10-2-2009

Section 5: Individual Rights

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

VII. INDIVIDUAL RIGHTS

In This Section:

Stop the Beach Renourishment v. Florida Department of Environmental Protection

08-1151

Ruling Below: *Fla Dep't of Envtl. Prot. v. Stop the Beach Renourishment, Inc.* 998 So. 2d 1102 (Fla. 2008).

After damage by hurricanes and tropical storms, beaches in Walton County, Florida, were identified as critically eroded. The county and Florida DEP sought to restore the beaches through renourishment. After the permit for renourishment was issued, Stop the Beach Renourishment (STBR), a not-for-profit association made up of beachfront property owners, challenged the permit's issuance and raised questions about the constitutional validity of the act of authorizing renourishment permits. The First District Court of Appeal ruled that the act was unconstitutionally *applied* in the issuance of this permit. The Supreme Court of Florida then changed the certified question on appeal to whether the statute was facially constitutional and did away with the *as-applied* language that STBR had used in its pleadings and that the First District had used in considering the question below. The Florida Supreme Court found the statute facially valid and quashed the First District Court's opinion.

Question Presented: Does Florida's Beach and Shore Restoration Act deprive upland owners of littoral property rights without just compensation in violation of the Fifth Amendment's Taking Clause?

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, etc., Petitioner,
v.
STOP THE BEACH RENOURISHMENT, Inc., et al., Respondents.

Supreme Court of Florida

Decided September 29, 2008

[Excerpt: some footnotes and citations omitted]

BELL, J.

We have for review the First District Court of Appeal's decision in *Save Our Beaches, Inc. v. Florida Department of Environmental Protection.* In its decision, the First District certified the following question to be of great public importance:

> Has Part I of Chapter 161, Florida Statutes (2005), referred to as the Beach and Shore Preservation Act, been unconstitutionally applied so as to deprive the members of Stop the Beach Renourishment, Inc. of their riparian rights without just compensation for the property taken, so that the exception provided in Florida Administrative Code Rule 18-21.004(3), exempting satisfactory evidence of sufficient upland interest if the activities do not unreasonably

infringe on riparian rights, does not apply?

We have both mandatory and discretionary jurisdiction.

Though it phrased its certified question in terms of an applied challenge, the First District actually addressed a facial challenge. Therefore, we rephrase the certified question as follows:

> On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?

We answer the rephrased certified question in the negative and quash the decision of the First District. As explained below, we find that, on its face, the Beach and Shore Preservation Act does not unconstitutionally deprive upland owners of littoral rights without just compensation. At the outset, however, we emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.

I. THE CONTEXT

A. Factual and Procedural History

[After Hurricane Opal destroyed Destin and Walton County beaches along the Gulf of Mexico, the municipalities began the process of restoration.

A coastline survey was completed to determine the mean high water line (MHWL), from which an erosion control line (ECL) was established. The ECL became the boundary between public and private property when it was recorded. The Department of Environmental Protection (Department) then issued the required permit to allow the restoration.

Stop the Beach Renourishment (STBR) challenged the permit, arguing that the statute fixing the ECL was an unconstitutional taking of private property.]

The First District agreed the Act divests upland owners of their littoral right to receive accretions and relictions because section 161.191(2) provides that the common law rule of accretion and reliction no longer operates once the ECL is recorded. The First District also agreed that the Act eliminates the right to maintain direct contact with the water since section 161.191(1) establishes the ECL as the shoreline boundary. Furthermore, the First District found that:

> Although section 161.201 has language describing a preservation of common law riparian rights, it does not actually operate to preserve the rights at issue . . . [because] Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of eminent domain.

Thus, the First District held that the final order issued pursuant to the Act results in an unconstitutional taking of the littoral rights to accretion and to contact with water without an eminent domain proceeding as required by *section 161.141, Florida Statutes*.

* * *

B. The Beach and Shore Preservation Act

Before addressing the rephrased certified question, it is helpful to provide the relevant

portions of the Beach and Shore Preservation Act.

Recognizing the importance and volatility of Florida's beaches, the Legislature in 1961 enacted the Beach and Shore Preservation Act. . . . The Legislature then delegated to the Department the authority to determine "those beaches which are critically eroded and in need of restoration and nourishment" and to "authorize appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach."

Pursuant to section 161.141, when a local government applies for funding for beach restoration, a survey of the shoreline is conducted to determine the MHWL for the area. Once established, any additions to the upland property landward of the MHWL that result from the restoration project remain the property of the upland owner subject to all governmental regulations, including a public easement for traditional uses of the beach.

After the MHWL is established, section 161.161(3) provides that the Board must determine the area to be protected by the project and locate an ECL. In locating the ECL, the Board is "guided by the existing line of mean high water, bearing in mind the requirements of proper engineering in the beach restoration project, the extent to which erosion or avulsion has occurred, and the need to protect existing ownership of as much upland as is reasonably possible."

Pursuant to section 161.191(1), this ECL becomes the new fixed property boundary between public lands and upland property after the ECL is recorded. And, under section 161.191(2), once the ECL has been established, the common law no longer operates "to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process."

However, section 161.201 expressly preserves the upland owners' littoral rights, including, but not limited to, rights of ingress, egress, view, boating, bathing, and fishing, and prevents the State from erecting structures on the beach seaward of the ECL except as required to prevent erosion. Section 161.141 further declares that the State has no intention "to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property."

Moreover, section 161.141 explains that "[i]f an authorized beach restoration, beach nourishment, and erosion control project cannot reasonably be accomplished without the taking of private property, the taking must be made by the requesting authority by eminent domain proceedings." And, in the event the beach restoration is not commenced within a two-year period, is halted in excess of a six-month period, or the authorities do not maintain the restored beach, section 161.211 dictates that the ECL is cancelled.

II. DISCUSSION

. . . The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo by this Court. . . . Moreover, "a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid." *Fla. Dep't of Revenue v. City of Gainesville*.

After reviewing Florida's common law as well as the Beach and Shore Preservation

Act's effect upon that common law, we find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. In explaining our conclusion, we first describe the relationship at common law between the public and upland owners in regard to Florida's beaches. We then detail the Beach and Shore Preservation Act's impact upon this relationship. In particular, we explore how the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that facially balances public and private interests. Finally, we address the First District's decision.

A. The Relationship at Common Law between the Public and Upland Owners

Since the vast development of Florida's beaches, there has been a relative paucity of opinions from this Court that describe the nature of the relationship at common law between the public and upland owners in regard to Florida's beaches. It is important that we outline this relationship prior to resolving the specific issues in this case.

(1) The Public and Florida's Beaches

[The State has a duty to protect the beaches under the "public trust doctrine" and as important natural resources, as defined by the Florida constitution.]

Concisely put, the State has a constitutional duty to protect Florida's beaches, part of which it holds "in trust for all the people." *Art. X, § 11, Fla. Const.*

* * *

(2) The Upland Owners and Florida's Beaches

Private upland owners hold the bathing, fishing, and navigation rights described above in common with the public. In fact, upland owners have no rights . . . that are superior to other members of the public in regard to bathing, fishing, and navigation. However, upland owners hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to the unobstructed view of the water. These special littoral rights "are such as are necessary for the use and enjoyment" of the upland property, but "these rights may not be so exercised as to injure others in their lawful rights." *Ferry Pass,* 48 So. at 645.

Though subject to regulation, these littoral rights are private property rights that cannot be taken from upland owners without just compensation. Indeed, in *Thiesen v. Gulf, Florida & Alabama Railway Co.,* this Court considered and rejected the notion that littoral rights are subordinate to public rights and, as a result, could be eliminated without compensation. And, over the years, Florida courts have found unconstitutional takings when certain littoral rights were materially and substantially impaired.

While Florida case law has clearly defined littoral rights as constitutionally protected private property rights, the exact nature of these rights rarely has been described in detail. . . .

. . . [T]he littoral rights to access, use, and view are easements under Florida common law. Generally speaking, "[a]n easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." More specifically, the littoral rights to access and use are affirmative easements as they grant "rights to enter and use land in possession of

another." In contrast, the littoral right to view is a negative easement as it "restrict[s] the uses that can be made of property."

Furthermore, based upon this Court's early description of the nature of littoral rights, it is evident that the littoral right to accretion and reliction is distinct from the rights to access, use, and view. The rights to access, use, and view are rights relating to the present use of the foreshore and water. The same is not true of the right to accretion and reliction. The right to accretion and reliction is a contingent, future interest that only becomes a possessory interest if and when land is added to the upland by accretion or reliction.

* * *

(3) Dealing with a Dynamic Boundary

The boundary between public or sovereignty lands and private uplands is a dynamic boundary, which is located on a shoreline that, by its very nature, frequently changes. Florida's common law attempts to bring order and certainty to this dynamic boundary in a manner that reasonably balances the affected parties' interests.

[The court reviews common law definitions. Erosion is gradual and imperceptible wearing away of land. Accretion is gradual and imperceptible accumulation of land on the shore. Reliction is an increase of land by gradual and imperceptible withdrawal of a body of water. Avulsion is the sudden, perceptible loss of or addition to land by a sudden change. Gradual and imperceptible means that changes are not observed occurring, but observers may periodically observe changes.] Moreover, "alluvion" describes the actual deposit of land that is added to the shore or bank.

The boundary between public lands and private uplands is the MHWL, which represents an average over a nineteen-year period. As the Second District has explained, "[t]he variations which occur in major tide producing forces will go through one complete cycle in approximately 18.6 years. Apparently this figure is often rounded out to nineteen years." *Kruse,* 349 So. 2d at 789-90. This nineteen-year period for determining the MHWL is codified in *section 177.27, Florida Statutes* (2007), a provision of the Florida Coastal Mapping Act of 1974.

Under Florida common law, the legal effect of changes to the shoreline on the boundary between public lands and uplands varies depending upon whether the shoreline changes gradually and imperceptibly or whether it changes suddenly and perceptibly.

* * *

Accordingly, under the doctrines of erosion, reliction, and accretion, the boundary between public and private land is altered to reflect gradual and imperceptible losses or additions to the shoreline. In contrast, under the doctrine of avulsion, the boundary between public and private land remains the MHWL as it existed before the avulsive event led to sudden and perceptible losses or additions to the shoreline.

These common law doctrines reflect an attempt to balance the interests of the parties affected by inevitable changes in the shoreline. For instance, as the Second District explained in *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.,* "[t]here are four reasons for the doctrine of accretion:"

(1) *[D]e minimis non curat lex*; (2)

> he who sustains the burden of losses and of repairs imposed by the contiguity of waters ought to receive whatever benefits they may bring by accretion; (3) it is in the interest of the community that all land have an owner and, for convenience, the riparian is the chosen one; (4) the necessity for preserving the riparian right of access to the water.

These same reasons explain the doctrine of reliction. And, as for the rationale underlying the doctrine of avulsion, it has been argued that there is a need to mitigate the hardship of drastic shifts in title that would result if the doctrines of accretion, erosion, and reliction were applied to sudden and unexpected changes in the shoreline.

While our common law has developed these specific rules that are intended to balance the interests in our ever-changing shoreline, Florida's common law has never fully addressed how public-sponsored beach restoration affects the interests of the public and the interests of the upland owners. . . .

B. The Beach and Shore Preservation Act's Balancing of Public and Private Interests

As explained earlier, the State has a constitutional duty to protect Florida's beaches, part of which it holds in trust for public use. The *Beach and Shore Preservation Act* effectuates this constitutional duty when the State is faced with critically eroded, storm-damaged beaches.

Like the common law, the Act seeks a careful balance between the interests of the public and the interests of the private upland owners. By authorizing the addition of sand to sovereignty lands, the Act prevents further loss of public beaches, protects existing structures, and repairs prior damage. In doing so, the Act promotes the public's economic, ecological, recreational, and aesthetic interests in the shoreline. On the other hand, the Act benefits private upland owners by restoring beach already lost and by protecting their property from future storm damage and erosion. Moreover, the Act expressly preserves the upland owners' rights to access, use, and view, including the rights of ingress and egress. The Act also protects the upland owners' rights to boating, bathing, and fishing. Furthermore, the Act protects the upland owners' view by prohibiting the State from erecting structures on the new beach except those necessary to prevent erosion. Thus, although the Act provides that the State may retain title to the newly created dry land directly adjacent to the water, upland owners may continue to access, use, and view the beach and water as they did prior to beach restoration. As a result, at least facially, there is no material or substantial impairment of these littoral rights under the Act.

Finally, the Act provides for the cancellation of the ECL if (1) the beach restoration is not commenced within two years; (2) restoration is halted in excess of a six-month period; or (3) the authorities do not maintain the restored beach. Therefore, in the event the beach restoration is not completed and maintained, the rights of the respective parties revert to the status quo ante.

To summarize, the Act effectuates the State's constitutional duty to protect Florida's beaches in a way that reasonably balances public and private interests. Without the beach renourishment provided for under the Act, the public would lose vital economic and natural resources. As for the upland owners, the beach renourishment

protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view. Consequently, just as with the common law, the Act facially achieves a reasonable balance of interests and rights to uniquely valuable and volatile property interests.

* * *

C. The First District's Decision

As stated earlier, the First District determined that the Beach and Shore Preservation Act results in an unconstitutional taking of upland owners' rights to accretions and to contact with the water. In its opinion, the First District essentially employed the following three-step analysis: (1) it found *sections 161.191* and *161.201*, which fix the shoreline boundary and suspend the operation of the common law rule of accretion but preserve the littoral rights of access, view, and use after an ECL is recorded, facially unconstitutional; (2) then, because eminent domain proceedings did not occur as required by *section 161.141*, it found that the Act was unconstitutionally applied by the Department in this case; and (3) because littoral rights were unconstitutionally taken, it found that property rights had been unreasonably infringed, making it necessary for the Department to provide satisfactory evidence of sufficient upland interest pursuant to rule 18-21.004(3).

We find facially constitutional the provisions of the Act that fix the shoreline boundary and that suspend the operation of the common law rule of accretion but preserve the littoral rights of access, view, and use after an ECL is recorded. Therefore, we hold that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation.

* * *

(1) Doctrine of Avulsion

In its opinion, the First District stated that beach restoration under the Act "will cause the high water mark to move seaward and ordinarily this would result in the upland landowners gaining property by accretion." This statement fails to consider the doctrine of avulsion, most likely because the parties did not raise the issue before the First District. As a result, the First District never considered whether the Act is facially constitutional given the doctrine of avulsion.

Under Florida common law, hurricanes, such as Hurricane Opal in 1995, are generally considered avulsive events that cause avulsion. . . .

Contrary to the First District's statement about accretion, under the doctrine of avulsion, the boundary between public lands and privately owned uplands remains the MHWL as it existed before the avulsive event. In *Peppe*, this Court expressly applied the doctrine of avulsion and held that title to a narrow strip of land that was submerged until a 1926 hurricane brought it to the surface remained in the State, not the adjoining landowners. This Court first determined that the hurricane was an avulsive event. Then, we reasoned that the parcel in question "was originally sovereignty land; and it did not lose that character merely because, by avulsion, it became dry land." Therefore, we found that "the plaintiff-respondents were charged with notice that the sudden avulsion of the parcel in controversy gave them no more title to it than they had to the water bottom before its emergence as dry land."

Significantly, when an avulsive event leads

to the loss of land, the doctrine of avulsion recognizes the affected property owner's right to reclaim the lost land within a reasonable time. In *State v. Florida National Properties, Inc.*, this Court specifically explained that affected property owners can return their property to its pre-hurricane status. [L]ittoral "owners had exercised self-help by dynamiting obstacles from a drainage canal to return [Lake Istokpoga] to an ordinary level . . . following the historic 1926 hurricane." This Court stated that the "self-help by the [littoral] owners did not affect [sic] a lowering of the water level below the normal high-water mark; instead, as the survey notes show, the action merely returned the water to its normal level and did not expose any lake bottom." In that circumstance, the Court determined that the littoral owners retained title to the present MHWL, which represented the pre-hurricane MHWL, and to the land they had reclaimed through lawful drainage of the lake.

To summarize, when the shoreline is impacted by an avulsive event, the boundary between public lands and private uplands remains the pre-avulsive event MHWL. Consequently, if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL.

In light of this common law doctrine of avulsion, the provisions of the Beach and Shore Preservation Act at issue are facially constitutional. In the context of restoring storm-ravaged public lands, the State would not be doing anything under the Act that it would not be entitled to accomplish under Florida's common law. Like the common law doctrine of avulsion, the Act authorizes the State to reclaim its storm-damaged shoreline by adding sand to submerged sovereignty lands. And similar to the common law, the Act authorizes setting the ECL and the boundary between sovereignty lands and private uplands at "the existing line of mean high water, bearing in mind . . . the extent to which . . . avulsion has occurred." In other words, when restoring storm-ravaged shoreline, the boundary under the Act should remain the pre-avulsive event boundary. Thus, because the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event, the Act is facially constitutional.

(2) Common Law Right to Accretion

Additionally, we disagree with the First District's determination that section 161.191(2) results in a facial and unconstitutional taking of the littoral right of accretion. We do not find the littoral right to accretion applicable in the context of this Act.

As we explained earlier, the right to accretion under Florida common law is a contingent right. It is a right that arises from a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water.

[The court restates the four reasons for the doctrine of accretion, cited earlier.]

None of these doctrinal reasons apply here. First, the beach restoration provisions of the Act do not apply to situations involving de minimis additions or losses of land. More specifically, critically eroded shorelines can hardly be characterized as trifles with which the law does not concern itself. Similarly, the beach renourishment itself is a change to the shoreline that is more than de minimis.

Second, by authorizing the creation of a buffer area of beach on sovereignty land, the Act removes the upland owner's concomitant risk of losses and repairs due to erosion. After renourishment, the risk of loss and repair lies more with the State than with the upland owner. Third, all land has an owner under the Act because the property line between private and public land is clearly and conveniently fixed at the ECL. Fourth, the upland owner's littoral right of access is preserved under the Act. Consequently, the common law rule of accretion, which is intended to balance private and public interests, is not implicated in the context of this Act.

