Section 9: Looking Ahead

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DIRECTION OF THE COURT

High Court's Course Debated After Rulings Two Key Civil Rights Decisions Mark Shift From Conservatism

The Boston Globe

June 30, 2003

Lyle Denniston

WASHINGTON A Supreme Court with a well-developed reputation for conservatism took its cues in the closing week of its term from an era of the court's liberal past, heating up the culture war over its future direction and membership. Two momentous rulings on civil rights on the final two decision days a solid endorsement of affirmative action in college admissions, and a declaration of the right for gays and lesbians to form intimate partnerships seem likely to define the term's legacy.

"This was a reversal, or at least a pause, in the court's rightward march," said Thomas C. Goldstein, a Washington lawyer who has an active practice before the Supreme Court and keeps a log on the results and trends of its work.

"On issues that are very important to cultural conservatives states' rights, affirmative action, gay rights, and others they suffered very serious and genuinely unexpected defeats," he said.

No one outside the court can know why, but in deciding those major rulings the court looked back to decisions handed down during one of its most liberal periods. In the affirmative action case, the court reached back to Brown v. Board of Education, the basic school desegregation ruling in 1954. On gays' right to intimate relationships, it returned to a 1965 ruling, Griswold v. Connecticut, that started the modern trend toward decisions that expand individual rights, including Roe v. Wade, which legalized abortion.

And few things were more telling about the just-ended term than the fact that the two most influential occupants of the court's philosophical center Justices Sandra Day O'Connor and Anthony M. Kennedy - wrote the two historic rulings at the end: O'Connor authored Grutter v. Bollinger on affirmative action, Kennedy wrote Lawrence v. Texas on gay rights.

Those rulings were denounced by conservative groups such as Concerned Women for America, a legal advocacy group. Its chief counsel, Jan LaRue, protested about "an extreme activist" court, dominated by justices "who believe in a 'living' and 'evolving' theory of the Constitution as if the Founders wrote it on a blackboard and gave them an eraser and chalk." She spoke of "vaporous law" emerging from the court. The rulings were lauded on the other side of the cultural divide.

"The affirmative action and gay rights
decisions are tremendous victories for civil liberties," said Steven R. Shapiro, national legal director of the American Civil Liberties Union. "We are an increasingly diverse society and the court, to its credit, recognized that America's diversity represents a strength, not a weakness."

Neither side in the culture war over the court's future is suggesting it is time for a cease-fire. If anything, the term-closing decisions energized both sides the conservatives in their campaign to change the court as soon as possible, the liberals in their desire to keep the court from changing and perhaps even push it more toward their view.

Each side has a rallying cry for its followers as they await a vacancy on the court. Conservatives are saying "no more Souters," the liberals are saying "no more Scalias or Thomases."

Justice David H. Souter, nominated to the court by President George H.W. Bush, voted in the majority in both the affirmative action and gay rights rulings. Justices Antonin Scalia, a nominee of President Ronald Reagan, and Clarence Thomas, also nominated by George H.W. Bush, dissented in both cases.

Souter has been a consistent member of the moderate-to-liberal voting bloc on the court. As Goldstein put it, "He is permanently divorced from the conservative camp."

Goldstein's statistics show Souter voted, in all cases taken together, 89 percent of the time with the court's most liberal member, John Paul Stevens, and the least with one of its most conservative members, 65 percent with Thomas.

Conservative activists are determined that President Bush not appoint justices who would follow Souter's path on the court. President George H. W. Bush's chief of staff, John Sununu, had assured conservatives at the time that Souter would be a conservative on the court.

Liberals are just as determined that no president appoint justices who would follow Scalia or Thomas, the two most consistent conservatives on the high bench and the two whom President Bush said during his run for the White House are his favorites on the court. Goldstein's statistics show the two voted together 95 percent of the time, taking all of the term's cases together. That affinity, Goldstein said, has been deepening.

The two major rulings at the end of the term did not produce identical lineups.

The law school admissions case was decided by a 5-to-4 vote, with O'Connor, Souter, Stevens, Stephen G. Breyer, and Ruth Bader Ginsburg in the majority, and Kennedy, Scalia, Thomas, and Chief Justice William H. Rehnquist dissenting.

In the case striking down a Texas sodomy law aimed at gay couples, Kennedy was joined in full in the majority by Breyer, Ginsburg, Souter, and Stevens. O'Connor wrote a separate opinion agreeing with the result, but not with Kennedy's denunciation of the court's 1986 ruling against privacy rights for gays, a decision O'Connor had joined. Rehnquist, Scalia, and Thomas dissented.

But the final rulings were not the entire story of the term. In much of the court's work over the past nine months, the
outcomes followed its dominant pattern of conservatism especially in rulings allowing the government to require libraries to put filters on computers to block sexually explicit websites, upholding "three-strikes-and-you're-out" criminal punishment laws, allowing states to list sex offenders on the Internet, and permitting the government to hold indefinitely immigrants facing deportation after criminal convictions.

That continuing trend, pleasing to conservatives, drew protests from liberals. Shapiro of the ACLU said: "This court remains fundamentally conservative in its judicial outlook. Its conservative instincts were evident in rulings involving criminal defendants and immigrants that were low points for civil liberties."

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A Timeout For Conservative Agenda; Despite Burst Of Progressive Rulings, Pillars Of Rehnquist Court Stand.

Legal Times
June 30, 2003

Tony Mauro

In the annals of the Rehnquist Supreme Court, June 26 will stand apart from any other day -- counterintuitive, almost otherworldly.

In rapid-fire announcements from the bench, the Supreme Court seemed to travel back in time to the days of the Warren Court.

The Court handed down decisions that supported the interests of sex offenders (Stogner v. California), homosexuals (Lawrence v. Texas), Democrats (Georgia v. Ashcroft), death row inmates (Wiggins v. Smith) and consumer advocates (Nike v. Kasky) -- none of them the typical beneficiaries of Rehnquist Court decision making.

As he sat in the courtroom that day, Paul Smith, the Jenner & Block partner who argued in favor of gay rights in Lawrence, was increasingly amazed as the opinion announcements proceeded.

"I thought, 'This is really interesting,'" says Smith, in a typical understatement. "The Court was not in its more conservative mode that day."

But in looking back at the decision making for the term that ended last week, it is hard to decide what mode it was in -- except to say that it seemed bent on upending the expectations of those who watch and analyze it. It was as if, after nine years of togetherness -- the longest period of stability in the history of the nine-member Court -- the justices became restless and decided to rearrange the furniture, at least temporarily.

And at week's end, it appeared the Supreme Court may well remain stable for another term or more, as much-anticipated retirements failed to materialize.

As recently as last year, most observers thought that the key legacies of the Rehnquist Court were its support of states in the federalism divide, its reining in of Congress, its support of the First Amendment, and, whenever possible, its avoidance of deciding hot-button social issues.

None of those Rehnquist pillars toppled this term -- but they also did not gain girth or deeper foundations.

"This was a term of more progressive victories," says University of Southern California law professor Erwin Chemerinsky. "I don't want to overstate that. I still painfully feel the outcome in Andrade. But it was remarkable how many cases had progressive versus conservative outcomes." Chemerinsky was counsel for Leandro Andrade, the
loser in March in Lockyer v. Andrade, in which the Court upheld California's "three strikes" law.

With last week's decisions fresh in mind, many analysts attributed the term's idiosyncratic trends to the dominance of Justice Sandra Day O'Connor and her brand of pragmatic, almost legislative, problem solving. O'Connor was in the majority of all 13 of the term's clear-cut 5-4 decisions.

"What is most striking is the assurance with which this formerly obscure state court judge effectively decides many hugely important questions for a country of 275 million people," said former Acting Solicitor General Walter Dellinger in Slate late last week.

Florida International University law professor Thomas Baker sees O'Connor as a legal realist like her friend and mentor, the late Justice Lewis Powell Jr. O'Connor, Baker says, uses her vote to express her "attitudinal preferences in close cases, to seek compromise." Assessing O'Connor's crucial influence on the current Court, Thomas Goldstein of D.C.'s Goldstein & Howe says, "A retirement by O'Connor would be thermonuclear war."

O'Connor's centrist approach, as much as any other factor, may explain why many of the Court's trends seemed to stall this term.

"Outside of the criminal law area, we don't have a particularly conservative Court," says Northwestern University School of Law professor John McGinnis. "They stand by their precedents, by and large."

Except, as it turned out June 26, when it comes to gay rights. Unflinchingly, and with disdain for its 1986 precedent Bowers v. Hardwick, the Court responded to -- some critics say overestimated -- society's growing acceptance of homosexuality.

In Lawrence and in Grutter v. Bollinger, which upheld affirmative action, the Court showed no reluctance to plant itself in the middle of what Justice Antonin Scalia derisively called America's "culture wars." This social boldness contrasts sharply with the Rehnquist Court's usual deference to the elected branches in resolving knotty policy problems.

Indeed, to some, O'Connor's majority in Grutter has the tone of a legislative enactment, adopting the University of Michigan Law School's affirmative action program with what amounts to a sunset provision. "We expect that 25 years from now, the use of racial preferences will no longer be necessary," she wrote.

"There is a focus-group, finger-to-the-wind quality to it," says Emory University School of Law professor David Garrow. "It's a good public policy solution, but, I think, not very good judicially."

On federalism, this was a term in which the Rehnquist Court's revolution stood still.

In a speech earlier this month, Justice Ruth Bader Ginsburg said, "Federalism was the dog that did not bark." Her best example was Nevada Department of Human Resources v. Hibbs, in which the Court -- by a 6-3 vote -- said that the
1999 federal Family and Medical Leave Act's family care leave provisions applied to state employees. But it was not the only defeat for what Ginsburg called "states' rights pleaders."

In The Citizens Bank v. Alafabco, a little-noticed per curiam opinion June 2, the Court affirmed the authority of the Federal Arbitration Act over an in-state commercial loan transaction. The Court said its 1995 precedent United States v. Lopez, the touchstone of many of its later federalism decisions, had been misread by the Alabama Supreme Court.

And in State Farm v. Campbell, the Court did not hesitate to rein in Utah and its state courts on the subject of excessive punitive damages, imposing federal due process standards on big awards.

Federal authority also carried the day in American Insurance Association v. Garamendi on June 23. A California law seeking to force insurance companies to yield information on Holocaust survivors, the Court said, "interferes with the President's conduct of the nation's foreign policy and is therefore preempted."

One exception to the trend: In Pharmaceutical Research and Manufacturers of America v. Walsh, the Court gave at least a tentative green light to Maine's efforts to secure discounts for drugs for its residents, rejecting claims that the program interferes with the federal Medicaid program.

Congress fared relatively well this term, finding fewer of its enactments tossed out by the Court.

In Eldred v. Ashcroft, the congressional extension of copyrights enacted in the Sonny Bono Copyright Term Extension Act won few fans on the Court, but by a 7-2 vote was upheld as a proper exercise of congressional power.

Federal Communications Commission v. NextWave Personal Communications can also be read as a win for the federal bankruptcy laws over efforts by the FCC to take back licenses from a bankrupt telecommunications firm.

Congressional efforts to restrict pornography on the Internet have not fared well before, but this term the justices found a law in this area that it could approve of: the Children's Internet Protection Act. In United States v. American Library Association, the Court had little trouble endorsing the law's requirement for filtering software on computers at public libraries as a condition for libraries seeking federal subsidies.

"Maybe it is a conservative Court that is more comfortable with Congress, now that Congress is in conservative hands," said O'Melveny & Myers partner and former Clinton administration official Ronald Klain at a Washington Legal Foundation review of the term.

The library case was one of several surprising defeats for free-speech and association claimants this term -- rare, coming from a Court that has consistently favored freedom of speech and press no matter what its leanings in other areas. In all eight of the cases raising First Amendment issues this term, government restrictions carried the day.
Virginia v. Black was the only case in which the free-speech side achieved partial victory. In that case, the Court upheld a state law that criminalized cross burning with the intent to intimidate. But it struck down a part of the law that said the act of cross burning itself was prima facie evidence of the intent to intimidate.

But in other First Amendment cases, the government won every time: campaign finance (Federal Election Commission v. Beaumont); prison visitation (Overton v. Bazzetta); trespassing laws (Virginia v. Hicks); telemarketing (Madigan v. Telemarketing Associates); and copyright (Eldred v. Ashcroft).

"The First Amendment has not been advanced in any meaningful way this term, and this is the first term we've seen that in a very long time," says Ronald Collins, a scholar at the Freedom Forum who keeps extensive records on the high court's First Amendment docket.

The common thread in many of the cases, says O'Melveny's Klain, may be that the Court is increasingly comfortable with laws of general applicability that happen to infringe on speech-related activities. "The First Amendment had a really lousy year at the Supreme Court," he says.

But apart from the decisions themselves, Klain says, the headline of the term is O'Connor's role. Noting that O'Connor did not author a single dissent all term, Klain says, "Her approach is the dominant one. It really was O'Connor's term. If we didn't have the tradition of naming courts after the chief justice, this would be the O'Connor Court."
Justices Take a Turn to the Left;
The Supreme Court's rulings for gay rights and affirmative action surprise many – and leave Justice Antonin Scalia on the margins.

Los Angeles Times

June 29, 2003

David G. Savage

WASHINGTON The Supreme Court was surprisingly empty on the last day of the term. Only a few dozen lawyers had gathered for the final decisions. Those who had were about to hear the rarest of judicial opinions: an apology for a past mistake and the promise of a distinctly new direction.

For the second time in a week, the normally conservative high court would proclaim a liberal policy of full inclusion for all. Monday's unexpectedly broad victory for affirmative action would be followed Thursday by a strong endorsement of gay rights.

A term that had produced some solid gains for conservatives -- including the upholding of California's three-strikes law, new limits on punitive damages verdicts against corporations and a ruling that public libraries can be forced to put pornography filters on their computers -- would end as the worst term for conservative causes since 1992.

And one of the court's strongest conservative justices, Antonin Scalia, would be left looking isolated and marginalized.

In a courtroom where silence and decorum are the rule, what unfolded Thursday made for a moment of extraordinary emotion, especially for a group of mostly young attorneys who sat in one front row.

They had worked on the pending case from Texas. At one end sat aging Harvard Law professor Laurence H. Tribe, who had argued -- and lost -- a challenge to Georgia's sodomy law 17 years ago.

Moments after the gavel sounded, Chief Justice William H. Rehnquist announced that Justice Anthony M. Kennedy would deliver the opinion in Lawrence vs. Texas.

Kennedy began by saying that the court had dealt with this issue before, in the 1986 Georgia case of Bowers vs. Hardwick. Then the court had delivered a thundering condemnation of homosexuals. Its opinion spoke of "heinous acts" and "crimes against nature." But on Thursday, it soon became clear Kennedy was not citing the Bowers precedent to follow it, but to admit that the court had been wrong -- and tragically so.

As Kennedy spoke, one of the young lawyers who had been listening intently peeked up and looked into the eyes of those down the row, as if seeking confirmation that they too had heard the
same words of respect and dignity that she had heard.

"Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers vs. Hardwick should be and now is overruled," Kennedy said.

There are no high-fives or applause in the Supreme Court. But across the front row could be heard quiet weeping. Tears flowed amid the smiles.

In one decision from the nation's highest court, gays and lesbians had gone from outcasts in the eyes of the law to full-fledged Americans entitled to the same rights and respect as others.

Day to day, the Supreme Court decides legal questions, and usually does so as narrowly as possible. But it also has a unique power to speak broadly to the nation and to proclaim basic principles of American law. Thursday's opinion was such a statement.

And it was the second such statement in a week. On Monday, the court endorsed the principle of racial diversity as a "compelling" goal. Race still matters, said Justice Sandra Day O'Connor, and it is essential that the door to opportunity remains open for blacks and Latinos.

The message of both opinions was that liberty and equality are not for some, but for all Americans. Gays and lesbians are entitled to be treated with dignity and blacks and Latinos are entitled to be full participants in the leadership ranks of the nation, the court said.

Of course, the Supreme Court does not by itself change attitudes. More often, it simply reflects a shift in thinking. In the case of gays and lesbians, the court could be said to have caught up with the generational shift in the public's notion of homosexuality.

The author of the 1986 Bowers opinion, Justice Byron White, was a football star of the 1930s. Then, homosexuality was seen as a moral failing or a psychological disorder, best to be avoided and free to be condemned.

In recent years, homosexuality has come be viewed by many as akin to being left-handed, a variation on the norm.

In May, a Gallup poll found that Americans by a 2-1 margin say sex laws targeting gays should be repealed. While the public remains split on same-sex marriages, the polls suggest a large majority supports the court's decision striking down the Texas law against "deviate" sex acts.

The court's view on affirmative action reflects elite opinion more than general sentiment. When asked about who should be admitted to colleges or law schools, the public by a large margin says "merit" should be the sole deciding factor.

But university officials, military leaders and corporate executives urged the court to give them leeway to choose minorities from the pool of highly qualified applicants. By a 5-4 vote, the court agreed and upheld the affirmative action policy at the University of Michigan Law School.

For social conservatives, the unexpected decisions of the 2003 term on
affirmation action and gay rights brought back memories of that 1992 term.

Then, the court was dominated by new appointees of Presidents Reagan and George H.W. Bush. Eight of the nine justices were Republican appointees, and the only Democratic appointee was the conservative Justice White.

That spring, the court had taken up an abortion case from Pennsylvania and a school graduation prayer case from Rhode Island. Many believed the court was on the verge of overturning Roe vs. Wade, the ruling that legalized abortion nationwide, and the bans on school-sponsored prayers handed down during the 1960s.

Instead, in a pair of 5-4 rulings, with O'Connor and Kennedy in the majority, the court affirmed the basic right to choose abortion and the prohibition on school-sponsored invocations and prayers. Scalia delivered a vehement dissent that accused his colleagues of betrayal.

This spring saw something of a replay.

The court had appeared poised to overturn the Bakke decision on affirmative action.

A conservative legal group had won a ruling knocking down race-based admissions policies in Texas and Georgia. It then took on the University of Michigan and succeeded in bringing the case before the high court, only to see the court strongly endorse the Bakke decision and affirmative action.

The court's new support for gay rights is not shared by all -- some believe homosexuality is sinful and should be illegal.

Scalia spoke for them Thursday.

"Today's opinion is the product of a court ... that has largely signed on to the so-called homosexual agenda," Scalia said in an angry tone. The majority has joined the "homosexual activists [who seek to] eliminate the moral opprobrium that has traditionally attached to homosexual conduct," he said. Only Rehnquist and Justice Clarence Thomas joined him.

As Scalia spoke, his colleagues seemed determined to ignore him. They gazed straight ahead or studied the ceiling.

Although Scalia's views resonate with a large segment of the public, his influence within the court appears to be minimal.

Without question, he is smart, quick, witty and devoted to the law. He is considered the court's most gifted writer, and he often dominates the oral arguments. Yet he rarely writes an important opinion for the court. Even when there is a conservative majority, Rehnquist assigns the court's opinion elsewhere, such as to Justices O'Connor and Kennedy.

Scalia has a rigidity and an abrasiveness that drives away the others. He is known for his sharply worded dissents -- but little else.

When he joined the court in 1986, many assumed the former University of Chicago law professor would emerge as the true leader of the court. But from the
beginning he had a hard time concealing his disdain for his colleagues.

Now 67, Scalia seems resigned to -- or perhaps relishes -- the role of the great dissenter.

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2 justices' influence felt in latest term;
Rehnquist, O'Connor signal they'll be around for awhile

USA Today

June 27, 2003

Joan Biskupic

On a drizzly afternoon this month, Chief Justice William Rehnquist heaved a chrome shovel and broke ground for a $122 million renovation of the Supreme Court. With him was Justice Sandra Day O'Connor, who declared, "Let's dig." The ceremony was rich with references to the future and seemed to be a metaphor for a pair of justices who, in the twilight of their careers and in the face of retirement rumors, don't appear to be going anywhere.

The groundbreaking, their opinions in the annual term that ended Thursday and several key cases the court has scheduled for its next term suggest that the court led by Rehnquist, 78, and O'Connor, 73, has unfinished business.

This term underscored the hold that the conservative Rehnquist and the more moderate O'Connor have on the Supreme Court, whose nine members have been together for nine years -- longer than any high court in U.S. history. This week's rulings endorsing racial preferences in college admissions and overturning anti-sodomy laws were huge victories for liberals. But day in and day out, Rehnquist and O'Connor set the pace for what remains a conservative court.

In fact, the ruling in the Michigan case backing affirmative action at colleges was made possible when O'Connor voted with the court's liberal wing -- Stephen Breyer, Ruth Bader Ginsburg, David Souter and John Paul Stevens. In the same dispute, O'Connor then sided with Rehnquist in a separate opinion that bans colleges from using scoring formulas that give automatic points to minority applicants.

Together, the rulings reflected a pragmatic conservatism on the court that stems from O'Connor regularly joining forces with Rehnquist, her old Stanford law school classmate, but also breaking from him in significant ways that push the court toward the nation's political center.

"The social fabric of America had adjusted to affirmative action, as shown by the number of business, military and other groups supporting it. She was not going to make a change," Yale law school professor Harold Hongju Koh says. "She's not ready to use the court to plow new ground. But she's also not ready to roll back advances made by the court."

Sometimes, that can mean walking a fine line. Thursday, O'Connor voted with the majority to strike down the Texas law that banned sex between homosexuals. But she cited grounds that differed from the majority's, so she, unlike the
majority, would not be invalidating precedent set by a ruling in 1986 based on a limited view of privacy rights.

O'Connor and Rehnquist were in tandem on other major cases that helped to define the 2002-2003 term. They backed rulings that:

* Favored law enforcement. The court's five conservatives, with O'Connor leading the way, upheld California's tough "three strikes" law, which sets strict prison sentences for a third felony conviction, regardless of the crime's severity. In this case, a repeat petty thief got a 50-year sentence.

The conservatives -- Rehnquist, O'Connor, Anthony Kennedy, Antonin Scalia and Clarence Thomas -- were joined by more liberal Justice Souter in another ruling that said states can demand public registration of sex offenders whose crimes were committed before "Megan's laws" were passed.

* Deferred to the administration's restrictions on immigrants in the name of border security. Over an impassioned dissent that the court was impinging individual liberty, Rehnquist wrote that legal immigrants who face deportation because of a past conviction and who have served their sentences can be jailed automatically without bail. He was joined by O'Connor and the other conservatives; the four liberals dissented.

* Took a detour from the court's emphasis on states' rights over federal power. Rehnquist and O'Connor unexpectedly joined the four liberals in a family care dispute from Nevada. The court said in an opinion by Rehnquist that state workers can sue their employers for money damages when the workers are denied time off to care for a sick relative. The court broadly interpreted a federal law that gives most public and private workers up to 12 weeks of unpaid leave to care for someone.

The case involved a social worker who lost his job after his wife was hurt in a car accident and he took time off to care for her. The decision was a departure from rulings in which the court had shielded states from suits brought by workers who claimed age or disability discrimination, but it was consistent with the court's practice of allowing Congress latitude to prevent sex discrimination. The law was designed to counter stereotypes of women as caregivers and men as wage earners, Rehnquist said.

The Nevada case showed that the court's conservative leaders occasionally are willing to step back from what has been a pattern of curtailing Congress' power to put demands on the states.

"In a way, they've really just started" to define such limits, says David Strauss, a law professor at the University of Chicago. He says the court has broadly defined the parameters of state autonomy but has yet to apply them to a range of situations that have practical consequences for many Americans.

Several cases on the docket for the term that begins in the fall could continue to shape the legacy of this court. Revisiting the Miranda warnings that police read to suspects, the justices will decide whether evidence obtained from suspects who are not advised of their right to remain silent should be admissible in court.
Rehnquist and O'Connor each have questioned the constitutional underpinning of the Supreme Court's ruling in 1966 that made reading the rights a requirement for police. Suspects who are not advised of their Miranda rights cannot have any of their incriminating remarks used against them. The question in the case coming before the court is whether physical evidence derived from such statements, such as guns or drugs, can be used at trial.

Another new case follows on the court's approval last year of publicly financed vouchers for religious schools. That decision said public money could be used for parochial school tuition. The new case tests whether, once a state offers scholarships or subsidies for private education, it must offer them for religious instruction as well. A student who qualified for a Washington state college scholarship sued officials when the state rejected his request to use the scholarship to get a theology degree at a private Christian college.

Finally, the court will return to its marble home Sept. 8, a month earlier than usual, to consider a case that asks whether a 2002 law overhauling federal campaign-finance rules violates free speech rights. The law includes a ban on "soft money" donations, the unlimited checks from corporations and labor unions that are given to political parties, which use the money to back specific candidates.

At the groundbreaking ceremony June 17, Rehnquist and O'Connor were the featured speakers. Beneath a white canopy that shielded them and Kennedy, Ginsburg and Breyer from the rain, the two senior jurists observed that their 68-year-old columned building needs new wiring, heating and cooling systems, more space and other improvements. A two-story underground annex is part of the renovation. Noting that the building is nearly as old as she, O'Connor quipped, "The difference is that with a building, when it gets that age, one can change all the infrastructure and keep it going for another 70 years or so."

When the ceremony was over, court staffers escorted the justices back into the building, holding umbrellas over their heads. Striding ahead of the others, O'Connor carried her own umbrella.

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Civil Liberties Were Term's Big Winner; Supreme Court's Moderate Rulings a Surprise

The Washington Post

June 29, 2003

Charles Lane

The Supreme Court term that ended last week will be remembered as the one in which a court usually considered conservative decided to play against type. The court backed gay rights in an opinion that essentially prohibits the majority from imposing its notions of sexual morality. It enshrined racial and ethnic diversity in higher education as a compelling goal of government policy, one important enough to warrant an exception to the usual race-neutral constitutional rules. It let gender equality in employment trump the sovereignty of a state. And it delivered not one but two stern rebukes to states over what justices considered unfair procedures for sentencing people to death.

"You put it all together, and it's a strong term for traditional civil rights," said Steven Shapiro, legal director of the American Civil Liberties Union.

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Yet in one crucial respect, this term was consistent with past years that had brought such conservative triumphs as the 5-4 vote in Bush v. Gore. Whatever ideological characterization may apply to its decisions, this group of nine justices, which has been in place longer than any other nine-member court since 1823, is utterly confident in its own wisdom and power vis-a-vis all other governmental institutions, state and federal.

"They go out and decide these great national questions and don't feel compunction about it," Yoo said. "It's the same mindset that lets them do Bush v. Gore. They see it as their duty."

The defining event of 2001-2002 term was the court's 5-4 decision upholding state-funded vouchers for religious school education, which culminated a long-term effort by Chief Justice William H. Rehnquist, a staunch conservative, and seemed to underscore his defining influence.

As the court reeled off its final landmark rulings last week, advocates of liberal causes seemed almost stunned by the string of victories they had been handed by a group of justices who were put on the bench mostly by Republican presidents.
But this term, in addition to the victories on gay rights, affirmative action and states' rights, liberals also saw their recent losing streak on property rights reversed, as the court, by a 5-4 vote, upheld a state program that funds legal aid through accumulated fees on certain trust accounts. Conservatives had denounced it as a forced subsidy of left-wing lawyers.

And, in a 9-0 opinion written by Justice Clarence Thomas, the court eased the requirements for proving some claims of sex discrimination in employment.

Justice Sandra Day O'Connor once again emerged as the pivotal player among the justices. Her moderate conservative vote was indispensable to forming a majority. In all 13 of this term's 5-4 cases, O'Connor was in the majority. She dissented only five times in the court's 81 decisions, according to figures compiled by Washington attorney Tom Goldstein, who referred to her, only half-jokingly, as "the most powerful woman in the history of the universe."

"If we didn't have a tradition of naming courts after chief justices, this would be the O'Connor court," said Washington attorney Ron Klain, a top Clinton administration aide.

Since her appointment by President Ronald Reagan in 1981, O'Connor has done her part to help conservatives build a new doctrine of states' rights, limit affirmative action and cut down on death-row appeals. But this term highlighted her role as a moderating force among the court's conservatives. She joined with the court's four liberals -- Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer -- to put the brakes on each of those conservative trends.

Most importantly, she wrote the 5-4 opinion upholding the University of Michigan's law school admissions policy, ruling that its use of race to bring a "critical mass" of blacks, Latinos and Native Americans to the campus without specific quotas for minority students did not unduly harm the rights of whites or Asians.

O'Connor voted to allow state employees to sue their employers for money damages when their rights to time off for illness or other family crises under the 1993 Family and Medical Leave Act are violated. The ruling signaled the court would give Congress more latitude to define and prevent discrimination against women than it has allowed in cases of age and disability.

While the vote was 6-3, and Rehnquist wrote the court's opinion, legal analysts considered O'Connor's role critical. Once she broke ranks with the usual five-vote conservative block on the issue, the chief justice may well have decided to join the majority and assign the opinion to himself, rather than permit the liberal Stevens, who would have been the most senior member of the majority, to control the opinion-writing, analysts said.

O'Connor also wrote the court's 7-2 opinion overturning the sentence of Maryland death-row inmate Kevin Wiggins, in a case notable both for its emphasis on the importance of effective legal counsel in capital cases -- an issue O'Connor has highlighted in recent public speeches -- and for reaffirming federal court review as a check on state criminal justice systems.
In a separate 8-1 case, the justices ordered lower courts to hear a Texas death-row inmate's claim of racial bias in jury selection, which the courts had previously brushed off.

Legal analysts say that this performance shows not only O'Connor's moderating influence, but also how the "O'Connor Court" functions as a rough barometer of public opinion, particularly elite opinion.

