement for ex-felons make monsters out of men, because it lends easy justification to an abridgement of rights that would not hold up under individual scrutiny. The truth is, the real monsters are largely either still in jail or under onerous probation requirements and will not likely be able to vote anytime soon. It's high time the rest of these men and women who have served their time are released from the caricature. The punishment does not fit the crime, and no matter which way it is spun, permanent disenfranchisement will never be compatible with a just society.

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