* * *

(3) Contact is Ancillary to the Littoral Right of Access

The First District concluded that, under section 161.191(1), upland owners "lose the right to have the property's contact with the water remain intact." However, under Florida common law, there is no independent right of contact with the water. Instead, contact is ancillary to the littoral right of access to the water.

The ancillary right to contact with the water exists to preserve the upland owner's core littoral right of access to the water. We have never addressed whether littoral rights are unconstitutionally taken based solely upon the loss of an upland owner's direct contact with the water. But we have held that littoral rights are unconstitutionally taken when sovereignty lands are used in a way that deprives the upland owner of the right of access to the water.

In this case, the Act expressly protects the right of access to the water, which is the sole justification for the subsidiary right of contact. The Act preserves the rights of ingress and egress and prevents the State from erecting structures upon the beach seaward of the ECL except as required to prevent erosion. The Act also provides that the State has no intention "to extend its claims to lands not already held by it or to deprive any upland or submerged land owner of the legitimate and constitutional use and enjoyment of his or her property." At least facially, these provisions ensure that the upland owner's access to the water remains intact. Therefore, the rationale for the ancillary right to contact is satisfied.

Furthermore, it is important to understand that contrary to what might be inferred from the First District's conclusion regarding contact, there is no littoral right to a seaward boundary at the water's edge in Florida. Rather, as explained previously, the boundary between sovereignty lands and private uplands is the MHWL, which represents an average over a nineteen-year period. Although the foreshore technically separates upland property from the water's edge at various times during the nineteen-year period, it has never been considered to infringe upon the upland owner's littoral right of access, which the ancillary right to contact is meant to preserve. Admittedly, the renourished beach may be wider than the typical foreshore, but the ultimate result is the same. Direct access to the water is preserved under the Act. In other words, because the Act safeguards access to the water and because there is no right to maintain a constant boundary with the water's edge, the Act, on its face, does not unconstitutionally eliminate the ancillary right to contact.

Lastly, we briefly explain our disagreement with the First District's use of *Belvedere* to discount the Act's express preservation of littoral rights in *section 161.201*.

(4) Belvedere

In its opinion, the First District concluded that "*Belvedere* controls by explicitly holding that [littoral] rights cannot be constitutionally reserved to the landowners as described in *section 161.201*." Contrary to the First District, we do not find our decision in *Belvedere* controlling or even particularly relevant.

In *Belvedere*, the Department of Transportation sought to acquire uplands in fee simple absolute, while expressly reserving the littoral rights to the former upland owners. The Department severed the littoral rights in an attempt to limit the compensation for uplands in eminent domain proceedings. In *Belvedere*, we were particularly concerned that the former upland owners did not have the actual ability to exercise any of their reserved littoral rights since they held no easement or right to enter upon their former land. Therefore, we held in *Belvedere* that littoral rights "cannot be severed by condemnation proceedings without the consent of the upland owner." In so holding, we emphasized that our decision was limited to the context of condemnation of upland property.

This case is clearly distinguishable from *Belvedere*. STBR is not arguing that the Act necessitates the condemnation of uplands. Thus, our holding that was limited to the context of condemnation of upland property is inapplicable.

Furthermore, in contrast to the circumstances of *Belvedere*, upland owners under the Act continue to have the ability to exercise their littoral rights to access, use, and view. Given these significant differences, *Belvedere* does not apply here.

III. CONCLUSION

As we have explained, the Beach and Shore Preservation Act effectuates the State's constitutional duty to protect Florida's beaches. And, like Florida common law, the Act facially achieves a reasonable balance between public and private interests in the shore. Specifically, the Act benefits upland owners by restoring lost beach, by protecting their property from future storm damage and erosion, and by preserving their littoral rights to use and view. The Act also benefits upland owners by protecting their littoral right of access to the water, which is the sole justification for the ancillary right of contact. Additionally, the Act authorizes actions to reclaim public beaches that are also authorized under the common law after an avulsive event. Furthermore, the littoral right to accretion is not implicated by the Act because the reasons underlying this common law rule are not present in this context.

In light of the above, we find that the Act, on its face, does not unconstitutionally deprive upland owners of littoral rights without just compensation. Consequently, we answer the rephrased certified question in the negative and **QUASH** the decision of the First District. And we again emphasize that our decision in this case is strictly limited to the context of restoring critically eroded beaches under the Beach and Shore Preservation Act.

It is so ordered.

[The dissenting opinion of Well, J. is omitted]

LEWIS, J., dissenting.

I cannot join the majority because of the

manner in which it has "butchered" Florida law in its attempted search for equitable answers to several issues arising in the context of beach restoration in Florida. In attempting to answer these questions, the majority has, in my view, unnecessarily created dangerous precedent constructed upon a manipulation of the question actually certified. Additionally, I fear that the majority's construction of the Beach and Shore Preservation Act is based upon infirm, tortured logic and a rescission from existing precedent under a hollow claim that existing law does not apply or is not relevant here. Today, the majority has simply erased well-established Florida law without proper analysis, and has further disregarded the manner in which the parties pled, and the lower court analyzed, an *as-applied* constitutional challenge. As the majority recognizes, the local governmental entities have yet to properly establish that the erosion-control line ("ECL") represents the pre-avulsion or pre-critical-erosion mean high-water line ("MHWL"), which in my view, is a critical factor in determining whether the State and local governmental entities have constitutionally *applied* the Act to the six property-owner members of Stop the Beach Renourishment, Inc. ("STBR").

First, the logic upon which the entire foundation of the majority opinion is based inherently assumes that contact with the particular body of water has absolutely no protection and is just some ancillary concept that tags along with access to the water and seemingly possesses little or no independent significance. I could not disagree more. By essential, inherent definition, riparian and littoral property is that which is contiguous to, abuts, borders, adjoins, or touches water. In this State, the legal essence of littoral or riparian land is contact with the water. Thus, the majority is entirely incorrect when it states that such contact has no protection under Florida law and is merely some "ancillary" concept that is subsumed by the right of access. In other words, the land *must touch* the water as a condition precedent to all other riparian or littoral rights and, in the case of littoral property, this touching must occur at the MHWL.

I agree with former Judge Hersey of the Fourth District Court of Appeal, who urged this Court to take action in *Belvedere Development Corp. v. Division of Administration*:

> To speak of riparian or littoral rights unconnected with ownership of the shore is to speak a *non sequitur*. Hopefully, the Supreme Court will take jurisdiction and extinguish this rather ingenious but *hopelessly illogical hypothesis*.

Later, this Court did act in *Belvedere* and agreed with Judge Hersey, quoting parts of his opinion at length. Most assuredly, *Belvedere* established clear principles of law with regard to riparian and littoral property, which the majority views as an inconvenient detail of Florida legal precedent and simply unnecessarily discards with one sentence and no analysis as not "controlling or even particularly relevant." Notwithstanding its apparent inconvenience to the majority, *Belvedere* continues to stand for the principle of law that riparian or littoral rights are generally inseparable from riparian or littoral uplands in this State. Today, the majority has returned to a "hopelessly illogical hypothesis" without even an attempt to advance some rational analysis that conforms to the Florida Constitution, our common law, and *section 253.141, Florida Statutes*.

Following *Belvedere* only a short two years later, this Court again directly addressed the

fundamental principles of law applicable to riparian and littoral property, its owners, and their correlative rights in *Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd.*. In very clear and unmistakable language, we stated:

> This Court has expressly adopted the common law rule that a riparian or littoral owner *owns to the line of the ordinary high water mark on navigable waters*. We have also held that riparian or littoral rights are legal rights and, for constitutional purposes, the common law rights of riparian and littoral owners constitute property. Riparian and littoral property rights consist not only of the right to use the water shared by the public, but include the following vested rights: (1) the right of access to the water, *including the right to have the property's contact with the water remain intact* . . . .

The majority now avoids this inconvenient principle of law—and firmly recognized and protected property right—by improperly describing the littoral property and its owner as having "no *independent* right of contact with the water," and by mischaracterizing the significant right of *contact* as being only "ancillary" to the right of access. Any claim that this existing precedent and law does not apply here is based upon empty, misguided logic that discounts the essential nature of littoral property. At least in theory, the MHWL is the location at which littoral property contacts the sea, and even the majority seems to accept this principle. As a definitional matter, without such contact with the water, littoral property does not exist in Florida. Although the MHWL may be a "dynamic" boundary, until today, Florida has judicially and legislatively accommodated these variations without emasculating the underlying private-property rights and ownership principles. Our common law, statutes, and Constitution indicate that the right of contact with the water is neither "independent of," nor "ancillary to," riparian and littoral property, its ownership, and associated protected rights. That contact is inherent in, and essential to, the very heart of the property we discuss. Without bordering on, lying contiguous to, or abutting the water, the property ceases to be "riparian" or "littoral" by working definition. . . .

The problem with the underlying logic and reasoning of the majority is not really a matter of just a few yards of sand but is, instead, its failure to acknowledge and account for the fundamental result that occurs in the absence of the inherent right of contact with the water. Under the legal principle adopted by the majority, the Sovereign could now create, widen, and extend "sovereign" land or a portion of beach between what should represent the status-quo-ante MHWL (also known as the ECL) and the water by hundreds or even thousands of yards without impacting the rights of riparian or littoral property owners. This new-found governmental power could be used to create extended state-owned or sovereign lands between the once-private riparian or littoral property and the water, thereby effectively severing private property from the sea, lakes, and rivers, which instantly converts ocean-front, gulf-front, lake-front, and river-front property into something far less. The protection of property rights in Florida is an essential element of our organic law, finding a home in multiple constitutional provisions. In a similar manner, there are constitutional limitations upon any encroachment on our property rights. In this context, we have recognized the property value of contact with the water. . . .

In addition to discounting the right of contact with the water, the majority skims the law with regard to riparian and littoral property ownership, and associated rights, to proceed into a discussion of erosion, accretion, reliction, and avulsion as though those concepts provide the end-all-be-all response to every question of riparian and littoral property rights. Although the Sovereign may have the right to *reclaim* land lost through an avulsive event, the littoral-upland property owner also maintains property rights to land submerged through avulsion. The upland owner continues to hold private-property rights to the extent and location of the MHWL as it existed before the storm (i.e., the avulsive event). In fact, even the majority affirmatively states: "Consequently, if the shoreline is lost due to an avulsive event, the public [through the Sovereign] has the right to restore its shoreline *up to that MHWL*." The majority opinion is actually replete with inconsistent principles. However, this particular recognition creates an internal inconsistency within the majority opinion because the opinion also states that there is no right for the littoral-upland property owner to contact the sea at the MHWL. The majority adds to this confusion when it recognizes that "when restoring storm-ravaged shoreline, the *boundary under the Act should remain the pre-avulsive vent boundary*." Such language indicates that even the majority recognizes the definitional, essential requirement in Florida that littoral property does not exist in the absence of contact with the sea at the MHWL, and that this requirement and right continues "under the Act." This position directly conflicts with its unfounded contention that "there is no independent right of contact with the water."

The majority thus overlooks that the State may only restore the beach to the pre-avulsion or pre-critical-erosion MHWL because of the quintessential aspect of littoral property under Florida law. As the Sovereign, the State owns the foreshore in trust for the public, which is the land *between the MHWL and the low-water mark*, while, in contrast, the littoral-upland holder's ownership continues until, and includes, the MHWL. Thus, the decision of the majority to grant the Sovereign the property right or authority to sever once riparian or littoral property from the water by creating as much dry land between the property and the water as the government may please is inconsistent with maintaining the MHWL. This separation may be *de minimis*, or a matter of a few yards, but it could also be a matter of hundreds or even thousands of yards upon application of the principle announced today that waterfront property does not enjoy the protection of a continuing right of contact with the water. Under the majority's analysis, this State has ceased to protect the condition precedent to all other littoral rights: contact with the sea.

Unlike the majority, I would not interpret the Act to permit a result that destroys the essential nature of riparian or littoral property. If a beach were restored and renourished *without altering the location of the pre-critical-erosion MHWL* (i.e., refilling only to restore the MHWL to the ECL), the Act could be applied without unconstitutionally severing riparian or littoral property from its contact with the water. In contrast, restoration and renourishment in the form of filling currently submerged property to separate riparian or littoral property from the resulting MHWL simply violates all prior notions of waterfront property rights in Florida.

I suggest that contact with the water by riparian or littoral property is not ancillary,

independent, or subsidiary to such property but is essential and inherent to its legal definition and is an indispensible predicate for the private owners' possession of other associated rights. Accordingly, I cannot agree that the Sovereign may create a substantially wider "foreshore," which unnecessarily destroys the inherent and essential nature of riparian and littoral property along with valuable property rights. Under our common law, *article X, section 11 of the Florida Constitution*, and *section 253.141, Florida Statutes*, the Sovereign only owns the land between the MHWL and the low-water mark (along with the land under navigable waters), and the private littoral-upland owner owns the land *up to, and including, the MHWL*. I would not interpret the Act to contradict this prior-existing, foundational law.

In contrast, the majority has done just that and, in the process, has destroyed the inherent and essential nature of privately held littoral property—contiguity with the sea. Furthermore, the majority has also transformed the certified question from one of constitutionality "as applied" to one of "facial validity." If the Court construed the Act in a manner that did *NOT* sever riparian or littoral property from the water, we could maintain its facial validity. Therefore, the Act may be applied constitutionally, but not in the manner espoused by the majority.

Under appropriate circumstances (e.g., where the ECL does not correspond to the restored MHWL), the property owners should retain the right to bring *as-applied* challenges to this beach-restoration project. That appears to be precisely what occurred in this case. Below, STBR challenged the local governmental entities' placement of the ECL 25 and, here, the majority recognizes that it is unclear whether the ECL represents the status-quo-ante MHWL. Further, although the majority mis-characterizes this action as a facial challenge, it states that "if the ECL does not represent the pre-hurricane MHWL, the resulting boundary between sovereignty and private property might result in the State laying claim to a portion of land that, under the common law, would typically remain with the private owner." Such state action constitutes a compensable taking, and therefore I dissent with regard to the majority's reversal of the First District and its mischaracterization of this action as a facial challenge. In spite of the majority's desire to destroy protected private-property rights, nothing in its opinion—which addresses a *judicially rewritten facial challenge*—prevents these property owners from bringing later *as-applied* challenges to this beach-restoration project.

Here, by disclaiming (1) any interest in land that it does not already own "as sovereign titleholder" and (2) any intent to deprive property owners of their littoral rights (other than accreted portions of land which the State may readjust to maintain the reestablished MHWL at the recorded ECL), the State could sustain the common-law rule and remain true to its definition of littoral and riparian rights contained within *section 253.141(1), Florida Statutes*: "The land to which the owner holds title *must extend to the ordinary high watermark of the navigable water in order that riparian [or littoral] rights may attach.*" If the State or applicable "governmental agency" does not carry out its statutory duty to maintain the reestablished MHWL at the ECL through renourishment efforts, it risks returning the shore to its pre-restoration status, which means that the MHWL would naturally move away from the ECL and contiguous ownership would remain with the littoral-upland owners, not the State.

Thus, if the State and our local governments restore and renourish our beaches so that the reestablished MHWLs remain at the ECLs, which may involve additional redistributions of accreted and eroded sand, then they could apply the Act in a constitutional manner because littoral property would retain its required contact with the sea. Any other interpretation of this legislation would lead to several constitutional problems with regard to uncompensated takings. I cannot endorse any construction of the Act that creates, rather than alleviates, constitutional concerns.

I recognize that beach restoration and renourishment are critical in Florida and present many difficult and complex issues. I have no doubt that the majority has attempted to balance the respective interests involved to reach a workable solution. However, this legislation has not been constitutionally applied in this case, and no matter the complexity or difficulty, I suggest that the private-property rights destroyed today are also critical and of fundamental importance. As constitutionally protected rights slide, it becomes more difficult to protect others. The rights inherent in private-property ownership are at the foundation of this nation and this State. I simply cannot join a decision which, in my view, unnecessarily eliminates private-property rights without providing "full compensation" as required by *article X, section 6 of the Florida Constitution.* While the Act was applied in an unconstitutional manner here, it may be constitutionally applied under other circumstances in a manner that preserves both the intent of the Legislature and the quintessential nature of littoral and riparian property in Florida.

"Supreme Court Takes up Property-Rights Case"

The Christian Science Monitor
June 15, 2009
Warren Richey

The US Supreme Court has agreed to take up a case examining whether the Florida Supreme Court violated the private property rights of waterfront landowners in a seven-mile-long beach restoration project.

The beach has been eroded by a series of hurricanes and tropical storms.

At issue in the case is whether the state high court violated the U.S. Constitution's takings clause when it upheld a Florida government plan to create a state-owned public beach, 60 feet to 120 feet wide, between private waterfront land and the Gulf of Mexico near Destin, Fla. In effect, the beach renourishment plan would convert privately owned waterfront property into waterview property without any compensation paid to the landowner, according to lawyers for the owners.

"This case is the ideal vehicle for [the US Supreme Court] to finally rein in activist state courts that continue to invoke non-existent rules of state substantive law to avoid takings claims by declaring no property rights ever existed," writes D. Kent Safriet, a Tallahassee lawyer in his brief on behalf of Stop the Beach Renourishment Inc., a property-owner group.

The high court announced its decision to hear the case in an order issued on Monday. ***Stop the Beach Renourishment v. Florida*** will be argued during the high court's next term, which begins in October.

Florida's 40-year-old Beach and Shore Preservation Act establishes a procedure for the state to restore eroded shorelines.

The seaward boundary of beachfront private property extends to the mean high water line (MHWL), a boundary that shifts over time with the size of the beach. In contrast, the Shore Preservation Act replaces the MHWL with a fixed erosion control line (ECL).

Prior to the beach nourishment project, the owner of the waterfront land enjoyed potential rights to any additional land from accretions—should the beach grow seaward. But once the state sets the ECL, that right no longer exists, the landowners complain.

State lawyers countered that upland owners continue to enjoy every preexisting waterfront property right "except the potential expansion of her property via accretions that hypothetically might form while the ECL is in place."