Ostensibly insulated from political currents by life tenure and the sheer physical isolation of quasi-academic chambers at the court's headquarters in Washington, the justices nevertheless incorporate the country's mood into their rulings, sometimes openly, sometimes not. That information reaches the court in a variety of ways -- through the media, from their own day-to-day experiences and a regular infusion of new young law clerks and, crucially, in friend of the court briefs from interest groups, which often document the real-world consequences of potential rulings.

O'Connor -- a former Arizona politician who travels widely for speaking engagements and has noted the importance of "common sense" in judging -- seems to possess a particular knack for rulings that translate the American public's often contradictory sentiments into workable, if not necessarily elegant, law.

For example, the public appears to oppose racial quotas, but also wants racially integrated elite universities. O'Connor's ruling in the Michigan law school case -- and her concurrence in a companion undergraduate admissions case -- heavily influenced by the views of high-ranking corporate, military, educational and legal officials, offered a way to get there.

The public is in no mood to abolish capital punishment, but increasingly nervous about whether innocent people may be getting crushed in the wheels of the death penalty system. O'Connor, in the Wiggins case, drew on ideas from the American Bar Association to encourage states to provide better lawyers to capital case defendants.

And with women's participation in the workplace deeply embedded as an American value, O'Connor ratified Congress's authority to impose new anti-gender discrimination rules on the states.

O'Connor's vote was not decisive in the court's 6-3 decision to overturn Texas's sodomy statute. She concurred in the majority's judgment, citing a different and, for O'Connor, characteristically narrower constitutional rationale.

In that case, the lead was taken by the court's other occasional Reagan-appointed swing voter, Justice Anthony M. Kennedy.

Kennedy's opinion, too, seemed not only to lead the country into new constitutional ground, but also to ratify wider changes that had already taken place in public attitudes toward homosexuality. The last 50 years, he wrote, "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."

This seemed evident in the views of the justices themselves. Seven justices went on record condemning Texas's statute --
including Thomas, who said he would have voted to repeal it if he were a legislator rather than a judge. Neither Rehnquist nor Justice Antonin Scalia, who bitterly dissented, ventured to say explicitly that they support the Texas law.

"These are cases that say less about the direction of the court than the direction of the country," the ACLU's Shapiro said. "Very few Americans want to go back to a world where great universities are all white and the government is in our bedrooms."

There were significant exceptions to the liberal trend. The court upheld California's law that metes out life sentences to three-time felons. It said that states can post the names of sex offenders on the Internet without investigating the danger that each individual poses.

And a court that has recently been highly protective of free speech upheld both a Virginia ban on cross-burning and a federal law requiring libraries to filter out Internet pornography.

Still, the affirmative action and gay rights cases set the tone, and the disappointment at those rulings among conservatives was palpable -- comparable, in its own way, to the disgust liberals expressed with the court after Bush v. Gore. The court's self-conscious effort to incorporate modern attitudes on race and sexuality into constitutional doctrine was, to the right, an unpardonable display of judicial activism.

"The sodomy case is most discouraging to people such as myself who continue to fancy the notion that there is something called law that is different from politics," said Douglas Kmiec, a Justice Department official during the Reagan administration who is the outgoing dean of the Catholic University law school.

Though there were no retirements from the court this term, the liberal victories in key cases appeared to redouble conservatives' determination to fight for a like-minded choice if a vacancy does occur during President George W. Bush's tenure.

The fight will be especially bitter if the seat vacated is O'Connor's. And it is a battle that may be fiercest within the administration itself. Republican conservatives increasingly see White House counsel Alberto R. Gonzales, a leading candidate for the job, as a moderate whose efforts to temper the administration's views on affirmative action are blamed by many on the right for the result in the Michigan cases. But the notion of scoring points with Hispanic voters by appointing the first Hispanic to the court remains attractive to White House political operatives.

More than once over the last week conservatives used a historical example to illustrate why nominations to the high court are so important to them: The 1987 Senate vote that rejected Robert Bork's nomination to the court paved the way for his replacement by last week's hero of the gay rights movement, Kennedy.
WASHINGTON The Supreme Court, as with many families, has some members who believe in setting clear rules and others who say the right action depends on the circumstances.

Lawyers who practice before the court talk about justices who are "rules" people and others who are "balancers."

The court's decision Monday upholding affirmative action offers a classic example of the difference. Justice Antonin Scalia is a rules person. He once wrote a law review article titled: "The Rule of Law Is the Law of Rules."

He relied on a familiar rule Monday. The Constitution says the government may not discriminate against any person "by reason of their skin color," he says. Therefore, any public program, including a university's affirmative action policy, is unconstitutional if it treats people differently based on their race.

Justice Sandra Day O'Connor, however, is a balancer who strives for a fair result in each case. For her, the dispute over affirmative action was not a "yes" or "no" question. The right outcome depended on the facts and circumstances, she reasoned.

Scalia's rigid rule would close the door of opportunity for too many aspiring black and Latino students, she said. But O'Connor has never gone along with the liberal justices who uphold affirmative action generally as a type of "benign" discrimination.

Instead, O'Connor announced a balanced, middle approach. She voted to approve the University of Michigan Law School's use of race as one factor weighing in favor of minority applicants, but she voted to strike down the university's undergraduate admissions policy because race was too big a factor.

A "highly individual holistic review" that weighs a student's race is constitutional, O'Connor said. A "mechanized selection" system that assigns points based on a student's race is not, she said.

Justice Clarence Thomas, like Scalia, seems to prefer clear rules, and he joined Scalia in saying that affirmative action is unconstitutional, no matter how it is practiced.

Justice Stephen G. Breyer, like O'Connor, is a balancer. He joined O'Connor in both opinions Monday. He voted to uphold the law school policy because it weighs the race of applicants fairly, but he voted to strike down the undergraduate admissions policy because it is too race-driven.
Legal experts were left debating whether Monday's opinions amounted to a victory for principle, or for fuzziness.

Some admitted they could not easily define the distinction between a school that evaluates applicants with the goal of enrolling a "critical mass" of minority students, which was upheld, and an admissions policy that uses a point scale to enroll a reasonable percentage of minority students.

"The difference is not all that clear. It is a difference of degree," said Samuel Issacharoff, a Columbia University law professor.

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A university policy that spells out rules for evaluating minority applicants could be challenged as unconstitutional, he said. Yet, a university that does the same, but obscures its actions, is immune from challenge, he noted.

Stanford law professor Pamela Karlan said she was pleased by Monday's outcome, and the approach endorsed by O'Connor. "Talking about [enrolling enough minority students] is not necessarily a good thing. That was also one of the virtues of Justice [Lewis F.] Powell's opinion in the Bakke case," she said, referring to the landmark 1978 case of Allan Bakke vs. the University of California. "You can take race into account, but don't be too blatant about it."

Former Solicitor General Walter Dellinger said that in teaching his law classes at Duke University, he used to rail about the "logical flaws" in Powell's opinion. If the University of California's race-based admissions policy was unconstitutional, as Powell said, why did he urge colleges to adopt policies that give preferences to minority applicants as individuals?

"A quarter of a century later, I have the maturity to see how profoundly wise that opinion was," Dellinger wrote Tuesday in a column for Slate magazine. He praised O'Connor's opinion for its "basic good sense." She had preserved affirmative action for another generation, yet rejected rigid point-driven systems that make race the only admissions factor.

Balderdash, responded Dahlia Lithwick, Slate's legal correspondent. "O'Connor's basic ends-justifies-the-means approach to upholding the principle" fails the test of "intellectual honesty," she wrote. "Her use of all the catchwords -- 'individual consideration' and 'flexible' and 'nonmechanical' -- all simply mean that when programs give minorities a boost informally, with a wink rather than out in the open, these programs are legitimate."

The debate is likely to go on for years. Lawyers debated the Bakke decision for decades before challenges to it moved through the federal courts.

On Thursday, the court will wrap up its term by issuing decisions in its five remaining cases. They include a Texas case that could be a landmark for the gay rights movement.
Polls: Americans Say Court Is 'About Right'

The Washington Post

July 7, 2003

Charles Lane

It was more than a century ago that a fictional Irish American rendered what is, for some, still the definitive verdict on the Supreme Court's actual degree of insulation from politics. "[N]o matter whether th' constitution follows th' flag or not," Mr. Dooley, journalist Finley Peter Dunne's Everyman, said in 1901, "th' supreme coort follows th' iliction returns."

Whether Mr. Dooley was right or not, recent polling data about the Supreme Court and the issues it decides suggest that, though the court may now be regarded as a somewhat more liberal institution than it was before its blockbuster rulings on race and homosexuality, it remains a fairly reliable weathervane of overall public sentiment.

Fifty-one percent of 900 registered voters queried by Fox News/Opinion Dynamics at the end of the term agree that the court is "in touch with what is going on in the country." Only 38 percent say the court is "not in touch."

In its two most highly publicized rulings of the term, the court let universities consider race in admissions and struck down the country's remaining state laws criminalizing gay sex.

Thirty percent of those questioned in the poll see the court as "too liberal," while a plurality, 37 percent, say the court is "about right" in its decisions. Twenty percent say it is "too conservative."

That represents a shift to the left in the public's perception of the court from a Quinnipiac University poll conducted in late February and early March. In that poll, 19 percent saw the court as too liberal, 46 percent said it was about right, and 26 percent saw it as too right-leaning.

But the current "about right" rating is in line with other recent polls showing that, even after its 5 to 4 decision in Bush v. Gore (with which 52 percent of Americans now agree, says the Quinnipiac poll), the high court retains a strong overall approval rating, usually in the 55 to 60 percent range.

Also, some of the shift in perception of the court could be accounted for by the fact that the Quinnipiac poll's larger sample of 1,448 adults was not limited to registered voters, as the Fox poll was.

Fox reported that a 44 percent to 40 percent plurality (just one point outside the poll's three-point margin of error) disapproved of striking down Texas's homosexual sodomy statute. But Justice Anthony M. Kennedy seems to have been right when he noted, in his majority opinion in the Texas case, that
Americans are growing more tolerant of homosexuality and accepting of gays.

The Quinnipiac poll, taken before the ruling, showed a 57 percent to 38 percent majority against the court's 1986 decision upholding a state's ban on gay sex; Kennedy's opinion overruled that decision.

In a 2000 Associated Press poll, solid majorities favored permitting gay partners to have legal rights to inheritance, health insurance coverage and Social Security benefits. In a 2000 Fox poll, 57 percent said that gay men and lesbians should be allowed to serve openly in the military.

And a CNN/USA Today/Gallup poll taken right after the court's ruling showed the lowest majority against gay marriage, 55 percent to 39 percent, since that poll began asking the question in 1996.

So even if the court was in front of the public on homosexuality, it was within the mainstream.

A strong 63 percent to 24 percent majority in the Fox poll objected to the court's affirmative action ruling.

But on affirmative action, poll results are notoriously dependent on how the question is phrased. When Americans are asked, as they were in the Fox poll, whether they favor "allowing an applicant's race to be a factor in college admission procedures," the response is usually strongly negative. However, on the question, "Do you favor or oppose affirmative action programs for racial minorities?" a 49 percent to 43 percent plurality favors such programs, according to a June Gallup poll.

Perhaps most significantly for the court, 80 percent of Americans told an AP poll earlier this year that it is very important or somewhat important "for a college to have a racially diverse student body." The court's opinion hinged on the view that race-conscious admissions are the only way to preserve a measure of campus integration.

Of the nine justices, middle-of-the-roader Justice Sandra Day O'Connor -- the author of the court's affirmative action decision -- tops the Fox poll's list of who Americans "most admire or agree with."

In the poll, 11 percent name her, almost twice as many as the second-place finisher, conservative icon Justice Antonin Scalia.

Sixty-eight percent of those who responded could not name any of the justices.

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PLEDGE OF ALLEGIANCE

Michael A. NEWDOW,
Plaintiff-Appellant,
v.
US CONGRESS; United States of America; William Jefferson Clinton, President of the United States; State Of California; Elk Grove Unified School District; David W. Gordon, Superintendent EGUSD; Sacramento City Unified School District; Jim Sweeney, Superintendent SCUSD, Defendants-Appellees.

United States Court of Appeals
For the Ninth Circuit

Decided March 14, 2002
Amended June 26, 2002.

[Excerpt; some footnotes and citations omitted]

GOODWIN, Circuit Judge:

Michael Newdow appeals a judgment dismissing his challenge to the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag. Newdow argues that the addition of these words by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, with the added words included, by his daughter's public school teacher are violations of the Establishment Clause of the First Amendment to the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ.Code § 52720 (1989) (hereinafter "California statute").1 To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school

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1 The relevant portion of California Education Code § 52720 reads:
In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.
class [shall] recite the pledge of allegiance to the flag once each day."2

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Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge.3 Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge, and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. This appeal followed.

DISCUSSION

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C. Standing

Article III standing is a jurisdictional issue. See United States v. Viltrakis, 108 F.3d 1159, 1160 (9th Cir.1997). Accordingly, it "may be raised at any stage of the proceedings, including for the first time on appeal." See A-Z Intern. v. Phillips, 179 F.3d 1187, 1190-91 (9th Cir.1999). To satisfy standing requirements, a plaintiff must prove that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.

Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. "Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right." Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 795 (9th Cir.1999)

Newdow has standing to challenge the EGUSD's policy and practice regarding

3 Compelling students to recite the Pledge was held to be a First Amendment violation in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)
the recitation of the Pledge because his daughter is currently enrolled in elementary school in the EGUSD. However, Newdow has no standing to challenge the SCUSD's policy and practice because his daughter is not currently a student there. The SCUSD and its superintendent have not caused Newdow or his daughter an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." Laidlaw, 528 U.S. at 180...

The final question of standing relates to the 1954 Act. Specifically, has Newdow suffered an "injury in fact" that is "fairly traceable" to the enactment of the 1954 Act? Id.

We begin our inquiry by noting the general rule that the standing requirements for an action brought under the Establishment Clause are the same as for any other action. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 488-90...

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While Valley Forge remains good law, the Supreme Court in more recent opinions has indirectly broadened the notion of Establishment Clause standing in public education cases by holding that the mere enactment of a statute may constitute an Establishment Clause violation. In Wallace v. Jaffree, 472 U.S. 38, ... the Court considered an Establishment Clause challenge to an Alabama statute that originally had authorized a one-minute period of silence in public schools "for meditation," ... we may presume that in Wallace the Court examined the standing question before deciding the merits, and that the Court determined that the schoolchildren's parents had standing to challenge the amended Alabama statute.

Our reading of Wallace is supported by Santa Fe Independent School District v. Doe, 530 U.S. 290, where the Court upheld a facial challenge to a school district's policy of permitting, but not requiring, prayer initiated and led by a student at high school football games. Noting that "the Constitution also requires that we keep in mind 'the myriad, subtle ways in which the Establishment Clause values can be eroded,'" id. at 314, the Court held that the "mere passage by the District of a policy that has the purpose and perception of government establishment of religion," id., violated the Establishment Clause. "[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." Id. at 316, 120 S.Ct. 2266 (emphasis added).

In Wallace and Santa Fe, the Court looked at the language of each statute, the context in which the statute was enacted, and its legislative history to determine that the challenged statute caused an injury in violation of the Establishment Clause. "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." Id. at 315, 120 S.Ct. 2266. Justice O'Connor's concurrence in Wallace noted that whether a statute actually conveys a message of endorsement of religion is "not entirely a question of fact .... The relevant issue is whether an objective
observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of prayer in public schools." 472 U.S. at 76, 105 S.Ct. 2479 (O'Connor, J., concurring in judgment). In Santa Fe, "[t]he text and history of this policy ... reinforce our objective student's perception that the prayer is, in actuality, encouraged by the school." 530 U.S. at 308, 120 S.Ct. 2266. In evaluating the purpose of the school district policy, the Court found "most striking ... the evolution of the current policy." Id. at 309. In Wallace, a review of the legislative history led the Court to conclude that enactment of the amended statute "was not motivated by any clearly secular purpose--indeed, the statute had no secular purpose." 472 U.S. at 56.

Operating within the above-described legal landscape, we now turn to the question initially posed, namely, does Newdow have standing to challenge the 1954 Act? Initially, we note that the 1954 statute challenged by Newdow is similar to the Alabama statute struck down in Wallace. Neither statute works the traditional type of "injury in fact" that is implicated when a statute compels or prohibits certain activity, nor do the amendments brought about by these statutes lend themselves to "as-applied" constitutional review. Nevertheless, the Court in Wallace, at least implicitly, determined that the schoolchildren's parents had standing to attack the challenged statute. Moreover, the legislative history of the 1954 Act shows that the "under God" language was not meant to sit passively in the federal code unbeknownst to the public; rather, the sponsors of the amendment knew about and capitalized on the state laws and school district rules that mandate recitation of the Pledge. The legislation's House sponsor, Representative Louis C. Rabaut, testified at the Congressional hearing that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins," and this statement was incorporated into the report of the House Judiciary Committee. H.R.Rep. No. 83-1693, at 3 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2341. Taken within its context, the 1954 addendum was designed to result in the recitation of the words "under God" in school classrooms throughout the land on a daily basis, and therefore constituted as much of an injury-in-fact as the policies considered in Wallace and Santa Fe. As discussed earlier, Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter. Accordingly, we hold that Newdow has standing to challenge the 1954 Act.

D. Establishment Clause

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion." **** Over the last three decades, the Supreme Court has used three interrelated tests to analyze alleged violations of the Establishment Clause in the realm of public education: the three-prong test set forth in Lemon v. Kurtzman, 403 U.S. 602; the "endorsement" test, first articulated by
Justice O'Connor in her concurring opinion in Lynch, and later adopted by a majority of the Court in County of Allegheny v. ACLU, 492 U.S. 573; and the "coercion" test first used by the Court in Lee.

...To survive the "Lemon test," the government conduct in question (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13, 91 S.Ct. 2105. The Supreme Court applied the Lemon test to every Establishment case it decided between 1971 and 1984, with the exception of Marsh v. Chambers, 463 U.S. 783, the case upholding legislative prayer. See Wallace, 472 U.S. at 63, 105 S.Ct. 2479 (Powell, J., concurring).

In the 1984 Lynch case, which upheld the inclusion of a nativity scene in a city's Christmas display, Justice O'Connor wrote a concurring opinion in order to suggest a "clarification" of Establishment Clause jurisprudence. 465 U.S. at 687, 91 S.Ct. 2479 (O'Connor, J., concurring). Justice O'Connor's "endorsement" test effectively collapsed the first two prongs of the Lemon test:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions.... The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Id. at 687-88, 91 S.Ct. 2105 (O'Connor, J., concurring).

The Court formulated the "coercion test" when it held unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies. Lee, 505 U.S. at 599, 112 S.Ct. 2649. Declining to reconsider the validity of the Lemon test, the Court in Lee found it unnecessary to apply the Lemon test to find the challenged practices unconstitutional. Id. at 587, 112 S.Ct. 2649. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so." Id. (citations and internal quotation marks omitted)....

Finally, in its most recent school prayer case, the Supreme Court applied the Lemon test, the endorsement test, and the coercion test to strike down a school district's policy of permitting student-led "invocations" before high school football games. See Santa Fe,...

We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. The Supreme Court has not repudiated Lemon: in Santa Fe, it found that the application of each of the three tests provided an independent ground for
invalidating the statute at issue in that case; and in Lee, the Court invalidated the policy solely on the basis of the coercion test. Although this court has typically applied the Lemon test to alleged Establishment Clause violations, see, e.g., Am. Family Ass'n, Inc. v. City and County of San Francisco, 277 F.3d 1114, 1120-21 (9th Cir. 2002), we are not required to apply it if a practice fails one of the other tests. Nevertheless, for purposes of completeness, we will analyze the school district policy and the 1954 Act under all three tests.

We first consider whether the 1954 Act and the EGUSD's policy of teacher-led Pledge recitation survive the endorsement test. The magistrate judge found that "the ceremonial reference to God in the pledge does not convey endorsement of particular religious beliefs." Supreme Court precedent does not support that conclusion.

In the context of the Pledge, the statement that the United States is a nation "under God" is an endorsement of religion. It is a profession of a religious belief, namely, a belief in monotheism. The recitation that ours is a nation "under God" is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase "one nation under God" in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and--since 1954--monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion. "[T]he government must pursue a course of complete neutrality toward religion." Wallace, 472 U.S. at 60, 105 S.Ct. 2479. Furthermore, the school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge.

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The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Lynch, 465 U.S. at 688, 104 S.Ct. 1355 (O'Connor, J., concurring). Justice Kennedy, in his dissent in Allegheny, agreed:

[B]y statute, the Pledge of Allegiance to the Flag describes the United States as 'one nation under God.' To be sure, no
one is obligated to recite this phrase, ... but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Allegheny, 492 U.S. at 672, 109 S.Ct. 3086 (Kennedy, J., dissenting) (citations and internal quotation marks omitted). Consequently, the policy and the Act fail the endorsement test.

Similarly, the policy and the Act fail the coercion test. Just as in Lee, the policy and the Act place students in the untenable position of choosing between participating in an exercise with religious content or protesting. As the Court observed with respect to the graduation prayer in that case: "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." Lee, 505 U.S. at 592, 112 S.Ct. 2649. Although the defendants argue that the religious content of "one nation under God" is minimal, to an atheist or a believer in certain non-Judeo-Christian religions or philosophies, it may reasonably appear to be an attempt to enforce a "religious orthodoxy" of monotheism, and is therefore impermissible. The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students. Furthermore, under Lee, the fact that students are not required to participate is no basis for distinguishing Barnette from the case at bar because, even without a recitation requirement for each child, the mere fact that a pupil is required to listen every day to the statement "one nation under God" has a coercive effect. The coercive effect of the Act is apparent from its context and legislative history, which indicate that the Act was designed to result in the daily recitation of the words "under God" in school classrooms. President Eisenhower, during the Act's signing ceremony, stated: "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower). Therefore, the policy and the Act fail the coercion test.

Finally we turn to the Lemon test, the first prong of which asks if the challenged policy has a secular purpose. Historically, the primary purpose of the

10 In Aronow v. United States, 432 F.2d 242 (9th Cir.1970), this court, without reaching the question of standing, upheld the inscription of the phrase "In God We Trust" on our coins and currency. But cf. Wooley v. Maynard, 430 U.S. 705, 722, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (Rehnquist, J., dissenting) (stating that the majority's holding leads logically to the conclusion that "In God We Trust" is an unconstitutional affirmation of belief). In any event, Aronow is distinguishable in many ways from the present case. The most important distinction is that school children are not coerced into reciting or otherwise actively led to participating in an endorsement of the markings on the money in circulation.
1954 Act was to advance religion, in conflict with the first prong of the Lemon test. The federal defendants "do not dispute that the words 'under God' were intended" "to recognize a Supreme Being," at a time when the government was publicly inveighing against atheistic communism. Nonetheless, the federal defendants argue that the Pledge must be considered as a whole when assessing whether it has a secular purpose. They claim that the Pledge has the secular purpose of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." Lynch, 465 U.S. at 693, 104 S.Ct. 1355.

The flaw in defendants' argument is that it looks at the text of the Pledge "as a whole," and glosses over the 1954 Act. The problem with this approach is apparent when one considers the Court's analysis in Wallace. There, the Court struck down Alabama's statute mandating a moment of silence for "meditation or voluntary prayer" not because the final version "as a whole" lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words "or voluntary prayer." 472 U.S. at 59-60, 105 S.Ct. 2479.

By analogy to Wallace, we apply the purpose prong of the Lemon test to the amendment that added the words "under God" to the Pledge, not to the Pledge in its final version. As was the case with the amendment to the Alabama statute in Wallace, the legislative history of the 1954 Act reveals that the Act's sole purpose was to advance religion, in order to differentiate the United States from nations under communist rule. "[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." Id. at 56, 105 S.Ct. 2479 (citations omitted) (applying the Lemon test). As the legislative history of the 1954 Act sets forth:

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R.Rep. No. 83-1693, at 1-2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340. This language reveals that the purpose of the 1954 Act was to take a position on the question of theism, namely, to support the existence and moral authority of God, while "deny[ing] ... atheistic and materialistic concepts." Id. Such a purpose runs counter to the Establishment Clause, which prohibits the government's endorsement or advancement not only of one particular religion at the expense of
other religions, but also of religion at the expense of atheism.

[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of a free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects-- or even intolerance among "religions"--to encompass intolerance of the disbeliever and the uncertain.

Wallace, 472 U.S. at 52-54, 105 S.Ct. 2479.

In language that attempts to prevent future constitutional challenges, the sponsors of the 1954 Act expressly disclaimed a religious purpose. "This is not an act establishing a religion.... A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs." H.R.Rep. No. 83- 1693, at 3 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2341-42. This alleged distinction is irrelevant for constitutional purposes. The Act's affirmation of "a belief in the sovereignty of God" and its recognition of "the guidance of God" are endorsements by the government of religious beliefs. The Establishment Clause is not limited to "religion as an institution"; this is clear from cases such as Santa Fe, where the Court struck down student-initiated and student-led prayer at high school football games. 530 U.S. at 310-16, 120 S.Ct. 2266. The Establishment Clause guards not only against the establishment of "religion as an institution," but also against the endorsement of religious ideology by the government. Because the Act fails the purpose prong of Lemon, we need not examine the other prongs. Lemon, 403 U.S. at 612-14, 91 S.Ct. 2105.

Similarly, the school district policy also fails the Lemon test. Although it survives the first prong of Lemon because, as even Newdow concedes, the school district had the secular purpose of fostering patriotism in enacting the policy, the policy fails the second prong. As explained by this court in Kreisner v. City of San Diego, 1 F.3d 775, 782(9th Cir. 1993), and by the Supreme Court in School District of Grand Rapids v. Ball, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267(1985), the second Lemon prong asks "whether the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." Ball, 473 U.S. at 390, 105 S.Ct. 3216. Given the age and impressionability of schoolchildren, as discussed above, particularly within the confined environment of the classroom, the policy is highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God. Therefore the policy fails the effects prong of Lemon, and fails the Lemon test. In sum, both the policy and the Act fail the Lemon test as
well as the endorsement and coercion tests.

In conclusion, we hold that (1) the 1954 Act adding the words "under God" to the Pledge, and (2) EGUSD's policy and practice of teacher-led recitation of the Pledge, with the added words included, violate the Establishment Clause. The judgment of dismissal is vacated with respect to these two claims, and the cause is remanded for further proceedings consistent with our holding. Plaintiff is to recover costs on this appeal.

REVERSED AND REMANDED.
The case of *United States v. Newdow*, No. 02-1574, is challenging enough for the Supreme Court.

The issue, whether the words "under God" render the Pledge of Allegiance unconstitutional under the First Amendment, has already divided the nation. But with the case comes the respondent: Michael Newdow of Elk Grove, Calif., who first challenged the Pledge on behalf of his public school student daughter -- and who promises to make the case even more tricky if the Supreme Court decides to grant review.

In a filing with the high court later this week, Newdow says, he plans to make it clear that he wants to take on the Supreme Court both pro se and pro hac vice -- joining the extremely small club of high court advocates who are not members of the Supreme Court bar but who argue their own cases nonetheless.

On top of that, Newdow plans at a later date to take the rare step of asking that Justice Antonin Scalia recuse himself in the case because of widely reported statements he made in January indicating that only "democratic" change could take the words "under God" out of the Pledge -- presumably meaning action by Congress, not the Supreme Court.

"I think I am highly qualified to argue this case. There is no one who knows this case better than me," says Newdow, who notes that he has written every brief and argued every minute of his case so far. "There may be people who know the legal issues better, but I needed to get an atheist to argue this. I want me."

Newdow's insistence about pressing his own case before the Supreme Court is causing discomfort among some of his natural allies. Both the American Civil Liberties Union and People for the American Way are staying on the sidelines until the high court acts. Only Americans United for Separation of Church and State is expected to file in the case at the certiorari stage. While some civil liberties lawyers have discussed the case with Newdow, he is not accepting substantive help.

"He's in over his head, but he won't let anyone else take it over," says one civil liberties activist who is monitoring the case. "A lot of us would breathe a sigh of relief if the case would just go away. It's a no-win situation."

In press reports last year, Newdow was usually identified as a physician. But he has also been licensed by the California State Bar since July 2002. He says he is a 1988 graduate of the University of Michigan Law School.

To be a member of the Supreme Court bar, a lawyer must have been a state bar member for three years. Supreme Court bar membership is not a prerequisite for filing a petition pro se, but it is for a lawyer who wants to argue a case -- unless he or she wins admission pro hac vice. The Court is rarely asked to admit someone this way, but when it is, it usually says yes, unless it...
appears to the Court that the lawyer has not been connected to the case for very long. Sometimes, freshly minted members of the solicitor general's office need pro hac vice admission in order to be allowed to argue before the Court.

What makes Newdow's plan especially unusual is that he is his own client, so he will also be filing pro se. In the most recent instances of pro se representation, the 1998 case Lunding v. New York Tax Appeals Tribunal and last year's Christopher v. Harbury, both Christopher Lunding and Jennifer Harbury were already members of the Supreme Court bar. Incidentally, Lunding won and Harbury lost. And the general consensus among Court-watchers is that Harbury did not help herself by arguing the highly emotional case involving the Central Intelligence Agency's role in the death of her husband, a Guatemalan rebel leader.

Emotion is never far away for Newdow either.

Solicitor General Theodore Olson's brief challenges Newdow's standing in the case, because he is the noncustodial parent of his daughter. The 9th U.S. Circuit Court of Appeals said Newdow had standing nonetheless.