In upholding the state law against the landowners, the Florida Supreme Court said the state has a constitutional duty to protect Florida's beaches as a vital economic and natural resource. "As for the upland land owners, the beach renourishment protects their property from future storm damage and erosion while preserving their littoral rights to access, use, and view," the state high court declared.

The Florida justices added that the law achieved a "reasonable balance of interests and rights to uniquely valuable and volatile property interests."

Property owners disagree. They say a portion of their property interests were taken by the state without any compensation. "The Florida Supreme Court's opinion is a product of judicial engineering to achieve a desired policy result," Mr. Safriet writes in his brief.

State officials have suggested that if Florida were required to pay compensation to landowners, the resulting financial burden might "cripple the state's beach renourishment program," the lawyer says.

The Florida justices, Safriet says, ignored 100 years of state property law to issue their decision.

A lawyer for Walton County and the City of Destin disagreed. "The Florida Supreme Court has simply continued the development of its own common law—a process which is not stagnant but fluctuates—in light of real property developments related to beach renourishment projects," writes Tampa lawyer Hala Sandridge, in her brief to the court.

"Beach Renourishment Victory: In Long-Awaited Decision, High Court Says It Is State's Duty to Restore Sand"

Destin Log
October 1, 2008
Fraser Sherman

Restoring eroded private beaches doesn't deprive owners of their property rights, the Florida Supreme Court says.

Although one of two dissenting judges blasted the majority opinion for "infirm, tortured logic" and a "desire to destroy protected private-property rights," on Monday a 5-2 verdict overruled a 2006 district court decision that a Destin/Walton County beach restoration project denied the rights of the affected owners.

"Now that this is over, I hope we can all move forward in a spirit of harmony," Mayor Craig Barker said Monday, "and put these beaches back the way they used to be."

The court decision focused specifically on beaches that had suffered heavy erosion, City Manager Greg Kisela said, rather than beach restoration in general.

Two property-owners' groups, Save Our Beaches and Stop the Beach Renourishment, formed in 2004 to challenge the six-mile restoration project. Owners objected that south of a state-set erosion control line behind their homes, all the expanded beach would be public land.

Linda Cherry of Save Our Beaches said this week that restoration opponents were "reviewing the options" with their attorneys in light of the court's decision.

"My initial reaction," Cherry said, "is that the court's ruling means that the government can permanently take your property in exchange for a temporary, unwanted and potentially harmful action."

Some owners, soured by arguments with Destin over the public's presence on private beachfront, have said restoration was a land grab to benefit the city's tourist industry by packing more bodies onto the beach.

"They want people in front of our houses," homeowner Patricia Young said in 2004. "It's only going to be done for the people who pack their pockets with money."

The groups challenged the Department of Environmental Protection's permit for the project on both administrative and constitutional grounds. They lost the administrative challenge; the constitutional issues moved on to the First District Court. Save Our Beaches did not, because the court ruled its approximately 150 members weren't necessarily owners of properties in the restoration area.

In 2006, the court ruled that by creating a stretch of public land between the Gulf and the private sands, beach restoration removed owners' right to maintain contact with the water and also their "right to accretion," meaning sand that would have gradually accumulated on their private beaches would now widen public property instead.

Walton County, Destin and the DEP appealed to the state Supreme Court, where the matter sat until Monday's ruling.

The court ruled against Stop the Beach

Renourishment on several grounds:

—While accretion no longer benefits the private beach, erosion won't affect private property until after it's eaten away the public land.

—Beach restoration doesn't deny the owners' right to "access, use and view" the waterfront.

—Sand south of the mean high waterline has always been state property, and the state has a right to restore it.

—Being a waterfront owner doesn't literally mean the edge of your property has to contact the edge of the Gulf.

In a dissent, Justice R. Fred Lewis said it was ridiculous to assume the owners had no "right of contact." He also objected that in focusing on general constitutional issues, the decision ignored complaints about the specific project and whether the erosion-control line had been placed correctly.

"The win is obviously good news," Barker said Monday night. "I still believe our intent has always been to put sand on those beaches as prescribed state law and to protect upland structures."

"Walton Resumes Beach Restoration near Pompano Joe's"

Northwest Florida Daily News
December 5, 2006
Heather Civil

Beach restoration in Walton County has resumed after months of delays, and the project will move into Destin next spring.

Work to pump sand from the East Pass onto beaches began in South Walton behind Pompano Joe's restaurant on Scenic Gulf Drive on Saturday.

Employees at Pompano Joe's have eagerly awaited beach restoration, said restaurant manager Vicki Berfanger. "We can already see a difference," she said. "It's definitely making a big improvement."

Beach erosion had so narrowed the shore behind the eatery that storm surge routinely caused water to rise to the building's back deck, Berfanger said.

"We're ready for it to be done," she said.

The final 6,300 feet of beach in Walton County should be finished by the middle of January, said Brad Pickel, director of beach management for the Walton County Tourist Development Council.

"We're very happy to see the project back under way," he said.

The U.S. Army Corps of Engineers shut the project down in May after several endangered sea turtles got caught in equipment and died during sand dredging.

The Corps later reversed its decision, and the TDC has spent the past several weeks working out a contract with Great Lakes Dredge and Dock for work to restart.

The project, which covers about four miles of beach in Walton and two miles of beach in Destin, originally had a price tag of $22.8 million.

Delays and the expense of getting Great Lakes to come back after shutting down in May have added almost $5 million to the cost.

The price now stands at roughly $27.7 million. Walton's share of that is $19.1 million.

The TDC is using state grant money and tourist bed-tax revenue to fund the project.

Part of the cost increase includes measures to reduce the risk of another sea turtle death.

The TDC has hired a trawler to cast nets near the East Pass and collect and relocate any sea turtles in that area.

The trawler started working Friday before the restoration resumed and had a close call when and endangered leatherback sea turtle got caught in the net and drowned, Pickel said.

It happened when the net got snagged on what the TDC believes is a sunken boat in the East Pass, he said.

That turtle death does not count against the restoration project because it happened during trawling and not during sand dredging, Pickel said.

Walton County has had to contend with not

just sea turtle deaths but a legal battle over the project since it began in February.

The case has reached the state Supreme Court, which will determine whether the project unconstitutionally violates private-property rights, as several Walton residents claim.

There is no timeframe for when the court will issue a ruling.

The TDC has said the restoration will continue as planned unless the court says otherwise. Plans call for the project to start on two miles of beach in Destin early next April.

That should take about 45 days to complete, Pickel said. He said he expects the Walton project to go smoothly and finish on time.

"We've had no delays yet," he said.

"A Frontline in the Sand Against Erosion"

Northwest Florida Daily News
August 3, 2005
Robbyn Brooks

Mother Nature—in the form of two Category 3 hurricanes and two tropical storms in 10 months—has taken a jagged bite out of the beaches along Destin and South Walton County.

Many homes and businesses close to the Gulf of Mexico are perched dangerously near water that laps farther upland with every passing storm.

But beach restoration proposed years ago when miles of beach were first declared critically eroded still hasn't begun, a result of legal fighting.

"Our only salvation is beach restoration," said Peggy Criser, who lost her home in Miramar Beach when Hurricane Dennis hit July 10. "As the storm started spinning toward us, it was like watching the Grim Reaper in the distance. We knew we were doomed."

Criser bought her home 19 years ago when it was a wood-shingled structure and remodeled the gulf-front house, adding furnishings from her travels. It was listed on the market for $2.3 million before Dennis, but now all that remains of her home is a pile of wood and rubble scattered on the sand.

"I'm sitting here itemizing my life over the last 20 years to turn in to the insurance company," she said. "It is a sobering thing for anyone to go through to say the least."

Hurricane Dennis washed away $12 million of sand and vegetation and damaged $11 million of property in Destin, according to early estimates from the city and Okaloosa County.

Extreme winds and crashing waves from the summer storm also displaced as much as two million cubic yards of sand in Walton County. Officials estimate it could cost $25 a cubic yard to replace it.

"There will continue to be significant home damage if no long-term solution is made," said Colleen Castille, secretary of the Florida Department of Environmental Protection.

The DEP has issued emergency beach scraping permits to build sand berms for Destin and Walton County, but Castille called that measure a "Band-Aid" approach.

Destin and Walton County entered into a joint partnership in 1999 when a restoration feasibility study was ordered, and funding was soon made available to extend area beaches 80 to 100 feet across two miles of beach in the city and 4.5 miles in the county.

Soon after the planning phase ended, a small group of beachfront property owners legally challenged the constitutionality of the project.

An administrative judge in Walton County sided in favor of the restoration project in late June. But a circuit judge in Leon County issued a statement on July 20 citing that there was not enough evidence from either side to issue a summary judgment in the case.

The case could now move to a formal trial if the plaintiffs choose to pursue one. D. Kent Safriet, a Tallahassee attorney representing the restoration opponents, did not return a phone call seeking comment.

Plaintiffs in the case continue to oppose restoration. Meanwhile, planning has begun anew for the restoration project.

"This lawsuit is about the City of Destin government attempting to take private property under cover of 'saving the beach,'" said Shannon Goessling, director of the Southeastern Legal Foundation. "Public relations efforts by the City of Destin government aside, the (initial) lawsuit filed by Save Our Beaches is not about keeping beach renourishment from taking place."

The legal foundation has been hired to represent beachfront homeowners in the fight against Destin and its beach access policy that allows for public use of the beach 20 feet upland of the mean high water mark.

Although the foundation isn't representing property owners in their restoration legal challenge, Goessling said it would offer any assistance possible because restoration would add more public beach in front of private homes.

The homeowner group initially challenged the restoration plan in court, stating it would take away their rights to any natural land expansion because the accretion would occur on beach added through state funding and become public property.

One of the plaintiffs, Denny Jones, owns a gulf-front home in Crystal Beach. He said the City of Destin offered to add 50 feet of beach to his lot and then continue with more land for public use.

"They're trying to sell me with this, 'You're going to gain all this sand because that will now be your property.'" Jones said. "They're not trying to help us. They're trying to bring more tourists in here."

Jones and other restoration opponents have come under fire from some beachfront property owners after Hurricane Dennis.

Pat Young, another Crystal Beach resident opposed to restoration, said she has received antagonizing phone calls but has no intention of giving up the struggle against Destin and South Walton County.

Restoration proponents believe adding sand to the beaches is in the best interest of the community as a whole.

"The damage we saw this year could be deadly for us," said Destin grants manager Lindey Chabot. "The charter boat captains, condominiums, beach shops . . . they all rely on tourists and I just don't know if we can get the season back."

Tourism generates an estimated $188 million a year in Destin, and $685 million in Walton County—nearly all of which is tied to the beach.

"Our visitors are showing up and are obviously disappointed in the shape of the beaches," said Destin Chamber of Commerce CEO Shane Moody. "As word gets out about the erosion, I fear people will change their minds about coming here."

A Walton County Tourist Development Council official said it may be the end of summer before tourism losses from Dennis can be calculated.

"We are still doing assessments to see how

bad it is," said Tracy Louthain with the TDC.

The real estate market in Destin and South Walton County has also suffered.

"We are feeling it," said Debbie Gericke with Coldwell Banker JME Realty, "and we are seeing an increase in bottom fishing definitely."

Gericke said her office has taken many calls from investors looking to buy property that sustained significant damage from Dennis in hopes of turning a quick buck.

The red-hot real estate market along the Emerald Coast had cooled over the past several months. But Gericke said sales have stalled since the beginning of this year's active hurricane season. In one JME office, real estate agents have taken $18 million in listings but have sold only $4 million worth of property.

"It's not going to be something we bounce back from suddenly," Gericke said.

But even as beach restoration planning begins anew, it won't provide a quick resolution to the beach erosion affecting nearly 13,000 jobs dependent on guests to the area and an economy driven by tourist dollars. Restoration will take years.

Representatives from Taylor Engineering, the firm hired to research and plan the project, are re-evaluating the critically eroded beaches in the area and updating their design.

Although engineers will need several months to revamp their plan for the beaches of Destin and South Walton County, beach restoration could begin before Nov. 1, the end of turtle nesting season. The project will still be for the original 6.5 miles of beach slated for restoration, but it is evident that the entire beach along Walton County and Destin is critically eroded.

Project engineer Mike Trudnak said planners are limited because of the amount of sand in the ebb shoal of Destin's East Pass, the borrow site for the project.

"I was pretty amazed at how much dune area was lost," Trudnak said. "That will take some of the depth we had on to rebuild that area."

Engineers estimate it would take nearly one million years for restoration to occur naturally.

"The area needs restoration," Trudnak said. "It's ridiculous to think it doesn't."

Walton County Beach Management Coordinator Brad Pickel said the project has become "life or death."

"Beach restoration projects generally focus on shore protection," Pickel said. "But I think our project has morphed into something much more."

Debris and unearthed cypress tree remains have raised safety issues. Pickel also said emergency vehicles are having trouble traversing the shrinking shoreline in some areas, such as the beach adjacent to Costa del Sol townhomes in Walton County.

"There is no sand left in our system to fight any more storms," Pickel said. "The tidal erosion has been too great and I just don't know what will become of our homes and environment and economy if we don't undergo beach restoration."

"Judge Says Renourishment Permit Should Be Issued"

Northwest Florida Daily News
July 6, 2005
Heather Civil

An administrative law judge's recommendation has moved Destin and Walton County a step closer to starting a beach renourishment project, but a separate court case could still stop it from becoming a reality.

In an opinion issued late last week, Judge J. Lawrence Johnston recommended issuance of a Department of Environmental Protection permit to add sand to about seven miles of beach in Walton County and Destin.

The groups Save Our Beaches and Stop the Beach Renourishment challenged the legality of the DEP permit last year. They claim that renourishment violates their private property rights, because the final 100 feet of added beach would become public property.

In his recommendation, Johnston said that the project offers "no unreasonable infringement" of those rights, and he recommended "approval of the beach restoration." Members of the opposition could not be reached for comment Tuesday.

Though the news is good, Walton and Destin have yet to hear another judge's decision regarding another legal challenge to the project.

The opposition took the issue to court in Tallahassee in May to challenge the constitutionality of the Beach Renourishment Act and the application of the act in the Destin-Walton County restoration effort. The judge has not made a ruling in that case.

"(Johnston's ruling) is another step in the right direction," said Kriss Titus, executive director of the Walton County Tourist Development Council. "We're still waiting on the (other) judge." The renourishment project will dredge sand from the East Pass and deposit it in Walton and Destin to replace critically eroded beaches.

Walton and Destin have not yet received a project permit from the DEP and cannot begin work without it.

The city hopes to begin its side of the project soon, said Lindey Chabot, city grants and projects manager.

"We're very excited and pleased," she said.

Walton County still holds out some hope to begin work this fall, Titus said.

But as the tropical storm activity begins to pick up in the Gulf of Mexico, she said that she's not sure the project can start before storm season gets too far under way.

"I'm wondering what will happen without the renourishment," she said.

Miramar Beach in Walton County suffers from some of the worst beach erosion and could benefit the most from the renourishment project, said Dan Tomasek, who owns property in Miramar Beach. He said that he is anxious to see how the other court case turns out.

"We are desperately in need of the sand," he said. "(But) the rest of the good news remains to be heard. There are a multitude of issues that need to be resolved."

"Justices Uphold Taking Property for Development"

The New York Times
June 24, 2005
Linda Greenhouse

The Supreme Court ruled on Thursday, in one of its most closely watched property rights cases in years, that fostering economic development is an appropriate use of the government's power of eminent domain.

The 5-to-4 decision cleared the way for the City of New London, Conn., to proceed with a large-scale plan to replace a faded residential neighborhood with office space for research and development, a conference hotel, new residences and a pedestrian "riverwalk" along the Thames River.

The project, to be leased and built by private developers, is intended to derive maximum benefit for the city from a $350 million research center built nearby by the Pfizer pharmaceutical company.

New London, deemed a "distressed municipality" by the state 15 years ago, has a high unemployment rate and fewer residents today than it had in 1920.

The owners of 15 homes in the Fort Trumbull neighborhood, including one woman who was born in her house 87 years ago and has lived there since, had resisted the plan and refused the city's offer of compensation.

After the city condemned the properties in November 2000, the homeowners went to state court to argue that the taking would be unconstitutional. The Connecticut Supreme Court upheld the use of eminent domain in a ruling last year.

In affirming that decision, the majority opinion by Justice John Paul Stevens resolved a question that had surprisingly gone unanswered for all the myriad times that governments have used their power under the Fifth Amendment to take private property for public use. The question was the definition of "public use."

The homeowners, represented by a public-interest law firm, the Institute for Justice, which has conducted a national litigation campaign against what it calls eminent domain abuse, argued that taking property to enable private economic development, even development that would provide a public benefit by enhancing the tax base, could never be a "public use."

In its view, the only transfers of property that qualified were those that gave actual ownership or use to the public, like for a highway or a public utility.

But the majority concluded on Thursday that public use was properly defined more broadly as "public purpose." Justice Stevens noted that earlier Supreme Court decisions interpreting the public use clause of the Fifth Amendment had allowed the use of eminent domain to redevelop a blighted neighborhood in Washington, to redistribute land ownership in Hawaii and to assist a gold-mining company, in a decision by Justice Oliver Wendell Holmes in 1906.

"Promoting economic development is a traditional and long accepted function of government," Justice Stevens said, adding, "Clearly, there is no basis for exempting economic development from our

traditionally broad understanding of public purpose."

In a dissenting opinion, Justice Sandra Day O'Connor objected that "the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."

Justice O'Connor said, "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded."

Justice Stevens, examining the New London plan in light of the majority's general analysis, said the plan "unquestionably serves a public purpose," even though it was intended to increase jobs and tax revenue rather than remove blight.

He described the plan as "carefully formulated" and comprehensive. Sounding a federalism note, Justice Stevens said that state legislatures and courts were best at "discerning local public needs" and that the judgment of the New London officials was "entitled to our deference."

Justices Stephen G. Breyer, Ruth Bader Ginsburg, Anthony M. Kennedy and David H. Souter joined the majority opinion in *Kelo v. City of New London*, No. 04-108. Justice Kennedy also wrote a separate concurring opinion to emphasize that while there was no suggestion in this instance that the plan was intended to favor any individual developer, "a court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see it if has merit."

Justice O'Connor's dissenting opinion was joined by Chief Justice William H. Rehnquist and by Justices Antonin Scalia and Clarence Thomas. She wrote that rather than adhering to its precedents, the court had strayed from them by endorsing economic development as an appropriate public use.

"Who among us can say she already makes the most productive or attractive use of her property?" Justice O'Connor asked.

She added: "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall or any farm with a factory."

Both Justice O'Connor and Justice Thomas, who also filed his own dissent, said the decision's burden would fall on the less powerful and wealthy.

"The government now has license to transfer property from those with fewer resources to those with more," Justice O'Connor said. "The founders cannot have intended this perverse result."

Justice Thomas, who called the decision "far reaching and dangerous," cited several studies showing that those displaced by urban renewal and "slum clearance" over the years tended to be lower-income minority residents.

"The court has erased the Public Use Clause from our Constitution," he said.

In the majority opinion, Justice Stevens said, "The necessity and wisdom of using eminent domain power to promote economic development are certainly matters of legitimate public debate."

The court did not "minimize the hardship that condemnations may entail," he said, despite the fact that the homeowners will

receive "just compensation."

Justice Stevens said that states remained free to place restrictions on their own use of eminent domain power through their own constitutions and laws, as many have; California, for example, has a law restricting to blighted areas the use of eminent domain for economic development.

Scott G. Bullock, the lawyer who argued the case for the New London homeowners, said in an interview that his organization, the Institute for Justice, would accept the court's invitation and "continue the fight in the state supreme courts." As a result of the decision, he said, "we are going to see more eminent domain abuse and a growing grass-roots rebellion against this type of government action."

Allan B. Taylor, a partner in the Hartford law firm Day, Berry & Howard who filed a brief on New London's behalf for the Connecticut Conference of Municipalities and organizations of cities in 31 other states, said an opposite outcome in this case would have ushered in an "extraordinary revolution."

If the court had not upheld the Connecticut Supreme Court, he said in an interview, "it would greatly limit what cities and towns all over the country could do." Mr. Taylor said he read the opinion not as a green light for the wholesale use of eminent domain, but as "a green light for continuing to do careful and responsible planning."

The decision was a clear defeat for the long-term effort by Chief Justice Rehnquist and Justice Scalia to limit government control over private property. Although a series of decisions from the mid-1980s through the early 90s had appeared to indicate a major shift in the court's traditional deference to government land-use policies, that effort has stalled in recent cases. By the same token, the decision was the latest success for Justice Stevens, the 85-year-old senior associate justice, who appears to be having one of the most productive terms in his 30 years on the Supreme Court.

The New London case was among the final decisions the court was expected to make in this term. The court indicated that Monday would be the final day of the term.

Kiyemba v. Obama

08-1234

Ruling Below: *Kiemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009)

District court overstepped its authority in ordering the government to bring to the United States, and subsequently to release here, 17 Chinese citizens being wrongfully detained as enemy combatants at Guantanamo Bay Naval Base, Cuba. Political branches have exclusive power to determine the admissibility of aliens to the United States, and the district court failed to identify any statute, treaty, or constitutional provision authorizing its action.

Question Presented: Exercising its habeas jurisdiction as confirmed by *Boumediene v. Bush*, does federal court have no power to order the release of prisoners held by the executive for seven years when that executive detention is indefinite without authorization in law, and the release into the continental United States is the only possible effective remedy?

Jamal KIYEMBA, Next Friend, et al., Appellees
v.
Barack H. OBAMA, President of the United States, et al., Appellants

United States Court of Appeals for the District of Columbia Circuit

Decided February 18, 2009

[Excerpt: some footnotes and citations omitted]

RANDOLPH, Senior Circuit Judge:

Seventeen Chinese citizens currently held at Guantanamo Bay Naval Base, Cuba, brought petitions for writs of habeas corpus. Each petitioner is an ethnic Uighur, a Turkic Muslim minority whose members reside in the Xinjiang province of far-west China. The question is whether, as the district court ruled, petitioners are entitled to an order requiring the government to bring them to the United States and release them here.

Sometime before September 11, 2001, petitioners left China and traveled to the Tora Bora mountains in Afghanistan, where they settled in a camp with other Uighurs. Petitioners fled to Pakistan when U.S. aerial strikes destroyed the Tora Bora camp. *Id.* Eventually they were turned over to the U.S. military, transferred to Guantanamo Bay and detained as "enemy combatants."

Evidence produced at hearings before Combatant Status Review Tribunals in Guantanamo indicated that at least some petitioners intended to fight the Chinese government, and that they had received firearms training at the camp for this purpose. The Tribunals determined that the petitioners could be detained as enemy combatants because the camp was run by the Eastern Turkistan Islamic Movement, a Uighur independence group the military believes to be associated with al Qaida or the Taliban, and which the State Department

designated as a terrorist organization three years after the petitioners' capture.

In the *Parhat* case, the court ruled that the government had not presented sufficient evidence that the Eastern Turkistan Islamic Movement was associated with al Qaida or the Taliban, or had engaged in hostilities against the United States or its coalition partners. Parhat therefore could not be held as an enemy combatant. The government saw no material differences in its evidence against the other Uighurs, and therefore decided that none of the petitioners should be detained as enemy combatants.

Releasing petitioners to their country of origin poses a problem. Petitioners fear that if they are returned to China they will face arrest, torture or execution. United States policy is not to transfer individuals to countries where they will be subject to mistreatment. Petitioners have not sought to comply with the immigration laws governing an alien's entry into the United States. Diplomatic efforts to locate an appropriate third country in which to resettle them are continuing. In the meantime, petitioners are held under the least restrictive conditions possible in the Guantanamo military base.

As relief in their habeas cases, petitioners moved for an order compelling their release into the United States. Although the district court assumed that the government initially detained petitioners in compliance with the law, *In re Guantanamo Bay Detainee Litig.*, the court thought the government no longer had any legal authority to hold them. As to the appropriate relief, the court acknowledged that historically the authority to admit aliens into this country rested exclusively with the political branches. Nevertheless, the court held that the "exceptional" circumstances of this case and the need to safeguard "an individual's liberty from unbridled executive fiat," justified granting petitioners' motion.

Our analysis begins with several firmly established propositions set forth in *Saavedra Bruno v. Albright*, from which we borrow. There is first the ancient principle that a nation-state has the inherent right to exclude or admit foreigners and to prescribe applicable terms and conditions for their exclusion or admission. This principle, dating from Roman times, received recognition during the Constitutional Convention and has continued to be an important postulate in the foreign relations of this country and other members of the international community.

For more than a century, the Supreme Court has recognized the power to exclude aliens as "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government" and not "granted away or restrained on behalf of any one." Ever since the decision in the *Chinese Exclusion Case*, the Court has, without exception, sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms.

With respect to the exclusive power of the political branches in this area, there is, as the Supreme Court stated in *Galvan*, "not merely 'a page of history,' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." Justice Frankfurter summarized the law as it continues to this day: "Ever since national States have come into being, the right of the people to enjoy

the hospitality of a State of which they are not citizens has been a matter of political determination by each State"—a matter "wholly outside the concern and competence of the Judiciary."

As a result, it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." With respect to these seventeen petitioners, the Executive Branch has determined not to allow them to enter the United States. The critical question is: what law "expressly authorized" the district court to set aside the decision of the Executive Branch and to order these aliens brought to the United States and released in Washington, D.C.?

The district court cited no statute or treaty authorizing its order, and we are aware of none. As to the Constitution, the district court spoke only generally. The court said there were "constitutional limits," that there was some "constitutional imperative," that it needed to protect "the fundamental right of liberty." These statements suggest that the court may have had the Fifth Amendment's due process clause in mind. But the due process clause cannot support the court's order of release. Decisions of the Supreme Court and of this court—decisions the district court did not acknowledge—hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States. The district court, no less than a panel of this court, must follow those decisions.

The district court also sought to support its order by invoking the idea embodied in the maxim ubi jus, ibi remedium—where there is a right, there is a remedy. We do not believe the maxim reflects federal statutory or constitutional law. Not every violation of a right yields a remedy, even when the right is constitutional. Application of the doctrine of sovereign immunity to defeat a remedy is one common example. Another example, closer to this case, is application of the political question doctrine. More than that, the right-remedy dichotomy is not so clear-cut. As Justice Holmes warned, "[s]uch words as 'right' are a constant solicitation to fallacy." Ubi jus, ibi remedium cannot tell us whether petitioners have a right to have a court order their release into the United States. Whatever the force of this maxim, it cannot overcome established law that an "alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such a privilege is granted to an alien only upon such terms as the United States shall prescribe."

Much of what we have just written served as the foundation for the Supreme Court's opinion in *Shaughnessy v. United States ex rel. Mezei*, a case analogous to this one in several ways. The government held an alien at the border (Ellis Island, New York). He had been denied entry into the United States under the immigration laws. But no other country was willing to receive him. The Court ruled that the alien, who petitioned for a writ of habeas corpus, had not been deprived of any constitutional rights. In so ruling the Court necessarily rejected the proposition that because no other country would take Mezei, the prospect of indefinite detention entitled him to a court order requiring the Attorney General to release him into the United States. As the Supreme Court saw it, the Judiciary could not question the Attorney General's judgment.

Neither *Zadvydas*, nor *Clark v. Martinez*, are to the contrary. Petitioners are incorrect in viewing these cases as holding that the

constitutional "liberty interests of concededly illegal aliens trumps [sic] statutory detention power pending exclusion once that detention becomes indefinite." Both cases rested on the Supreme Court's interpretation not of the Constitution, but of a provision in the immigration laws—a provision, the Court acknowledged, Congress had the prerogative of altering. It is true that *Zadvydas* spoke of an alien's due process rights, but the Court was careful to restrict its statement to aliens who had already entered the United States. It was on that ground that the Court distinguished *Mezei*. The distinction is one that "runs throughout immigration law." The Court stated: "It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."

And so we ask again: what law authorized the district court to order the government to bring petitioners to the United States and release them here? It cannot be that because the court had habeas jurisdiction, it could fashion the sort of remedy petitioners desired. The courts in *Knauff* and in *Mezei* also had habeas jurisdiction, yet in both cases the Supreme Court held that the decision whether to allow an alien to enter the country was for the political departments, not the Judiciary. Petitioners and the amici supporting them invoke the tradition of the Great Writ as a protection of liberty. As part of that tradition, they say, a court with habeas jurisdiction has always had the power to order the prisoner's release if he was being held unlawfully. But as in *Munaf v. Geren*, petitioners are not seeking "simple release." Far from it. They asked for, and received, a court order compelling the Executive to release them into the United States outside the framework of the immigration laws. Whatever may be the content of common law habeas corpus, we are certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy.

An undercurrent of petitioners' arguments is that they deserve to be released into this country after all they have endured at hands of the United States. But such sentiments, however high-minded, do not represent a legal basis for upsetting settled law and overriding the prerogatives of the political branches. We do not know whether all petitioners or any of them would qualify for entry or admission under the immigration laws. We do know that there is insufficient evidence to classify them as enemy combatants—enemies, that is, of the United States. But that hardly qualifies petitioners for admission. Nor does their detention at Guantanamo for many years entitle them to enter the United States. Whatever the scope of habeas corpus, the writ has never been compensatory in nature. The government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more.

* * *

We have the following response to Judge Rogers's separate opinion.

1. Judge Rogers: "The power to grant the writ means the power to order release."

No matter how often or in what form Judge Rogers repeats this undisputed proposition—and repeat it she does—it will not move us any closer to resolving this case. The question here is not whether petitioners should be released, but where. That question was not presented in

Boumediene and the Court never addressed it. As we wrote earlier, never in the history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population. As we have also said, in the United States, who can come in and on what terms is the exclusive province of the political branches. In response, Judge Rogers has nothing to say.

2. Judge Rogers: "[T]he district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention as the Executive alternatively suggested."

This statement, and others like it throughout the separate opinion, is confused and confusing. First of all, the government has never asserted, here or in the district court, that it is holding petitioners pursuant to the immigration laws. None of the petitioners has violated any of our immigration laws. How could they? To presume otherwise—as Judge Rogers does throughout her separate opinion—is strange enough.

Stranger still, Judge Rogers charges the district court with acting "prematurely" in ordering petitioners' release into the United States. How so? As she sees it, the district court should have first determined whether, under the immigration laws, petitioners were eligible to enter the country or were excludable. But no one—not the government, not petitioners, not the amici—no one suggested that the court should, or could, make any such determination.

What then is Judge Rogers talking about when she insists on evaluating petitioners' eligibility for admission under the immigration laws? None of the petitioners has even applied for admission. Perhaps she thinks a court should decide which, if any, of the petitioners would have been admitted if they had applied. But deciding that at this stage is impossible. A brief survey of immigration law shows why.

Eligibility turns in part on what status the alien is seeking. The immigration laws presume that those applying for entry seek permanent resident status. Such persons must first obtain an immigrant visa from a consular officer. But the consular officer can only act after a petition is filed with the Secretary of Homeland Security, showing the immigrant status for which the alien qualifies. The consular officer then has the exclusive authority to make the final decision about the issuance of any such immigrant visa. That decision is not judicially reviewable.

Worldwide limits on immigration are set out in 8 U.S.C. § 1151. Additionally, there are limitations on the number of visas that can be issued to immigrants from any one particular country. Immigrants are divided into three categories: family-sponsored immigrants; employment-based immigrants; and diversity immigrants. For employment-based immigrants, first preference is given to "priority workers," which include aliens with extraordinary ability in sciences, arts, education, business, or athletics; "outstanding professors and researchers,"; and "certain multinational executives and managers." There are lower preference categories unnecessary to set forth.

Suppose the eligibility of any of the petitioners was determined on the basis that they were seeking only temporary admission. Here again, to be admitted as a nonimmigrant in any of the categories set forth in the margin, the alien must apply for a visa. Different classes have different requirements for what the alien must do to

obtain a visa, but all require that the alien submit some form.

Suppose the petitioners' eligibility for admission turned on whether they could be considered refugees or asylum seekers. An alien seeking refugee or asylum status (refugees apply from abroad; asylum applicants apply when already here) must qualify as a "refugee" as defined in 8 U.S.C. § 1101(a)(42). Whether they could be admitted under this heading depends on numerical limitations established by the President, and on the discretion of the Attorney General or the Secretary of Homeland Security. To qualify as a refugee, an alien must (1) not be firmly resettled in a foreign country, (2) be of "special humanitarian concern" to the United States, and (3) be admissible as an immigrant under the immigration laws. Although the Attorney General and the Secretary are given discretion to waive many of the grounds of inadmissibility for a refugee applicant, the statute specifically prohibits waiver of the "terrorist activity" ground.

The parole remedy, 8 U.S.C. § 1182(d)(5)(A), not only is granted in the exclusive discretion of the Secretary of Homeland Security, but also is specifically limited to "any alien applying for admission." The section also provides that no alien who would more properly be considered a refugee should be paroled unless the Secretary specifically determines that "compelling reasons in the public interest" argue in favor of the parole remedy.

There are many more complications, but the bottom line is clear. Aliens are not eligible for admission into the United States unless they have applied for admission. Numerical limits may render them ineligible, as may many other considerations. The Secretary has wide discretion with respect to several categories of applicants and the decisions of consular officers on visa applications are not subject to judicial review. And so we find it impossible to understand what Judge Rogers is thinking when she insists, for instance, that "the district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention" of someone who (a) has never entered or attempted to enter the country, and (b) has never applied for admission under the immigration laws.

3. Judge Rogers: "[T]he majority has recast the traditional inquiry of a habeas court from whether the Executive has shown that the detention of the petitioners is lawful to whether the petitioners can show that the habeas court is 'expressly authorized' to order aliens brought into the United States."

Judge Rogers fails to mention that the "expressly authorized" quotation in our opinion is taken from a Supreme Court opinion in a habeas case. We repeat with some additional emphasis: it "is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." When Judge Rogers finally confronts *Knauff*, how does she deal with the Supreme Court's opinion? She calls it an "outlier," as if her label could erase the case from the United States Reports. We know and she knows that the lower federal courts may not disregard a Supreme Court precedent even if they think that later cases have weakened its force. With respect to *Knauff*, later cases have reinforced, not lessened, its precedential value.

4. Judge Rogers: "[T]he majority has mischaracterized relevant precedent."

Judge Rogers is referring to our discussion of the Supreme Court decisions in *Clark* and *Zadvydas*. We made two points about the cases. The first was that both rested on statutory provisions that are not involved here. Judge Rogers acknowledges the correctness of our view. Our second point was that as far as a court's releasing an alien into the country temporarily pursuant to statutory authority, there was a clear distinction between aliens within the United States and those "outside our geographic borders." How does Judge Rogers deal with this distinction? She claims that *Boumediene* "rejected this territorial rationale as to Guantanamo." But as the Court recognized, it had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically limited its holding to the Suspension Clause.

* * *

The judgment of the district court is **REVERSED** and the cases are **REMANDED** for further proceedings consistent with this opinion.

So ordered.

ROGERS, Circuit Judge, concurring in the judgment:

In *Boumediene v. Bush*, the Supreme Court held that detainees in the military prison at Guantanamo Bay ("Guantanamo") are "entitled to the privilege of habeas corpus to challenge the legality of their detentions," and that a "habeas court must have the power to order the conditional release of an individual unlawfully detained." Today the court nevertheless appears to conclude that a habeas court lacks authority to order that a non-"enemy combatant" alien be released into the country (as distinct from be admitted under the immigration laws) when the Executive can point to no legal justification for detention and to no foreseeable path of release. I cannot join the court's analysis because it is not faithful to *Boumediene* and would compromise both the Great Writ as a check on arbitrary detention and the balance of powers over exclusion and admission and release of aliens into the United States recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court. Furthermore, that conclusion is unnecessary because this court cannot yet know if detention is justified here. Due to the posture of this case, the district court has yet to hear from the Executive regarding the immigration laws, which the Executive had asserted may form an alternate basis for detention. The district court thus erred in granting release prematurely, and I therefore concur in the judgment.