When asked about the standing issue in a phone interview, Newdow angrily launched into an indictment of the "insane and grossly unconstitutional family law system" that resulted in his loss of custody. "I am a terrific father, and yet I am the only person in the world who is forbidden to see her -- except every two weeks."

According to Newdow, the custody battle has cost him more than $100,000, much of which has gone to pay attorney fees for his daughter's mother. (Newdow says he and the mother, Sandra Banning, never married.) Banning's Sacramento lawyer, Dianne Fetzer, did not return phone calls seeking comment.

In any event, Newdow says he expects to regain custody of his daughter this summer, so that standing will not be an issue. But if it still is, he thinks he can achieve standing as a taxpayer and as a parent who still has a role in making decisions about his daughter.

Asked if the emotion of the custody battle will hamper his advocacy on the Pledge issue, Newdow said, "You're allowed to have passion at the Supreme Court."

On the merits of the case, Newdow is also taking an unusual step. His filing this week will respond to the government's certiorari petition, which asks the Court to review the controversial ruling of the 9th Circuit declaring the Pledge unconstitutional.

Ordinarily, respondents oppose review, but Newdow will acquiesce, because he, too, objects to the 9th Circuit ruling. In its original June 2002 ruling, the 9th Circuit said the 1954 congressional enactment including the words "under God" was unconstitutional, as was the Elk Grove School District's teacher-led recitation of the Pledge. But the court amended its ruling in February to limit its scope to the school district's use of the Pledge. On the broader issue of the constitutionality of the Pledge, the appeals court remanded for further proceedings. Newdow challenges the narrowing of the decision, so he, too, wants the high court to grant review.

Proponents of the government's position are viewing Newdow's unusual tactics with amusement and concern.

Jay Sekulow, chief counsel of the American Center for Law and Justice, who wrote a brief in the case for some members of Congress, says he understands Newdow's decision to press the litigation himself. "It's his right to take the case," he says. Sekulow adds that he believes
the high court will grant cert by early fall: "I'd be stunned if they didn't."

But he also thinks the standing issue is crucial, and could give the justices an "easy out" if they want to avoid the contentious Pledge debate. Since the question of standing has such personal dimensions for Newdow, Sekulow says he, like others, wonders if it is wise for Newdow to argue on his own.
WASHINGTON  The Bush administration, vowing to "vigorously defend" children's right to recite the Pledge of Allegiance as now written, urged the Supreme Court yesterday to uphold the constitutionality of the pledge with the phrase "under God" included.

The administration's appeal to the Supreme Court challenges a federal appeals court decision in February barring public school children in a California community from reciting the pledge as long as "under God" is a part of it.

Justice Department lawyers argued that the pledge is being recited as written everywhere else in the country, and it "cannot serve its purpose of unifying and commonly celebrating the national identity unless it is one Pledge with one content for all citizens at all points in their lives."

It is doubtful that the Supreme Court will act on the appeal during the current term, scheduled to end before July 1. The action is likely to occur when the court opens a new term in early October.

The new appeal contended that the issue of the pledge's constitutionality is already a settled one, even though the Supreme Court has never had a case directly testing its validity. Department attorneys, however, said that at least two opinions of the court, and statements in various opinions by as many as 12 justices over several years, show that "the Pledge of Allegiance is constitutional."

Announcing the appeal, Attorney General John D. Ashcroft said: "Our religious heritage has been recognized and celebrated for hundreds of years in the national motto [In God We Trust], national anthem, Declaration of Independence, and Gettysburg Address."

The decision nullifying the pledge as written when recited by public school children was issued by the US Circuit Court of Appeals for the Ninth Circuit, in San Francisco. It applied its ruling only to the school district where it had been challenged, in Elk Grove, Calif., a suburb of Sacramento. After nullifying the recitation, the appeals court put its decision on hold until the Supreme Court could rule.

The Elk Grove school district is expected to file a separate appeal defending the pledge in the next few days, according to spokesman Jim Elliott.

The pledge's inclusion of the phrase "one nation under God" was challenged by Michael A. Newdow, an atheist parent of a child in the Elk Grove schools. The appeals court ruled that he had a right to make the challenge to protect
his right to teach his views about religion to his daughter.

The Justice Department, while urging the Supreme Court to uphold the pledge, also argued that the court could avoid facing that issue by ruling that Newdow had no right to bring his challenge - a ruling that would nullify the appeals court ruling, and leave the pledge as is.

The department said it was defending the pledge in general, and also specifically because it is recited every day in schools that the military operates for the children of military members. Four of those schools are within the jurisdiction of the Ninth Circuit.
WHAT'S THE BIG DEAL? THE UNCONSTITUTIONALITY OF GOD IN THE PLEDGE OF ALLEGIANCE

Harvard Civil Rights-Civil Liberties Law Review

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John E. Thompson

[Excerpt; some footnotes omitted]

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In June 2002, a three-judge panel of the Ninth Circuit held unconstitutional the federal statute inserting "under God" into the Pledge of Allegiance, as well as a California school district's policy requiring teacher-led recitation of the Pledge.

The Pledge of Allegiance was written in 1892 by a socialist Baptist minister. As codified by Congress in 1942, the Pledge of Allegiance read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Congress amended the law in 1954 by adding the phrase "under God" after the word "Nation." According to the amendment's congressional sponsors, its purpose was to distinguish America from atheistic communism, affirm the nation as a religious one, and infuse children with the belief that the United States is under God.

California law mandates that the state's public schools start each school day with "appropriate patriotic exercises" and provides that the recitation of the Pledge of Allegiance satisfies this requirement. To implement this law, the Elk Grove Unified School District adopted a policy requiring that "[e]ach elementary school class [shall] recite the pledge of allegiance to the flag once each day." The daughter of the plaintiff, Michael Newdow, attended an Elk Grove elementary school, where her teacher led her class in reciting the Pledge as codified in federal law.

Newdow filed suit in the Eastern District of California challenging the constitutionality of the federal statute, the California statute, and the school district policy. He did not claim that his daughter was required to recite the Pledge. He did claim, however, that his daughter was injured when she was forced to "watch and listen as her state-employed teacher in her state-run school [led] her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" The school district filed a motion to dismiss for failure to state a claim, in which the United States joined. The district court granted the motion to dismiss, and Newdow appealed the

13 Id. Such a requirement, of course, would directly violate the holding of West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (holding that forcing students to recite the Pledge of Allegiance violated the students' free speech rights under the First Amendment).

dismissal to the Ninth Circuit Court of Appeals.

On appeal, a two-judge majority of the three-judge Ninth Circuit panel ruled both the federal law and the school district policy unconstitutional under the First Amendment's Establishment Clause. The majority noted that the Supreme Court had used three different tests to assess Establishment Clause challenges: (1) the three-part test from Lemon v. Kurtzman,20 (2) the endorsement test first articulated in Justice O'Connor's concurrence in Lynch v. Donnelly21 and later adopted by a majority in County of Allegheny v. ACLU,22 and (3) the coercion test upon which the Court relied in Lee v. Weisman.23 Since the Supreme Court continues to use all three tests, the panel felt "free to apply any or all of the three tests, and to invalidate any measure that fails any one of them." For the sake of completeness, the panel chose to analyze the claims under all three tests.

Turning first to the endorsement test, the majority found the federal law's inclusion of "under God" in the Pledge, as well as the school district's recitation policy, to be endorsements of religion. The court rejected the notion that the phrase was merely a description of the historical importance of religion in the United States or an acknowledgement that many Americans believe in God. Instead, the court found the Pledge's statement that the United States is "under God" to be a profession of a specific religious belief--monotheism. The majority stated that the Pledge takes a position with regard to a fundamental religious question, whether God exists, in contravention of the principle of government neutrality toward religion. The panel cited West Virginia Board of Education v. Barnette,20 in which the Supreme Court emphasized that the Pledge was not merely descriptive, but rather normative and ideological. "To recite the Pledge is ... to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and--since 1954--monotheism."

Applying the language of Justice O'Connor's endorsement test, the panel found that the Pledge sends a message to non-believers "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." The panel agreed with Justice Kennedy's dissent in Allegheny, that "it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false."

The panel then found that the Act and the policy violated the coercion test. The panel relied heavily on Lee v. Weisman, in which the Supreme Court struck down a graduation prayer as coercive even though students were not required to pray along. As in Lee, the recitation of the Pledge puts "students in the untenable position of choosing between

20 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive government entanglement with religion.'").


23 505 U.S. 577 (1992)

30 319 U.S. 624. For a summary of the holding of this opinion, see supra note 13.
participating in an exercise with religious content or protesting." The Supreme Court in Lee, employing a broad concept of coercion, held that "the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position." Like the prayer in Lee, the majority felt that the Pledge of Allegiance may appear to the non-believer to be "an attempt to enforce a 'religious orthodoxy' of monotheism." Lee is especially apropos because, like Newdow, it involved schoolchildren, whom the Supreme Court had found particularly susceptible to government coercion. As for the federal act, the panel found that it too had a coercive effect—its context and history showed that Congress intended it to lead to the recitation by schoolchildren of "under God" as part of the Pledge. President Eisenhower announced upon signing the bill, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural school-house, the dedication of our Nation and our people to the Almighty."

Turning finally to the Lemon test, the Ninth Circuit panel first found that the federal law violated the test's "purpose" prong. In defense of the Pledge statute, the United States had urged the court to recognize that the Pledge of Allegiance as a whole had secular purposes, including the solemnization of public occasions. The court, however, concluded that the proper focus was on the 1954 Act alone (inserting "under God"), concluding that its "sole purpose was to advance religion ..." The panel cited the House Report on the 1954 act, which included the statement: "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."

The school district's recitation policy, on the other hand, did have a secular purpose: to foster patriotism. He panel, however, found that despite the secular purpose, the policy had the impermissible effect of promoting religion, and thus it failed Lemon's second prong. Given the impressionability of schoolchildren and the confined school environment, the majority found the policy "highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God."

Judge Fernandez dissented from the panel's Establishment Clause holdings. He declined to apply any of the specific Supreme Court tests cited by the majority or to lay out in depth any particular theory of the religion clauses, dismissing such tests and concepts as "legal world abstractions and ruminations." Instead, his dissent relied primarily on the assertion that any harm caused by the Pledge's religious language is so "miniscule," "de minimis," or "picayune at most," that there was no constitutional violation. In support of this proposition, Judge Fernandez pointed to relevant dicta in five Supreme Court cases.53 He also

53 Id. at 613 (Fernandez, J., concurring in part and dissenting in part). These various majority, concurring, and dissenting opinions were joined over the years by Justices Burger, Rehnquist, Harlan, Brennan, White, Goldberg, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia, and Kennedy. Id. at 614 (Fernandez, J., concurring in part and dissenting in part). The following opinions cited by Fernandez suggested approval of the words "under God" in the Pledge of Allegiance, at least to some extent: Lynch v. Donnelly, 465 U.S. 668, 676 (1984); County of Allegheny v. ACLU, 492 U.S. 573, 672-73 (1989) (Kennedy, J., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring); and Lynch,
expressed concern that the majority's analysis would lead to the invalidation of "God Bless America," "America the Beautiful," the fourth stanzas of both "The Star Spangled Banner" and "My Country 'Tis of Thee," and references to God on currency.

The Ninth Circuit's decision in Newdow quickly provoked significant criticism. United States Senators and Representatives took to the floors of their respective chambers to decry the ruling. The Senate unanimously approved a resolution denouncing the decision. The House approved a similar resolution by a vote of 416 to 3. On the same day that the Ninth Circuit issued its opinion, President Bush called it "ridiculous," House Majority Whip Tom DeLay deemed it "sad" and "absurd," and Senate Majority Leader Tom Daschle said it was "nuts." Senator John Edwards called the opinion "wrong," and Senator Robert Byrd called the judges in the Newdow majority "stupid." Major newspapers also criticized the decision.

In an unusual move, the day after its decision, the panel stayed the enforcement of its decision pending appeal. The U.S. Department of Justice petitioned the Ninth Circuit to rehear the case en banc, as did the Elk Grove school district. Meanwhile, on December 4, 2002, the panel rejected a motion by the student's mother to strip Newdow of standing on the ground that the mother had sole legal custody.

B. Newdow II

On February 28, 2003, the Ninth Circuit panel amended its decision, and the full circuit declined to rehear the case en banc. The amended decision (Newdow II) is significantly narrower than the panel's June 2002 opinion.

First, the panel declined to reach the issue of whether the federal Pledge of Allegiance statute is unconstitutional. The panel noted that the district court had not reached the issue, finding only that the school district policy was constitutional. Given its finding that Newdow was entitled to injunctive relief against recitation of the Pledge, and given the rules for granting declaratory relief, the Ninth Circuit panel doubted that the district court would have granted the declaratory relief sought by Newdow regarding the 1954 Act. On remand, however, Newdow could still ask the district court to declare the federal statute unconstitutional, in addition to issuing the injunction against the school district policy.

Second, the Ninth Circuit's amended opinion rested only on the coercion test in finding that the school district's recitation policy violated the Establishment Clause. While the panel still felt free to apply any of the Supreme Court's three tests, it

465 U.S. at 716 (Brennan, J., dissenting). Fernandez could also have included: Lee v. Weisman, 505 U.S. 577, 639 (1992) (Scalia, J., dissenting); Wallace, 472 U.S. at 88 (Burger, C.J., dissenting); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); and Engel v. Vitale, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting). Furthermore, one of the opinions cited, Justice Blackmun's majority opinion in Allegheny, puts to the side the question of the constitutionality of "nonsectarian references to religion" such as the Pledge; it did not express a view either way. Allegheny, 492 U.S. at 602-03.


emphasized that it was unnecessary to apply the Lemon or endorsement tests, once the panel found that the policy was impermissibly coercive. Thus, the panel abandoned its original strategy of completeness in order to focus on the ground it presumably felt was the strongest.

The amended opinion, however, did not simply discard its previous analysis under the endorsement and Lemon tests, nor did it completely ignore the 1954 Act. Rather, it folded much of this analysis into its coercion holding. For example, the amended decision still argues that the statement that the nation is "under God" expresses a belief in monotheism, and that the Pledge has a normative and ideological character, as the Supreme Court recognized in Barnette. These arguments were part of Newdow I's endorsement holding. The opinion also cites the legislative history of the 1954 Act to bolster its finding of coercion, whereas Newdow I had considered this history in applying Lemon's purpose prong to the federal statute.

The amended opinion also addressed the criticism that the original opinion ignored Supreme Court dicta regarding the constitutionality of the Pledge. The panel focused on the two times that a Supreme Court majority opinion specifically addressed the Pledge of Allegiance in dicta--in Lynch v. Donnelly and in County of Allegheny v. ACLU. According to the panel's majority, in neither case did the Court suggest it was permissible for schools to lead recitations of the Pledge.

At the same time that the Ninth Circuit ordered Newdow I amended, it announced--without opinion--that the petition for rehearing en banc had failed to gain the support of a majority of the full circuit court. Nine judges dissented from the denial of en banc review; there were two dissenting opinions. Judge McKeown's one-paragraph opinion simply stated that the case was sufficiently important to be reheard en banc. Judge O'Scannlain, writing for six judges, issued a scathing attack on the Newdow II decision, which he considered a barely modified version of Newdow I. Reviewing the Supreme Court's school prayer cases, O'Scannlain concluded that the Supreme Court had barred only religious acts (such as prayer) in public schools, but that it had not barred mere references to religion, a category that includes the Pledge of Allegiance. The panel's decision "contradicts our 200-year history and tradition of patriotic references to God" and conflicts with the Founders' understanding. O'Scannlain feared that Newdow II would forbid recitation of the Constitution, Declaration of Independence, Gettysburg Address, and National Motto, in addition to singing the National Anthem, since they also contain religious references; he also feared it would forbid observation of the national holidays of Thanksgiving and Christmas.

The Elk Grove School District quickly announced that it would appeal Newdow II to the Supreme Court. On March 4, 2003, the Ninth Circuit stayed its decision for ninety days; if the school district files an appeal with the Supreme Court within the ninety days, the stay will be extended until the Court acts on the case.

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74 Newdow II, 2003 WL 554742, at *20 (concluding that Congress and the President intended the religious words to be recited by schoolchildren).

80 Id. at *3-*13 (O'Scannlain, J., dissenting).
MEDICAL MARIJUANA

Marcus CONANT, Dr.; Donald Northfelt, Dr.; Debashish Tripathy, Dr.; Neil Flynn, Dr.; Stephen Follansbee, Dr.; Stephen O'Brien, Dr.; Milton Estes, Dr.; Jo Daly; Keith Vines; Judith Cushner; Valerie Corral; Bay Area Physicians for Human Rights; Being Alive: People with HIV/AIDS Action Coalition, Inc.; Howard Maccabee, Dr.; Daniel Kane; Allan Flach, Dr.; Michael Ferrucci, Plaintiffs-Appellees,

v.

John P. WALTERS, Director of the White House Office of National Drug Control Policy; Asa Hutchinson, Administrator, U.S. DEA; John Ashcroft, Attorney General of the United States; Tommy G. Thompson, Secretary of the Department of Health and Human Services, Defendants-Appellants.

United States Court of Appeals
For the Ninth Circuit.

Argued and Submitted April 8, 2002.
Filed Oct. 29, 2002.

[Excerpt; some footnotes and citations omitted]

SCHROEDER, Chief Judge.

This is an appeal from a permanent injunction entered to protect First Amendment rights. The order enjoins the federal government from either revoking a physician's license to prescribe controlled substances or conducting an investigation of a physician that might lead to such revocation, where the basis for the government's action is solely the physician's professional "recommendation" of the use of medical marijuana. The district court's order and accompanying opinion are at Conant v. McCaffrey, 2000 WL 1281174 (N.D.Cal. Sept.7, 2000). The history of the litigation demonstrates that the injunction is not intended to limit the government's ability to investigate doctors who aid and abet the actual distribution and possession of marijuana. 21 U.S.C. § 841(a). The government has not provided any empirical evidence to demonstrate that this injunction interferes with or threatens to interfere with any legitimate law enforcement activities. Nor is there any evidence that the similarly phrased preliminary injunction that preceded this injunction, Conant v. McCaffrey, 172 F.R.D. 681 (N.D.Cal.1997), which the government did not appeal, interfered with law enforcement. The district court, on the other hand, explained convincingly when it entered both the earlier preliminary injunction and this permanent injunction, how the government's professed enforcement policy threatens to interfere
with expression protected by the First Amendment. We therefore affirm.

I. The Federal Marijuana Policy

The federal government promulgated its policy in 1996 in response to initiatives passed in both Arizona and California decriminalizing the use of marijuana for limited medical purposes and immunizing physicians from prosecution under state law for the "recommendation or approval" of using marijuana for medical purposes. See Cal. Health & Safety Code § 11362.5. The federal policy declared that a doctor's "action of recommending or prescribing Schedule I controlled substances is not consistent with the 'public interest' (as that phrase is used in the federal Controlled Substances Act)" and that such action would lead to revocation of the physician's registration to prescribe controlled substances.4

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II. Litigation History

Plaintiffs are patients suffering from serious illnesses, physicians licensed to practice in California who treat patients with serious illnesses, a patient's organization, and a physician's organization. The patient organization is Being Alive: People with HIV/AIDS Action Coalition, Inc. The physician's organization is the Bay Area Physicians for Human Rights. Plaintiffs filed this action in early 1997 to enjoin enforcement of the government policy insofar as it threatened to punish physicians for communicating with their patients about the medical use of marijuana. The case was originally assigned to District Judge Fern Smith, who presided over the case for more than two years. After Judge Smith received the parties' briefs, she issued a temporary restraining order, certified a plaintiff class, denied the government's motion to dismiss, issued a preliminary injunction, awarded interim attorney's fees to plaintiffs, and set the briefing schedule for discovery.

Judge Smith entered the preliminary injunction on April 30, 1997. It provided that the government "may not take administrative action against physicians for recommending marijuana unless the government in good faith believes that it has substantial evidence" that the physician aided and abetted the purchase, cultivation, or possession of marijuana, 18 U.S.C. § 2, or engaged in a conspiracy to cultivate, distribute, or possess marijuana, 21 U.S.C. § 846. Id. at 700. Judge Smith specifically enjoined the "defendants, their agents, employees, assigns, and all persons acting in concert or participating with them, from threatening or prosecuting physicians, [or] revoking their licenses ... based upon conduct relating to medical marijuana that does not rise to the level of a criminal offense." Id. at 701. The preliminary injunction covered not only "recommendations," but also "non-criminal activity related to those recommendations, such as providing a copy of a patient's medical chart to that patient or testifying in court regarding a recommendation that a patient use marijuana to treat an illness." Id. at 701 n. 8.

4 The policy was entitled "The Administration's Response to the Passage of California Proposition 215 and Arizona Proposition 200" and was released on December 30, 1996, by Barry R. McCaffrey, the Director of the Office of National Drug Control Policy ("ONDCP") at the time. The Administration's Response was promulgated by an interagency working group that included the ONDCP; the Drug Enforcement Administration ("DEA"); the Department of Justice ("DOJ"); the Department of Health and Human Services ("HHS"); the Nuclear Regulatory Commission; and the Departments of Treasury, Defense, Transportation, and Education.
The government did not appeal the preliminary injunction, and it remained in effect after the case was transferred more than two years later to Judge Alsup on August 19, 1999. Judge Alsup in turn granted a motion to modify the plaintiff class, held a hearing on motions for summary judgment, granted in part and denied in part the cross-motions for summary judgment, dissolved the preliminary injunction, and entered a permanent injunction. The class was modified to include only those patients suffering from specific symptoms related to certain illnesses and physicians who treat such patients. The permanent injunction appears to be functionally the same as the preliminary injunction that Judge Smith originally entered. It provides that the government is permanently enjoined from:

(i) revoking any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on a sincere medical judgment and (ii) from initiating any investigation solely on that ground. The injunction should apply whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law.

In explaining his reasons for entering the injunction, Judge Alsup pointed out that there was substantial agreement between the parties as to what doctors could and could not do under the federal law. Id. at *11. The government agreed with plaintiffs that revocation of a license was not authorized where a doctor merely discussed the pros and cons of marijuana use. Id. The court went on to observe that the plaintiffs agreed with the government that a doctor who actually prescribes or dispenses marijuana violates federal law. The fundamental disagreement between the parties concerned the extent to which the federal government could regulate doctor-patient communications without interfering with First Amendment interests. Id. This appeal followed.

III. Discussion

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The dispute in the district court in this case focused on the government's policy of investigating doctors or initiating proceedings against doctors only because they "recommend" the use of marijuana. While the government urged that such recommendations lead to illegal use, the district court concluded that there are many legitimate responses to a recommendation of marijuana by a doctor to a patient. There are strong examples in the district court's opinion supporting the district court's conclusion. For example, the doctor could seek to place the patient in a federally approved, experimental marijuana-therapy program. Id. at *15. Alternatively, the patient upon receiving the recommendation could petition the government to change the law. Id. at *14. By chilling doctors' ability to recommend marijuana to a patient, the district court held that the prohibition compromises a patient's meaningful participation in public discourse. Id. The district court stated:

Petitioning Congress or federal agencies for redress of a grievance or a change in policy is a time-honored tradition. In the marketplace of ideas, few questions are more deserving of free-speech protection than whether regulations affecting health and welfare are sound public policy. In the debate, perhaps the status quo will (and should) endure. But patients and physicians are certainly entitled to urge their view. To
hold that physicians are barred from communicating to patients sincere medical judgments would disable patients from understanding their own situations well enough to participate in the debate. As the government concedes, many patients depend upon discussions with their physicians as their primary or only source of sound medical information. Without open communication with their physicians, patients would fall silent and appear uninformed. The ability of patients to participate meaningfully in the public discourse would be compromised.

On appeal, the government first argues that the "recommendation" that the injunction may protect is analogous to a "prescription" of a controlled substance, which federal law clearly bars. We believe this characterizes the injunction as sweeping more broadly than it was intended or than as properly interpreted. If, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law. That, the injunction is intended to avoid. Indeed the predecessor preliminary injunction spelled out what the injunction did not bar; it did not enjoin the government from prosecuting physicians when government officials in good faith believe that they have "probable cause to charge under the federal aiding and abetting and/or conspiracy statutes." 172 F.R.D. at 701.

The plaintiffs themselves interpret the injunction narrowly, stating in their brief before this Court that, "the lower court fashioned an injunction with a clear line between protected medical speech and illegal conduct." They characterize the injunction as protecting "the dispensing of information," not the dispensing of controlled substances, and therefore assert that the injunction does not contravene or undermine federal law.

As Judge Smith noted in the preliminary injunction order, conviction of aiding and abetting requires proof that the defendant "associate[d] himself with the venture, that he participate[d] in it as something that he wishe[d] to bring about, that he [sought] by his actions to make it succeed." 172 F.R.D. at 700 (quoting Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 190, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (internal quotation marks and citation omitted)). This is an accurate statement of the law. We have explained that a conviction of aiding and abetting requires the government to prove four elements: "(1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." See United States v. Gaskins, 849 F.2d 454, 459 (9th Cir.1988). The district court also noted that conspiracy requires that a defendant make "an agreement to accomplish an illegal objective and [that he] knows of the illegal objective and intends to help accomplish it." 172 F.R.D. at 700-01 (citing United States v. Gil, 58 F.3d 1414, 1423 & n. 5 (9th Cir.1995)).

The government on appeal stresses that the permanent injunction applies "whether or not the doctor anticipates that the patient will, in turn, use his or her recommendation to obtain marijuana in violation of federal law," and suggests that the injunction thus
protects criminal conduct. A doctor's anticipation of patient conduct, however, does not translate into aiding and abetting, or conspiracy. A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. See Gaskins, 849 F.2d at 459. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana. See Gil, 58 F.3d at 1423. Holding doctors responsible for whatever conduct the doctor could anticipate a patient might engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.

The government also focuses on the injunction's bar against "investigating" on the basis of speech protected by the First Amendment and points to the broad discretion enjoyed by executive agencies in investigating suspected criminal misconduct. The government relies on language in the permanent injunction that differs from the exact language in the preliminary injunction. The permanent injunction order enjoins the government "from initiating any investigation solely on" the basis of "a recommendation for the use of medical marijuana based on a sincere medical judgment." Conant, 2000 WL 1281174, at *16. The preliminary injunction order provided that "the government may not take administrative action against physicians for recommending marijuana unless the government in good faith believes that it has substantial evidence of [conspiracy or aiding and abetting]." 172 F.R.D. at 701.

The government, however, has never argued that the two injunctive orders differ in any material way. Because we read the permanent injunction as enjoining essentially the 13 same conduct as the preliminary injunction, we interpret this portion of the permanent injunction to mean only that the government may not initiate an investigation of a physician solely on the basis of a recommendation of marijuana within a bona fide doctor-patient relationship, unless the government in good faith believes that it has substantial evidence of criminal conduct. Because a doctor's recommendation does not itself constitute illegal conduct, the portion of the injunction barring investigations solely on that basis does not interfere with the federal government's ability to enforce its laws.

The government policy does, however, strike at core First Amendment interests of doctors and patients. An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege. See Fed.R.Evid. 501.

The doctor-patient privilege reflects "the imperative need for confidence and trust" inherent in the doctor-patient relationship and recognizes that "a physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). The Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality) (recognizing physician's First Amendment right not to speak); Rust v. Sullivan, 500 U.S. 173, 200,
111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (noting that regulations on physician speech may "impinge upon the doctor-patient relationship").

This Court has also recognized the core First Amendment values of the doctor-patient relationship. In Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043 (9th Cir.2000), we recognized that communication that occurs during psychoanalysis is entitled to First Amendment protection. Id. at 1054. We upheld California's mental health licensing laws that determined when individuals qualified as mental health professionals against a First Amendment challenge. Id. at 1053-56. Finding the laws content-neutral, we noted that California did not attempt to "dictate the content of what is said in therapy" and did not prevent licensed therapists from utilizing particular "psychoanalytical methods." Id. at 1055-56.


In its most recent pronouncement on regulating speech about controlled substances, Thompson v. Western States Medical Ctr., 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002), the Supreme Court found that provisions in the Food and Drug Modernization Act of 1997 that restricted physicians and pharmacists from advertising compounding drugs violated the First Amendment. Id. at 1500. The Court refused to make the "questionable assumption that doctors would prescribe unnecessary medications" and rejected the government's argument that "people would make bad decisions if given truthful information about compounded drugs." Id. at 1507. The federal government argues in this case that a doctor-patient discussion about marijuana might lead the patient to make a bad decision, essentially asking us to accept the same assumption rejected by the Court in Thompson. Id. We will not do so. Instead, we take note of the Supreme Court's admonition in Thompson: "If the First Amendment means anything, it means that regulating speech must be a last--not first--resort. Yet here it seems to have been the first strategy the Government thought to try." Id.

The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient. Such condemnation of particular views is especially troubling in the First Amendment context. "When the government targets not subject matter but particular views taken by speakers on a
subject, the violation of the First Amendment is all the more blatant." Rosenberger v. Rector, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).


The government's policy is materially similar to the limitation struck down in Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001), that prevented attorneys from "present[ing] all the reasonable and well-grounded arguments necessary for proper resolution of the case." 531 U.S. at 545, 121 S.Ct. 1043. In Velazquez, a government restriction prevented legal assistance organizations receiving federal funds from challenging existing welfare laws. Id. at 537-38, 121 S.Ct. 1043. Like the limitation in Velazquez, the government's policy here "alter[s] the traditional role" of medical professionals by "prohibit[ing] speech necessary to the proper functioning of those systems." Id. at 544, 121 S.Ct. 1043.