I.

The Executive chose not to file returns to the petitions for writs of habeas corpus for a majority of the petitioners. After several hearings and briefing, the district court determined that the Executive neither claimed petitioners were "enemy combatants" or otherwise dangerous, nor charged them with a crime, nor pointed to other statutory grounds for detention, nor presented reliable evidence that they posed a threat to U.S. interests. The Executive also did not deny it detained the petitioners. The district court understood the Executive to argue instead that it had extra-statutory "wind-up" authority to repatriate petitioners and that the district court in any case lacked the authority to order them released into the United States. Rejecting both of these rationales—the first in view of the years in which the Executive had unsuccessfully sought to find a country that would receive the petitioners without risk of their being

tortured, the second in view of *Boumediene* and the need to afford an effective habeas remedy—the district court granted the petitions, which sought release into the country. Ruling the Executive had shown no lawful basis for what had become indefinite detention, the district court concluded petitioners must be brought before the court and released.

However, in the district court the Executive had also pointed to a possible separate ground for detention that the district court did not resolve—namely that petitioners were excludable under the immigration statutes and could be detained pending removal proceedings. The Executive had also sought a stay so it could evaluate petitioners' status under the immigration laws and present the views of the Department of Homeland Security. The district court declined to stay the proceedings, noting that petitioners had already been imprisoned for seven years and delay had been "the name of the game" in the Executive's litigation strategy. Instead the district court ordered the petitioners immediately released into the United States, with a hearing to follow a week later at which time the position of Homeland Security could be presented. At that time, the district court intended to consider conditions for petitioners' continued release. The district court also purported to restrain the Executive from taking petitioners into custody pursuant to the immigration statutes during the week prior to the hearing.

In so proceeding, the district court erred by ordering release into the country without first ascertaining whether the immigration laws provided a valid basis for detention as the Executive alternatively suggested. The court seems to have relied on *Zadvydas v. Davis*, and *Clark v. Martinez*, for the proposition that petitioners could no longer be detained. But in those cases the Supreme Court first assessed the Executive's arguments that it had the right to detain under the immigration statutes before finding that power had expired and ordering release. In so doing, the Court gave effect to both the province of the Great Writ as a check on unjustified detention and the power of the political branches over exclusion and admission of aliens into the country. To instead order release before assessing asserted legal authority for detention is incompatible with the obligation of a habeas court. Even if the Executive's delay in raising the immigration statutes as a basis for detention appears troubling given its opportunity to file returns to the writs, as the petitioners asserted they did not seek an immigration remedy, the Executive cannot have waived the argument when it raised the argument in response to the district court's rejection of its other rationales for detention.

Because the district court could not properly order release into this country when it could not yet know whether detention was justified, I concur in the judgment vacating the release order. Because the question of whether the immigration statutes provide that justification "cannot be resolved at this stage," I would remand the case for that determination to be made.

II.

In reversing and remanding, the majority has written broadly, apparently concluding that a habeas court is without power to order the release into this country of Guantanamo detainees whom the Executive would prefer to detain indefinitely, where there is no legal basis for that detention, including no contention that these petitioners are "enemy combatants" or a showing that they are even dangerous. Because this court does not know if detention could be authorized here,

the majority need not reach that issue. More fundamentally, its analysis compromises both the Great Writ as a check on arbitrary detention, effectively suspending the writ contrary to the Suspension Clause, art. 1, § 9, cl. 2, and the balance of powers regarding exclusion and admission and release of aliens into the country recognized by the Supreme Court to reside in the Congress, the Executive, and the habeas court. Consequently, I cannot join it.

A.

The Executive urges this court to recognize an extra-statutory, perhaps constitutional, Executive power to detain in order to prevent an alien from entering the United States. Supreme Court precedent indicates there is no such power, and the Executive's authority to exclude and remove aliens, and to detain them to effect that end, must come from an explicit congressional delegation, as the majority's citations confirm. It would be surprising under our constitutional system if the law were otherwise. Even the single apparent outlier to this line of precedent, which stated that the power to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation," *U.S. ex rel. Knauff v. Shaughnessy*, is no outlier at all. In *Knauff*, the Court upheld the challenged action because it was authorized by statute, albeit in "broad terms," thereby acknowledging that the political branches act on matters of exclusion and admittance through statutes and treaties.

Where the Executive claims need of a power not yet delegated in order to control entry into the country, the Supreme Court has instructed it to look to Congress for a remedy. Other statutory justification may also exist in some cases. If these petitioners present "special circumstances," as the Executive appears to suggest, Congress may, within constitutional limits, provide a remedy.

Shaughnessy v. United States ex rel. Mezei, relied on by the majority (and the Executive), is not to the contrary. That case does not stand for the proposition that any detention by the Executive is authorized if it serves to effect exclusion of an alien whom the Executive chooses not to admit. To the contrary, the Supreme Court looked to a statute then in effect and since repealed, wherein Congress had "expressly authorized" the President to exclude aliens without a hearing when the Attorney General determined entry would be prejudicial to the interests of the United States. The Attorney General so determined and ordered the petitioner excluded on the basis of confidential information. Thus, in *Mezei* the Supreme Court recognized broad Executive power not because it was inherent to the Office of the President, but because in *Mezei's* case that power was specifically authorized by Congress. *Mezei* is thus another case in which the Supreme Court found detention justified because it was authorized by statute.

B.

The majority does not adopt outright the Executive's argument that detention here is justified under an extra-statutory Executive power, but instead seems to conclude that the habeas court lacks the power to order the release of non-"enemy combatant" Guantanamo detainees from indefinite detention, even where such detention is not justified by statute. The effect, however, is much the same. To reach this conclusion, the majority has recast the traditional inquiry of a habeas court from whether the Executive has shown that the detention of the petitioners is lawful to whether the

petitioners can show that the habeas court is "expressly authorized" to order aliens brought into the United States. Along the way, the majority's analysis tends to conflate the power of the Executive to classify an alien as "admitted" within the meaning of the immigration statutes, and the power of the habeas court to allow an alien physically into the country. But this analysis, like the majority's rights/remedy discussion, ignores the very purpose of the Great Writ and its province as a check on arbitrary Executive power. The power to grant the writ means the power to order release.

Furthermore, the majority has mischaracterized relevant precedent. The majority offers that the district court did not have the power to order that petitioners be released into the United States because such an order would impermissibly "set aside the decision of the Executive Branch" to deny petitioners release into the United States. But the Supreme Court in *Clark* makes clear that a district court has exactly the power that the majority today finds lacking—the power to order an unadmitted alien released into the United States when detention would otherwise be indefinite. The majority notes that *Clark*, like *Zadvydas*, rested on the proposition that detention was unauthorized by the immigration statutes. But that only goes to whether detention is justified. Relevant here is that once the Supreme Court concluded the detention was unlawful, it ordered the aliens released into the United States. If the majority were correct that a habeas court, upon finding that the Executive detains indefinitely an unadmitted alien without authorization, is nonetheless powerless to order release, then the Executive in *Clark* could have continued the detention, even without legal justification. Instead, the Supreme Court held that "the petitions for habeas corpus should have been granted."

The majority also offers that because petitioners are aliens outside the United States and have not applied for visas they are not entitled to the same due process as the aliens in *Zadvydas* and even *Clark*. However, in *Boumediene*, the Supreme Court rejected this territorial rationale as to Guantanamo, holding that detainees who were brought there involuntarily were entitled under the Constitution to seek habeas relief because "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction [and 'plenary control'] of the United States." It held further that whether a substitute process "satisf[ied] due process standards" was not "the end [of the Court's] inquiry," because "[h]abeas corpus is a collateral process that exists, in Justice Holmes' words, to 'cu[t] through all forms and g[o] to the very tissue of the structure.'" Furthermore, the majority does not explain how a lack of procedural due process rights in petitioners, which it asserts and uses to distinguish *Clark*, would go to the power of the court, which the majority finds lacking.

In sum, the majority aims to safeguard the separation of powers by ensuring that the judiciary does not encroach upon the province of the political branches. But just as the courts are limited to enumerated powers, so too is the Executive, and the habeas court exercises a core function under Article III of the Constitution when it orders the release of those held without lawful justification. Indeed habeas is not an encroachment, but "a time-tested device" that "maintain[s] the 'delicate balance of governance' that is itself the surest safeguard of liberty." The petitioners have the privilege of the writ including the right to invoke the court's power to order release,

and the Supreme Court's decision in Clark shows that a habeas court has the power to order the release into the United States of unadmitted aliens whom the Executive would prefer to detain indefinitely but as to whom the Executive has exercised no lawful detention authority. The petitioners seeking release into the United States are seventeen Uighurs who come to the court as unadmitted aliens who are not "enemy combatants" or otherwise shown by the Executive, when afforded the opportunity, to be dangerous or a threat to U.S. interests, and as to whom the Executive as yet has failed to show grounds for their detention, which appears indefinite. Because the district court prematurely determined the petitioners were entitled to be released into the country prior to ascertaining whether the Executive, as asserted, would have lawful grounds to detain them under the immigration statutes, I concur with the judgment and would remand the case so that the district court could so ascertain. Unlike the majority, however, I would conclude, consistent with the province of the Great Writ and the power of the political branches, that, were the district court to ascertain thereafter that petitioners' detention is not lawful and has become effectively indefinite, then under *Clark*, it would have the power to order them conditionally released into the country.

"Detainees' Case Put off"

SCOTUSblog
June 29, 2009
Lyle Denniston

Lawyers for 13 Guantanamo Bay prisoners learned Monday that the Supreme Court has put off any action on their case until its next Term. After noticing that the Court had issued no order on the case of ***Kiyemba, et al., v. Obama, et al.*** (08-1234), the attorneys checked with Court aides and were told there would be no decision "until October at the earliest." That apparently means that the Court will not consider granting or denying the case until it next assembles for a private Conference on Sept. 29.

Because the Court took no formal action on ***Kiyemba*** Monday, there was no explanation. It is possible to speculate on the reasons.

Among them could be that the Court did not want to be seen to be interfering with diplomatic efforts to arrange the re-settlement of the 13 men in the case—Chinese Muslims who are members of the Uighur sect. The U.S. Solicitor General had told the Court that four of 17 Uighurs originally involved in the case had been released, and that diplomatic efforts would go on to try to place the other 13.

Another possible reason was that the Court was unwilling, while the new Obama Administration was sorting out its overall detention policy, to engage in a confrontation over presidential or congressional war powers of the kind that had led to four earlier rulings limiting detention authority. The prospect that the remaining 13 might yet be placed in another country perhaps made it seem that the case simply would become moot in a matter of weeks.

Still another factor in the postponement decision could have been Congress' passage this month of new legislation that severely restricts the President's power to order the release of any detainees at Guantanamo, to live in the U.S. or to be re-settled in any other country. That legislation raises significant new constitutional questions, and the Court may have been reluctant to take them on if, in fact, they would not have to do so because the case might become moot.

Because the case had developed so late in the just-closed Term, the Court would not have heard it until the next Term even if it had opted to grant review now, unless the Court held a special summer session, which was unlikely. That, too, may have contributed to the perception that there was no need to act on it Monday.

For the 13 men involved, of course, the postponement means that, even though they are no longer considered to be dangerous or enemies, they will continue to be confined at Guantanamo Bay under conditions that their lawyers contend are little better than those faced by prisoners still regarded as enemies.

They will gain relief from their captivity over the summer months only if the State Department succeeds in efforts—stalled for years—to re-settle all of them.

In the meantime, the D.C. Circuit Court's ruling in the ***Kiyemba*** case—a declaration that no federal judge has any authority to order the release of Guantanamo detainees, at least when the prisoners seek to be transferred to the U.S.—will remain

unreviewed and thus fully intact. Although it applies formally only to an order to transfer the Uighurs to the U.S. to live, federal District judges in other habeas cases have interpreted the Circuit Court decision to mean that they cannot order the actual release of any Guantanamo detainee, but can only urge the government to take diplomatic steps to release those who are eligible.

Thus, the combined effects of the ***Kiyemba*** decision by the Circuit Court and the new legislative limits imposed by Congress may seriously complicate President Obama's efforts to fashion new detention policy and to take control over the fate of the 229 detainees remaining at Guantanamo.

In their petition to the Supreme Court, the Uighurs had contended that, absent review of the Circuit Court ruling, the detainees' fate would depend upon the "largesse" of the Executive Branch. But it also now depends, at least in the near future, on how far Congress's new restrictions go to curb how the President may use what authority remains available to his branch of government.

"Court Blocks Release of 17 Uighurs into U.S."

The Washington Post
February 19, 2009
Del Quentin Wilber and Carrie Johnson

A federal appeals court yesterday blocked the transfer to the United States of a small band of Chinese Muslims held at the U.S. military prison at Guantanamo Bay, Cuba.

The decision by a three-judge panel reversed a lower-court ruling that ordered the government to release the 17 Uighurs and resettle them with Uighur families in the Washington region. The government no longer considers the Uighurs to be enemy combatants and has been trying to find nations willing to take them in. U.S. authorities do not want to send the men home to China, where they are considered terrorists and may be tortured.

The ruling came the day top government lawyers, including White House Counsel Gregory B. Craig, visited Guantanamo Bay as part of their efforts to determine what to do with the remaining 245 detainees.

Attorney General Eric H. Holder Jr. is visiting the facility Monday. He is in charge of a government task force that will determine who can be released, sent to other countries or charged with crimes. President Obama has said he wants to close the prison within a year.

The appeals court decision yesterday came in a lawsuit brought by the Uighurs, who are challenging their detention in federal court. The panel on the U.S. Court of Appeals for the D.C. Circuit ruled that U.S. District Judge Ricardo M. Urbina had erred in ordering the Uighurs' release into the United States.

Two of the judges, Karen LeCraft Henderson and A. Raymond Randolph, found that Urbina had overstepped his authority in ordering such a remedy. Only the executive branch and Congress have the power to allow people to enter the United States, they said.

"The question here is not whether petitioners should be released, but where," Randolph wrote, adding that the Supreme Court has long "sustained the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms."

In a concurring opinion, Judge Judith W. Rogers wrote that federal judges had the right to order the release of the Uighurs into the country but that Urbina first needed to assess whether the men should be excluded from entry under immigration laws.

Government lawyers have said that because the men trained at a military camp in Afghanistan they would probably be prevented from entering the United States under immigration laws.

The judges sent the case back to Urbina for reconsideration.

One other federal judge has ordered detainees to be released from Guantanamo. U.S. District Judge Richard J. Leon recently ordered the government to engage in diplomatic efforts to transfer six detainees to other countries after he determined that there was not enough evidence to justify their

confinement. The government has transferred three of those prisoners.

Human rights advocates and attorneys for detainees said yesterday's ruling will weaken the efforts of other detainees seeking freedom. Absent the power to order the release of detainees into the United States, the Supreme Court's decision in June granting them the right to challenge their confinements before independent judges "is now meaningless," said Susan Baker Manning, an attorney for the Uighurs. "You win and still can't get out," she said.

The Uighurs are natives of northwestern China who have been demanding an independent homeland. The 17 Uighurs were picked up in Pakistan in early 2002 and accused of training at military camps in Afghanistan sponsored by the East Turkistan Islamic Movement, a group that the Bush administration designated a terrorist organization after the men were captured.

They have repeatedly told military officials they are not enemies of the United States.

The Justice Department did not produce any evidence to justify their confinement. Government lawyers argued that the president had the power to detain the men until they could be safely transferred to another country.

In ordering their release into the United States, Urbina said in October that diplomatic resettlement efforts had stalled and that the Constitution "prohibits indefinite detention without cause."

P. Sabin Willett, an attorney for the Uighurs, said he and other lawyers have been pressing the Obama administration to let the Uighurs into the country.

An administration official declined to comment on the decision, saying only that Obama "has requested a review of all of these cases, and we're not going to prejudge the outcome of the review and comment on individual cases."

"Judge Orders Guantanamo Releases"

Los Angeles Times
October 8, 2008
David G. Savage

For the first time, a federal judge has ordered the Bush administration to release prisoners held at the U.S. military facility at Guantanamo Bay, Cuba, ruling Tuesday that 17 Chinese Muslims must be brought to his courtroom by the end of the week so that they can be set free.

U.S. District Judge Ricardo M. Urbina said that the government's authority to hold the men had "ceased" and that they were entitled to be released.

He said he would hold a hearing to decide on the conditions for releasing the men. Several religious and social groups, including 20 church leaders from Tallahassee, Fla., said they would help the men resettle in their community.

The 17 are Uighurs who fled persecution in the far western reaches of China. U.S. authorities, fearing what Chinese officials would do, have refused to send them back to China, and no other country has been willing to take them.

The judge's order came more than six years after the men were sent to Guantanamo and more than four years after the Pentagon cleared most of them to be released. The Supreme Court ruled four months ago that judges can order the release of prisoners wrongly held at Guantanamo.

Soon thereafter, a federal appeals court reviewed the case of one of the Uighurs, Huzaifa Parhat, and ruled that the government had no basis for believing he was an "enemy combatant." That decision set the stage for Urbina's ruling Tuesday.

Civil liberties advocates hailed the order.

"This is a historic day for the United States," said Emi MacLean, a lawyer for the Center for Constitutional Rights. "Finally, we are beginning the process of taking responsibility for our mistakes and fixing them."

But Bush administration lawyers have insisted that judges have no authority to interfere with the handling of foreign military prisoners. On Tuesday, they also argued that immigration laws prohibit the release into the United States of individuals alleged to have terrorist ties and asked for an emergency order to block the release.

Administration officials "are deeply concerned by and strongly disagreed with" the decision to release the men, White House Press Secretary Dana Perino said in a statement.

Human rights lawyers have described the 17 Uighurs as among the most egregious examples of wrongful imprisonment at Guantanamo. Natives of an area they call East Turkistan, the Uighurs fled from oppression by the Chinese government, including its policy of forced abortions, and settled in Afghanistan in 2001.

But after U.S. bombing raids hit their camps, they fled to Pakistan, where they were taken into custody by locals, who turned them

over to U.S. troops offering $5,000 bounties for suspected foreign fighters. The U.S. military alleged that the Uighurs had received military training, and they were suspected of ties to the East Turkistan Islamic Movement, which the State Department had designated a terrorist group.

But the Uighurs strongly denied any ties to the Taliban, Al Qaeda or other enemies of the United States; their only enemy, they said, was the government of China.

They said they had initially welcomed being in U.S. custody, hoping they would be safe and treated humanely.

Instead, 22 Uighurs were imprisoned at Guantanamo Bay in 2002. Five were released and sent to Albania two years ago, but the rest remained in custody because no country was willing to accept them. Lawyers spent years in court arguing for their release.

"The U.S. government has long recognized these men did not pose, and really never posed, a threat to the United States," said Jennifer Daskal, a lawyer for Human Rights Watch. Tuesday's ruling was significant, she said, because a judge "rejected the Bush administration's theory that its own determination can trump judicial review and constitutional rights."

Neil McGaraghan, a Boston lawyer who worked on the Uighurs' case, said the men would be released from military custody Friday, barring a last-minute order from the appellate court.

Since 2002, the Pentagon has approved the release of more than 500 prisoners from Guantanamo, including the five Uighurs sent to Albania. More than 250 are still being held, including about 60 who would be freed if the U.S. government could find countries willing to take them.

"For 20 at Guantanamo, Court Victories Fall Short"

The New York Times
February 26, 2009
William Glaberson

Since the Supreme Court's landmark ruling in June giving Guantanamo detainees a constitutional right to have federal judges review their imprisonment, 23 of the men have been declared in court not to be enemies of the United States.

But 20 of those 23 remain at the United States naval base in Guantanamo Bay, Cuba, caught in a strange limbo of exonerated men living behind barbed wire. Their lawyers are now appealing directly to President Obama, arguing that the federal habeas corpus cases allowed by the Supreme Court decision are failing to deliver the only justice that matters: freedom.

"These are innocent men, held in a prison that has become a national shame," the lawyers say in a letter to President Obama they are to release at a Washington news conference on Thursday. They ask that the president "restore liberty to these men" by sending them home, finding another country where they are willing to go, or permitting them into the United States.

Although most of the men are held in conditions less restrictive than Guantanamo's maximum-security cells, they remain prisoners subject to military rules and, some of the lawyers claim, abusive conditions. One of them is Lakhdar Boumediene, an Algerian who once lived in Bosnia, for whom the Supreme Court's June ruling was named.

Stephen H. Oleskey, one of his lawyers, said Mr. Boumediene and another Algerian who was also ordered freed by a judge in November see their legal victory as hollow.

"It's very hard to explain how they could be free men and still be imprisoned," Mr. Oleskey said.

A Justice Department spokesman, Dean Boyd, said officials were "taking all necessary and appropriate steps" to transfer the two Algerians and were "actively seeking the resettlement" of 17 others, Muslim Uighurs from China. He said the government was considering whether to appeal a judge's January ruling in the case of the 20th detainee, a former resident of Saudi Arabia who was first detained when he was 14.

Some legal experts say the cases of the 20 men pose an extraordinary challenge for the courts, which are generally able to ensure that prisoners who should not be held can be released. But government officials say arranging the transfers of Guantanamo detainees to other countries involves a complicated negotiation through a minefield of international sensitivities.

The Bush administration refused to admit any of the former Guantanamo detainees into the United States. The Obama administration has not yet made its position clear.

Samuel Issacharoff, a professor at New York University Law School, said the standoff showed the limitations of the legal system in dealing with the prison set up

seven years ago on the naval base in Cuba, partly to be remain clear of American courts.

"The Bush administration chose the path of holding people beyond the reach of the law," Professor Issacharoff said. "The Obama administration is learning it is difficult to unwind those practices." Habeas corpus cases, he said, are hampered because there are no clear rules about how to deal with prisoners who cannot simply be set free outside the jailhouse doors.

The detainees' lawyers assert that at least two of the 20 men have been physically abused in recent weeks. A spokeswoman for the prison, Cmdr. Pauline Storum, said there had been no substantiated claims of abuse in recent weeks.

In a news conference in Washington, Attorney General Eric H. Holder Jr. said that in a visit to Guantanamo on Monday he noted a "very conscious attempt" by guards to "conduct themselves in an appropriate way."

The 17 Uighurs have been described as terrorists by the Chinese government, which has a history of repressive measures in dealing with its Muslim minority. Last week, a federal appeals court overturned a district judge's order that would have freed the men in the United States, saying the judge was assuming powers reserved to the President and Congress. But that decision left in place the Bush administration's concession that the men are not enemy combatants, the classification the government used to detain men at Guantanamo.

Bush administration officials said for years that they could not return the Uighurs to China for fear of mistreatment or torture. They also said efforts to find a new home for the 17 men had failed after talks with more than 100 countries.

"Analysis: What Are Detainees' Rights Now?"

SCOTUSblog
June 12, 2008
Lyle Denniston

The Supreme Court's lead opinion in the Guantanamo Bay cases Thursday declares simply: "The detainees in these cases are entitled to a prompt habeas corpus hearing. . . . The costs of delay can no longer be borne by those who are held in custody."

But that does not mean any detainee is going to be released soon—although that ultimate remedy does have to remain available as a potential outcome. Much was decided on Thursday—particularly in terms of constitutional magnitude—but much remains open for the future. What is next, and where might the decision lead in the end? Answers, but only preliminary answers, can be suggested.

First, however, some policy and political calculations have to be gauged. The decision does leave President Bush and Congress with the power to try again (assuming they could find some common ground) to head off habeas. Even though Thursday's decision was a constitutional ruling, the Court did not say that there can never be any substitutes for habeas review of detention. But, as a matter of political reality, a Republican President with only six months left in office and historically low popular approval ratings, and a Democratic Congress that is less and less deferential to the Executive even on war-on-terrorism issues, very likely will not be able to agree in the short time realistically available to find an alternative to habeas that has any chance of surviving a court test.

The Pentagon, too, still has some options open to it. It can scrap the existing system that decides who is to be designated as an "enemy combatant" and thus must remain confined. The Court did not strike down the so-called Combatant Status Review Tribunals; indeed, it said, they "remain intact." But, the less such a filtering system protects a detainee's legal rights, the more chances he has to challenge the enemy label and the detention in court, according to Thursday's decision. Does the Pentagon have a military interest in expanding detainee's rights up-front? Given its history with CSRTs, the answer is probably not.

The Pentagon perhaps also might ponder some changes in the system for trying detainees on war crimes charges—the so-called military commissions that are ponderously moving forward at Guantanamo. But the Court said nothing about the commission system Thursday, so the military may have no incentive to re-think a system that it has struggled to keep going amid a host of difficulties, major and minor. Still, the Court's ruling does portend some serious challenges to the military commissions through habeas cases, even though the specific cases decided Thursday involved challenges only to detention, not to prosecution.

There is one other political calculation to take into account: the prospect that Guatanamo Bay itself may be shut down entirely as an apparatus for detention and prosecution of captives in the war on terrorism. That could change, in wholesale ways, the fate of the detainees, and Bush Administration policy. But, between now and the start of a new Presidency, the time

may be too short to find an alternative to Guantanamo, at least one that the President and Congress could agree on.

Thus, leaving aside all the prospects for political change of greater or lesser moment, what is going to happen next for the detainees is going to be legal in nature. As the Court said, the captives must have a "prompt" habeas hearing. What will go on in those hearings is going to be discussed shortly by the judges of the U.S. District Court in Washington (where such hearings will be held) joined by lawyers for the detainees, and for the government (Justice Department and Pentagon, in particular). As an earlier post on this blog indicated, the judges are already planning for such discussions.

Those in on the discussions about habeas proceedings have some leeway in how to proceed, because the Court said explicitly on Thursday that its "opinion does not address the content of the law that governs" the Guantanamo detention. "That is a matter yet to be determined."

But there is a good deal of guidance in the Court's opinion written by Justice Anthony M. Kennedy, although some of it is a bit contradictory, or perhaps at least a bit unclear. On the one hand, for example, the Court says the detainees must have a "prompt" habeas hearing. But elsewhere, the opinion says that "federal courts should refrain from entertaining an enemy combatant's habeas corpus petition at least until after the [Defense] Department, acting via the CSRT, has had a chance to review his status." The latter point, however, does not explicitly take account of the fact that all of the detainees now at Guantanamo (270 or so remain) have had at least one CSRT review, and a few have had more than one. The Pentagon, though, may want to have some additional "do-overs," especially if it fears that the existing basis for a specific prisoner's detention is vulnerable to a strong habeas challenge, so the Court may be anticipating some time for those to occur. And it obviously did have in mind future captives, not yet at Guantanamo.

It is clear from the opinion that the detainees who already have had their CSRT reviews may proceed directly to District Court, with a new or reopened habeas challenge. (Some 200 habeas petitions are already waiting there.) The Court said that the detainees in that category need not pursue their challenges to CSRT decisions in the D.C. Circuit Court under the Detainee Treatment Act (Congress' alternative to habeas). To require those who have been held for six years to complete that process ahead of habeas "would be to require additional months, if not years, of delay," the Court said.

In fact, in the two cases that the Court explicitly decided Thursday (*Boumediene v. Bush*, 06-1195, and *Al Odah v. U.S.*, 06-1196), the Court ordered the D.C. Circuit to send them back to District Courts for the habeas review now required.

Still, the Court said it was not disturbing the DTA process that Congress assigned to the D.C. Circuit, so it will be up to that tribunal, in cases other than those in which detainees have been held for years, to decide how to proceed, if at all, now. Lawyers in some of the DTA cases pending at the Circuit Court are already under orders to advise that Court on what they think should happen following the Supreme Court decision. One of the cases in which such an updating order has been issued involves Salim Ahmed Hamdan, who has seeking to use his DTA not only to challenge his detention, but his war crimes prosecution before a military commission.

The Circuit Court already has under advisement an appeal testing the legal rights of another Guantanamo detainee, Omar Ahmed Khadr.

But, returning to the habeas cases that are expected to resume in District Court, what rights will the captives have? Or, at least, what did Thursday's decision seem to say about those rights, even while insisting it was not providing a final checklist of rights?

Two somewhat general principles were stated: (1) that, if the detention decision comes in a proceeding in which the captive's legal rights are limited so that the process was not "thorough," the habeas review must be more expansive and comprehensive; and (2) that the judges handling habeas cases "must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."

Going beyond those generalities, the Court made comments, in critiquing the CSRT and DTA proceedings, that suggest what habeas rights a detainee probably has to have before a court can uphold a decision that he must remain in detention or before a court would allow him to be tried for war crimes (since a CSRT or other designation of enemy status is necessary for a war crimes trial):

1. The habeas hearing must be prompt—at least for a detainee who has been held for several years (the time factor is uncertain).

2. The habeas review must be sufficiently comprehensive to significantly reduce the risk of error in an enemy designation, and the court must have the authority to correct errors in that designation.

3. The detainee must have a meaningful right to rebut the Pentagon's evidence that seeks to support an enemy label, including some right to bring in additional evidence challenging the enemy status finding.

4. The detainee must have the assistance of a lawyer.

5. The detainee's habeas case may demand an answer to the question of whether the President has the authority to order a captive held indefinitely—in other words, to challenge the basic authority of the Executive to have a prolonged detention policy for war-on-terrorism captives.

6. Release of custody, at least a "conditional" release (unspecified conditions), must remain one of the remedy options. It would not be enough, constitutionally, for a court merely to order a new CSRT proceeding as the only possible remedy.

Potentially, the first five of these rights may exist in a habeas case brought by a detainee who is facing a war crimes prosecution before a military commission. That is because a habeas challenge in that context would be, in part, a challenge to the enemy designation that must be made before a detainee may be charged with war crimes. But a habeas challenge in the war crimes context might also involve other constitutional claims of defects in the military prosecution itself—such as a denial of access to classified evidence against the accused. It is unclear, though, whether a habeas court would have the authority to examine those challenges in a pre-trial habeas case—or would have to await a final conviction. There might be other ways, different from habeas, for challenging the constitutionality of the commission process.

The Court said nothing Thursday about such challenges. Those, too, are for the future.

There is no way, at this point, to predict how many—if any—detainees now at Guantanamo may win their freedom as a result of the ruling. District Court judges already have been divided in their views of detainees' rights, and that conflict is likely to continue.

An entirely separate question arises over whether the decision will provide habeas access for any detainees held elsewhere than at Guantanamo Bay—for example, at the U.S. military's detention facility at Bagram air base in Afghanistan. Detainees there now have attempts at habeas pending in the District Courts in Washington.

Their attorneys surely will attempt to take advantage of the ruling, and of the separate decision Thursday (in *Munaf v. Geren*, 06-1666), finding that habeas rights do apply to those held by the U.S. military in Iraq. The *Munaf* decision involved only American citizens so held, but lawyers predictably would contend that should apply to foreign nationals so held, too—on the same rationale that the Guantanamo decision recognized habeas rights for foreign nationals at the Cuba base.

"Analysis: Congress Moves to Control Detainees"

SCOTUSblog
June 21, 2009
Lyle Denniston

On the eve of the Supreme Court's planned look at the most significant sequel to its year-ago ruling in *Boumediene v. Bush*, Congress has moved to take control of the fate of Guantanamo Bay detainees in ways that could cut back sharply on the power of the courts, and also could limit the President's powers.

On Thursday, the Justices are scheduled to examine in their private Conference the case of ***Kiyemba, et al., v. Obama, et al.*** (08-1234), according to the Court's electronic docket. Lawyers for 13 Chinese Muslim (Uighur) detainees at Guantanamo are seeking to test the scope of the Court's constitutional mandate in *Boumediene* that the detainees at the U.S. military prison in Cuba have a right to challenge their captivity, including a possible right to be released.

Soon, however, President Obama is expected to sign into law a new war budget bill sent to him by Congress last Thursday. Congress flatly barred the release of any Guantanamo prisoner into the U.S.—the issue that is the core of the ***Kiyemba*** case—and surrounded with conditions the President's power to transfer any detainee anywhere in the world.

In those provisions, Congress, apparently deeply upset at the prospect not only of release of detainees into the U.S., but their release to live in any other country, moved to take a significant degree of control over transfers, further detention, and even, to a degree, criminal prosecution of any Guantanamo captive.

While the new limits on transfers or release of detainees are written in terms of denial of federal funds (under Congress's Article I Spending Clause powers), their actual practical effect is to restrict in major ways the President's use of his powers under Article II. The bill makes no attempt to curb directly the Article III authority of the courts, but they clearly would have a direct impact.

Some of the provisions would appear to have such an impact on the ***Kiyemba*** case, whether or not the Court agrees to review the D.C. Circuit Court decision that is being tested in the Uighurs' petition. (When the petition was filed, 17 Uighurs were involved; 13 remain at Guantanamo and in the case, since four have just been transferred to live in Bermuda—a move that might at least have been complicated, and might not have occurred at all, if the new congressional limits had been in place.)

It seems likely that the Obama Administration will notify the Court, perhaps before Thursday, about the new legislation, perhaps to reinforce its earlier argument that the Court should deny review of the ***Kiyemba*** case. Solicitor General Elena Kagan promptly told the Court of the four Uighurs' move to Bermuda.

The ***Kiyemba*** case, as it now stands, represents what could be the final chance that some Guantanamo detainees could gain their release and move to the U.S. to live, at least temporarily. Any such move is barred by the D.C. Circuit ruling that is being challenged; the Circuit Court ruled, in a

decision binding on all federal District judges handling Guantanamo cases, that no court has authority to order detainees sent to the U.S. even if the individual was no longer considered an enemy. If that ruling stands, any transfers to the U.S. would be up to Congress and the President, and Congress has now imposed a flat ban.

The 17 Uighurs won a District Court judge's permission last October to release into the U.S., but that was struck down by the Circuit Court. The remaining 13 Uighurs are asking the Justices to reverse that conclusion.

District Courts are processing more than 150 remaining Guantanamo cases. And they are doing so partly under the Constitution and partly under the traditional federal habeas law that dates back to 1789. The Court ruled in *Boumediene* that Congress had invalidly suspended habeas, and so restored the right to challenge continued detention at Guantanamo.

District judges have been moving forward with the cases, resolving a host of new legal issues that arose after *Boumediene*. In any case that now results in a judge's ruling that continued detention of an individual was not legally justified, the issue would arise—under the new provisions Congress has adopted—whether the judge had any authority to do anything about such a finding.

If the Supreme Court were to agree to hear and decide the ***Kiyemba*** case, it potentially could reinforce judges' authority to order release, at least somewhere, or it could ratify the Circuit Court ruling denying that authority. If it denies review, then the political branches would seem to have nearly unlimited authority.

Here are the key provisions of the "supplemental appropriation" bill (H.R. 2346) bearing upon the fate of detainees. (It is now at the White House awaiting the President's expected signature):

** The measure bars the use of any funds to release an individual now at Guantanamo into the continental U.S., the District of Columbia, Alaska or Hawaii.

** It bars the use of any funds to transfer any Guantanamo prisoner to the U.S. for prosecution for a crime, or for detention "during legal proceedings," until 45 days after the President submits a required secret report to Congress.

** The report is to lay out a plan for what to do with each detainee, with findings of any assessment of risk to the U.S. if the individual is transferred to the U.S. for trial or during legal proceedings, the costs of such a transfer, the legal rationale including any court order for transfer, and a plan to "mitigate any risk" found.

** The President must also send to Congress in that report a copy of a notice to the governor of any state to which the prisoner will be transferred (or to the mayor of Washington, D.C.), with advance assurances—14 days before transfer—from the Attorney General that the individual "poses little or no security risk to the United States."