The government relies upon Rust and Casey to support its position in this case. Rust, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233; Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674. However, those cases did not uphold restrictions on speech itself. Rust upheld restrictions on federal funding for certain types of activity, including abortion counseling, referral, or advocacy. See Rust, 500 U.S. at 179-80, 111 S.Ct. 1759. In Casey, a plurality of the Court upheld Pennsylvania's requirement that physicians' advice to patients include information about the health risks associated with an abortion and that physicians provide information about alternatives to abortion. 505 U.S. at 883-84, 112 S.Ct. 2791. The plurality noted that physicians did not have to comply if they had a reasonable belief that the information would have a "severely adverse effect on the physical or mental health of the patient," and thus the statute did not "prevent the physician from exercising his or her medical judgment." Id. The government's policy in this case does precisely that.

The government seeks to justify its policy by claiming that a doctor's "recommendation" of marijuana may encourage illegal conduct by the patient, which is not unlike the argument made before, and rejected by, the Supreme Court in a recent First Amendment case. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S.Ct. 1389, 1403, 152 L.Ed.2d 403 (2002). In Free Speech Coalition, the government defended the Child Pornography Prosecution Act of 1996 by arguing that, although virtual child pornography does not harm children in the production process, it threatens them in "other, less direct, ways." Id. at 1397. For example, the government argued pedophiles might use such virtual images to encourage children to participate in sexual activity. Id. The Supreme Court rejected such justifications, holding that the potential harms were too attenuated from the proscribed speech. "Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage ... illegal conduct." Id. at 1403. The government's argument in this case mirrors the argument rejected in Free Speech Coalition.

The government also relies on a case in which a district court refused to order an injunction against this federal drug policy. See Pearson v. McCaffrey, 139 F.Supp.2d 113, 125 (D.D.C.2001). The court did so, however, because the plaintiffs in that case did not factually support their claim that the
policy chilled their speech. See id. at 120. In this case, the record is replete with examples of doctors who claim a right to explain the medical benefits of marijuana to patients and whose exercise of that right has been chilled by the threat of federal investigation. The government even stipulated in the district court that a "reasonable physician would have a genuine fear of losing his or her DEA registration to dispense controlled substances if that physician were to recommend marijuana to his or her patients."

To survive First Amendment scrutiny, the government's policy must have the requisite "narrow specificity." See Button, 371 U.S. at 433, 83 S.Ct. 328. Throughout this litigation, the government has been unable to articulate exactly what speech is proscribed, describing it only in terms of speech the patient believes to be a recommendation of marijuana. Thus, whether a doctor-patient discussion of medical marijuana constitutes a "recommendation" depends largely on the meaning the patient attributes to the doctor's words. This is not permissible under the First Amendment. See Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). In Thomas, the court struck down a state statute that failed to make a clear distinction between union membership, solicitation, and mere "discussion, laudation, [or] general advocacy." The distinction rested instead on the meaning the listeners attributed to spoken words. Id. The government's policy, like the statute in Thomas, leaves doctors and patients "no security for free discussion." Id. As Judge Smith appropriately noted in granting the preliminary injunction, "when faced with the fickle iterations of the government's policy, physicians have been forced to suppress speech that would not rise to the level of that which the government constitutionally may prohibit." 172 F.R.D. at 696.

Our decision is consistent with principles of federalism that have left states as the primary regulators of professional conduct. See Whalen v. Roe, 429 U.S. 589, 603 n. 30, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (recognizing states' broad police powers to regulate the administration of drugs by health professionals); Linder v. United States, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819 (1925) ("direct control of medical practice in the states is beyond the power of the federal government"). We must "show [ ] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." Oakland Cannabis, 532 U.S. at 501, 121 S.Ct. 1711 (Stevens, J., concurring) (internal quotation marks omitted).

For all of the foregoing reasons, we affirm the district court's order entering a permanent injunction.

AFFIRMED.

KOZINSKI, Circuit Judge, concurring:

I am pleased to join Chief Judge Schroeder's opinion. I write only to explain that for me the fulcrum of this dispute is not the First Amendment right of the doctors. That right certainly exists and its impairment justifies the district court's injunction for the reasons well explained by Chief Judge Schroeder. But the doctors' interest in
giving advice about the medical use of marijuana is somewhat remote and impersonal; they will derive no direct benefit from giving this advice, other than the satisfaction of doing their jobs well. At the same time, the burden of the federal policy the district court enjoined falls directly and personally on the doctors: By speaking candidly to their patients about the potential benefits of medical marijuana, they risk losing their license to write prescriptions, which would prevent them from functioning as doctors. In other words, they may destroy their careers and lose their livelihoods.

This disparity between benefits and burdens matters because it makes doctors peculiarly vulnerable to intimidation; with little to gain and much to lose, only the most foolish or committed of doctors will defy the federal government's policy and continue to give patients candid advice about the medical uses of marijuana. Those immediately and directly affected by the federal government's policy are the patients, who will be denied information crucial to their well-being, and the State of California, whose policy of exempting certain patients from the sweep of its drug laws will be thwarted. In my view, it is the vindication of these latter interests—those of the patients and of the state—that primarily justifies the district court's highly unusual exercise of discretion in enjoining the federal defendants from even investigating possible violations of the federal criminal laws.

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2 As Alice Pasetta Mead explained in her expert report:

"Physicians are particularly easily deterred by the threat of governmental investigation and/or sanction from engaging in conduct that is entirely lawful and medically appropriate.... A physician's practice is particularly dependent upon the physician's maintaining a reputation of unimpeachable integrity. A physician's career can be effectively destroyed merely by the fact that a governmental body has investigated his or her practice...."

The federal government's policy had precisely this effect before it was enjoined by the district court. Dr. Milton N. Estes, Associate Clinical Professor in the Department of Obstetrics, Gynecology and Reproductive Medicine at the University of California-San Francisco (UCSF), reports:

"As a result of the government's public threats, I do not feel comfortable even discussing the subject of medical marijuana with my patients. I feel vulnerable to federal sanctions that could strip me of my license to prescribe the treatments my patients depend upon, or even land me behind bars.... Because of these fears, the discourse about medical marijuana has all but ceased at my medical office.... My patients bear the brunt of this loss in communication."

And Dr. Stephen O'Brien, former co-director of UCSF HIV Managed Care, similarly notes:

"Due to fear caused by these threats, I feel compelled and coerced to withhold information, recommendations, and advice to patients regarding use of medical marijuana.... I am fearful and reluctant to engage in even limited communications regarding medical marijuana."
9TH CIRCUIT BACKS DOCTORS’ RIGHT TO DISCUSS MARIJUANA

The Recorder

October 30, 2002

Jason Hoppin

Doctors can advise their patients about medical marijuana without fear of criminal prosecution or losing their ability to write prescriptions, the Ninth Circuit U.S. Court of Appeals ruled Tuesday.

The decision was met with unbridled enthusiasm by medical marijuana supporters angered by the federal government's recent crackdown on marijuana dispensaries, and comes as the debate about medical benefits of the drug appears to be heating up. It also preserves a key underpinning of Proposition 215, California's medical marijuana initiative.

"The [government's] policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient," wrote Chief Judge Mary Schroeder. "Such condemnation of particular views is especially troubling in the First Amendment context."

She was joined in Conant v. Walters, 02 C.D.O.S. 10709, by Senior Judge Betty Fletcher and Judge Alex Kozinski, who wrote a broader concurrence providing arguments that could be used to defend state medical marijuana initiatives.

"The Commerce Clause limits the scope of national power, while the commandeering doctrine limits how Congress may use the power it has," Kozinski wrote. "These checks work in tandem to ensure that the federal government legislates in areas of truly national concern, while the states retain independent power to regulate areas better suited to local governance.

"Medical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce."

The case arose after federal authorities sent medical associations a letter threatening to revoke doctors' Drug Enforcement Agency registrations if they enabled patients to obtain marijuana. Without a DEA registration, doctors can't write prescriptions of any kind.

Represented by the American Civil Liberties Union's Drug Policy Litigation Project, a group of patients, health care groups and doctors including one who was being investigated by the DEA - sought an injunction to prevent the government from going after doctors.

One of the plaintiffs in the case is Valerie Corral, director of Santa Cruz County's Wo/Men's Alliance for Medical Marijuana. WAMM was the target of a raid last month by DEA agents, touching off protests at federal buildings around the Bay Area.

Agents confiscated 167 marijuana plants and arrested Corral and her husband, but the couple was later released when no charges were forthcoming from the U.S. attorney's office. Corral has since sued for the return of the plants. Meanwhile, criminal charges could still be brought against her.

Corral said she has used marijuana for more than 25 years to combat epileptic seizures that
once made her life "hellish." She said she didn't respond to normal medications.

"It's made all the difference in my life," Corral said.

She still worries about the possibility of federal prison, but said, "When you live in the prison of illness, it reduces the concept of risk."

A Time/CNN poll released Tuesday showed that 80 percent of Americans favor allowing those in need access to medical marijuana. The poll was released in conjunction with a Time magazine cover story about the ongoing controversies and a ballot measure asking Nevada voters whether to legalize the possession of marijuana.

Corral's first appearance in her suit against the DEA is scheduled for a federal courtroom Monday. She and her lawyer, Santa Clara University law professor Gerald Uelmen, said Kozinski's concurrence will give her arguments more weight.

"I'm Xeroxing it for Judge [Jeremy] Fogel," Uelman said. "We're going to rely on it in our arguments."

Uelmen has said that Corral's case is a vehicle for unique arguments not raised before, since patients at least those who are able - help grow the marijuana at WAMM, and no money changes hands.

DEA spokesman Richard Meyer said DEA lawyers in Washington, D.C., were reviewing the decision. "That's all we have for now," Meyer said.

"All we're saying is that we're reviewing the matter," said Susan Dryden, a Department of Justice spokeswoman.

Kozinski pointed out that what the government sought to do would nullify Prop 215, since state voters decided that the line between legal and illegal marijuana use rests in the hands of doctors.

The majority opinion made it clear, though, that doctors could still face prosecution if they write a note for the sole purpose of helping patients procure illegal substances.

"If, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law," Schroeder clarified.

Schroeder and U.S. District Judge William Alsup, author of the permanent injunction at issue in the case, noted that there are several legitimate reasons for doctors to recommend marijuana. The patient could seek to participate in a government-sanctioned medical marijuana program or petition the government to change the law.

In California, many medical marijuana dispensaries require a written recommendation from a doctor. Graham Boyd, director of the Drug Policy Litigation Project, disputed that a written recommendation could make doctors criminally liable.

"No, it wouldn't, as long as it's a recommendation," Boyd said.
White House Escalates Pot War / It Asks High Court to let Doctors be Punished

The San Francisco Chronicle

July 11, 2003

Bob Egelko

The Bush administration, pressing its campaign against state medical marijuana laws, has asked the U.S. Supreme Court to let federal authorities punish California doctors who recommend pot to their patients. The administration would revoke the federal prescription licenses of doctors who tell their patients marijuana would help them, a prerequisite for obtaining the drug under the state's voter-approved medical marijuana law.

Justice Department lawyers this week asked the high court to take up the issue in its next term, which begins in October. The department is appealing a ruling by an appellate court in San Francisco that said the proposed penalties would violate the freedom of speech of both doctors and patients.

If the justices agree to review the case, it would be their first look at medical marijuana since May 2001, when they upheld the federal government's authority to close down a pot dispensary in Oakland and others in the state.

The October decision by the U.S. Court of Appeals in San Francisco "effectively licensed physicians to treat patients with prohibited substances" and interfered with the government's authority "to enforce the law in an area vital to the public health and safety," Justice Department lawyers Mark Stern and Colette Matzzie wrote in court papers.

The appeal "is a sign that this administration will do everything they can to defeat the will of the voters of California and many other states," said Graham Boyd, an American Civil Liberties Union lawyer for doctors, patients and AIDS support groups. Those groups sued the federal government in 1997 over the policy, which the Clinton administration originally introduced but later decided not to pursue.

STATE LAWS WOULD BE MOOT

If the Supreme Court takes the case and ultimately rules in the government's favor, Boyd said, "it would make all of the states' marijuana laws a dead letter. . . . If a physician can't recommend marijuana, then no patient can qualify" to use it under state law.

The federal action was in response to California voters' 1996 approval of Proposition 215. The initiative, a trailblazer for laws in eight other states, allows seriously ill patients to use marijuana with their doctors' approval. Prop. 215 specified that the approval would take the form of a recommendation rather than a formal prescription.

The federal government, which classifies marijuana in the same prohibited category as heroin -- drugs with a high potential for abuse and no medical value -- has fought Prop. 215 since its passage. The reaction began under former President Bill Clinton and has escalated under President Bush, whose drug enforcers have raided local pot clubs and filed criminal charges against their suppliers.
The Bush administration also revived the effort to target doctors' federal licenses, which started under the Clinton administration. When a federal judge issued a permanent injunction against the policy in 2000, Clinton's Justice Department did not appeal, but the new administration took up the case after taking office in 2001.

Under the administration's policy, doctors who recommended marijuana would lose their licenses to prescribe federally regulated narcotics. Doctors in many fields need federal licenses to remain in practice.

GIVING ADVICE RULED LEGAL

The government's attempt to enforce the policy was rejected in October by the U.S. Court of Appeals in San Francisco.

In the 3-0 appellate decision, Chief Judge Mary Schroeder said federal authorities can prosecute doctors for helping patients acquire illegal drugs, but not for simply giving medical advice that might let a patient obtain marijuana.

She said the federal policy clashed not only with free speech but also with the states' traditional authority over the practice of medicine. That issue is central to another case now pending before the appeals court, involving Attorney General John Ashcroft's attempt to punish doctors who prescribe lethal drugs for patients under Oregon's assisted-suicide law.

The Justice Department's Supreme Court appeal argues that a physician's "recommendation" under California law is the equivalent of a prescription for illegal drugs, an action the government can forbid without violating free speech.

Department lawyers said the federal policy would not penalize a doctor for merely discussing marijuana with a patient -- as long as the doctor makes it clear that the drug is illegal under federal law, that federal authorities consider it dangerous and medically useless, and that the doctor is not recommending it.

'WAR AGAINST PATIENTS'

News of the administration's appeal dismayed two patients who are plaintiffs in the lawsuit.

"I wish the government would stop this war against patients and doctors," said Keith Vines, 53, a San Francisco assistant district attorney who lost 50 pounds and nearly died from a wasting syndrome associated with AIDS. He credits medical marijuana with restoring his appetite and saving his life.

"Medical marijuana is keeping me with the ability to continue treatment," said Judith Cushner, 58, director of Laurel Hill Nursery School in San Francisco, who is undergoing chemotherapy after suffering a relapse of breast cancer. The government's bid for Supreme Court intervention, she said, is "absolutely frightening.". The case is Walters vs. Conant, No. 03-40.
THE MEDICAL NECESSITY DEFENSE AND DE MINIMIS PROTECTION FOR PATIENTS WHO WOULD BENEFIT FROM USING MARIJUANA FOR MEDICAL PURPOSES: A PROPOSAL TO ESTABLISH COMPREHENSIVE PROTECTION UNDER FEDERAL DRUG LAWS

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Ronald Timothy Fletcher

[Excerpt; some footnotes omitted]

[M]arijuana, in its natural form, is one of the safest therapeutically active substances known to man .... One must reasonably conclude that there is accepted safety for use of marijuana under medical supervision. To conclude otherwise, on the record, would be unreasonable, arbitrary, and capricious.1

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C. Attempts to Effectuate Change in the System

1. State-Based Initiatives

The states and their citizens have responded to the federal government’s classification of marijuana into Schedule I by enacting initiatives allowing for the use of medicinal marijuana under the relevant state laws. California and Arizona have led this movement by enacting laws allowing the use of medicinal marijuana in 1996.89 Numerous other states have followed their example by enacting their own versions of medicinal marijuana reforms. Significantly, current President George W. Bush has gone on record in support of states’ rights to determine for themselves how to address this issue.91 Moreover, Representative Barney Frank, a Democrat from Massachusetts, has introduced a proposal into the United States House of Representatives that calls for the rescheduling of marijuana from Schedule I to Schedule II.

However, many Americans remain opposed to the idea of allowing marijuana to be prescribed as medicine. Many fear that marijuana acts as a


89 California’s law was a direct result of the voter support of Proposition 215. Cal. Health & Safety Code § 11362.5 (West Supp. 2002). It is known as the Compassionate Use

91 Susan Feeney, Bush Backs States’ Rights on Marijuana: He Opposes Medical Use But Favors Local Control, DALLAS MORNING NEWS, Oct. 20, 1999, at 6A. Then Governor of Texas, Mr. Bush stated, “I believe each state can choose that decision as they so choose.” Id.
gateway drug to more serious drugs, such as heroin or cocaine. Others are concerned with the possible deleterious physiological effects that result from the usage of marijuana. Similarly, those opposed to medicinal marijuana note the increase in drug use by teenagers, the increase in marijuana-related emergency room visits, and the increase in the numbers of babies born addicted to drugs.

Critics of medicinal marijuana also point to the costs of marijuana on society as a whole. First, the illegal drug trade has had a negative impact on the natural environment. Secondly, there is a concern about the possibility of increased accidents in the workplace that would be caused by marijuana users. Thirdly, many fear that if any of the restrictions on marijuana are reduced the result would be an increase in crime. Similarly, those opposed have noted that, because of such an increase in crime, many doctors would refuse to prescribe medicinal marijuana simply because they would not want to be associated with any perception of criminal activity. The concerns of those opposed to medicinal marijuana are valid, and, as such, any proposal for change would need to address these concerns properly in order to maintain any semblance of legitimacy.

2. Lobbying Groups and the Courts

Over the years, lobbying groups such as the National Organization for the Reform of Marijuana Laws ("NORML") and the Alliance for Cannabis Therapeutics have attempted to use the judicial system to change the application of marijuana laws in the United States.107 In one case, NORML sought to have marijuana removed entirely from the Controlled Substances Act or to at least have marijuana reclassified from Schedule I to Schedule V. The Director of the Bureau of Narcotics and Dangerous Drugs, under a delegation of authority from the Attorney General, refused NORML's request. NORML then brought suit challenging the Director's ruling. The court held that the Attorney General was within his authority to refuse NORML's request.

In a later proceeding involving the same parties, the determination of the Administrator of the Drug Enforcement Agency that marijuana had no currently accepted medical use was challenged.108 The court found the Administrator's interpretation of the statute to be a reasonable one. As of yet, these lobbying groups have been unsuccessful in their attempts to use the court system to have marijuana reclassified into a lower schedule under the Controlled Substances Act. Because marijuana remains classified in Schedule I, those who are arrested must rely on other novel approaches, including the First Amendment and the medical necessity defense, in order to attempt to prevent their criminal prosecution under the current state of the law.

4. The Medical Necessity Defense

The necessity defense has been characterized as a choice between two evils.116 The necessity

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108 Alliance for Cannabis Therapeutics, 930 F.2d at 937. The Administrator found that only a "respectable minority" of physicians adhered to the use of marijuana as medical treatment. Id. at 938. The Administrator ruled that this "respectable minority" was not conclusory evidence to show that there was a currently accepted medicinal use for marijuana. Id.

116 United States v. Bailey, 444 U.S. 394, 410 (1980) (noting that "the defense of necessity, or choice of evils,
defense was created and recognized under the common law. Modern courts, however, have not been receptive to the medical necessity defense when used as a defense for marijuana possession. One of the more significant difficulties defendants have had in asserting this defense is that the courts appear to be hostile to the idea that there are no alternatives available other than medicinal marijuana. Another significant difficulty in asserting a necessity defense for medical reasons is that marijuana remains classified as a Schedule I controlled substance, which carries the presumption that it has no medically accepted purpose or use.

The United States Supreme Court recently handed down a decision regarding the medicinal use of marijuana in United States v. Oakland Cannabis Buyers' Cooperative. In reviewing the federal drug laws, the Court found no implied medical necessity exception to the prohibition on the manufacturing and distribution of medicinal marijuana as established in the Controlled Substances Act. The Court did not, however, rule on whether the same defense would be available for those accused of possession of marijuana. Many agree that the Supreme Court's decision will create additional litigation. Moreover, disagreement on this issue will not subside without distinguishing the proper role of states' rights and the regulatory power of the United States Congress.

D. The Role of Federalism

Federalism refers to a system of government, like that of the United States, in which governmental power is divided among a national government and individual states. The result of this form of government is a great variety in both procedural and substantive laws and rights. The Framers of the United States Constitution saw this balance of powers as necessary to relieve symptoms resulting from multiple sclerosis.

117 State v. Hastings, 801 P.2d 563, 564 (Idaho 1990). In Hastings, the Idaho Supreme Court held that Idaho law was not a bar to the use of the defense of necessity. Id. The court remanded the case to allow a jury to consider the application of the necessity defense to a woman who was arrested for possessing marijuana that she used to treat her rheumatoid arthritis. Id. at 565. The court noted that

118 See generally United States v. Burton, 894 F.2d 188, 191 (6th Cir. 1990) (holding that the medical necessity defense was unavailable to a man suffering from glaucoma due to the amount of marijuana that he possessed); Spillers v. State, 245 S.E.2d 54, 55 (Ga. Ct. App. 1978) (holding that the medical necessity defense was unavailable for marijuana possession by a man suffering from rheumatoid arthritis); State v. Corrigan, 2001 WL 881394, at *2 (Minn. Ct. App. Aug. 7, 2001) (holding that the medical necessity defense was unavailable for marijuana possession); State v. Tate, 505 A.2d 941, 942, 947 (N.J. 1986) (holding that the medical necessity defense was unavailable to a quadriplegic who used marijuana); State v. Piland, 293 S.E.2d 278, 280 (N.C. Ct. App. 1982) (holding that medical necessity defense was unavailable to a physician who grew marijuana for his patients); State v. Poling, 531 S.E.2d 678, 684-85 (W. Va. 2000) (holding that the medical necessity defense was unavailable to a woman who used marijuana to relieve symptoms resulting from multiple sclerosis).
necessary to avoid any risk of tyranny or abuse from any one entity. Because of their former relationship with England, the Framers' biggest fear was an overpowering central government. As a result, the Bill of Rights was intended to restrain the central government provided for by the Federal Constitution. The Ninth and Tenth Amendments of the Bill of Rights reflect this in their acknowledgment of the retention of rights in both the people and the states. Thus, citizens at this time looked to their state constitutions for protection of their rights. However, the passage of the Fourteenth Amendment established that Americans have a dual citizenship in both the United States and their individual states. Moreover, the Fourteenth Amendment also worked as a restriction on the states' power to prevent them from infringing on the liberties that dual citizenship provided.

After passage of the Fourteenth Amendment, the United States Supreme Court began the process of selectively incorporating rights guaranteed by the Bill of Rights into the Fourteenth Amendment, thus making them applicable to the states. This process of incorporation was incremental, and, as a result, very few provisions of the Bill of Rights became binding on the states. During the 1960s, however, the Supreme Court became more active and extended nine provisions of the Bill of Rights to the states. The result of this judicial activism was that states now have become deeply involved in the application of federal law. Many scholars have noted that this shift has been detrimental to individuals who attempt to assert their rights under the United States Constitution because state constitutions often provide more expansive protections. Even the United States Supreme Court has recognized this in Michigan v. Long.139

The states, however, are not unrestrained in their provision of rights and protections. The states remain bound by the Supremacy Clause, which requires state action to comply with laws passed by Congress and with the interpretations of those laws by the United States Supreme Court. Similarly, state courts are also bound by the Supremacy Clause when exercising their discretion in fashioning equitable relief. It is this delicate balance of powers which has led to the current stalemate involving medicinal marijuana.

On occasion, the United States Supreme Court has determined that Congress has overstepped its Commerce Clause powers and, thus, has invalidated certain federal statutes.142 For many years, the Supreme Court had been more deferential to congressional action. However, recent decisions indicate that the Supreme Court has become more aggressive in reviewing congressional action. In United States v. Lopez, the Court established a paradigm for reviewing federal statutes based on Congress' Commerce Clause powers. The Court began by noting three broad categories of activity that Congress is permitted to regulate. The three categories include: first, the use of the channels of interstate commerce; second, the instrumentalities of interstate commerce, or persons or things in interstate commerce; and third, economic activities that substantially affect interstate commerce.

The Court has determined that congressional action must contain a jurisdictional element in order to show some nexus between the activity to be regulated and interstate commerce. Furthermore, it was also determined that

139 463 U.S. 1032, 1033 (1982) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, this Court will not undertake to review the decision.").

legislative findings regarding the effects that the regulated activity has on interstate commerce would be relevant. The Court noted that, while formal findings are normally not required, they would assist in evaluating the constitutionality of congressional action. Subsequently, the Court has established that it is within this framework that it will review legislative enactments. However, the Court did assert that it will not invalidate such enactments unless Congress has clearly exceeded its constitutional bounds.

Some commentators have asserted that Congress has exceeded its constitutional boundaries under the Commerce Clause by enacting the Controlled Substances Act. However, an investigation of the Controlled Substances Act within the framework established by Lopez will demonstrate that Congress has not exceeded its power, but rather that Congress has wrongfully exercised its power. As a result, a new approach must be considered in order to effectuate any changes in medicinal marijuana policy at the federal level.

III. AN ANALYSIS OF THE ATTENDANT PROBLEMS ASSOCIATED WITH CURRENT FEDERAL LAW REGARDING MEDICINAL MARIJUANA

A. Federalism and Medicinal Marijuana

Under the current federal laws and the analytical framework established by the United States Supreme Court, it becomes apparent that the federal government has the power to control this issue. While many states have indicated their desire to be able to allow for medicinal marijuana, it is the federal government that is preventing them from doing so. The Supreme Court has held that Congress may regulate economic activities that substantially affect interstate commerce.

Unlike the statutes involved in Lopez and Morrison that did not regulate activities with any economic effects on interstate commerce, marijuana does have an impact on interstate commerce. In order to see this impact, one can look to the amount of money expended in the enforcement of drug laws. For example, in 1983 the federal budget allocated approximately two billion dollars to the war on drugs, but by 1993 that number had increased to nearly thirteen billion dollars. Moreover, those who would be responsible for prescribing, manufacturing, and distributing medicinal marijuana would be making profits on a substance that has an established market. Thus, marijuana regulation can be seen as more akin to the regulation of the wheat market that was upheld in Wickard v. Filburn.163

The next steps in the Lopez analysis look to the statute to find a jurisdictional element and indications of congressional findings. The Controlled Substances Act provides for both of these items in the text of the Act. The jurisdictional element can be satisfied by noting the flow of controlled substances not only across state lines, but also across international borders. Additionally, the Controlled Substances Act regulates much more than mere possession, unlike the statute in Lopez, which regulated mere possession of guns. Moreover, unlike the statute in Lopez that had no congressional findings, the Controlled Substances Act provides an enumerated list of findings. A particularly significant finding is that it is impossible to differentiate drugs that are manufactured and distributed intrastate from those involved in interstate movement. Thus, under the Lopez analysis, Congress is within its constitutional domain to regulate controlled substances. However, merely recognizing that Congress has the power to regulate does not mean that it has done so in accordance with the will of the people.

163 317 U.S. 111, 128 (1942).
The actions that the states and their citizens have undertaken in an attempt to allow medicinal marijuana to be prescribed are laudable and deserve due credence. However, this activity has been ineffectual because of congressional power to control drugs for the safety and health of the citizens in all states. This Note does not take issue with the federal government's ability to control drugs but rather with the way in which this power has been exercised. Indeed, it is this power of the federal government which must be called upon to effectuate lasting and uniform change to the laws pertaining to medicinal marijuana. Drugs and the regulation thereof involve issues which are more suitable to being dealt with at the federal level because of the federal government's unique national viewpoint. Additionally, there is an international element to the drug issue in that the federal government has the responsibility of controlling drugs that are imported illegally.

Allowing states to decide for themselves how to deal with this issue would result in a patchwork of laws that would create even more problems because the states focus on solving problems within the confines of their borders. For example, if one state allows for medicinal marijuana and another does not, patients may be forced to choose between leaving their prescription at home or not traveling out of state. Similarly, a state that allowed for medicinal marijuana could be faced with an influx of patients wishing to have the opportunity to have a medicinal marijuana prescription. The medicinal use of marijuana is not simply an issue that one state must address, but, rather, it must be addressed at the federal level to ensure uniformity and clarity.
PORTLAND Judges with the 9th U.S. Circuit Court of Appeals led a vigorous debate Wednesday about whether Oregon's physician-assisted suicide law should stand.

The hearing before a three-judge panel was the latest battle over the five-year-old law, which U.S. Attorney General John Ashcroft moved to block in November 2001, drawing a lawsuit by the state.

The panel's decision, expected this summer, could determine whether terminally ill Oregonians who meet certain criteria have the right to end their lives with a doctor's help. Either side could appeal the decision.

Much of the discussion Wednesday centered around the same arguments heard in April, 2002, when U.S. District Judge Robert Jones issued an injunction blocking Ashcroft from trying to prevent doctors from writing lethal prescriptions for terminally ill patients who request the drugs.

"We expect to prevail for ALL the same reasons," said Eli Stutsman, an attorney representing a plaintiff physician and pharmacist in the case, after the hearing.

"This case has not changed. You saw today what you saw a year ago."

Federal lawyers would not comment directly on the hearing, but deputy assistant attorney general Gregory Katsas read a statement.

"Federal law has long authorized physicians to prescribe controlled substances only for legitimate medical purposes," Katsas read. "Assisting suicide is not such a purpose," but appropriate pain management is, he said.

The hearing got off to a running start before a packed courtroom.

Minutes into arguments by Katsas, Judge Richard Tallman cut in with questions about the attorney general's right to regulate states' medical practice an issue at the heart of the case.

And so it went for the rest of the hour, with judges Clifford Wallace and Donald Lay also interrupting lawyers with questions, observations and counter-arguments.

Central to the discussion was the Controlled Substances Act, or CSA, passed by Congress in 1970 to combat illicit drug use, trafficking and diversion.

In his initial attack on the Oregon law, Ashcroft said assisted suicide violates the CSA because it is not a "legitimate medical purpose."
Robert Rocklin, a lawyer for the state, maintained the CSA was intended to incorporate different state medical standards, and that Congress did not intend the CSA to give the attorney general authority to interfere with state medical practices.

Judge Wallace asked hypothetically if the attorney general would have to defer to a state law that allowed chiropractors to give morphine to patients to relax them.

Rocklin answered yes.

But Katsas said controlled substances, which include the lethal barbiturates used in assisting suicide, have been regulated by the federal government for 90 years, and that the attorney general is not required to defer to such "idiosyncratic" state laws as Oregon's.

"The ordinary working assumption is that the application of federal statutes is uniform throughout the nation," he said.

Katsas said the attorney general "affirmatively promotes" pain treatment. "That kind of pain treatment is permissible, even if a collateral consequence is to hasten death," he said.

But the judges said the case for deferring to Ashcroft's interpretation was weakened by inconsistencies between attorney generals.

"Attorney General (Janet) Reno - she went the other way, and presumably within a few months, the new attorney general will go the other way," Judge Lay said.

Reno, a Clinton appointee, decided not to interfere with Oregon's law in 1998.

Outside the courthouse, a small crowd of protesters gathered, some supporting the law, others calling it a slippery slope to legalized euthanasia.

The American Medical Association and the American Nurses Association reject assisted suicide as fundamentally incompatible with the physician's role as healer.

George Eighmey of the Oregon chapter of Compassion in Dying, which supports assisted suicide, said he thinks the panel will uphold Jones' decision if the judges' concerns about two technical issues are satisfied.

One the question of whether either the federal court or the appeals court had jurisdiction of the case - cropped up repeatedly Wednesday.

The other is the issue of "ripeness," or whether the court should get involved before the Ashcroft ruling is enforced.

But the fact that six of nine terminally ill patients who joined the state's lawsuit have died since the case went to court was a persuasive indicator that the case is not premature, Eighmey said.

Doctors and pharmacists "can just wait until their license is jerked and then they can sue, but a patient can't wait," Eighmey said.

Dr. Kenneth Stevens, president of Physicians for Compassionate Care, which advocates against the law, said a ruling against Oregon would not spell the end of the Death with Dignity Act, because doctors still could use drugs and methods not regulated by the CSA to assist suicide, such as insulin.

Salem oncologist Dr. Peter Rasmussen, a plaintiff in the case, disagreed.

"I don't think I would do that and I don't think other Oregon physicians would do it because
there are side-effects and complications," he said.

"With barbiturates, the patient simply falls asleep."

Thirty-eight Oregon residents used the law to end their lives in 2002. They're among 129 people who have done so since the law took effect in 1998, according to state records.

Laurence M. Cruz can be reached at (503) 399-6716 or lcruez@StatesmanJournal.com
PORTLAND, Ore. -- Atty. Gen. John Ashcroft has the right to ban Oregon physicians from prescribing lethal doses of controlled narcotics to terminally ill patients who want to die sooner, Justice Department lawyers argued Wednesday before federal appellate judges.

The drugs doctors prescribe under the state's assisted-suicide law are regulated by the federal Controlled Substances Act, which restricts their use for medical purposes only, said lawyer Gregory G. Katsas. Assisting suicide is not a medical procedure, he said.

The Oregon attorney general's office countered that the federal statute was designed to fight drug trafficking and drug abuse, and not impinge on state medical laws including physician-assisted suicide.

Under Ashcroft's directive, doctors face a "Hobson's choice" because they would be punished for trying to help their dying patients, said attorney Nicholas W. van Aelstyn, representing patients seeking a physician-assisted suicide.

Oregon is the only state in the nation to have an assisted-suicide law, which voters have approved twice since 1994. Under strict guidelines, it allows doctors to prescribe lethal cocktails of narcotics to terminally ill patients who meet specific criteria.

Ashcroft, who opposes assisted suicide, tried to overrule the state law in 2001 by prohibiting doctors from prescribing controlled substances for that purpose.

Oregon and suicide advocates went to court to challenge Ashcroft's directive, and last year, U.S. District Judge Robert Jones ruled that Ashcroft had overstepped his authority by trying to dictate a state's medical practices. Jones issued a permanent injunction blocking Ashcroft's directive.

Ashcroft contested that ruling and a three-judge panel of the U.S. 9th District Court of Appeals heard the challenge Wednesday.

Two judges -- Clifford Wallace and Richard Tallman -- wondered whether physicians could get around Ashcroft's ban by using other drugs, such as insulin.

"Practitioners won't use anything but a controlled substance," answered Eli Stutsman, an attorney representing a physician and pharmacist who are plaintiffs in the case. "You can't meet the standard of care without using controlled substances."

In focusing the legal debate, Tallman said, "The argument is not that the attorney general has prevented assisted suicides, but what drugs to use to assist suicide -- that these are the medicines doctors can use."

"So the question is, may Oregon adopt ... a medical practice that is in federal law prohibited?" Tallman asked.
Katsas acknowledged that states can craft their own medical laws, but he said suicide is not a medical mission, and chastised Oregon for trying to up-end a tradition of medical healing dating back to Hippocrates. Federal regulations on the use of controlled substance trump a state's desire to want to use them for suicide, he said.

After the hearing, Van Aelstyn said, "I'm encouraged that there appeared to be an appreciation for the profoundly difficult situation the patients find themselves in if Ashcroft's directive is allowed to be enforced."

Justice Department attorneys declined comment outside the courtroom, but read a prepared statement. "Physicians have long sworn a sacred oath to 'neither give a deadly drug to anybody if asked for it, nor ... make a suggestion to this effect,'" Assistant Atty. Gen. Robert D. McCallum Jr. said.

"In contrast to assisted suicide, the prescription of controlled substances for pain management has long been recognized as a legitimate medical purpose," he said, "and appropriate pain management serves to protect the terminally ill at the time of their greatest vulnerability and to preserve human life."

To qualify for physician-assisted suicide, an adult must be diagnosed as having a life expectancy of less than six months, and a second doctor must find the patient mentally competent and not suffering from depression. The patient must make two oral requests, and a third in writing, for a physician's assistance, and then wait 15 days before receiving the prescription.

Since 1998, when the law took effect, 129 people in Oregon have committed suicide with prescribed narcotics.

A decision by the panel is expected this summer. Any ruling is likely to be appealed to the full 9th Circuit Court, or directly to the U.S. Supreme Court.
Federal Interference in Assisted Suicide

New York Times

March 27, 2002

The state of Oregon and the Bush administration collided in court last week on the sensitive issue of physician-assisted suicide. The hearing provided sad evidence of the administration's willingness to misuse a law designed to control illicit drugs to prevent doctors from carrying out the wishes of Oregon voters that lethal drugs be provided to terminally ill patients under tightly regulated circumstances.

Oregon voters approved the Death With Dignity Act by a narrow margin in 1994 and reaffirmed it by a 60-to-40 margin in 1997, but right-to-life and conservative religious groups have been trying to overturn the law ever since. Their attempts in Congress have been unsuccessful so far, but late last year Attorney General John Ashcroft, reversing a decision made by his predecessor, Janet Reno, asserted that the federal Controlled Substances Act could be used against Oregon doctors who helped patients commit suicide by prescribing lethal drugs.

That opinion would allow the federal Drug Enforcement Administration to revoke the prescription-writing privileges of any Oregon doctor who prescribed the drugs commonly used for assisted suicide, and would open the doctor to possible criminal prosecution as well. Oregon has quite rightly filed a lawsuit to block this vast and dispiriting overreach of federal authority.

The Oregon law, the first assisted suicide act approved in any state, is a model of carefully controlled compassion for patients ravaged by painful, incurable diseases. The law allows terminally ill patients to receive prescriptions for lethal medications that they must administer themselves, without assistance from a doctor or anyone else. Two doctors must certify that the patient is of sound mind and has less than six months to live before a prescription can be written. There has been no rush to suicide under this process; only 21 patients died from taking the lethal medications last year, down from 27 in each of the preceding two years.

We suspect that, when all the legal proceedings are done, the courts will uphold Oregon's right to settle this issue for itself. Troubling end-of-life issues are surely better handled through democratic political processes than through a unilateral declaration by an attorney general who may be responding to constituency groups or personal ideology.
I. Interactions Between States and Between State Governments and the Federal Government

The basic notion of American federalism is that decisions are divided between the central, national government and the individual states. Additionally, within the states, power is frequently devolved further to municipalities and other entities; however, for present purposes, the article will focus almost exclusively on the choice between federal and state regulation. In the practice of American federalism, various themes have emerged: in particular, the idea of states as experimental laboratories; and the tension between state autonomy, national citizenship, and federal governmental initiatives.

A. States as Laboratories

Justice Louis Brandeis famously described the value of federalism in terms of how the states can try out new programs and approaches--the states as "laboratories":

To say experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Thus, states are generally to be encouraged to try out new approaches to dealing with social, and even moral, problems. At the same time, one need not assume that experimentation is always valuable for its own sake, any more than one should assume that liberty is valuable, however it might be used. We might rightly resist allowing certain states to "experiment" with slavery, torture, or involuntary euthanasia. One justification for federal intervention would be the belief that certain matters should be beyond the scope of state choice.

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The notion of using the state as experimental laboratories is also connected with the desire of the federal courts (and, to some extent, Congress) not to intervene on issues until the consequences of various approaches have become clearer through actual practice. The United States Supreme Court decisions that refused to recognize a constitutional right to physician-assisted suicide, Washington v. Glucksberg\(^7\) and Vacco v. Quill\(^8\) contained numerous references to the ongoing state "experimentations" on the issue, indicating, perhaps, that one problem with the challenges in those cases was that they were brought too early.

Oregon is currently the only "laboratory" in the United States experimenting with physician-assisted suicide. In the 2000 Election, Maine narrowly defeated a ballot measure which would have allowed physician-assisted suicide. Similar initiatives had also been defeated in Washington in 1991 and in California in 1993. Finally, the Hawaii legislature defeated a comparable proposal in 2002. Of course, experimentation on this issue is also going on in other countries, and there is no reason why Americans should not try to learn from foreign experiences.

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C. Federal Intervention

The federal government has already stepped in, to a limited extent, to constrain state experimentation in the area of physician-assisted suicide, and some federal officials have tried to end the experiment entirely.

The first form of federal intervention with the Oregon legislation in fact came neither from the legislative branch nor from the executive branch, but from the judicial branch. The legislation legalizing physician-assisted suicide, after being passed in a November 1994 referendum, was supposed to go into effect in December 1994. However, a federal district court enjoined implementation of the Act, on the basis of a lawsuit which claimed that the legislation violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.\(^3\) However, the district court decision was overturned by the Ninth Circuit Court of Appeals, and the United States Supreme Court refused to hear the appeal.\(^4\)

\(^7\) 521 U.S. 702 (1997).  
\(^8\) 521 U.S. 793 (1997).
The injunction against implementation of the Oregon legislation had been lifted on October 27, 1997, and in November of the same year, Oregon voters rejected by a margin of 60% to 40% a referendum effort to repeal the legislation. (Sixteen patients died ingesting legally prescribed lethal medication in 1998; twenty-seven in 1999; twenty-seven in 2000; and twenty-one in 2001.)

The Federal Assisted Suicide Funding Restriction Act of 1997 was a more "successful" federal intervention, prohibiting the use of federal funds in support of physician-assisted suicide. More extensive and constraining federal intervention has been introduced, but has not (yet) been enacted. The Pain Relief Promotion Act was introduced in the House and the Senate in both 1999 and 2000, and was in fact passed by the House in October 1999 before it died in the Senate. That Act would, among other things, have made it illegal to use a federally controlled substance in physician-assisted suicide (and most commentators viewed blocking physician-assisted suicide in Oregon as this Act's main purpose).

On November 6, 2001, Attorney General John Ashcroft sent a letter to the Drug Enforcement Administration, a copy of which was published in the Federal Register, stating that assisting suicide was not a "legitimate medical purpose," and therefore the use of controlled substances to effect that purpose would violate the Controlled Substances Act, and make a physician's license subject to suspension or revocation if she prescribed controlled substances for that purpose of assisting suicide. The State of Oregon subsequently filed a complaint in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief from the Attorney General's Directive. Judge Robert E. Jones initially granted temporary relief, and eventually granted a permanent injunction against enforcement of the Directive. The District Court grounded the injunction on the conclusion that the Attorney General's actions had exceeded his authority under the Controlled Substances Act.

There is ample evidence that Oregon residents, whatever their positions on the issue of physician-assisted suicide, generally have not reacted well to the perceived federal interference with what is perceived to be a state matter.

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E. Application to Physician-Assisted Suicide

Both the Oregon law and most other recent proposals impose a residency requirement on those who would take advantage of the legalization of physician-assisted suicide. That alone should be sufficient to mollify most concerns about one state's laws undermining the policies of other states, or about there being a ghoulish "race to the bottom" for the medical-suicide "tourist trade." Here, it is interesting to contrast the likely effects of two different controversial state health legalizations—physician-assisted suicide and medical marijuana—and perhaps add in the non-medical example of same-sex

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47 A physician, a pharmacist, and a number of terminally ill patients were allowed to intervene. State v. Ashcroft, 192 F. Supp. 2d at 1084.
marriage. Though some commentators had suggested that there might be a strong financial incentive for states to enact same-sex marriage in order to gain the tourism dollars from those who would take advantage of such laws, there has in fact been no rush to that "top" or "bottom," because the proposal is sufficiently controversial that there will inevitably be serious resistance to the proposal, whatever the financial (or other) incentives might be for passage. Similarly, for physician-assisted suicide and medical marijuana: whatever incentives there might be for passage, the proposals inevitably evoke sufficiently strong ideological opposition that the marginal financial (or other) incentives are unlikely to cause quick passage—contrast rules like those regarding corporate governance or securities regulation, where those favoring business-friendly rules are likely to be well-organized and have a strong financial incentive in passage, while opponents are unlikely to be either strongly organized or strongly motivated.

Second, even assuming that physician-assisted suicide is an appropriate matter for state choice, what is the baseline against which federal funding decisions are to be evaluated? If one considers the baseline to be "no funding," then a decision not to offer federal funds to physician-assisted suicides in Oregon seems entirely acceptable. This is an experiment of that state, and to require the citizens of other states, including states whose citizens sharply disagree with the practice, to subsidize Oregon's experiment, seems contrary to the whole notion of "the states as laboratories." Each state, as experimenter, should make its own decisions and live with the costs and benefits of those decisions.

On the other hand, if the federal decision to block funds is seen against a baseline of general funding for medical procedures, then the federal decision is less a matter of a "failure to subsidize," fully justified under federalist principles, and more a matter of the federal government trying to undermine the practice. The inverse of the prior analysis then applies: just as experimenting states have no right to be subsidized by (the citizens of) other states, so they have a right not to be undermined by the federal government, representing the citizens of other states. There is no easy or obvious conclusion regarding the proper baseline for this analysis, and the analysis raises conceptual, moral, and political questions far beyond the scope of this piece.
DEATH WITH

This analysis of foreign laws and state laws regarding PAS and euthanasia emphasizes two main theories. First, at least some people in the United States have considered the prospect of dying as they choose and clearly want a choice if they become terminally ill or debilitated. That theory seems to transcend state lines as Dr. Kevorkian did not confine his "practice" to Michigan and was sought out by ill patients across the country. Second, efforts by private citizens to challenge anti-PAS statutes have proven unsuccessful. However, as foreign countries have shown, the Supreme Court hinted, and Oregon has attempted to show, legislative efforts to legalize PAS may be successful.

"Oregon's Death with Dignity Act is an exemplary model of public interest direct democracy, not because of the outcome, but because of the process. Both the 1994 voter initiative and the 1997 referendum were free of many of the 'flaws' typically associated with direct democracy."  

A. The Death with Dignity Act

While PAS and euthanasia have been debated for decades, Oregon's DWDA was merely a hope for one man at the beginning of 1990.

1. History of the DWDA

Elvin Sinnard began the quest for legalized physician-assisted suicide in Oregon during 1990. The quest stemmed from Mr. Sinnard's elderly wife who took her own life in 1989 after living on massive doses of morphine for 18 months due to suffering caused by chronic heart disease. Mr. Sinnard "had sought and received information from the Hemlock Society, a national euthanasia advocacy group headquartered at the time in Eugene,  

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Oregon." Mr. Sinnard sought to legalize PAS when he realized that "to legally protect himself he had to leave his wife's side when she died." After her death, Mr. Sinnard "and a coalition of attorneys and physicians, which eventually organized as Oregon Right to Die, met in his basement and began drafting what would be passed in November of 1994 by Oregon voters as the Oregon Death with Dignity Act--the first statute in this country to legalize PAS."

The Oregon Death with Dignity Act (DWDA), known as Measure 16 on the ballot, was brought by initiative and voted on November 8, 1994.106 It was "voted into law by fifty-one percent of Oregon's voters." However, Lee v. State of Oregon107 was filed in the U.S. District Court of Oregon in December of 1994 and a preliminary injunction was issued by the Court stating:

1. the defendant ... [is] preliminarily enjoined from recognizing the exception from the homicide laws created by Oregon Ballot Measure 16 ....;
2. defendant ... [is] preliminarily enjoined from recognizing the exception from the standard of professional conduct created by Oregon Ballot Measure 16 in the conduct of their duties ....;
3. the defendant ... is preliminarily enjoined from allowing assisted suicides to be performed in its facilities;
4. [the defendant is] preliminarily enjoined from bringing criminal, civil, or regulatory enforcement action based on Ballot Measure 16 against any plaintiff for refusing, on the basis of religious objection to, ... assist any physician with a patient suicide; and,
5. [defendant is] preliminarily enjoined from recognizing the constitutionality of recently enacted Oregon Ballot Measure 16.

The court re-affirmed its temporary restraining order on August 3, 1995, basically restating the above injunction.110 However, the Ninth Circuit Court of Appeals vacated the lower court's judgment and on remand directed the district court to dismiss the plaintiffs' complaint for lack of jurisdiction.111 This decision allowed the Oregon voters to once again vote on the Death with Dignity Act, which passed again. The DWDA went into effect in November of 1997 and has been in use since that time.

2. The Language and Use of the DWDA

The DWDA is quite lengthy and includes forms that patients are required to fill out to receive a prescription from their physician. The DWDA defines the terms used in the statute, dictates who

106 The initiative process in Oregon is authorized under Article IV, Section 1, of the Oregon Constitution which provides, in part, that "the legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and House of Representatives."

107 869 F. Supp. 1491 (D. Or. 1994) (plaintiffs in this case were two physicians, four terminally ill or potentially terminally ill patients, a residential care facility, and individual operators of residential care facilities).


111 Lee v. State of Oregon, 107 F.3d 1382 (9th Cir. 1997).
may initiate a written request for medication, and describes the attending physician's responsibilities. The DWDA also provides certain safeguards to ensure that the statute is followed explicitly, and that PAS is not abused. Another key provision states that a patient has a right to rescind his or her request at any time.

Under the Act, the Oregon Health Department is required to review records that are maintained under Oregon statutes annually. After review, the Health Department must compile a statistical report that is to be made available to the public. This annual report is available both in hard copy and on the World Wide Web. In 2001, the statistics showed that 21 patients "used legalized physician-assisted suicide," bringing the four-year total to 91. The Fourth Annual Report shows that the median age of those requesting a prescription was 68 and almost half had been educated beyond high school. Common illnesses predicating the patients' requests were lung cancer, breast cancer, pancreatic cancer, ovarian cancer, prostate cancer, colon cancer, amyotrophic lateral sclerosis, and chronic lower respiratory disease.

Public support for the DWDA is high. According to a Harris Poll, by approximately "two-to-one, most adults continue to favor the right to euthanasia and physician-assisted suicide." In fact, a considerable majority believes the law should allow physicians to help dying patients who are in severe distress. The poll concludes by stating: "No matter which questions are asked, there is a strong, approximately two-to-one majority in favor of an individual's right to euthanasia and physician-assisted suicide where terminally ill patients clearly want this to happen."

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Attorney General Ashcroft's Order and Memo

AG Ashcroft's order stated that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substance Act." The order also stated that the "conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted." The order goes on to say that, although the CSA and Drug Enforcement Agency (DEA) are involved, the AG understands that physicians have a legitimate medical purpose in dispensing controlled substances for pain management. AG Ashcroft ends by saying that the order in no way changes DEA standards in any state except Oregon.

Attached to the order is a memorandum that AG Ashcroft wrote to DEA Administrator Asa Hutchinson. In this memo, AG Ashcroft lists various reasons why he issued the order, reasoning that narcotics and other dangerous drugs controlled by federal law may not be dispensed consistently with the Controlled Substance Act, 21 U.S.C. 801-971 (1994 & Supp. II 1996) (CSA), to assist suicide in the United States .... [T]he DEA's original reading of the CSA—that controlled substances may not be dispensed to assist suicide—was correct .... [T]he original DEA
determination is reinstated and should be implemented ....

Mr. Hutchinson was quoted as saying how pleased he was that the issue of PAS had been addressed and clarified. He stated the "DEA had always ensured that controlled substances were prescribed properly, and that health and safety are always of paramount importance." He continued by saying that the AG's statement mirrors the DEA's current and past stance.

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C. Oregon Physicians' Fears of Being Reprimanded

Attorney General Ashcroft stressed that his decision to regulate Oregon's Death with Dignity Act will not increase the scrutiny of physicians who prescribe controlled substances for pain relief. It remains the position of the Department of Justice and the Drug Enforcement Administration that the dispensing of controlled substances for pain treatment, when carried out by a physician acting in the usual course of professional practice, is a legitimate medical purpose under federal law.

However, Brad Wright, a member of Compassion in Dying, a group that supports PAS, stated that "[m]any Oregon doctors have been reluctant to assist with suicides because of Ashcroft's order." It follows that, with heightened scrutiny, Oregon physicians will probably be writing prescriptions with "one eye over their shoulder."

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IV. OREGON TAKES ON ATTORNEY GENERAL JOHN ASHCROFT

Oregon's sovereign rights are being stepped upon by AG John Ashcroft's order to the DEA to "investigate and prosecute Oregon doctors who prescribe life-ending medication to terminally ill patients .... Ashcroft's decision ... raises difficult questions of statutory and constitutional interpretation. However, the courts ultimately resolve those issues." While there are a few grounds for a federal law to legitimately usurp state law, "the Oregon experience does not justify federal intervention on this issue." In fact, "[t]he Supreme Court has decided to leave the physician-assisted suicide issue to the states, and Ashcroft, who is a proponent of federalism, ought to follow the Court's lead on this issue."

As it stands, Ashcroft "fired the first shot in the battle between the state of Oregon and the federal government over which government has the ultimate authority to decide what constitutes the legitimate practice of medicine, at least when schedule II substances regulated by the Controlled Substance Act ... are involved."168 Immediately after AG Ashcroft set forth his order, the State of Oregon filed suit in federal district court requesting a temporary restraining order, which was granted on November 7, 2001, and then extended until further notice on November 20, 2001. Oral arguments were heard on March 22, 2002, before U.S. District Judge Robert E. Jones, who issued a written opinion on April 17, 2002.

A. Oregon's Argument

Oregon's argument is based on five factors:

1. The CSA does not apply. The Controlled Substance Act created a "closed system" intended to prevent trafficking and diversion and physicians and pharmacists who practice under the Death with Dignity Act are in full compliance with the state's standard of care and are not trafficking or diverting drugs.

2. The DOJ cannot change previous rulings in this manner. The Attorney General violated the Administrative Procedures Act by attempting to promulgate a substantive regulation (or amend an existing regulation) without following the mandatory notice and comment procedure.

3. Ashcroft pushes federal v. state limits. The CSA lacks the requisite "clear statement" that the Supreme Court has required before it will find that Congress intended to alter the federal-state framework—in this case by permitting federal encroachment into [an] area traditionally reserved to the states.

4. Ashcroft abuses commerce clause. The manner in which Oregonians die is not interstate commerce, nor may the federal government use a trivial connection to commerce to justify a heavy-handed federal intrusion into areas traditionally reserved to the states. The states are capable of addressing this issue themselves, and should be permitted to do so, as the Supreme Court contemplated in Washington v. Glucksberg.

5. Ashcroft is in violation of Executive Order 13132 on Federalism. Ashcroft's ruling violates this Executive Order reiterating the principles of Federalism as outlined in the U.S. Constitution.172

Although Judge Jones did not hint at how he might rule, he questioned the government's attorneys on "whether the government's authority rested on the relatively narrow regulating of drugs or the much broader issue of stopping doctors who might advise patients on suicide."

B. State of Oregon v. Ashcroft174

In its written opinion, the court, through Judge Jones, first addressed the background of the CSA set forth above. It then outlined the purpose of the CSA by stating: "The CSA provides a comprehensive federal scheme for regulation and control of certain drugs and other substances. The congressional findings supporting Title II reveal that Congress' overarching concern in enacting the CSA was the problem of drug abuse and illegal trafficking in drugs." The court explained the different amendments the CSA has gone through and pointed out that Congress continually attempted to address problems with illegal drug trafficking and drug abuse.

The court then specifically addressed the DWDA, including the events that gave rise to the current suit.


On July 27, 1997, Senator Orrin Hatch and Representative Henry Hyde sent a letter to the Administrator of the DEA advocating an interpretation of the CSA that would, in effect, permit the DEA to revoke the registrations of physicians and pharmacists who take actions authorized by the Oregon Act. In late October 1997, Hatch and Hyde sent a second letter to the DEA, expressing "heightened ... urgency" resulting from the United States Supreme Court's decision to deny certiorari in Lee v. State of Or., which had, until then, kept the Oregon Act from going into effect.

From the court's opinion, one can see that the DWDA is what the people of Oregon want.

The court continued, stating that AG Ashcroft passed on the opportunity to "evaluate carefully the scientifically conducted epidemiological studies of the Oregon Act, and the excellent analysis of the multiple issues as set forth in the briefs submitted by plaintiff and intervenors in these proceedings." Prior to the publication of the Ashcroft order, Ashcroft did not consult with, or give notice to, Oregon's public officials. In failing to do so, Ashcroft eliminated any opportunity for public comment. The court then stated that "[t]he [p]lain [l]anguage of the CSA [d]oes [n]ot [s]upport the Ashcroft [order]," and the "[l]egislative [h]istory of the CSA [d]oes [n]ot [s]upport the Ashcroft [order]."

Judge Jones summarized the court's opinion by saying:

The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states .... The CSA was never intended, and the USDOJ and DEA were never authorized, to establish a national medical practice or act as a national medical board. To allow an attorney general--an appointed executive whose tenure depends entirely on whatever administration occupies the White House--to determine the legitimacy of a particular medical practice without a specific congressional grant of authority would be unprecedented and extraordinary.

The court concluded by saying that "the fact that opposition to assisted suicide may be fully justified, morally, ethically, religiously or otherwise, does not permit a federal statute to be manipulated from its true meaning to satisfy even a worthy goal."

Even though the court ruled for the plaintiffs, "the case is almost certain to be appealed, extending the controversy that has defined the landmark law since it was approved by Oregon voters eight years ago." In fact, the defendants have appealed to the Ninth Circuit Court of Appeals.

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In 1999, the State of California enacted amendments to its gun control laws that significantly strengthened the state's restrictions on the possession, use, and transfer of the semi-automatic weapons popularly known as "assault weapons." Plaintiffs, California residents who either own assault weapons, seek to acquire such weapons, or both, brought this challenge to the gun control statute, asserting that the law, as amended, violates the Second Amendment, the Equal Protection Clause, and a host of other constitutional provisions. The district court dismissed all of the plaintiffs' claims. Because the Second Amendment does not confer an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision. As to the Equal Protection claims, we conclude that there is no constitutional infirmity in the statute's provisions regarding active peace officers. We find, however, no rational basis for the establishment of a statutory exception with respect to retired peace officers, and hold that the retired officers' exception fails even the most deferential level of scrutiny under the Equal Protection Clause. Finally, we conclude that each of the three additional constitutional claims asserted by plaintiffs on appeal is without merit.

I. INTRODUCTION

In response to a proliferation of shootings involving semi-automatic weapons, the California Legislature passed the Roberti-Roos Assault Weapons Control Act ("the AWCA") in 1989. . . . The AWCA renders it a felony offense to manufacture in California any of the semi-automatic weapons specified in the statute, or to possess, sell, transfer, or import into the state such weapons without a permit. CAL. PENAL CODE § 12280. The statute contains a grandfather clause that permits the ownership of assault weapons by individuals who lawfully purchased them before the statute's enactment, so long as the owners register the weapons with the state Department of Justice. Id. The grandfather clause, however, imposes significant restrictions on the use of weapons that are registered pursuant to its provisions. Id. § 12285(c). . .