** It bars the use of any funds, in this bill or any prior legislation, to transfer or release an individual now at Guantanamo to any other country outside the U.S., unless the President sends a secret report to Congress 15 days before transfer.

** In that secret report, the President must

provide the identity of the individual to be transferred elsewhere and where he is to be sent, an assessment of any risk to national security, including a risk to U.S. armed forces, posed by the transfer or release of the individual, along with actions taken to "mitigate such risk," plus any terms of an agreement with another country for such a transfer, including whether any money was paid in the arrangement.

** The President may not shut down the Guantanamo military prison until after he has sent a secret report to Congress "describing the disposition or legal status of each individual" now at Guantanamo.

"Detainees Challenge New Law"

SCOTUSblog
June 25, 2009
Lyle Denniston

Hours after President Obama signed into law a new set of restrictions on release of Guantanamo Bay detainees, lawyers for a group of prisoners told the Supreme Court Thursday that the law appears to violate the Constitution. That raises the stakes on the case of ***Kiyemba, et al., v. Obama, et al.*** (08-1234)—a petition that the Court was scheduled to consider at today's private Conference.

Lawyers for the 13 prisoners involved—members of a Chinese Muslim sect known as Uighurs—said that the Court should go ahead and grant review of their case, and consider as part of that review "the impact of the new law." But, they added, the statute "appears to be an unlawful suspension"—that is, a violation of the Constitution's strict limit on suspension of the writ of habeas corpus. A year ago, in *Boumediene v. Bush*, the Court struck down earlier legislation limiting detainees' legal rights, finding that to be an unlawful suspension of the writ.

While U.S. Solicitor General Elena Kagan advised the Court Thursday morning of the new legislation, she did not make any comments on it. Earlier, she had urged the Court not to hear the case, leaving the development of detainee policy to the White House and Congress. The new law is a supplemental appropriations measure that covers many subjects other than the detainee provisions, such as funding current military war operations. The detainee clauses are in Section 14103, found on pages 62 and 63 of the bill text. The measure also imposes new duties on the President to send reports to Congress on what is being done with each of the 229 detainees remaining at Guantanamo. That provision is Sec. 319, found on pages 16 and 17 of the bill text.

The detainees' counsel said that, "in another case," the Court might want to send the lawsuit back to lower courts to examine the effect of the new legislation. But, they went on, the D.C. Circuit Court has ruled for the government already, so such a remand might not illuminate the issues in the case.

Passage of the new law, their letter added, is an argument for Supreme Court review, not against it. "At the heart of this case is the question whether habeas corpus represents a real check on the political branches. The new legislation sharpens that question."

District judges have been applying the Circuit Court ruling, the letter noted, and as a result may only request, not order, the release of any Guantanamo prisoner.

In earlier opposing review of the ***Kiyemba*** petition, the Solicitor General supported the Circuit Court ruling, and said that diplomatic efforts to resettle the Uighurs were continuing. (Four of the 17 previously involved in the case before the Justices have now been released, and are living in Bermuda. The other 13 remain at Guantanamo, and their lawyer, in a letter to the Court a week ago, said that "no solution has been found" for those 13.)

All of the new filings are being considered by the Justices as they consider whether to hear the case, according to entries on the Court's electronic docket.

National Rifle Association v. City of Chicago

08-1497

Ruling Below: *Nat'l Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009)

Under *United States v. Cruikshank*, 92 U.S. 542 (1876), *Presser v. Illinois*, 116 U.S. 252 (1886), and *Miller v. Texas*, 153 U.S. 535 (1894), which rejected arguments based on the 14th Amendment's privileges and immunities clause and have never been overruled, the Second Amendment, which protects individuals' right to keep and bear arms in home for self-defense, applies only to federal government and its enclaves, and thus does not invalidate laws of Chicago and Oak Park, Ill., that ban possession of most handguns.

Question Presented: Is the right of people to keep and bear arms, guaranteed by the Second Amendment, incorporated into the due process clause or the privileges and immunities clause of the 14th Amendment so as to be applicable to the states, thereby invalidating ordinances prohibiting possession of handguns in home?

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al., Plaintiffs-Appellants,
v.
CITY OF CHICAGO, ILLINOIS, and Village of Oak Park, Illinois, Defendants-Appellees.

United States Court of Appeals for the Seventh Circuit

Decided June 2, 2009

[Excerpt: some citations omitted]

EASTERBROOK, Chief Judge.

Two municipalities in Illinois ban the possession of most handguns. After the Supreme Court held in *District of Columbia v. Heller*, that the second amendment entitles people to keep handguns at home for self-protection, several suits were filed against Chicago and Oak Park. All were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago and Oak Park are subordinate bodies of a state. The Supreme Court has rebuffed requests to apply the second amendment to the states. The district judge thought that only the Supreme Court may change course.

Cruikshank, *Presser*, and *Miller* rejected arguments that depended on the privileges and immunities clause of the fourteenth amendment. *The Slaughter-House Cases*, holds that the privileges and immunities clause does not apply the Bill of Rights, en bloc, to the states. Plaintiffs respond in two ways: first they contend that *Slaughter-House Cases* was wrongly decided; second, recognizing that we must apply that decision even if we think it mistaken, plaintiffs contend that we may use the Court's "selective incorporation" approach to the second amendment. *Cruikshank*, *Presser*,

and *Miller* did not consider that possibility, which had yet to be devised when those decisions were rendered. Plaintiffs ask us to follow *Nordyke v. King*, which concluded that *Cruikshank*, *Presser*, and *Miller* may be bypassed as fossils. (*Nordyke* applied the second amendment to the states but held that local governments may exclude weapons from public buildings and parks.) Another court of appeals has concluded that *Cruikshank*, *Presser*, and *Miller* still control even though their reasoning is obsolete. *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir.2009). We agree with *Maloney*, which followed our own decision in *Quilici v. Morton Grove*.

Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case". Plaintiffs say that a decision of the Supreme Court has "direct application" only if the opinion expressly considers the line of argument that has been offered to support a different approach. Yet few opinions address the ground that later opinions deem sufficient to reach a different result. If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Anyone who doubts that *Cruikshank*, *Presser*, and *Miller* have "direct application in [this] case" need only read footnote 23 in *Heller*. It says that *Presser* and *Miller* "reaffirmed [*Cruikshank's* holding] that the Second Amendment applies only to the Federal Government." The Court did not say that *Cruikshank*, *Presser*, and *Miller* rejected a particular argument for applying the second amendment to the states. It said that they hold "that the Second Amendment applies only to the Federal Government." The Court added that "*Cruikshank's* continuing validity on incorporation" is "a question not presented by this case". That does not license the inferior courts to go their own ways; it just notes that *Cruikshank* is open to reexamination by the Justices themselves when the time comes. If a court of appeals may strike off on its own, this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision.

State Oil Co. v. Khan, illustrates the proper relation between the Supreme Court and a court of appeals. After *Albrecht v. Herald Co.*, held that antitrust laws condemn all vertical maximum price fixing, other decisions (such as *Continental T.V., Inc. v. GTE Sylvania Inc.*) demolished *Albrecht's* intellectual underpinning. Meanwhile new economic analysis showed that requiring dealers to charge no more than a prescribed maximum price could benefit consumers, a possibility that *Albrecht* had not considered. Thus by the time *Khan* arrived on appeal, *Albrecht's* rationale had been repudiated by the Justices, and new arguments that the *Albrecht* opinion did not mention strongly supported an outcome other than the one that *Albrecht* announced. Nonetheless, we concluded that only the Justices could inter *Albrecht*. By plaintiffs' lights, we should

have treated *Albrecht* as defunct and reached what we deemed a better decision. Instead we pointed out *Albrecht's* shortcomings while enforcing its holding. The Justices, who overruled *Albrecht* in a unanimous opinion, said that we had done exactly the right thing, "for it is this Court's prerogative alone to overrule one of its precedents."

What's more, the proper outcome of this case is not as straightforward as the outcome of *Khan*. Although the rationale of *Cruikshank*, *Presser*, and *Miller* is defunct, the Court has not telegraphed any plan to overrule *Slaughter-House* and apply all of the amendments to the states through the privileges and immunities clause, despite scholarly arguments that it should do this. The prevailing approach is one of "selective incorporation." Thus far neither the third nor the seventh amendment has been applied to the states—nor has the grand jury clause of the fifth amendment or the excessive bail clause of the eighth. How the second amendment will fare under the Court's selective (and subjective) approach to incorporation is hard to predict.

Nordyke asked whether the right to keep and bear arms is "deeply rooted in this nation's history and tradition." It gave an affirmative answer. Suppose the same question were asked about civil jury trials. That institution also has deep roots, yet the Supreme Court has not held that the states are bound by the seventh amendment. Meanwhile the Court's holding that double-jeopardy doctrine is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," "selective incorporation" thus cannot be reduced to a formula.

Plaintiffs' reliance on William Blackstone for the proposition that the right to keep and bear arms is "deeply rooted" not only slights the fact that Blackstone was discussing the law of another nation but also overlooks the reality that Blackstone discussed arms-bearing as a political rather than a constitutional right. The United Kingdom does not have a constitution that prevents Parliament and the Queen from matching laws to current social and economic circumstances, as the people and their representatives understand them. It is dangerous to rely on Blackstone (or for that matter modern European laws banning handguns) to show the meaning of a constitutional amendment that this nation adopted in 1868. Blackstone also thought determinate criminal sentences (e.g., 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. That's not a plausible description of American constitutional law.

One function of the second amendment is to prevent the national government from interfering with state militias. It does this by creating individual rights, *Heller* holds, but those rights may take a different shape when asserted against a state than against the national government. Suppose Wisconsin were to decide that private ownership of long guns, but not handguns, would best serve the public interest in an effective militia; it is not clear that such a decision would be antithetical to a decision made in 1868. (The fourteenth amendment was ratified in 1868, making that rather than 1793 the important year for determining what rules must be applied to the states.) Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and

Heller concluded that the second amendment protects only the interests of law-abiding citizens.

Our hypothetical is not as farfetched as it sounds. Self defense is a common-law gloss on criminal statutes, a defense that many states have modified by requiring people to retreat when possible, and to use non-lethal force when retreat is not possible. An obligation to avoid lethal force in self-defense might imply an obligation to use pepper spray rather than handguns. A modification of the self-defense defense may or may not be in the best interest of public safety—whether guns deter or facilitate crime is an empirical question—but it is difficult to argue that legislative evaluation of which weapons are appropriate for use in self-defense has been out of the people's hands since 1868. The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate.

Chicago and Oak Park are poorly placed to make these arguments. After all, Illinois has not abolished self-defense and has not expressed a preference for long guns over handguns. But the municipalities can, and do, stress another of the themes in the debate over incorporation of the Bill of Rights: That the Constitution establishes a federal republic where local differences are to be cherished as elements of liberty rather than extirpated in order to produce a single, nationally applicable rule. Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon. How arguments of this kind will affect proposals to "incorporate" the second amendment are for the Justices rather than a court of appeals.

AFFIRMED

"NRA Takes Gun Case to High Court; 2nd Amendment's Breadth Disputed"

USA Today
June 8, 2009
Joan Biskupic

WASHINGTON—One year after the Supreme Court ruled that the Second Amendment protects an individual right to keep handguns, the justices have before them a new test of that right.

The National Rifle Association has appealed a ruling from a U.S. appeals court in Chicago that said the right to bear arms cannot be invoked by gun owners challenging state and local firearm regulations. It said the high court's groundbreaking decision last term in a case from Washington, D.C., allows the Second Amendment to cover only regulations by the federal government—at least until the high court weighs in again.

If the justices decide to take up the appeal, it would probably be heard next fall by a bench that could include Supreme Court nominee Sonia Sotomayor, who is now on a federal appeals court in New York. She was part of a court panel in January that similarly held that the 2008 gun decision did not apply to state regulations.

A U.S. appeals court in San Francisco, however, ruled this year that the Second Amendment indeed covers state gun restrictions.

"Because of the split in opinions (on the breadth of the 2008 ruling), it seems likely that the court would take it," says Daniel Vice, a lawyer with the Brady Center to Prevent Gun Violence. He says a ruling could affect gun laws nationwide.

The June 2008 decision, decided by a 5-4 vote, said for the first time that the Second Amendment protects an individual right to keep handguns at home for self-protection. A 1939 high court decision had led lower courts and many legal analysts to believe the Second Amendment covered firearm rights only for state militias such as National Guard units.

The new decision in ***National Rifle Association v. Chicago*** by the U.S. Court of Appeals for the 7th Circuit in Chicago, written by conservative Ronald Reagan appointee Frank Easterbrook, echoes the closely scrutinized decision from a three-judge panel of the U.S. appeals court for the 2nd Circuit that included Sotomayor.

She joined an opinion that rejected a challenge to a New York ban on certain weapons used in martial arts and emphasized that the high court has never specifically ruled that the Second Amendment can be applied to state regulations. That 2nd Circuit decision, *Maloney v. Cuomo*, provoked some gun rights groups to protest Sotomayor's nomination.

The Virginia-based Gun Owners of America called her "an anti-gun radical."

Last Tuesday's decision by the 7th Circuit undercuts criticism that the Sotomayor panel decision was extreme. As Easterbrook wrote, specifically agreeing with the 2nd Circuit, the Supreme Court said in the 2008

case involving a District of Columbia handgun ban that it was not deciding whether the Second Amendment covered state or local regulations.

Justice Antonin Scalia, who authored the high court decision, noted that the case arose from the federal enclave of Washington, D.C., and that past cases said the Second Amendment covers only the federal government. With a new case from a state or municipality, the court could extend the reach of the Second Amendment.

Until then, Easterbrook wrote in the case involving handgun bans in Chicago and Oak Park, an appeals court may not "strike off on its own." He said that would undermine the uniformity of the nation's laws.

The NRA's Stephen Halbrook, representing Chicago and Oak Park residents who want to keep handguns at home, urged the justices to take up the 7th Circuit case to resolve the reach of last term's ruling. Halbrook said the right to guns "allows one to protect life itself."

"Court Upholds Chicago's Gun Laws"

Los Angeles Times
June 3, 2009
David G. Savage

The U.S. 7th Circuit Court of Appeals on Tuesday upheld strict gun control ordinances in Chicago and suburban Oak Park, Ill., setting the stage for a Supreme Court battle over whether the 2nd Amendment and its protection for gun owners extends to state and municipal laws.

In a 3-0 decision, the judges said they were bound by legal precedents that held the 2nd Amendment applied only to federal laws. Judge Sonia Sotomayor, President Obama's nominee to the Supreme Court, in January joined a three-judge panel in New York that came to the same conclusion. Last week, activists cited that decision in calling her an "anti-gun radical."

Tuesday's decision in the Chicago case was written by Judge Frank H. Easterbrook and joined by Judges Richard A. Posner and William J. Bauer. All three were Republican appointees.

One of the lawyers for the Chicago gun owners said he planned to appeal the case to the Supreme Court.

Last year, the high court in a 5-4 decision said the 2nd Amendment "right to keep and bear arms" protects an individual's right to have a gun for self-defense. Before, many judges had said the amendment protected only a state's right to maintain a militia. Though the case gained wide attention, the ruling struck down a handgun ban only in the District of Columbia, a federal enclave. The justices did not decide whether the 2nd Amendment applied the same way throughout the country.

Until the middle of the 20th century, most parts of the Bill of Rights applied only to the federal government, not to states or localities. In a step-by-step process, however, the high court decided that most of the rights in the Bill of Rights were fundamental to liberty and, therefore, limit the action of states and municipalities.

There are exceptions. For example, the 5th Amendment says persons can be charged with a serious crime only by "indictment of a grand jury," but this right was not extended to the states.

Gun-rights advocates have been focused on the issue since last year's high court ruling.

"We believe it is time for this issue to be decided," said Alan Gura, a Virginia lawyer who won the D.C. gun case last year. He said he would file a petition in the Supreme Court seeking a review of the Chicago ruling.

Gura represented four gun owners who are challenging the near ban on private handguns in Chicago. In April, the U.S. 9th Circuit Court of Appeals in San Francisco came to the opposite conclusion on the 2nd Amendment. Its judges said that because the right to bear arms is a fundamental right, it should apply to local and state ordinances.

Easterbrook questioned whether lower courts should make such a leap.

"Federalism is an older and more deeply rooted tradition than is the right to carry any particular kind of weapon," he wrote.

Deciding what is a fundamental right is "for the justices rather than a court of appeals," he said.

The high court will not consider an appeal in the Chicago case until the fall. By then, Sotomayor may well be one of the justices considering the issue.

"This ruling is significant because it means that we can continue to enforce our gun ordinance while this case progresses," said Jennifer Hoyle, spokeswoman for Chicago's Law Department, said in a written statement.

"We recognize, though, that this fight is not over, and we are prepared to go to the Supreme Court if the court agrees to take the case," she added, noting that in the Washington, D.C., case, the Supreme Court determined that "reasonable" gun restrictions would pass constitutional muster.

In December, Chicago Mayor Richard M. Daley said he was looking at less-sweeping gun control measures in the wake of the D.C. ruling. Daley specifically referred to new laws in the nation's capital requiring gun owners to go through five hours of safety training, register their firearms every three years and undergo criminal background checks every six years. Hoyle could not immediately verify the status of those efforts.

Richard Pearson, executive director of the Illinois State Rifle Assn., said he predicted last year that the case would go to the Supreme Court.

"It was not unexpected," Pearson said. "The only surprise to this was it happened so quickly." Oral arguments were held before the 7th Circuit on May 26, he said. Typically, decisions come months after arguments are heard.

"They did say this case was better decided by the Supreme Court than the 7th Circuit," Pearson added, noting that the Supreme Court in previous Bill of Rights cases has extended federal interpretations to states and cities—a step called "incorporation" in legal language.

Most of the other rights are incorporated, "so I see no reason why this won't be incorporated," he said.

"The Best Nine-Page Opinion Ever Written!"

Balkinization
June 12, 2009
Sandy Levinson

Anyone interested in seeing how a very smart judge can write the equivalent of a treatise in nine pages should read Frank Easterbrook's opinion in ***National Rifle Association of America v. City of Chicago***. It is a truly remarkable performance.