In 1999, the legislature amended the AWCA in order to broaden its coverage and to
render it more flexible in response to technological developments in the manufacture of semiautomatic weapons. The amended AWCA retains both the original list of models of restricted weapons, and the judicial declaration procedure by which models may be added to the list. The 1999 amendments to the AWCA statute add a third method of defining the class of restricted weapons: The amendments provide that a weapon constitutes a restricted assault weapon if it possesses certain generic characteristics listed in the statute. Id. § 12276.1. Examples of the types of weapons restricted by the revised AWCA include a "semiautomatic, center-fire rifle that has a fixed magazine with the capacity to accept more than 10 rounds," § 12276.1(a)(2), and a semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine and also features a flash suppressor, a grenade launcher, or a flare launcher. § 12276.1(a)(1)(A)-(E). The amended AWCA also restricts assault weapons equipped with "barrel shrouds," which protect the user's hands from the intense heat created by the rapid firing of the weapon, as well as semiautomatic weapons equipped with silencers. Id.

Plaintiffs in this case are nine individuals, some of whom lawfully acquired weapons that were subsequently classified as assault weapons under the amended AWCA. They filed this action in February, 2000, one month after the 1999 AWCA amendments took effect. Plaintiffs who own assault weapons challenge the AWCA requirements that they either register, relinquish, or render inoperable their assault weapons as violative of their Second Amendment rights. Plaintiffs who seek to purchase weapons that may no longer lawfully be purchased in California also attack the ban on assault weapon sales as being contrary to their rights under that Amendment. Additionally, plaintiffs who are not active or retired California peace officers challenge on Fourteenth Amendment Equal Protection grounds two provisions of the AWCA: one that allows active peace officers to possess assault weapons while off-duty, and one that permits retired peace officers to possess assault weapons they acquire from their department at the time of their retirement. The State of California immediately moved to dismiss the action pursuant to Federal Rule of Civil Procedure 12(b)(6), contending that all the claims were barred as a matter of law. After a hearing, the district judge granted the defendants' motion in all respects, and dismissed the case. Plaintiffs appeal, and we affirm on all claims but one.

II. DISCUSSION

A. Background and Precedent.

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There are three principal schools of thought that form the basis for the debate. The first, which we will refer to as the "traditional individual rights" model, holds that the Second Amendment guarantees to individual private citizens a fundamental right to possess and use firearms for any purpose at all, subject only to limited government regulation. This view, urged by the NRA and other firearms enthusiasts, as well as by a prolific cadre of fervent supporters in the legal academy, had never been adopted by any court until the recent Fifth Circuit decision in United States v. Emerson, 270 F.3d 203, 227 (5th Cir. 2001), cert. denied, 153 L. Ed. 2d 184, 122 S. Ct. 2362 (2002). The second view, a variant of the first, we
will refer to as the "limited individual rights" model. Under that view, individuals maintain a constitutional right to possess firearms insofar as such possession bears a reasonable relationship to militia service. The third, a wholly contrary view, commonly called the "collective rights" model, asserts that the Second Amendment right to "bear arms" guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons. Under this theory of the amendment, the federal and state governments have the full authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process, equal protection, and the like. Long the dominant view of the Second Amendment, and widely accepted by the federal courts, the collective rights model has recently come under strong criticism from individual rights advocates. After conducting a full analysis of the amendment, its history, and its purpose, we reaffirm our conclusion in Hickman v. Block, 81 F.3d 98 (9th Cir. 1996), that it is this collective rights model which provides the best interpretation of the Second Amendment.

Despite the increased attention by commentators and political interest groups to the question of what exactly the Second Amendment protects, with the sole exception of the Fifth Circuit's Emerson decision there exists no thorough judicial examination of the amendment's meaning. The Supreme Court's most extensive treatment of the amendment is a somewhat cryptic discussion in United States v. Miller, 307 U.S. 174, 83 L. Ed. 1206, 59 S. Ct. 816 (1939). . . . in Miller the Supreme Court decided that because a weapon was not suitable for use in the militia, its possession was not protected by the Second Amendment. As a result of its phrasing of its holding in the negative, however, the Miller Court's opinion stands only for the proposition that the possession of certain weapons is not protected, and offers little guidance as to what rights the Second Amendment does protect. . . .

Some thirty-odd years after Miller, two Justices of the Court pithily expressed their views on the question whether the Second Amendment limits the power of the federal or state governments to enact gun control laws. Justice Douglas, joined by Justice Thurgood Marshall, stated in dissent in Adams v. Williams, that in his view, the problem of police fearing that suspects they apprehend are armed:

"is an acute one not because of the Fourth Amendment, but because of the ease with which anyone can acquire a pistol. A powerful lobby dins into the ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment. . . . There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police."

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Our court, like every other federal court of appeals to reach the issue except for the Fifth Circuit, has interpreted Miller as rejecting the traditional individual rights view. In Hickman v. Block, we held that "the Second Amendment guarantees a collective rather than an individual right." 81 F.3d at 102 (citation and quotation marks omitted). Like the other courts, we reached our conclusion regarding the Second Amendment. . . .
Amendment's scope largely on the basis of the rather cursory discussion in Miller, and touched only briefly on the merits of the debate over the force of the amendment. See id.

Appellants contend that we misread Miller in Hickman. They point out that, as we have already noted, Miller, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion. We agree that our determination in Hickman that Miller endorsed the collective rights position is open to serious debate. We also agree that the entire subject of the meaning of the Second Amendment deserves more consideration than we, or the Supreme Court, have thus far been able (or willing) to give it. This is particularly so because, since Hickman was decided, there have been a number of important developments with respect to the interpretation of the highly controversial provision: First, as we have noted, there is the recent Emerson decision in which the Fifth Circuit, after analyzing the opinion at length, concluded that the Supreme Court's decision in Miller does not resolve the issue of the Amendment's meaning. The Emerson court then canvassed the pertinent scholarship and historical materials, and held that the Second Amendment does establish an individual right to possess arms -- the first federal court of appeals ever to have so decided. Second, the current leadership of the United States Department of Justice recently reversed the decades-old position of the government on the Second Amendment, and adopted the view of the Fifth Circuit. Now, for the first time, the United States government contends that the Second Amendment establishes an individual right to possess arms. The Solicitor General has advised the Supreme Court that 'the current position of the United States . . . is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions . . . .' Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19 n.3. In doing so, the Solicitor General transmitted to the Court a memorandum from Attorney General John Ashcroft to all United States Attorneys adopting the Fifth Circuit's view and emphasizing that the Emerson court "undertook a scholarly and comprehensive review of the pertinent legal materials . . .," although the Attorney General was as vague as [*25] the Fifth Circuit with respect both to the types of weapons that he believes to be protected by the Second Amendment, and the basis for making such determinations. Id., app. A.

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In light of the United States government's recent change in position on the meaning of the amendment, the resultant flood of Second Amendment challenges in the district courts, the Fifth Circuit's extensive study and analysis of the amendment and its conclusion that Miller does not mean what we and other courts have assumed it to mean, the proliferation of gun control statutes both state and federal, and the active scholarly debate that is being waged across this nation, we believe it prudent to explore Appellants' Second Amendment arguments in some depth, and to address the merits of the issue, even though this circuit's position on the scope and effect of the amendment was established in Hickman. Having engaged in that exploration, we determine that the conclusion we reached in Hickman was correct.

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The Text and Structure of the Second Amendment Demonstrate that the Amendment's Purpose is to Preserve Effective State Militias; That Purpose Helps Shape the Content of the Amendment.

The Second Amendment states in its entirety: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. As commentators on all sides of the debate regarding the amendment's meaning have acknowledged, the language of the amendment alone does not conclusively resolve the question of its scope. . . . What renders the language and structure of the amendment particularly striking is the existence of a prefatory clause, a syntactical device that is absent from all other provisions of the Constitution, including the nine other provisions of the Bill of Rights. Our analysis thus must address not only the meaning of each of the two clauses of the amendment but the unique relationship that exists between them.


The first or prefatory clause of the Second Amendment sets forth the amendment's purpose and intent. An important aspect of ascertaining that purpose and intent is determining the import of the term "militia." Many advocates of the traditional individual rights model, including the Fifth Circuit have taken the position that the term "militia" was meant to refer to all citizens, and, therefore, that the first clause simply restates the second in more specific terms. . . . We agree with the Fifth Circuit in a very limited respect. We agree that the interpretation of the first clause and the extent to which that clause shapes the content of the second depends in large part on the meaning of the term "militia." If militia refers, as the Fifth Circuit suggests, to all persons in a state, rather than to the state military entity, the first clause would have one meaning -- a meaning that would support the concept of traditional individual rights. If the term refers instead, as we believe, to the entity ordinarily identified by that designation, the state-created and organized military force, it would likely be necessary to attribute a considerably different meaning to the first clause of the Second Amendment and ultimately to the amendment as a whole.

We believe the answer to the definitional question is the one that most persons would expect: "militia" refers to a state military force. We reach our conclusion not only because that is the ordinary meaning of the word, but because contemporaneously enacted provisions of the Constitution that contain the word "militia" consistently use the term to refer to a state military entity, not to the people of the state as a whole. We look to such contemporaneously enacted provisions for an understanding of words used in the Second Amendment in part because this is an interpretive principle recently explicated by the Supreme Court in a case involving another word that appears in that amendment -- the word "people." That same interpretive principle is unquestionably applicable when we construe the word "militia."

1."Militia" appears repeatedly in the first and second Articles of the Constitution. From its use in those sections, it is apparent that the drafters were referring in the Constitution to the second of two government-established and -controlled military forces. Those forces were, first, the national army and navy, which were subject
to civilian control shared by the president and Congress, and, second, the state militias, which were to be "essentially organized and under control of the states, but subject to regulation by Congress and to 'federalization' at the command of the president." Paul Finkelman, "A Well Regulated Militia": The Second Amendment in Historical Perspective, 76 CHI.-KENT L. REV. 195, 204 (2000).

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After examining each of the significant words or phrases in the Second Amendment's first clause, we conclude that the clause declares the importance of state militias to the security of the various free states within the confines of their newly structured constitutional relationship. With that understanding, the reason for and purpose of the Second Amendment becomes clearer.

b. The Meaning of the Amendment's Second Clause: "The Right of the People to Keep and Bear Arms, Shall Not Be Infringed."

Having determined that the first clause of the Second Amendment declares the importance of state militias to the proper functioning of the new constitutional system, we now turn to the meaning of the second clause, the effect the first clause has on the second, and the meaning of the amendment as a whole. The second clause -- "the right of the people to keep and bear Arms, shall not be infringed" -- is not free from ambiguity. We consider it highly significant, however, that the second clause does not purport to protect the right to "possess" or "own" arms, but rather to "keep and bear" arms. This choice of words is important because the phrase "bear arms" is a phrase that customarily relates to a military function.

Historical research shows that the use of the term "bear arms" generally referred to the carrying of arms in military service -- not the private use of arms for personal purposes. For instance, Professor Dorf, after canvassing documents from the founding era, concluded that "overwhelmingly, the term had a military connotation." Dorf, supra, at 314. Our own review of historical documents confirms the professor's report.

c. The Relationship Between the Two Clauses.

Our next step is to consider the relationship between the two clauses, and the meaning of the amendment as a whole. As we have noted, and as is evident from the structure of the Second Amendment, the first clause explains the purpose of the more substantive clause that follows, or, to put it differently, it explains the reason necessitating or warranting the enactment of the substantive provision. Moreover, in this case, the first clause does more than simply state the amendment's purpose or justification: it also helps shape and define the meaning of the substantive provision contained in the second clause, and thus of the amendment itself.

When the second clause is read in light of the first, so as to implement the policy set forth in the preamble, we believe that the most plausible construction of the Second Amendment is that it seeks to ensure the existence of effective state militias in which the people may exercise their right to bear arms, and forbids the federal government to interfere with such exercise. This conclusion is based in part on the premise, explicitly set forth in the text of the amendment, that the maintenance of effective state militias is essential to the preservation of a free State, and in part on the historical meaning of the right that the operative clause protects.
right to bear arms. In contrast, it seems reasonably clear that any fair reading of the "bear Arms" clause with the end in view of "assuring . . . the effectiveness of" the state militias cannot lead to the conclusion that the Second Amendment guarantees an individual right to own or possess weapons for personal and other purposes. . . . In the end, however, given the history and vigor of the dispute over the meaning of the Second Amendment's language, we would be reluctant to say that the text and structure alone establish with certainty which of the various views is correct. Fortunately, we have available a number of other important sources that can help us determine whether ours is the proper understanding. These include records that reflect the historical context in which the amendment was adopted, and documents that contain significant portions of the contemporary debates relating to the adoption and ratification of the Constitution and the Bill of Rights. . . . In sum, our review of the historical record regarding the enactment of the Second Amendment reveals that the amendment was adopted to ensure that effective state militias would be maintained, thus preserving the people's right to bear arms. The militias, in turn, were viewed as critical to preserving the integrity of the states within the newly structured national government as well as to ensuring the freedom of the people from federal tyranny. Properly read, the historical record relating to the Second Amendment leaves little doubt as to its intended scope and effect.

3. Text, History, and Precedent All Support the Collective Rights View of the Amendment.

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After conducting our analysis of the meaning of the words employed in the amendment's two clauses, and the effect of their relationship to each other, we concluded that the language and structure of the amendment strongly support the collective rights view. The preamble establishes that the amendment's purpose was to ensure the maintenance of effective state militias, and the amendment's operative clause establishes that this objective was to be attained by preserving the right of the people to "bear arms" -- to carry weapons in conjunction with their service in the militia. . . .

CONCLUSION

Because the Second Amendment affords only a collective right to own or possess guns or other firearms, the district court's dismissal of plaintiffs' Second Amendment claims is AFFIRMED. . . . The constitutional challenges to the validity of the California Assault Weapons Control Act are all rejected, with the exception of the claim relating to the retired officers provision.

AFFIRMED in part, REVERSED in part, and REMANDED.
A divided federal appeals court Tuesday declined to reconsider an earlier ruling that the Second Amendment affords Americans no personal right to own firearms.

The December decision by the 9th U.S. Circuit Court of Appeals upheld California's law banning certain assault weapons and revived the national gun ownership debate. With Tuesday's action, the nation's largest federal appeals court cleared the way for an appeal to the U.S. Supreme Court, which has never squarely ruled on the issue.

"I'll have this filed by the end of the week, it's already drafted," said attorney Gary Gorski, who challenged California's ban on 75 high-powered, rapid-fire weapons.

California lawmakers passed the nation's first law banning such weapons in 1989 after a gunman fired a semiautomatic weapon into a Stockton schoolyard, killing five children and injuring 30.

Following California's lead, several states and the federal government passed similar or more strict bans.

In originally dismissing the bulk of Gorski's challenge, a three-judge panel of the San Francisco-based appeals court ruled 2-1 that the Second Amendment was not adopted "to afford rights to individuals with respect to private gun ownership or possession."

That December decision was written by Judge Stephen Reinhardt, a President Carter appointee who also signed on with the court's decision in June declaring the Pledge of Allegiance and unconstitutional endorsement of religion when recited in public schools. The pledge case is pending before the high court.

On Tuesday, a majority of the circuit's 25 active judges declined to rehear the case, as Gorski had requested. Only six judges publicly said they wished to reconsider.

Circuit Judge Alex Kozinski urged his colleagues to rehear the case with a panel of 11 judges, arguing that without individual Second Amendment protections, the government could ban the public's only recourse against tyranny.

"The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed, where the government refuses to stand for re-election and silences those who protest, where courts have lost the courage to oppose, or can find no one to enforce their decrees," Kozinski wrote in papers released Tuesday.

Matt Nosanchuk, litigation director of the Violence Policy Center, said Kozinski has got it wrong. Weapons don't keep the government in
check, free speech does, he said. "The Second Amendment is not the bulwark against tyranny. It's the First Amendment," he said.

The court's decision, which said weapons were properly allowed for the states to maintain militias, conflicts with a 2001 decision from the New Orleans-based 5th U.S. Circuit Court of Appeals that said individuals had a constitutional right to guns.

Reinhardt, appointed in 1980, noted in the December ruling that the Supreme Court's guidance on whether the Second Amendment offers individuals the right to bear arms was "not entirely illuminating." The high court, he said, has never directly said whether the personal right to possess weapons was a constitutional guarantee.

State and federal laws barring assault and other types of weapons are routinely upheld in the courts on grounds that the prohibitions are rational governmental approaches to combat violence. The Second Amendment has had little, if any, impact on those decisions, except in the California case.

Attorney General John Ashcroft has said he believes the Second Amendment grants individuals the right to bear arms, but that the right is not absolute. In a 2001 memo to federal prosecutors, he said the Justice Department "will vigorously enforce and defend existing firearms laws."

Larry Pratt, executive director of the 300,000-member Gun Owners of America, said he wants the Supreme Court to overturn Reinhardt's decision. "If judge Reinhardt prevails, the American people could become subjects of the government," Pratt said.

California Attorney General Bill Lockyer, through a spokeswoman, said he was "pleased that the court has upheld this important California law regulating assault weapons."


The case is Silveira v. Lockyer, 01-15098.
B. Guns

The Second Amendment issue of the right to guns in fact consists of three basic issues. The first issue is whether the right "to keep and bear arms" is an individual right or only a collective right of states to organize and regulate their militias free from unreasonable national regulations. Second, if this is an individual right, should this right be incorporated into the Fourteenth Amendment's Due Process Clause and applied to gun regulations by state and local governments in the same way that this right applies against the national government under the Second Amendment? The Bill of Rights was originally designed to limit only the national government, but most of the Bill of Rights, including the Free Speech Clauses, have been incorporated into the Fourteenth Amendment's Due Process Clause by judicial interpretation and applied to the states because of fundamental relationships that these rights bear to our concepts of liberty and property that are protected by due process. Does then the right "to keep and bear arms," if it is an individual right, bear the same kind of fundamental relationship to liberty or property as, for example, the Free Speech Clauses bear to the liberties of citizens in a democracy? Third, if the right to guns is an individual right, what standard of judicial review of the reasons for gun regulations should be used to balance the right to guns against the legitimate needs of governments to regulate guns? Should the courts employ the standard of "strict scrutiny," which they use to protect political speech, or a form of "intermediate scrutiny," which they use to protect commercial speech, or the deferential "rational basis test" that tests the constitutionality of most economic regulations?

We have already considered competing arguments from the text and the Framers' intent about whether the Second Amendment provides an individual right to keep and bear arms or only a collective right of states to maintain their militias free of interference from the national government. The textual arguments, however, were about what the Framers of the Second Amendment might have meant its words to mean, not about what the text might mean to contemporary society. Looking to the contemporary meaning of the Second Amendment's language, there is a strong argument to be made that the words "the right of the people to keep and bear arms"

154 See Barron v. City of Baltimore, 32 U.S. 243 (1833).
means an individual right to possess guns. This is so not only because "the right of the people" has been interpreted to mean individual rights in other constitutional contexts, but also because the National Rifle Association (NRA) and other gun enthusiasts have campaigned so vigorously and effectively in public discourse to equate the language of the Second Amendment with an individual's right to guns. At the same time, the Second Amendment's first clause refers to the purpose of maintaining "[a] well regulated Militia," and one can argue that the contemporary disappearance of state-managed or state-regulated militias has vitiated any individual right to keep and bear arms that might have been recognized in the eighteenth century in order to support the operation of such militias. That is, one may argue that militias are assemblies of persons with their own guns brought together to fight battles or put down insurrections and that such state-organized militias no longer exist, thus eliminating any individual right to keep guns to support this kind of militia. Alternatively, one can argue that the word militia means something similar to today's National Guard, where by practice and law all arms are kept in government-operated arsenals. Textual arguments about today's meaning of the Second Amendment's language also appear to have uncertainty and elasticity.

When we turn to precedents, these authorities may not be entirely dispositive either, although the argument from precedent seems to cut against the individual right to guns. In 1939, in California v. Miller, the Supreme Court rejected a claim of a Second Amendment right to possess a sawed-off shotgun, reasoning that there was no evidence that possession of such a weapon bore "some reasonable relationship to the preservation or efficiency of a well regulated militia." Under this reasoning, many kinds of guns and gun regulations would seem to fall outside the scope of the Second Amendment. Still, the Miller decision did not expressly hold that the Second Amendment fails to recognize any individual right to possess firearms, for one can imagine that keeping some weapons might bear a "reasonable relationship" to the preservation of militias, however militias are defined. The Miller opinion also describes the calling together of citizen-soldiers, who would bring their own weapons when called upon to do so by the states, as the purpose of the Second Amendment. The proponents of an individual right to guns can thus reasonably claim that Miller is at least opaque on the basic issue of an individual or collective right.

But the Supreme Court has never articulated an individual rights interpretation of Miller when given the opportunity, and the lower courts with one recent exception have interpreted Miller to stand for the collective rights interpretation of the Second Amendment. The Supreme Court surely could shift this doctrine without too much straining or overruling of its precedents, but the trend and weight of judicial precedents is

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166 See, e.g., Hickman v. Block, 81 F.3d 98, 101 (9th Cir. 1996); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992). The odd case out is United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), cert. denied 122 S. Ct. 2362 (2002) (explaining the Second Amendment grants an individual right to possess firearms, but a federal statute that prohibits firearms possession by individuals subject to judicial protective orders is "reasonable" and a "limited, narrowly tailored" regulation of this right that survives constitutional scrutiny).
against the individual rights reading and any shift in constitutional doctrine of this sort should require some kind of special justification if the principle of stare decisis, that previous judicial decisions should be followed without reexamination, is to be given respect. As earlier noted, neither the textual nor historical arguments about the meaning of the Second Amendment offer clear or dispositive evidence about what this amendment means. Thus, the other kinds of conventional constitutional authority, text and the Framers' intent, do not seem to provide special justification for the courts to retreat from the Miller line of precedents or stare decisis.

Constitutional theory, or how the Constitution should be interpreted, may thus be a likely decisive factor in determining the basic issue of whether the Second Amendment confers an individual right to guns or only a collective right for states to maintain militias as they wish. Many if not all originalist judges may favor the individual right to guns, since they will be able to find many specific statements about such a right in the eighteenth century background to the adoption of the original Constitution and Second Amendment. These judges, desiring a specific rule from the eighteenth century to support their decision, also might easily imagine how the Framers would have decided this issue if they had been directly confronted with it instead of the more complex debate about the allocation of military powers between the national and state governments. Originalist judges, wanting to give great weight to original intent, are also likely to favor narrow interpretations of Miller v. California. On the other hand, judges of principle are likely to favor the collective right interpretation of the Second Amendment, for these judges are likely to focus upon the general purposes of the amendment, as expressed in its preamble, the debates among the Framers about the purpose of allocating military powers between the national and state governments and, importantly, the judicial need to translate these purposes of the late eighteenth century into meaningful rules for the twenty-first century. In this case, the demise of state-operated militias and the changing nature of guns in our contemporary society will figure importantly in the decision and will support the collective rights reading of the Second Amendment's text, its history, and its precedents. Theory counts at least in some constitutional issues.

Suppose the Supreme Court decided that the Second Amendment confers an individual right to own or use guns free of unreasonable regulations by the federal government. Would the Court also incorporate this right into the Fourteenth Amendment's Due Process Clause and apply the right against state and local government gun regulations? The standard for incorporating other rights in the Bill of Rights into the Fourteenth Amendment has been stated variously as whether the right is "of the very essence of a scheme of ordered liberty,"171 reflects "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,"172 or, in the case of criminal procedure rights, is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."173 Since most of the Bill of Rights has gradually been incorporated into the Fourteenth Amendment during the twentieth century,

one might reasonably predict that a Supreme Court following the individual rights reading of the Second Amendment would not hesitate to apply this right to state and local governments as some kind of "fundamental right." Yet the Supreme Court decided two cases in the late nineteenth century, after adoption of the Fourteenth Amendment but before emergence of the modern incorporation doctrine, which held the Second Amendment does not apply to the states under the Fourteenth Amendment.175 Moreover, some judges might reasonably interpret the modern nature of guns and gun regulations in ways that discourage the characterization of an individual constitutional right to possess firearms as a fundamental liberty that is necessary to the operations of a free democratic society. Guns today are much more dangerous, society is much more crowded and complex, and the need for various sorts of gun regulations more imperative than was the case in the late eighteenth century. Accordingly, there might be openness or doubt about how the Supreme Court would decide this issue assuming that it recognized an individual right to guns.

Most importantly, if an individual right to possess firearms were recognized, how would the Supreme Court be likely to protect this right in terms of the standard of judicial review applied to gun regulations? The precedent of Miller v. California, which upheld a gun regulation in the absence of a reasonable relationship between guns and militias might seem to support a deferential standard, say one that requires that a gun regulation, to be constitutional, need only have some reasonable relationship to a government's safety or welfare purpose. The fact that guns can be dangerous to others, as complex economic relationships can be dangerous to others, would also support such a deferential standard since the Supreme Court generally reviews economic regulations under the Fourteenth Amendment by the deferential rational basis or reasonable means test.178 But if the Supreme Court adopts the individual rights view of the Second Amendment, Miller is also likely to be viewed as a dated or not particularly persuasive precedent for the standard of judicial review, and the right to guns is likely to be viewed as more important to individual liberties than the economic rights to contract or property. The critical question on the issue of judicial review may be whether courts will protect the right to guns by strict judicial scrutiny, as they protect most speech and privacy rights, or will apply some form of intermediate scrutiny to gun regulations such as the Central Hudson rule for reviewing commercial speech regulations, the ad hoc weighing of factors approach courts use to test state regulations which burden interstate and local commerce in even-handed ways180 or disadvantage children who are born out-of- wedlock, or the equally open-ended reasonableness standard that is used to determine the Fourth Amendment right against unreasonable searches and seizures.

Which is the compelling analogy? Is the right to possess guns as fundamental to

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democracy and our liberties as the right to free speech? Proponents of the right to possess guns, who typically emphasize the connection of guns to self-defense, would agree and thus attempt to justify a review standard of strict scrutiny. Should the right to possess guns be analogized instead to the constitutional rights of commercial advertisers to be free from unreasonable restrictions on their speech, the rights of interstate businesses to be free from particularly burdensome state safety regulations, or the rights of criminal defendants to invalidate unreasonable searches and seizures by the police? The great harms from guns and the apparent need to carefully calibrate or balance individual rights and the power of governments to regulate against harm to others in complex arenas of social action support these analogies. Proponents of gun regulations and lesser standards of judicial scrutiny will argue for these analogies, and they will emphasize distinctions between any right to possess guns and the constitutional rights to political speech and personal privacy that obtain the protection of strict judicial scrutiny.

One senses that a judge's choice of the appropriate analogy for this most critical issue respecting an individual constitutional right to guns could be heavily influenced by either the mutual construction of facts and rules or the judge's theory of constitutional interpretation. If a judge perceives of gun possession as a fundamentally legitimate activity and government regulations as inclined towards oppressive bureaucracy, then this judge is more likely to favor strict judicial scrutiny of gun regulations. Similarly, if a judge is an originalist who likes to think in eighteenth century terms, he or she seems likely to favor strict judicial scrutiny as an appropriate method of protecting a fundamental right. By contrast, if a judge is more ambivalent about the value of guns, perceives their dangers as well as their legitimate uses, and is more inclined to think that government ought to be allowed to address pressing social issues, then the judge may favor the more lenient form of intermediate scrutiny that allows considerable government regulation, or even the deferential reasonable means test. Likewise, a judge of principle rather than originalism seems more likely to think in twentieth or twenty-first century terms and give weight to analogies between the need for modern gun regulations and the need for regulations of commercial advertising, interstate businesses and criminal activity in order to limit the harms to others that these complex activities can cause. The openness or dialectical quality of constitutional law continues to appear in this more technical issue of the standard of review, and yet the theory of conventional constitutional argument that we have been developing in this article seems capable of explaining judicial and political differences over this issue too.

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FILE-SHARING

Recording Firms Win Copyright Ruling; Judge Orders Verizon to Identify Internet Customer Who Used Music-File-Sharing Service

The Washington Post

January 22, 2003

Jonathan Krim

An Internet service provider must turn over the identity of one of its customers suspected of illegally trading music files, a federal judge ruled yesterday, handing the recording industry a powerful new weapon in its efforts to crack down on what it considers digital piracy.

In a closely watched test case of how much anonymity Internet users can expect, U.S. District Judge John D. Bates ordered the online division of Verizon Communications Inc. to give the Recording Industry Association of America (RIAA) the name of a Verizon customer who had downloaded as many as 600 songs a day using the popular Kazaa music-file-sharing service.

If the decision survives a promised appeal, it means that people who use such file-swapping programs could be targeted for legal action by entertainment companies. Because file sharing is popular with teenagers, their parents also could be in the cross hairs if they are the official subscribers of online services that connect their homes to the Internet.

The major labels have been waging fierce legal battles against file-sharing services, successfully shutting down the pioneering Napster Inc. and recently winning a ruling that the overseas-based Kazaa service could be sued in the United States. But online file sharing, which allows users to trade songs without paying for them, has persisted, costing the industry an estimated $5 billion in lost revenue last year worldwide.

The Kazaa software has been downloaded more than 100 million times. Now the industry can zero in on individuals as well, legal experts said.

"This will be a big club in the hands of the entertainment industry," said Jonathan Band, a Washington lawyer who specializes in Internet law. "They will definitely be able to reach a class of users that they have not been able to reach until now."

Cary Sherman, president of the RIAA, hailed the decision.

"The illegal distribution of music on the Internet is a serious issue for musicians, songwriters and other copyright owners," he said in a statement. "Now that the court has ordered Verizon to live up to its obligation under the law, we look forward to contacting the account holder whose identity we were seeking
so we can let them know that what they are doing is illegal."

Sarah B. Deutsch, Verizon's associate general counsel, countered that the judge improperly interpreted the law and that the company would appeal.

Internet service companies fear that if the decision stands, they will be deluged by subpoenas from the music industry demanding the identities of the tens of thousands of users, which will compromise their privacy and have a "chilling effect" on consumers and the online providers, she said.

Verizon also argued that the subpoena process is unfair to users because it does not require judicial approval. Subpoenas can be issued by the clerk of any federal court.

The case began last July, when the RIAA served Verizon with a subpoena for the user's name under a provision of the 1998 Digital Millennium Copyright Act (DMCA). The organization uses automated software to scour the Internet and identify file swappers but can identify them only by numeric Internet addresses on various networks. The RIAA also asked Verizon to terminate the user's service, which Verizon refused to do.

Verizon said it opposes digital piracy but argued that under the law Internet service providers are required to provide such information only if the offending material is stored on its network -- if, for example, it provides Web hosting services -- and not if it is merely the conduit for data transmission. Typically, the offending files reside on users' computers, which they make publicly available over the file-sharing networks.

But Bates ruled that the 1998 copyright act clearly specifies an ability and process for copyright holders to demand the identities of suspected infringers.

"Verizon's assertions to the contrary are refuted by the structure and language of the DMCA," Bates wrote. "Verizon has provided no sound reason why Congress would enable a copyright owner to obtain identifying information from a service provider storing the infringing material on its system, but would not enable a copyright owner to obtain identifying information from a service provider transmitting the material over its system."

That distinction is crucial to online providers. Providers often work with law enforcement agencies to identify lawbreakers but have been generally exempted from responsibility for the actions of their users in non-criminal areas such as libel.

"We support the right of RIAA and other copyright owners to protect their intellectually property," said David Baker, head of public policy for online provider EarthLink. "But RIAA is misusing the DMCA as a sword instead of a shield."

Some of the consumer groups that filed briefs in support of Verizon argued that the DMCA is unconstitutional because it restricts users' "fair use" rights to replay music and infringes on their privacy.

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Pacific Bell Internet Services jumped into the fray over music downloading late Wednesday, filing a federal lawsuit against the recording industry and questioning the constitutionality of the industry's effort to track down online music sharers. PBIS, the California Internet service provider of San Antonio-based SBC Communications Inc., alleges that many of the subpoenas served against it by the Recording Industry Assn. of America were filed improperly.

The RIAA has filed at least 871 subpoenas in U.S. District Court in Washington this month, demanding information from universities and Internet service providers about users of the online file-sharing network Kazaa.

PBIS claims that 154 subpoenas seeking file sharers' e-mail addresses were issued from the wrong jurisdictions. PBIS said the RIAA's demand for information on multiple file sharers could not be grouped under one subpoena.

In the suit, filed in U.S. District Court in San Francisco, PBIS maintains that it acts only as a "passive conduit" for the activity of its subscribers and "does not initiate or direct the transmission of those files and has no control over their content or destination."

PBIS is seeking a declaration that the subpoenas are overly broad in scope and should have been issued by a California district court.

In response, the RIAA called the suit "procedural gamesmanship" and said Internet service providers must identify online copyright violators.

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PARTIAL-BIRTH ABORTION

Judge Blocks Va. 'Partial-Birth' Abortion Ban; Federal Trial Scheduled to Decide Whether Measure Is Constitutional

The Washington Post

July 2, 2003

Michael D. Shear

A federal judge today blocked enforcement of a new Virginia law barring the termination of pregnancy by "partial birth," pending a trial in November on whether the measure is constitutional. The Center for Reproductive Rights had challenged the constitutionality of the ban, which was to take effect today. Lawyers for Attorney General Jerry W. Kilgore (R) defended the law in a brief hearing today and argued that it should take effect immediately.

U.S. District Judge Richard L. Williams granted the center's request that the law be put on hold. And he denied a motion by Kilgore's office for a 120-day delay before trial.

"I don't know why you need 120 days for a no-brain case like this," Williams said, alluding to previous reviews of the issue. In 1998, a similar Virginia law was struck down as unconstitutional by another judge in the same court.

The law, passed this year over the objections of Gov. Mark R. Warner (D), would make it a crime for doctors to perform procedures that opponents label "partial-birth infanticide."

The ban is similar to the "partial-birth abortion" ban that has passed both houses of Congress. Suzanne Novak, who argued the case for the center, called the judge's decision a temporary victory and a good sign that the ban would be struck down permanently later this year.

"We're happy that women's rights are protected, at least for now," she said. "If the Virginia General Assembly wants to pass unconstitutional laws, they will be struck down."

Priscilla Smith, another lawyer for the center, said the outcome in the Virginia case could indicate the fate of the national measure, which the center also opposes.

"That bill, like this one, is plainly unconstitutional," Smith said.

Supporters of Virginia's ban said it would stop the practice of killing infants moments after they had been prematurely delivered. They said they were disappointed by today's ruling.

"It is disappointing, but not unexpected, that those who have lost in the court of public opinion and the legislature use the courts to circumvent the will of the people," said Victoria Cobb, a
spokeswoman for the Family Foundation, which lobbied for the law.

Timothy Murtaugh, a spokesman for Kilgore, said the attorney general "intends to forcefully and vigorously defend the law, duly passed by the legislature. We are going to explore all of our options."

That could include asking the U.S. Court of Appeals for the 4th Circuit to overturn the judge's injunction.

The Virginia law was the first scheduled to take effect since the U.S. Supreme Court ruled in 2000 that a Nebraska partial-birth abortion bill was unconstitutional. The court said that law was too broad and should have included an exception to allow the procedure when a woman's health was at risk.

This year, the General Assembly sought to avoid the constitutional issue by defining the procedure as infanticide rather than abortion. The new law did not include a health exception.

A lawyer for Kilgore recounted the differences between the laws during the hearing.

But Williams, a longtime federal judge nominated to the bench by President Jimmy Carter in 1980, did not dwell on those arguments, barely waiting until the attorney had finished speaking before he ruled.

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House Votes to Restrict Abortions; Bill Would Ban Method Foes Call 'Partial Birth'

The Washington Post

June 5, 2003

Juliet Eilperin

The House voted last night to ban a series of procedures that critics call "partial birth" abortion, handing abortion opponents their biggest legislative win in more than a decade. President Bush -- unlike his predecessor -- has promised to sign the bill, which passed the Senate earlier this year in a slightly different form. Senate and House members plan to resolve those differences, and the measure could become law within weeks.

That will not end the fight, however. Abortion rights activists have vowed to challenge the measure in court, noting that three years ago the Supreme Court struck down a similar law in Nebraska.

Yesterday's 282 to 139 vote caps an eight-year legislative battle in which opponents used graphic depictions of abortion procedures to sway the opinion of the public and many Democrats who normally resist abortion restrictions. Under the bill, doctors could not commit an "overt act" to kill a partially delivered fetus whose head is outside the mother's body, or whose trunk beyond the navel is outside her body.

The bill defines partial-birth abortion as an operation in which the doctor "deliberately and intentionally vaginally delivers a living fetus . . . for the purpose of performing an overt act that the person knows will kill the partially delivered fetus." Doctors violating the law would face fines and as much as two years in prison.

In yesterday's contentious floor debate, the bill's supporters described the procedure as a savage and immoral act that must be stopped. "It's violent, it's barbaric, it's gruesome, it's horrific, it's infanticide," said Rep. Steve Chabot (R-Ohio).

Abortion rights advocates, who concede there is a procedure called "dilation and extraction," said doctors resort to it only when it is medically necessary. They said that the bill would apply to an array of common abortion methods used in the second or third trimester of pregnancy and that it fails to provide an exception for the mother's health.

"We should be promoting a woman's health. We shouldn't be endangering it," said Rep. Lynn C. Woolsey (D-Calif.).

Reps. Thomas M. Davis III and Frank R. Wolf voting in favor. It is unclear how often physicians perform the procedures in question. Opponents say thousands take place each year, but others say the number is far lower. The Alan Guttmacher Institute, which does research for abortion rights groups, estimates that about 2,200 dilation and extraction procedures took place in 2002, but that procedure is defined slightly differently from the one outlined in the bill adopted yesterday.

Congress has approved the ban twice before, but President Bill Clinton vetoed it each time. Supporters set the bill aside three years ago when the Supreme Court, voting 5 to 4, ruled that Nebraska's law on partial birth abortions was unconstitutional because it did not define the procedure clearly enough and failed to provide an exception for the mother's health.

Authors of the House bill said they addressed the court's concerns by including a more specific description of partial-birth abortion as well as language saying the procedure is never medically essential, making a health exception unnecessary.

Although the bill contains an exception for the mother's life, it asserts that "partial-birth abortion is never medically indicated to preserve the health of the mother; is in fact unrecognized as a valid abortion procedure by the mainstream medical community [and] poses additional health risks to the mother."}

Judiciary Committee Chairman F. James Sensenbrenner Jr. (R-Wis.) said he is confident the Supreme Court will "defer" to the congressional findings stated in the bill.

But opponents of the legislation said Congress could not simply sidestep the constitutional requirement for a health exception by declaring it unnecessary. "Congress cannot suddenly claim to have medical degrees," said Rep. Mark S. Kirk (R-III).

Doctors typically perform dilation and extraction procedures for health reasons, such as when a woman is prone to uterine perforation, when the fetus's head is enlarged and when doctors want to reduce the likelihood of retained fetal tissue that can lead to infection in the woman.

If lawmakers succeed in outlawing such procedures, doctors could employ methods that many consider riskier, such as hysterectomies.

Seeking a different approach, a bipartisan group of lawmakers who support abortion rights offered a substitute amendment that would outlaw abortions after a fetus becomes viable, unless the attending physician determines "it is necessary to preserve the life of the woman or to avert serious adverse consequences to her health." That proposal was defeated 133 to 287.

Advocates on both sides described yesterday's vote as groundbreaking. Although Congress has limited federal funding for abortion in the past, it has never banned a specific procedure in the three decades since the Supreme Court legalized abortion in Roe v. Wade.
"Congress is passing legislation that prevents women and families and doctors from making decisions about the best way to protect the life and health of the woman," said Gloria Feldt, president of Planned Parenthood.

Douglas Johnson, legislative director for the National Right to Life Committee, said the vote demonstrated that Americans were growing more comfortable with curtailing abortion rights.

"Increasing numbers of people are coming to understand Roe v. Wade is far more expansive than people realized," Johnson said.

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CARNES, Circuit Judge:

The Chief Justice of the Alabama Supreme Court installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building. He did so in order to remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church. And he rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." Glassroth v. Moore, 229 F.Supp.2d 1290, 1297 (M.D.Ala.2002).

The monument and its placement in the rotunda create the impression of being in the presence of something holy and sacred, causing some building employees and visitors to consider the monument an appropriate and inviting place for prayer. Three attorneys who do not consider the monument appropriate at all and who do not share the Chief Justice's religious beliefs brought two separate lawsuits to have the monument taken out. Agreeing with them that it violated the Establishment Clause of the First Amendment, the district court ordered the monument removed. Glassroth, 229 F.Supp.2d at 1319; Glassroth v. Moore, 242 F.Supp.2d 1067 (M.D.Ala.2002). The Chief Justice appealed. We affirm.

I.

Because "[i]n religious-symbols cases, context is the touchstone," King v. Richmond County, 331 F.3d 1271, 1282, slip op. at 2552 (11th Cir.2003), we set out the relevant facts in some detail, most of which are pulled from the district court's opinion, but a few of which we have drawn from undisputed testimony or other evidence in the record.

Chief Justice Moore began his judicial career as a judge on the Circuit Court of Etowah County, Alabama. After taking office he hung a hand-carved, wooden plaque depicting the Ten Commandments behind the bench in his courtroom and routinely invited clergy
to lead prayer at jury organizing sessions. Those actions generated two high-profile lawsuits in 1995 based on the Establishment Clause, one filed by a nonprofit organization seeking an injunction and the other brought by the State of Alabama seeking a declaratory judgment that then-Judge Moore's actions were not unconstitutional. Both suits were dismissed on justiciability grounds.

During his campaign for the Chief Justice position in the November 2000 election, then-Judge Moore's campaign committee, capitalizing on name recognition from the lawsuits, decided to refer to him as the "Ten Commandments Judge." The central platform of his campaign was a promise "to restore the moral foundation of law."

After he was elected, Chief Justice Moore fulfilled his campaign promise by installing the Ten Commandments monument in the rotunda of the Alabama State Judicial Building. Chief Justice Moore placed the monument in the rotunda of the Judicial Building without the advance approval or even knowledge of any one of the other eight justices of the Alabama Supreme Court. All decisions regarding it were made by him. He did not use any government funds in creating or installing the monument.

Thousands of people enter the Judicial Building each year. No one who enters the building through the main entrance can miss the monument. Members of the public must pass through the rotunda to access the public elevator or stairs, to enter the law library, or to use the public restrooms. A person walking to the elevator, stairs, or restroom will pass within ten to twenty feet of the monument. The Chief Justice chose the location of the monument so that everyone visiting the Judicial Building would see it.

The 5280-pound granite monument is "approximately three feet wide by three feet deep by four feet tall." Two tablets with rounded tops are carved into the sloping top of the monument. Excerpts from Exodus 20:2-17 of the King James Version of the Holy Bible, the Ten Commandments, are chiseled into the tablets.

The monument was installed after the close of business during the evening of July 31, 2001. The Chief Justice has explained that it was done at night to avoid interrupting the normal business of the building. The installation of the monument that night was filmed by Coral Ridge Ministries, an evangelical Christian media outreach organization. The organization has used its exclusive footage of the installation to raise funds for its own purpose and for Chief Justice Moore's legal defense, which it has underwritten.

At the public unveiling of the monument the day after its installation, Chief Justice Moore delivered a speech commemorating the event, and in that speech explained that the location of the monument was "fitting and proper" because:

this monument will serve to remind the appellate courts and judges of the circuit and district courts of this state, the members of the bar who appear before them, as well as the people who
visit the Alabama Judicial Building, of the truth stated in the preamble of the Alabama Constitution, that in order to establish justice, we must invoke "the favor and guidance of Almighty God."

During that speech, the Chief Justice criticized government officials who "forbid teaching your children that they are created in the image of Almighty God" and who "purport all the while that it is a government and not God who gave us our rights," because they have "turned away from those absolute standards which form the basis of our morality and the moral foundation of our law" and "divorced the Constitution and the Bill of Rights from these principles." Recalling his campaign "pledge to restore the moral foundation of law," he noted that "[i]t is axiomatic that to restore morality, we must first recognize the source of that morality," and that "our forefathers recognized the sovereignty of God." He noted during the speech that no government funds had been expended on the monument.

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The rotunda is open to the public, but it is not a public forum where citizens can place their own displays. Chief Justice Moore has denied the two requests that have been made to place other displays in the rotunda. He did so because he believed that those displays would have been inconsistent with the rotunda's theme of the moral foundation of law.

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The Chief Justice did add two smaller displays to the rotunda at some point after the Ten Commandments monument was installed. The first, a plaque entitled "Moral Foundation of Law," contains a quotation from the Rev. Dr. Martin Luther King Jr.'s letter from the Birmingham jail speaking of just laws and "the moral law or law of God," and a quotation from Frederick Douglass speaking of slavery as hiding man "from the laws of God." That plaque, which the Chief Justice paid for with his own money, measures forty-two inches by thirty-two inches. The second display is a brass plaque that contains the Bill of Rights. That plaque, measuring thirty inches by thirty-six inches, had been found in a box in the building. The Chief Justice added both plaques because he thought that they "comported with the moral foundation of law theme." The two plaques are inconspicuous compared to the Ten Commandments monument. Each is not only much smaller than the monument, but also is located seventy-five feet from it. A person standing in front of the monument cannot see either plaque. Nothing about their location or appearance indicates that they are connected to the monument.

The three plaintiffs are practicing attorneys in the Alabama courts. As a result of their professional obligations, each of them has entered, and will in the future have to enter, the Judicial Building. Because of its location, they necessarily come in contact with the monument. The monument offends each of them and makes them feel like "outsiders." ***

II.
Pursuant to 42 U.S.C. § 1983, the three plaintiffs sued Chief Justice Moore in his official capacity as administrative head of Alabama's judicial system, claiming that his actions violated the Establishment Clause of the First Amendment as applied to the states
through the Due Process Clause of the Fourteenth Amendment. They sought a declaratory judgment that his actions were unconstitutional and an injunction to force him to remove the monument. Prior to trial, Chief Justice Moore’s counsel requested—it may have been done jointly, but it is unclear from the record whether the plaintiffs actually joined or simply did not object to the request—that the district court judge visit the monument. The judge did so, accompanied by the attorneys for both sides.

After a seven-day bench trial, the district court concluded that Chief Justice Moore’s actions violated the Establishment Clause because his purpose in displaying the monument was non-secular and because the monument’s primary effect is to advance religion. The court entered judgment to that effect and gave the Chief Justice thirty days to remove the monument voluntarily. After he declined to do so, the district court entered an order enjoining him from failing to remove the monument from the public areas of the Judicial Building. The Chief Justice appealed, and the district court stayed its injunction pending appeal.

III.
As this Court recently explained, Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts. King v. Richmond County, 331 F.3d 1271, ----, slip op. 2541 (11th Cir.2003). As we have already noted, the facts set out in this opinion are taken largely from the district court’s findings. The Chief Justice attacks those findings on several bases.

[The court dismisses the Chief Justices four contentions. First that “the district court judge should not have made any factfindings based upon his viewings of the monument.” The court finds that the judge “fully discuss[ed] the matter with counsel for both sides . . . [a]nd he undertook the view in their presence.” Second, the court holds that the judge was not required to disclose its factfindings prior to issuing his opinion. Third, the court holds that the district court’s “subjective impressions” were acceptable, since the judge was required to “apply the reasonable person test.” Finally, the court finds no clear error in the district court’s factfindings.]

IV.
[The court finds that the plaintiffs have suffered as a result of the monument, and therefore have standing to bring the lawsuits.]

V.
Because of this country’s "history and tradition of religious diversity that dates from the settlement of the North American Continent," the Founders included in the Bill of Rights an Establishment Clause which prohibits any law "respecting an establishment of religion." County of Allegheny v. ACLU, 492 U.S. 573, 589, 109 S.Ct. 3086, 3099, 106 L.Ed.2d 472 (1989). In the more than two centuries since that clause became part of our Constitution, the Supreme Court has arrived at an understanding of its general meaning, which is that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious
institution, and may not involve itself too deeply in such an institution's affairs." *Id.* at 590-91, 109 S.Ct. at 3099 (footnotes omitted). Some aspects of the Chief Justice's position in this case are aimed directly at that understanding. Take, for example, the one we address next.

A. The First Amendment does not say that no government official may take any action respecting an establishment of religion or prohibiting the free exercise thereof. It says that "Congress shall make no law" doing that. Chief Justice Moore is not Congress. Nonetheless, he apparently recognizes that the religion clauses of the First Amendment apply to all laws, not just those enacted by Congress. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511, 91 L.Ed. 711 (1947) (holding that the Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment). Even with that concession, his position is still plenty bold. He argues that because of its "no law" language, the First Amendment proscribes only laws, which should be defined as "rule[s] of civil conduct ... commanding what is right and prohibiting what is wrong." Brief of Appellant at 19 (quoting 1 William Blackstone, *Commentaries* *44*). Any governmental action promoting religion in general or a particular religion is free from constitutional scrutiny, he insists, so long as it does not command or prohibit conduct. The monument does neither, but instead is what he calls "a decorative reminder of the moral foundation of American law."

However appealing those prospects may be to some, the position Chief Justice Moore takes is foreclosed by Supreme Court precedent. *Allegheny County*, 492 U.S. at 612, 109 S.Ct. at 3110, which held unconstitutional the placement of a creche in the lobby of a courthouse, stands foursquare against the notion that the Establishment Clause permits government to promote religion so long as it does not command or prohibit conduct. *Id.*, 109 S.Ct. at 3110 ***

B. Another of the Chief Justice's broad-based attacks on the application of the Establishment Clause to his conduct involves the definition of religion. [The court dismisses the Chief Justice's definition of religion as "inconsistent with the Supreme Court's."]] As for the other essential premise of Chief Justice Moore's argument—that the Ten Commandments monument depicts only the moral foundation of secular duties—the Supreme Court has instructed us that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 194, 66 L.Ed.2d 199 (1980) (footnote omitted). ***

[**A**] particular governmental use of [the Ten Commandments] is permissible under the Establishment Clause only if it withstands scrutiny under the prevailing legal test. As we discuss next, the use to which Chief Justice Moore, acting as a government official, has put the Ten Commandments in this case fails that test.
C.
For a practice to survive an Establishment Clause inquiry, it must pass the three-step test laid out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The *Lemon* test requires that the challenged practice have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion. *Id.* at 612-13, 91 S.Ct. at 2111.

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*** We applied the *Lemon* test in another religious display case just days before this one was orally argued. See *King v. Richmond County*, 331 F.3d 1271 (11th Cir.2003). In doing so, we observed that "[e]ven though some Justices and commentators have strongly criticized *Lemon*, both the Supreme Court and this circuit continue to use *Lemon's* three-pronged analysis." *Id.* at 1276, slip op. at 2545-46 (footnote omitted).

Applying *Lemon*, the district court concluded that Chief Justice Moore's purpose in displaying the monument was not secular. It based that conclusion on the Chief Justice's own words, on the monument itself, and on the physical context in which it appears. *Glassroth*, 229 F.Supp.2d at 1299-1300. ***

***

Chief Justice Moore testified candidly that his purpose in placing the monument in the Judicial Building was to acknowledge the law and sovereignty of the God of the Holy Scriptures, and that it was intended to acknowledge "God's overruling power over the affairs of men." 1st Supp. Rec. Vol. 2 at 100; 1st Supp. Rec. Vol. 3 at 34. ***

Against the weight of all this evidence, Chief Justice Moore's insistence in his briefs and argument, and in part of his testimony, that the Ten Commandments as presented in his monument have a purely secular application is unconvincing.

Under our circuit law, the purpose inquiry is a factual one, see *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1110-11 (11th Cir.1983), and on appeal we are obligated to accept the district court's findings of fact unless they are clearly erroneous, *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Clearly erroneous they are not. Moreover, even if we were free to review the determination *de novo*, having examined the record ourselves, we agree with the district court that it is "self-evident" that Chief Justice Moore's purpose in displaying the monument was non-secular.

[The court acknowledges that its inquiry could end there, but, applying the effect prong, further finds that the monument had "the primary effect of advancing religion." It concludes, "The monument fails two of *Lemon* 's three prongs. It violates the Establishment Clause."]

D.
Chief Justice Moore contends that even if it cannot clear the *Lemon* test, the monument is saved by the Supreme Court's decision in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983). In that case, the Supreme Court considered a challenge to
the Nebraska Legislature's practice of employing a chaplain to lead it in prayer at the beginning of each session. *Id.* at 784-85, 103 S.Ct. at 3332-33. Applying the *Lemon* test to the practice, the court of appeals concluded that the practice of beginning legislative sessions with prayer violated all three requirements of the test. *Id.* at 786, 103 S.Ct. at 3333. The Supreme Court, without applying *Lemon*, reversed on the ground that the challenged practice was "deeply embedded in the history and tradition of this country." *Id.* at 795, 103 S.Ct. at 3333, 3338.

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[The court refuses to read *Marsh* as broadly as the Chief Justice argues, and finds that there is "no evidence of an 'unambiguous and unbroken history' of displaying religious symbols in judicial buildings." Therefore, the court finds that *Marsh* does not apply to this case.]

**E.**

The result we reach in this case is not inconsistent with our recent decision in *King*, 331 F.3d at ----, slip op. 2541. In that case, we applied the *Lemon* test and concluded that the Seal of the Richmond County Superior Court did not violate the Establishment Clause despite its inclusion of a depiction of the Ten Commandments. *Id.* at ----, slip op. at 2556. The Seal included an image of two tablets, the first with Roman numerals I through V and the second with numerals VI through X. *Id.* at ----, slip op. at 2543. The Seal had been in use for more than one hundred thirty years, and there was no evidence about why the pictograph of the Commandments was originally included. The county proffered a plausible secular purpose, which was that the Commandments allowed illiterate Georgians to recognize the Seal as a symbol of law, and in the absence of any showing that the proffered secular purpose was implausible, we concluded that the County had satisfied the purpose prong of the *Lemon* test. *Id.* at ---- ----, slip op. at 2546-48.

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The distinctions between that case and this one are clear. In *King*, there was no evidence of a non-secular purpose; in this case, there is an abundance of evidence, including parts of the Chief Justice's own testimony, that his purpose in installing the monument was not secular. In *King*, the image was in the context of another symbol of law; in this case the monument sits prominently and alone in the rotunda of the Judicial Building. In *King*, the image was approximately one-inch in size and not a focal point; in this case the monument is an unavoidable two-and-one-half ton centerpiece of the rotunda. Finally, there was no text of the Commandments on the Seal in *King*; in this case the monument contains text from the King James version of the Bible.

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**VI.**

Finally, we turn to a position of Chief Justice Moore's that aims beyond First Amendment law to target a core principle of the rule of law in this country. He contends that the district court's order and injunction in this case contravene the right and authority he claims under his oath of office to follow the state and federal constitutions "as he best understands them, not as understood by others." He asserts that "courts are
bound by the Constitution, not by another court's interpretation of that instrument," and insists that he, as Chief Justice is "not a ministerial officer; nor is he answerable to a higher judicial authority in the performance of his duties as administrative head of the state judicial system."  

The Chief Justice's brief reminds us that he is "the highest officer of one of the three branches of government in the State of Alabama," and claims that because of his important position, "Chief Justice Moore possesses discretionary power to determine whether a court order commanding him to exercise of [sic] his duties as administrative head is consistent with his oath of office to support the federal and state constitution."  

The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era.  

Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case.  

The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail.  

VII.  

AFFIRMED.
Ten Commandments Monument Removal Ordered

AP Online

August 5, 2003

Bob Johnson

MONTGOMERY, Ala. (AP) A federal judge on Tuesday ordered the chief justice of Alabama's Supreme Court to remove a Ten Commandments monument from the state's Judicial Building within 15 days.

The federal judge, who has ruled the 5,300-pound monument violates the constitutional ban on government promotion of religion, lifted a stay he had previously issued while Alabama Chief Justice Roy Moore appealed.

Moore, whose stand was rejected by an appeals court, has said he will turn next to the U.S. Supreme Court.

The ruling by Judge Myron Thompson came a day after Moore filed a brief claiming Thompson did not have the authority to make him remove the black granite monument from the building's rotunda. Moore contends Alabama's constitution permits the acknowledgment of God by the state and that the federal court has no jurisdiction to order the state to act otherwise.

Thompson's order said the monument must be moved from the public areas of the building by Aug. 20, but could remain in a private area, such as Moore's chambers. The building houses the Supreme Court chamber and offices of appeals court judges.

Thompson said he does not plan to take immediate action to remove the monument if Moore does not comply, but may fine the state each day the monument remains in place.

An attorney for Americans United for Separation of Church and State, one of three groups that filed suit challenging the monument, said it is time for Moore to remove it.

"The monument is becoming a millstone around the neck of Alabama. It is time to let reason prevail over politics," Ayesha Khan said.

Moore had no immediate comment Tuesday. His spokesman, Tom Parker, issued a statement calling Thompson's order "judicial tyranny."

Parker added that Thompson had no right to fine other state officials if the monument is not removed. "They are not parties to this case," he said.

Moore had the monument moved into the building's rotunda in the middle of the night on July 31, 2001, saying that the Ten Commandments represent the moral foundation of American law.

Last year, Thompson ruled that the monument was an unconstitutional endorsement of religion by the state. Thompson ordered Moore to remove the monument within 30 days, but stayed
that order pending Moore's appeal. A federal appeals panel upheld Thompson's order last month.

Several religious groups have called on Christians across the country to come to Montgomery and kneel around the monument to prevent its removal.

John Giles, president of the Alabama Christian Coalition, said there would be a showdown if Thompson attempts to have the monument removed.

"The encroachment of the federal court on this matter will be met with considerable peaceful intervention," Giles said.

Richard Cohen, a lawyer for the Southern Poverty Law Center, which also joined the lawsuit, urged Attorney General Bill Pryor "to put aside his personal support of the monument and work with Justice Moore to follow the law."

A spokeswoman for Pryor declined to comment.

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Moore vows to fight ruling

*Montgomery Advertiser*

July 23, 2003

Todd Kleffman

The chief justice plans to take the Commandments case to the nation's highest court Alabama Supreme Court Chief Justice Roy Moore decided Tuesday to take his Ten Commandments case directly to the U.S. Supreme Court, triggering a timeline that opponents say could lead to the monument's removal by next week.

"If he wants to continue his grandstanding, he better do it quickly, because that monument is not going to be there much longer," said attorney Danielle Lipow of the Southern Poverty Law Center, one of three organizations battling Moore in court.

Moore had until Tuesday to ask the full 11th Circuit Court of Appeals to reconsider an earlier ruling by three of the circuit's judges. They ruled that the Ten Commandments monument Moore installed in the rotunda of the state Judicial Building two years ago is unconstitutional.

"I will not delay by seeking further hearings before the 11th Circuit Court of Appeals," Moore said in a statement released Tuesday. "I will personally petition the United States Supreme Court as chief justice of this state to hear me on this matter."

Because Moore has decided not to ask for a rehearing before the 11th Circuit, the decision made by the three-judge panel becomes official on July 29.