The ostensible (and actual) issue before the Court (a pane of Easterbrook, Posner, and Bauer) is whether *Heller* should be read as incorporating the Second Amendment against states (or, in this case, the City of Chicago). One Circuit, the Second, has held no, in an opinion joined by Judge Sotomayor. Another, the Ninth, did hold that the Second Amendment was incorporated. So what did the Seventh Circuit do?

First, it is worth noting that the case was argued on May 26 and decided on June 2. This is quite astounding in itself, suggesting very powerfully, as is argued in the opinion itself, that the panel found near-frivolous the claim that it was empowered to apply the Amendment against the states. The reason is, as the opinion elaborates at length, the insistence by the United States Supreme Court that it and only it is empowered to overrule past precedents clearly on point, whatever the current strength of those precedents. Thus the Circuit notes that three opinions (the most recent in 1886) clearly and unequivocally hold that the Amendment limits only the national government. As if this isn't enough, they quote footnote 23 of *Heller*. which acknowledges the reaffirmation in the latter two of these cases the holding in *Cruickshank* "that the Second Amendment applies only to the Federal Government."

So why doesn't it follow the trail blazed by the Ninth Circuit panel, which argued that these earlier cases rejected only one particular argument and not the claim accepted by that Circuit? "If a court of appeals could disregard a decision of the Supreme Court," Easterbrook writes, "by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument." As it happens, I don't find the Supreme Court's authoritarianism with regard to its unique ability to inter what are clearly anachronistic precedents at all attractive, but if one takes the doctrine seriously, as the Seventh Circuit either does or professes to do, then it seems to me that their argument is clearly correct. Thus they endorse the Second Circuit decision and, along the way, make it far harder for political conservatives—unless they want to describe Easterbrook and Posner as apostates—to denounce Sotomayor for following extraordinarily clear doctrine on the point.

(Incidentally, I think there is some reason to believe that the panel may in fact believe that the doctrine makes sense. Thus it writes that "If a court of appeals may strike off on its own [as the Ninth Circuit did], this not only undermines the uniformity of national law but also may compel the Justices to grant certiorari before they think the question ripe for decision." What is interesting is what they mean by "ripe for decision." We know that Richard Posner basically disdains the notion that one can

treat the Supreme Court as a "court of law." So does "ripeness," in this context, simply mean, perhaps with a tip of the hat to Alex Bickel, that we leave it up to the political judgment of the Supreme Court when it is timely for its own intervention with regard to a political hot potato? Quite frankly, I'd far rather that Judge Sotomayor be examined on this question than on more substantive doctrine (do you like Roe? Do you support Heller?) where she will obviously make sure that she has nothing truly interesting to say. The Supreme Court's control over its own docket is really quite astonishing, in many ways, including enhancing the ability to decide on rawly political grounds whether or not to take any given case in the first place. I'd be very curious to know what Judge Sotomayor, as the most experienced federal judge to be nominated for the Supreme Court I believe in our history, if one adds together her district and circuit judging, thinks of the way that the Court has exercised this low-visibility, completely discretionary authority with providing whatever "guidance" we think the Court should in fact provide to the constitutionally "inferior" courts.)

Where things get even more interesting, though, is Easterbrook's well-founded statement of doubt as to whether the Supreme Court is in fact prepared to overturn the earlier non-Incorporation cases. As he notes, the Court has firmly rejected Hugo Black's "every last word" theory of incorporation in favor of "selective incorporation." But on what basis does the Court (or any court) "select"? At that point Easterbrook noted that the Ninth Circuit, quoting *Washington v. Glucksberg*, asked if "the right to keep and bear arms is 'deeply rooted in this nation's history and tradtion.'" At the very least, this requires judges to pick and choose among aspects of the Bill of Rights on the basis of highly debatable, often tendentious, claims about our "history and tradition." As Easterbrook writes, "'Selective incorporation' . . . cannot be reduced to a formula."

So, should the Court actually grant cert in either the Seventh or Second Circuit case—it is almost literally inconceivable that they would do so in the Ninth Circuit case, since that Circuit, after "incorporating" the Amendment, promptly went on to say that it didn't prevent Alameda County from refusing to rent public property for gun shows—we would have the enjoyable spectacle of watching Scalia and Thomas try to figure out what is sufficiently rooted to be incorporated. It occurred to me while reading the opinion that both of these Justices joined the Court well after the heyday of incorporation, selective or otherwise. Indeed, Edwin Meese was making speeches during the 1980s attacking the idea of incorporation, and one might assume that either or both of these Justices were sympathetic to Meese's attack.

Judge Easterbrook notes that one might think that the right to trial by jury is part of the American tradition, yet it is notoriously true that neither the grand jury provision of the Fifth Amendment nor the petit jury provision of the Seventh Amendment has been incorporated against the states. There may be very good reason for this, but the reasons ultimately sound, dare one say it, in a "policy choice" rather than any plausible citation to the barebones text or original history of the sacred document. Indeed, the opinion notes that "the best way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate." Take that, Nino (a former colleague of both Easterbrook's and Posner at the University of Chicago Law School)! Is there any doubt

that the panel is basically endorsing Fourth Circuit Judge J. Harvie Wilkinson's lacerating attack on *Heller* as betraying "judicial restraint" and instead serving as a "conservative" analogue of Roe? (Of course, Judge Posner, no inferior polemicist himself, delivered his own withering attack in the pages of the New Republic.)

But wait, there's more. The opinion concludes by quoting Brandeis's hoary chestnut about states as laboratories of experiment, thus throwing the "federalism" gauntlet before, say, Anthony Kennedy, who often writes of the "dignity" of states and the necessity of federal courts to protect that dignity against those who would unduly limit state autonomy. Thus the penultimate line of this remarkable opinion: "Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon."

Moreover, Judge Easterbrook and his colleagues note that any incorporation of *Heller*, assuming one takes Scalia's opinion truly seriously, means that every rejected self-defense claim suddenly becomes a constitutional issue, since the basis of Scalia's opinion is the hitherto unrecognized fundamental constitutional right of self defense. Some states have limited that right, for example, by requiring "retreat when possible" or "to use non-lethal force when retreat is not possible." Are such limitations now unconstitutional? If not, why not, if one both takes Scalia's opinion seriously and believes that it applies against the states?

Chief Justice Roberts dissented this past week in *Caperton*, the "judge-buying" case, on the ground that it will open the floodgates to litigation by every frustrated loser in any given case. Maybe that's true, maybe not. But if one is concerned about such floodgates, then incorporation of the Second Amendment would seem to assure at least as many new constitutionally based cases as *Caperton*. So perhaps Roberts will be less eager to incorporate than some of his conservative admirers think. Who knows?

The Court's moderates—I am hesitant to call them "liberals"—might ordinarily be expected to endorse incorporating the Bill of Rights, but does anyone seriously believe they will do so in this case? Won't they happily embrace "selective incorporation" and suggest that the Second Amendment has little to do with the "ordered liberty" endorsed by Justice Cardozo in *Palko v. Conn.*, which (in)famously refused to incorporate the double-jeopardy clause against the states.

In any event, anyone who enjoys good legal prose by a judge operating at the top of his game should read the Easterbrook opinion.

"Judge: Chicago's Handgun Ban Legal"

Chicago Sun Times
December 19, 2008
Fran Spielman

A federal judge Thursday upheld Chicago's 1982 handgun ban as Mayor Daley disclosed plans to strengthen it by following Washington, D.C.'s lead.

In a 5-4 decision in June, the U.S. Supreme Court overturned the D.C. handgun ban on grounds that the Second Amendment establishes the right to own a handgun for personal self-defense.

Hours later, the National Rifle Association and the Illinois State Rifle Association filed lawsuits seeking to overturn handgun bans in Chicago, Morton Grove, Evanston and Oak Park. Wilmette and Morton Grove subsequently repealed their handgun bans. Chicago held fast.

On Thursday, U.S. District Judge Milton Shadur rewarded the city for hanging tough, rejecting the lawsuits challenging Chicago's handgun ban.

The Daley administration was pleased, but not surprised, by the decision.

"We believe this decision will ultimately end up in the hands of the U.S. Supreme Court," said Law Department spokeswoman Jennifer Hoyle. "This is a victory for us, but it's just one step in what is probably going to be a long battle."

Todd Vandermyde, Illinois legislative liaison for the NRA, called Thursday's ruling a temporary victory for the city.

"It was expected. We went to court knowing it's going to take a higher court's ruling," he said. "City taxpayers are going to pay more money in legal fees for a fight they will ultimately lose."

Earlier this week, the D.C. Council replaced its overturned law with new regulations that require gun owners to receive five hours of safety training and register their firearms every three years. Gun owners would face criminal background checks every six years.

At a news conference on school violence that preceded Shadur's ruling, Daley hinted strongly that he intends to follow Washington's lead.

The mayor said he plans to hold a gun conference early next year to consider trends in gun violence and how they might be addressed within the legal parameters established by the U.S. Supreme Court.

Asked whether he intends to use the city's home-rule powers to mimic the D.C. changes, Daley said, "That's what we're looking at."

"Conflicting Rulings on Guns Open Way to Supreme Court Review"

The New York Times
June 17, 2009
John Schwartz

A year ago, the United States Supreme Court issued a landmark decision establishing the constitutional right of Americans to own guns. But the justices did not explain what the practical effect of that ruling would be on city and state gun laws.

Could a city still ban handguns? The justices said the District of Columbia could not, but only because it is a special federal district. The question of the constitutionality of existing city and state gun laws was left unanswered.

That left a large vacuum for the lower courts to fill. Supporters of gun rights filed a flurry of lawsuits to strike down local gun restrictions, and now federal appeals courts have begun weighing in on this divisive issue, using very different reasoning. One court this month upheld Chicago's ban on automatic weapons and concealed handguns, while in April a California court disagreed on the constitutional issue.

The differing opinions mean that the whole issue of city and state gun laws will probably head back to the Supreme Court for clarification, leading many legal experts to predict a further expansion of gun rights.

The new cases are fallout from last year's Supreme Court case, *District of Columbia v. Heller*, which struck down parts of Washington's gun-control ordinance, the strictest in the country, and stated for the first time that the Second Amendment gives individuals a right to keep and bear arms for personal use. But the court declined to say whether the Second Amendment in general applies to state and local governments.

In January, the United States Court of Appeals for the Second Circuit, in New York, in a ruling joined by Judge Sonia Sotomayor, declined to apply the Second Amendment to a New York law that banned the martial-arts device known as chukka sticks. The ban was allowed to stay in place.

Then in April, a three-judge panel of the Ninth Circuit, in San Francisco, ruled that the Second Amendment did apply to the states, even though it allowed a California county to ban guns on government property like state fairgrounds. That case, *Nordyke v. King*, is being considered for a rehearing by the full Ninth Circuit.

Those two conflicting cases set the stage for two other cases that were heard as one in the Seventh Circuit in Chicago, testing that city's handgun ban. On June 2, a three-judge panel of the court, led by Chief Judge Frank H. Easterbrook, a well-known conservative, ruled that there was no basis for the court to apply the Second Amendment to the states. Such a decision, Judge Easterbrook wrote, should be made only by the Supreme Court, not at the appellate level.

The right of states to make their own decisions on such matters, Judge Easterbrook wrote, "is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon."

The lawyers for the plaintiffs, including the National Rifle Association, have asked the Supreme Court to take up the Chicago cases.

A split among the federal appeals circuits, especially on constitutional issues, invites Supreme Court action, said Adam Winkler, a law professor at the University of California, Los Angeles.

"Californians, Hawaiians and Oregonians have a Second Amendment right to bear arms, but New Yorkers, Illinoisans, and Wisconsinites don't," Professor Winkler said. "The Supreme Court will want to correct this sooner rather than later."

The process of applying amendments of the Bill of Rights to the states, known as incorporation, began after the Civil War but had its heyday in the activist Supreme Court of the Earl Warren era. Much of the Bill of Rights, including the First Amendment's freedom of speech and some rights of criminal defendants, have been applied to the states, but other elements have not, including the Seventh Amendment right to a civil jury trial and the Second Amendment.

Incorporation fell out of favor after the 1960s, but a new generation of largely liberal scholars of law and history have brought it back into the intellectual mainstream, said Akhil Reed Amar, a law professor at Yale University, who supports the process.

"The precedents are now supportive of incorporation of nearly every provision of the Bill of Rights," Professor Amar said. "Now what's odd is that the Second Amendment doesn't apply to the states."

Sanford Levinson. a law professor at the University of Texas, said he would be surprised if the Supreme Court accepted these gun cases, because some of the conservative justices on the court had scoffed at incorporation arguments in the past and might not want to set a precedent.

Professor Amar, however, argued that the justices would not only take up the case but would also ultimately vote for incorporation of the Second Amendment.

Even if the Second Amendment becomes the controlling law of every state and town, constitutional scholars say it is still unlikely that gun laws would be overturned wholesale.

The Supreme Court's *Heller* decision last year, notes Nelson Lund, a law professor at George Mason University, "clearly indicates that governments will still have wide latitude to regulate firearms."

Even the Ninth Circuit in California, while applying the Second Amendment to the states, still upheld the gun ordinance that gave rise to the lawsuit.

Eugene Volokh, a law professor at the University of California, Los Angeles, said the view of the Ninth Circuit reflected what polls have said was, by and large, the view of the American people.

"There is a right to bear arms," Professor Volokh said, "but it's not absolute."

"Gun Ruling Was Called a Landmark, but That Remains to Be Seen"

The New York Times
March 17, 2009
Adam Liptak

About nine months ago, the Supreme Court breathed new life into the Second Amendment, ruling for the first time that it protects an individual right to own guns. Since then, lower federal courts have decided more than 80 cases interpreting the decision, *District of Columbia v. Heller*, and it is now possible to make a preliminary assessment of its impact.

So far, *Heller* is firing blanks.

The courts have upheld federal laws banning gun ownership by people convicted of felonies and some misdemeanors, by illegal immigrants and by drug addicts. They have upheld laws banning machine guns and sawed-off shotguns. They have upheld laws making it illegal to carry guns near schools or in post offices. And they have upheld laws concerning concealed and unregistered weapons.

"The *Heller* case is a landmark decision that has not changed very much at all," said Adam Winkler, a law professor at the University of California, Los Angeles, who keeps a running tally of decisions based on the case. "To date, the federal courts have not invalidated a single gun-control law on the basis of the Second Amendment since *Heller*."

Heller itself struck down parts of the District of Columbia's gun-control law, the strictest in the nation. The case was brought by law-abiding people who wanted to keep guns in their homes for self-defense. The cases that have followed it tend to concern more-focused laws and less-attractive gun owners.

Harvey C. Jackson IV, for instance, argued that he had a constitutional right to carry a gun while selling drugs in a dangerous neighborhood in East St. Louis, Ill. The federal appeals court in Chicago was unimpressed.

"The Constitution does not give anyone the right to be armed while committing a felony," Chief Judge Frank H. Easterbrook wrote last month in Mr. Jackson's case.

Professor Winkler summarized the impact of *Heller* in an article to be published in The U.C.L.A. Law Review in June. "So far," he wrote, "the only real change from *Heller* is that gun owners have to pay higher legal fees to find out that they lose."

There is one arguable exception to this trend. Two judges have struck down a part of the Adam Walsh Child Protection and Safety Act, named after the murdered son of John Walsh, the host of the television show "America's Most Wanted." The act says that people accused of child pornography offenses must be prohibited from possessing guns while they await trial.

That provision may well have been unconstitutional as a matter of due process even before *Heller*, as it seems to impose a punishment before conviction. But two courts have struck down the provision based partly on the fact that a fundamental constitutional right is at stake.

"A year ago, I might well have taken for granted the authority of Congress to require that a person charged with a crime be

prohibited from possessing a firearm," Magistrate Judge James C. Francis IV of the Federal District Court in Manhattan wrote in December. *Heller* changed that, he said.

"The right to possess a firearm is constitutionally protected," Judge Francis wrote. "There is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm."

The cases discussed so far all concerned federal laws, and there is no question that the Second Amendment applies to the federal government. The great open question after *Heller* is whether the Second Amendment also applies to the states or, in the legal jargon, whether the amendment is incorporated against them.

The Supreme Court has said that most but not all of the protections of the Bill of Rights are incorporated by the Fourteenth Amendment, one of the post-Civil War amendments.

The consensus among legal scholars is that incorporation of the Second Amendment is likely. True, the Supreme Court has said in some past cases that the Second Amendment applies only to the federal government. But a footnote in *Heller* cast doubt on those decisions. For now, lower courts probably have to follow the older decisions until the Supreme Court says otherwise.

There are cases in the pipeline, notably in the federal appeals courts in Chicago and San Francisco, that could give the court an opportunity to answer the question in its next term.

Even if the court applies the amendment to the states, though, little may change. Most state constitutions already protect an individual right to bear arms, and federal protection, depending on its form, could well be merely duplicative.

But some liberal lawyers and law professors sense an opportunity, and they have urged courts to incorporate the Second Amendment in a novel way, one that might help liberal arguments for protecting rights not specifically mentioned in the Constitution. Abortion and gay rights come to mind.

In a supporting brief filed in the Chicago case, lawyers for the Constitutional Accountability Center, a liberal group, urged the court to bypass the usual way that amendments are applied to the states, through the Fourteenth Amendment's due process clause. Using that clause to guarantee fundamental rights has always seemed a little curious, as "due process" would seem to protect only fair procedures and not substance.

Another possibility, and the one urged by the center's brief, is the Fourteenth Amendment's "privileges and immunities" clause, which says that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." The virtues of that clause are it makes sense by its terms and there is some evidence that its framers specifically wanted it to apply to allow freed slaves to have guns to defend themselves.

All of this is awfully technical, of course, and it may have no practical consequences at all.

"My own bet," said Sanford Levinson, a law professor at the University of Texas, "is that *Heller* will more likely than not turn out to be of no significance to anyone but constitutional theorists."