The appellate judges upheld an earlier ruling by U.S. District Judge Myron Thompson that the monument violates the First Amendment's prohibition against state-endorsed religion. After a weeklong trial last year, Thompson ordered the monument removed but issued a stay until after Moore appealed to the 11th Circuit.

"On that day, the plaintiffs will ask Judge Thompson to lift his stay. He stated very clearly that he would lift the stay immediately upon receipt of the appellate court's decision," Lipow said.

"I believe Judge Thompson may wait to hear what Chief Justice Moore has to say, but I can't imagine a good argument for keeping it a day longer," she continued. "This has already been delayed four months so Chief Justice Moore could pursue an appeal that never had a prayer for success. At a certain point, the federal court is going to treat the plaintiff's civil rights more seriously than the chief justice's ego."

Tom Parker, Moore's spokesman, said Tuesday that neither Moore nor his attorneys would comment beyond what was said in the press release. In the past, the chief justice has repeatedly declined to comment on what he will do if
ultimately ordered by the courts to remove the monument.

Moore now has until early October to file a petition of certiorari with the Supreme Court, requesting the high court to take on the case.

"We are 100 percent confident they will elect not to hear this case," Lipow said.

Moore's plan to petition the high court personally as chief justice will not earn him any extra favors with the justices, Lipow said.

"His name or position carry no weight with the Supreme Court. They will give him the same respect they would to anyone coming before them," she said.

Moore supporter Mel Glenn, executive director of Foundation for Moral Law, said that, despite the naysayers, he remains hopeful the high court will hear Moore out.

"People say it has only a remote chance, but I believe in my heart they will agree to hear it because of all the critical issues involved," said Glenn, whose organization helps raise money to defend Moore's monument in court.

"This isn't your average Ten Commandments case," he continued. "It is being raised by the top judicial official in the state. It's about whether the state and its citizens can publicly acknowledge God. The eyes of the nation are on this case. I believe the Supreme Court will pick up on all this and pick up the case on certiorari."

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[Excerpt; some footnotes and citations omitted.]

[After a panel of the Fourth Circuit denied him relief, Hamdi filed a petition for rehearing en banc. The Court denies the petition for rehearing.]

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

I concur in the denial of the rehearing en banc. The panel opinion written by Chief Judge Wilkins, Judge Traxler, and myself has already properly resolved this case. I thus offer only these few comments in response to the dissent of my good colleague Judge Motz.

Hamdi is being held according to the time-honored laws and customs of war. There is nothing illegal about that. The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief. And the question is essentially whether the United States can capture and retain prisoners of war without subjecting the factual circumstances surrounding foreign battlefield seizures to extensive in-court review. The answer to this is now—and always has been—yes. In giving prisoners of war the right to litigate their detentions in American courts, the dissent would install a more restrictive regime on the executive branch after September 11 than existed before. I regret that my colleague does not even quote the provisions of Article I and Article II which delegate the conduct of war to the coordinate branches of our government.

To claim, as my colleague does here, that there was no meaningful judicial review of Hamdi's detention is incorrect. There was extensive review of every legal challenge to Hamdi's detention. The dissent wishes to proceed further and litigate precisely why petitioner was seized and whether the military capture can be justified. The conduct of war, however, involves innumerable discretionary decisions made by our armed forces in the field every day. Many of them have life or death consequences. To subject these discretionary decisions made in the course of foreign combat operations to the prospect of domestic litigation would be an unprecedented step. Doing so

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would ignore the fundamentals of Article I and II—namely that they entrust to our armed forces the capacity to make the necessary and traditional judgments attendant to armed warfare, and that among these judgments is the capture and detention of prisoners of war.

Hamdi’s own filings make clear that he was seized in a zone of active combat operations. Hamdi’s petition notes that "[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." In their traverse, petitioners state that the petition does not "implicate Respondents' initial detention of Petitioner Hamdi in Afghanistan." And outside the legal arena, petitioner Esam Fouad Hamdi, in a letter to Senator Patrick J. Leahy, stated that they were "not challenging the battlefield determination, decision to detain individuals in the theater of combat." Even the district court, while ordering a more intrusive examination of the circumstances of Hamdi’s capture, noted that "[p]etitioners concede that Hamdi’s initial detention in a foreign land during a period of ongoing hostilities is not subject, for obvious reasons, to a due process challenge." Our review of the petition was undertaken in light of this undisputed fact.

With respect, the dissent’s demand for further factual inquiries raises many more questions than it answers. The dissent notes vaguely that it wants a non-hearsay basis for petitioner’s detention and that the Mobbs Declaration must be probed for every incompleteness or inconsistency. While the dissent appears to acknowledge that the district court production order went too far, its specific criticisms of the Mobbs Declaration suggest otherwise. This desire to have courts wade further and further into the supervision of armed warfare ignores the undertow of judicial process, the capacity of litigation to draw us into the review of military judgments step by step.

The dissent declines to acknowledge the perils in its path, and we are left to guess at how it would proceed. Opposing affidavits would not likely satisfy the dissent, for they would leave the court to weigh one protestation against the other with little means of doing so. Ex parte, in camera review would set disputes in motion over the scope of redaction and create a whole new set of secrecy issues surrounding Hamdi’s case. Ex parte, in camera submissions would likely please no one—neither the government required to hand over potentially sensitive materials, nor Hamdi who would be denied the chance to contest an ex parte review of them, nor the public who would be left in the dark about the real basis for resolving Hamdi’s case. My dissenting colleague also laments the absence of "first-hand knowledge of Hamdi’s conduct or status in Afghanistan." The dissent is plainly unwilling to trust the judgment of those actually fighting the war that Hamdi was properly seized. What further steps should the judiciary then be prepared to take? What kind of hearings? What role for counsel? What kind of showings? What sort of witnesses? The district court struggled with these questions to ill effect. See Hamdi, 316 F.3d at 470-71; Hamdi v. Rumsfeld, 243 F.Supp.2d 527 (E.D.Va.2002).

My colleague’s desire for more and more information signals not the end of a constitutionally intrusive inquiry, but the beginning. To start down this road of
litigating what Hamdi was actually doing among the enemy or to what extent he was aiding the enemy is to bump right up against the war powers of Articles I and II. Judges are ill equipped to serve as final and ultimate arbiters of the degree to which litigation should be permitted to burden foreign military operations. The ingredients essential to military success--its planning, tactics, and intelligence--are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil.

Because I think it both unreasonable and unfair to expect either judges or attorneys to discard a lifetime of honed instinct, I suspect that in time, if the course of the dissent is followed, the norms of the criminal justice process would come to govern the review of battlefield detentions in federal court. The prospect of such extended litigation would operate to inhibit our armed forces in taking the steps they need to win a war. The specter of hindsight in the courtroom would haunt decision-making in the field. At a minimum, if rules are to be prescribed for litigating something as sensitive as the soundness of battlefield detentions in Article III courts, then the prescription should come from Congress or the Executive--the branches of government charged by our Constitution with the conduct of foreign war. I cannot conceive of the courts on their own motion--without the considered input of the political branches--devising a set of procedures allowing prisoners of war to hold American commanders accountable in federal court. If any illustration of the difficulties and hazards of such a judicial enterprise were needed, the history of Hamdi's case should more than suffice.

My colleague also interprets a series of World War II-era Supreme Court cases as invitations for the judiciary to involve itself in an exacting review of decisions made on foreign battlefields. My colleague's overreading of these decisions misses their fundamental import: they are replete with warnings that the judiciary must stay its hand when reviewing an exercise of the Commander-in-Chief powers during wartime. Ex parte Quirin, for example, holds without reservation that detentions "ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" should not "be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." 317 U.S. 1, 25, 63 S.Ct. 2, 87 L.Ed. 3 (1942). Likewise, Johnson v. Eisentrager emphasized that "[e]xecutive power over enemy aliens"--the enemy combatants at issue in that case--"undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security." 339 U.S. 763, 774, 70 S.Ct. 936, 94 L.Ed. 1255 (1950). And In re Yamashita noted that the military tribunals challenged in that case were "not subject to judicial review merely because they have made a wrong decision on disputed facts." 327 U.S. 1, 8, 66 S.Ct. 340, 90 L.Ed. 499 (1946). These cases are caution signals to the judiciary, not green lights.

I seriously doubt that any mistake was made in Hamdi's case. But the Supreme Court in Ex parte Quirin, Johnson v. Eisentrager, and In re Yamashita was
fully aware that war was a messy business, that mistakes could be made, but that close judicial review was nonetheless costly and constitutionally proscribed. And the panel in this case did not seek to move further than the precise case before it. To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges. Moreover, the recharacterizations of the holding in the dissent are manifestly far afield. The panel did not suggest that its holding would apply to any part of the world where American troops might happen to be present. There is not the slightest resemblance of a foreign battlefield detention to the roundly and properly discredited mass arrest and detention of Japanese-Americans in California in *Korematsu*. These attempts to recharacterize the holding of the panel find no support in the opinion's text itself.

Finally, although both the panel opinion and the dissent have noted the evidentiary shortcomings of the Mobbs Declaration, there is a value to having the United States state under oath its reasons for the detention of an American citizen, even one captured during the course of armed combat. To go further, however, would be folly. It is precisely at the point of armed combat abroad that the government's detention interests in gathering vital intelligence, in preventing detainees from rejoining the enemy and in stemming the diversion of military resources abroad into litigation at home are at their zenith. It diminishes these interests to inquire whether the judiciary deems them "legitimate," "substantial," or "compelling," for they are grounded in the wording of Articles I and II themselves. The federal judiciary plays a vital role in securing our rights. But the other branches of government also play their part in securing the blessings of our liberty. In this case, the paramount right is that of the citizens of our country to have their democracy's most vital, life-or-death decisions made by those whom the Constitution charges with that task.

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TRAXLER, Circuit Judge, concurring in the denial of rehearing en banc: [Omitted.]

LUTTIG, Circuit Judge, dissenting from denial of rehearing *en banc*: [Omitted.]

DIANA GRIFFIN MOTZ, Circuit Judge, dissenting from denial of rehearing *en banc*:

For more than a year, a United States citizen, Yaser Esam Hamdi, has been labeled an enemy combatant and held in solitary confinement in a Norfolk, Virginia naval brig. He has not been charged with a crime, let alone convicted of one. The Executive will not state when, if ever, he will be released. Nor has the Executive allowed Hamdi to appear in court, consult with counsel, or communicate in any way with the outside world. Precedent dictates that we must tolerate some abrogation of constitutional rights if Hamdi is, in fact, an enemy combatant. However, a panel of this court has held that a short hearsay declaration by Mr. Michael Mobbs—an unelected, otherwise unknown, government "advisor," "standing alone" (subject to no challenge by Hamdi or court-ordered verification) is "sufficient as a matter of law to allow meaningful
judicial review" and approval of the Executive's designation of Hamdi as an enemy combatant. I cannot agree.

To justify forfeiture of a citizen's constitutional rights, the Executive must establish enemy combatant status with more than hearsay. In holding to the contrary, the panel allows appropriate deference to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed all citizens. With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case en banc.

I.
The panel's decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanction this holding.

***
The panel suggests that this conclusion accords with precedent. In fact the Supreme Court has never held that a person designated by the Executive as an enemy combatant cannot challenge that designation or that a court cannot require the Executive to substantiate it. In the case on which the majority relies, Ex Parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3 (1942), the Court did hold that for a violation of the laws of war, even an American citizen could be treated as an "enemy combatant" and held without the full array of Constitutional rights, but only because the citizen, after consultation with legal counsel, stipulated to the facts supporting the enemy combatant designation.

Thus, in Quirin, a German-born soldier, who claimed to be an American citizen, stipulated that after receiving payment by the German government and instruction by the "German High Command to destroy war industries and war facilities in the United States," he and six other German soldiers secretly landed in the United States during World War II with "a supply of explosives." *** Critical to the case at hand, the Court first expressly rejected the Executive's argument that the soldiers, "must be denied access to the courts because they are enemy aliens who have entered our territory." Instead, each of the soldiers was permitted, with the assistance of counsel, to file his own (not a next friend) petition for a writ of habeas corpus, which the courts reviewed to ensure that each soldier was in fact an enemy combatant.

None of the few other Supreme Court cases addressing the rights of enemy combatants involved American citizens. But even when dealing with the claims of German and Japanese citizens detained by military authorities outside the United States during World War II, the Court has never suggested that an enemy combatant is without recourse to challenge that designation in court. On the contrary, the Court has held that a resident alien—who, the Court specifically noted, has far less status than those, like Hamdi, who enjoy the "high privilege" of citizenship—can challenge the Executive's designation of him as an enemy. Johnson v. Eisentrager, 339 U.S. 763, 770, 775, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).
Moreover, the Supreme Court has upheld the Executive's designation of a person as an enemy alien or enemy combatant only when presented with facts supporting this designation—facts stipulated by the petitioner with the advice of counsel, as in *Quirin*, or facts proved by the prosecution at a military trial in which the petitioner was afforded counsel, as in *Yamashita*. In the case at hand, no facts have been presented to support the Executive's designation. ***

Denied the most basic procedural protections, Hamdi could not possibly mount a challenge to the Executive's designation of him as an enemy combatant. Yet in *Eisentrager, Ludecke*, and *Yamashita* the Supreme Court has explained that even aliens are entitled to precisely this right. Thus, far from supporting the panel's position, controlling precedent prohibits its approach.

II.

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Indeed, the panel offers only a single justification for its unprecedented decision to permit the Executive to support its designation of Hamdi as an enemy combatant with pure hearsay: Hamdi's capture in a "zone of active combat" was assertedly "undisputed." ***

[Judge Motz argues against relying on Hamdi's next friend petition and the Mobbs declaration.]

At the same time, I hasten to note that the total inadequacy of the Executive's proffer and the panel's review here does not provide license for a searching judicial inquiry into the factual circumstances of every detainee's capture, or require compliance with a production order as demanding as that called for by the district court. Such an approach could hamper the Executive's ability to wage war, as the panel explains at length. But the possibility, no matter how real, that an improperly conducted judicial inquiry could impair the Executive's ability to wage war cannot, as the panel seems to believe, provide a justification for holding that the Executive can indefinitely detain an American citizen (even one captured in a zone of active hostilities) without producing any credible evidence that the citizen is an "enemy combatant." The Constitution gives Congress, not the Executive and not the courts, the power to suspend the writ of habeas corpus when the public safety requires it. Absent a suspension of the writ, the Constitution demands that we strike the proper balance between ensuring the Executive's ability to wage war effectively and protecting the individual rights guaranteed to all American citizens. Without such a balance, our system of ordered liberty will indeed ring hollow.
Dissent on Detention

The Washington Post

July 19, 2003

Editorial

Until the war on terrorism began and the military brought to American shores a man named Yaser Esam Hamdi, Americans had no cause to worry about their government locking them up without charge. It was thought that sort of thing doesn't happen here; people can't be held without access to lawyers, and those arrested have access to the courts. But Mr. Hamdi, the government claimed, was not like other Americans; he was an "enemy combatant." Allegedly captured with a Taliban unit in Afghanistan, he was brought to a Navy brig in Virginia -- where he has been held incommunicado ever since -- after military interrogators learned that the Louisiana-born Saudi was probably an American citizen. Since his arrival, Mr. Hamdi has not been charged and has not seen a lawyer or his family. Earlier this year a federal appeals court panel in Richmond declared all of this legal. The panel of the U.S. Court of Appeals for the 4th Circuit ruled that the military owes the courts no more justification for the indefinite detention of an American than a two-page affidavit by a Pentagon official. The president can, with a sweep of the pen, designate individuals as beyond the protection of the Bill of Rights.

Last week, the full 4th Circuit Court, by an 8 to 4 vote, declined to reconsider the panel's ruling. This is no particular surprise; few were expecting it to do so. What was surprising was the vigor of the dissents, which came from an ideologically eclectic group of the court's judges, unified less by their sense of how the case should be resolved than by a laudable insistence on acknowledging the true stakes for liberty that it presents.

Mr. Hamdi likely is the enemy fighter the government alleges him to be. And we do not claim -- as some civil libertarians do -- that the government may never hold an American citizen as an enemy combatant. But the question is whether the courts have any meaningful role in overseeing such designations and what, if any, right the accused has to object to a designation. The panel held that Mr. Hamdi has no right to respond to the government's claims, because it is "undisputed that he was captured in a zone of active combat operations abroad." Because of Mr. Hamdi's purported concession of that fact, the court simply signed off on the detention.

Yet the use of the word "undisputed" is sleight of hand -- as Judges J. Michael Luttig and Diana Gribbon Motz both pointed out in separate dissents. Judge Luttig wrote that "those circumstances are neither conceded in fact nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel." And Judge Motz warned additionally

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that under the panel's ruling, "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an 'enemy combatant.'"

Unlike Judge Motz, who would insist that Mr. Hamdi get to make his case, Judge Luttig makes clear that he would likely agree that the court need not hear from Mr. Hamdi before okaying his detention. What Judge Luttig would not do, however, is dodge what he terms "the admittedly difficult issue" the case presents by pretending the courts have heard the whole story when they have heard only one side of it. By doing so, he complains, the court "succeeded in securing neither the guarantees of the Bill of Rights nor the powers" of the president to wage war without judicial micromanagement. We disagree with Judge Luttig's bottom line. But his point is well taken: Some circles can't be squared, and the courts must at some point choose between deference to the president's war powers and protecting the liberty of Americans. Here's hoping the Supreme Court makes a better choice.

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Jailing of Hamdi Upheld As Rehearing Is Denied

The Washington Post

July 10, 2003

Jerry Markon

A federal appeals court yesterday denied a rehearing for a U.S. citizen captured with Taliban soldiers in Afghanistan, letting stand a ruling that the man can be jailed indefinitely without an attorney. The decision by the Richmond-based U.S. Court of Appeals for the 4th Circuit came in the case of Yaser Esam Hamdi, a Louisiana-born man designated an "enemy combatant" by the military. In January, a three-judge panel of the 4th Circuit gave the government an important victory in the war on terrorism by ruling that the Constitution gives the executive branch the responsibility to wage war and the courts must yield to the military in making such determinations.

Hamdi's attorney and a coalition of more than 100 law professors and legal organizations asked for a rehearing. By an 8 to 4 vote, the full slate of active judges let the decision stand. Two judges on each side of the rehearing issue wrote strong opinions evoking centuries-old constitutional issues.

Judge J. Harvie Wilkinson III, who co-wrote the original Hamdi decision, was even more forceful yesterday. "The ingredients essential to military success -- its planning, tactics, and intelligence -- are beyond our ken, and the courtroom is a poor vantage point for the breadth of comprehension that is required to conduct a military campaign on foreign soil," he wrote in arguing that the separation of powers in the Constitution keeps the judiciary out of warmaking.

Judge Diana Gribbon Motz was just as forceful in writing a dissent: "The panel's decision marks the first time in our history that a federal court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant."

Frank W. Dunham Jr., the federal public defender who represented Hamdi, said last night he intends to ask the Supreme Court to review the decision. "Because I cannot talk to my client and because of the extreme importance of the issue, I have no choice but to pursue the matter to the U.S. Supreme Court," he said.

While fighting with Taliban troops in Afghanistan, Hamdi was captured by Northern Alliance forces in November 2001. He was placed in the Navy brig in Norfolk when it was learned that he was born in Baton Rouge. His case entered the legal system after Dunham saw media reports of Hamdi's arrival in Virginia and tried to see him.

The government objected and justified Hamdi's detention with a declaration that Hamdi had joined a Taliban military unit, received training and
acknowledged loyalty to the Taliban when captured.

The 4th Circuit's decision in January was not a total victory for the government because it covered only Americans captured on a battlefield overseas and not citizens arrested in the United States. As such, the decision would not apply to Jose Padilla, an American declared an enemy combatant for allegedly plotting to detonate a dirty bomb, or Bradley University graduate Ali Saleh Kahlah Al-Marri, who was placed under military control June 23 after President Bush said he was an al-Qaeda sleeper agent. In federal court in Illinois, Al-Marri's attorneys this week challenged his designation as an enemy combatant.

Douglas Kmiec, dean of Catholic University Law School in Washington, said the Hamdi decision is justified because the nation is at war against terrorism. "I think the government received a necessary affirmation of its position," said Kmiec, one of seven people who filed pro-government briefs in the case.

But Rosa Ehrenreich Brooks, an associate professor of law at the University of Virginia, blasted the decision as "chilling" and called Wilkinson's concerns "wildly overblown."

"What is at issue is not whether the military has the authority on the battlefield to temporarily detain someone they believe to be a combatant. Nobody is questioning that," said Ehrenreich Brooks, one of the professors who supported Hamdi. "The question is, Can you then detain a U.S. citizen indefinitely without charge and without access to counsel once you have gotten him off the field of combat."

Judge William B. Traxler Jr. also filed an opinion yesterday concurring with the court's decision, and Judge J. Michael Luttig dissented. Luttig called the original panel decision "unpersuasive" and called for the entire court to review it because of "the significance of the issue."

NEW YORK Jose Padilla must have no idea how famous he has become in the last year.

Padilla, the former Chicago gang member who is suspected of plotting to explode a radioactive "dirty bomb," is being held incommunicado in a South Carolina navy brig. Since last June, he has had no contact with his family or his attorneys, and an appellate court order last week made it clear he faces several more months of isolation.

But while intelligence officials have been interrogating him to find out what he knows about the Al Qaeda organization, his case has become a lightning rod in the government's controversial crackdown on terrorist groups and those suspected of having terrorist ties.

Civil liberties advocates view Padilla, a U.S. citizen whom President Bush designated an "enemy combatant," as one of the chief victims of an overzealous administration ready to run roughshod over the Constitution to score victories against terrorism.

"I think it's the most extreme assertion of unchecked executive authority in the war on terrorism," said David Cole, a Georgetown University law professor. "The government asserts that they can do this with respect to any person, anywhere in the world, and the courts have virtually no role to play in reviewing that assertion."

Defenders of the administration's legal tactics say the "enemy combatant" category is a new weapon for a new kind of war, where terrorists can exploit the freedoms of an open society to cause the deaths of thousands, as happened on Sept. 11, 2001. And so far, they note, only Padilla and one other person, Yaser Esam Hamdi, also a U.S. citizen, have been designated enemy combatants.

"We are capable of drawing lines, and we do not need to presume bad motivation and abuse" by the government, said Paul Rosenzweig, a senior fellow at the Heritage Foundation, a conservative think tank. ***

These competing views of the enemy combatant designation will be aired before the U.S. 2nd Circuit Court of Appeals here. Last week, the court said it would review a federal judge's ruling this year, which upheld the government's right to hold Padilla as an enemy combatant but ordered the government to let him meet with his attorneys.
Padilla, 32, was picked up on a material witness warrant in May 2002 at O'Hare International Airport after returning from Pakistan. While abroad, he allegedly discussed plans to explode a "dirty bomb" somewhere in the U.S., possibly Washington, according to a six-page government document that contains the only evidence that has been made public in the case.

After his arrest, Padilla was transferred to New York as part of a federal grand jury investigation. During the next four weeks, he met several times with his court-appointed attorney, Donna Newman, a New Jersey defense lawyer.

A day before a court appearance where the government would have had to explain the grounds on which Padilla was being held, Newman received a call from an assistant U.S. attorney. "He tells me that my client has been designated an enemy combatant," recalled Newman, who had prepared motions demanding Padilla's release. "I really thought he was kidding."

But the designation was no joking matter.

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The administration claims that a World War II espionage case established the precedent for declaring U.S. citizens as enemy combatants and holding them until hostilities cease. Hamdi was captured on an Afghanistan battlefield, fighting for the Taliban.

In January, the U.S. 4th Circuit Court of Appeals in Richmond, Va., said the government was within its rights in the Hamdi case, but its opinion was worded to exclude Padilla, an unarmed man arrested as he got off an airplane.

Attorneys denied access

Since Padilla was moved to the Naval Consolidated Brig in Charleston, S.C., last June, the Justice Department has argued in federal court that Newman and her co-counsel, Andrew Patel, should not be allowed to see Padilla because their presence could impair Padilla's interrogation.

"Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation," Vice Adm. Lowell Jacoby, the head of the Defense Intelligence Agency, said in a declaration filed this year in U.S. District Court here. "Any insertion of counsel into the subject-interrogator relationship . . . can undo months of work and may permanently shut down the interrogation process."

In fact, Jacoby said, Padilla may prove tougher to question than most terrorism suspects because of his extensive criminal record. Padilla, who was born in Brooklyn but grew up in Chicago, served jail sentences in Florida and Illinois.

"These experiences have likely heightened his expectations that counsel will assist him in the interrogation process," Jacoby wrote. "Only after such time as Padilla has perceived that help is not on the way can the United States
reasonably expect to obtain all possible intelligence information from Padilla."

Intelligence officials in Washington have competing views about Padilla's significance in the war on terror.

One U.S. official, speaking on the condition of anonymity, said the potential intelligence value of Padilla, like all captives with alleged Al Qaeda ties who have been in extended detention, has been diminished because he's been out of commission for so long.

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But another intelligence official said Padilla "still has the potential to be of high value" for counterterrorism operations because of his alleged involvement in "dirty bomb" discussions.

According to administration officials, enemy combatants can be held as long as the war on terrorism continues. But defeating terrorism, unlike vanquishing Germany and Japan, is a far less tangible goal.

"That point is never going to arrive," said Georgetown's Cole, author of "Enemy Aliens," which examines the war on terrorism and constitutional rights. "This is a permanent condition."

But the Heritage Foundation's Rosenzweig views that thinking as alarmist, arguing that the government has improved at not overreacting in times of crisis.

"These are two guys we actually think are terrorists," he said, referring to Padilla and Hamdi. "I simply can't accept the idea that unless the government acts perfectly, it can't act at all."

A recent report by the Justice Department's inspector general has raised concerns among civil liberties groups about the conditions under which Padilla is being interrogated. The report found that some of the 762 immigrants who were detained after Sept. 11 were abused before being deported or released.

"Whether all kinds of deprivations are happening, we don't know," said Barbara Olshansky, deputy legal director of the Center for Constitutional Rights, a New York civil liberties group. "People who were just being detained were badly mistreated, subjected to patently unconstitutional policies and practices."

Defense Department officials could not be reached Friday.

Although Padilla's case is heading to appellate court, he is destined to spend several more months in the navy brig. The court will not hear oral arguments until mid-October at the earliest, and the decision is likely to be appealed.

"They're going to succeed in having him in detention for well over a year and a half without his seeing an attorney, or anyone else, for that matter," Cole said. "Simply by asserting its authority, the government has gotten much of what it wants."

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NEW YORK -- In a sharply worded rebuke to the Bush administration, a Manhattan federal judge ruled Tuesday that Jose Padilla, the former Chicago street gang member held incommunicado for nine months, can meet with his lawyers.

Stung by U.S. District Judge Michael Mukasey's December ruling in favor of Padilla, who was accused of plotting a radioactive "dirty bomb" attack, the government had taken the unusual step of asking Mukasey to reconsider his decision.

U.S. officials argued that meetings between Padilla, 31, and lawyers could disrupt his interrogation and even allow him to leak secret messages to Al Qaeda operatives, using his lawyers as unwitting conduits.

But Mukasey said Tuesday that if Padilla does not receive all the legal protections due defendants in criminal cases, "a dictatorship will be upon us, the tanks will have rolled."

President Bush classified Padilla, a U.S. citizen, as an enemy combatant in June. Since then Padilla has been held in a Navy brig in Charleston, S.C., without formal charges or access to a lawyer.

He was detained May 8, 2002, at O'Hare International Airport after he got off an international flight and was brought to New York as a material witness in a federal grand jury probe of the Sept. 11, 2001, attacks.

Although Mukasey has supported the president's authority to jail U.S. citizens as enemy combatants, he said Padilla has the right to challenge that status by having his lawyers present evidence.

Legal experts predicted the Bush administration would appeal Mukasey's ruling.

U.S. officials said Tuesday that they had not decided their next move, but the Justice Department's reaction to the ruling echoed statements made before the government challenged other unfavorable opinions.

Barbara Comstock, a spokeswoman for Atty. Gen. John Ashcroft, said officials are reviewing the opinion "in light of our duty to take all steps possible within the law to protect the American people."

"In times of war, the president must have the authority to act when an individual associated with our nation's enemies enters our country to endanger American lives," she said.

Padilla is one of two American citizens being held as enemy combatants after the Sept. 11 attacks. The other is...
Louisiana native Yaser Esam Hamdi, captured while fighting for the Taliban in Afghanistan.

Hamdi's lawyers have argued unsuccessfully for a meeting with him at the Navy brig in Norfolk, Va., where he is being held. But his status as a member of an armed force fighting the U.S. is not in dispute.

On Jan. 8, the 4th U.S. Circuit Court of Appeals in Richmond ruled Hamdi could be held indefinitely. It refrained from saying its ruling applied to an American arrested on U.S. soil, a clear reference to Padilla.

The detention of Padilla is seen as an important test case of how well the government can balance civil liberties against concerns for national security.

The Justice Department has argued that the president has wartime powers to hold enemy combatants indefinitely. Padilla's attorneys say that is unconstitutional.

"We are pleased with the judge's ruling, and we think all citizens should be pleased," said Donna Newman, one of Padilla's court-appointed attorneys. "This reaffirms that, even under these circumstances, a defendant's access to legal counsel is necessary."

Newman said she doesn't know when she may meet with her client. The judge ordered the government and Padilla's lawyers to discuss the conditions for meetings between Padilla and his lawyers and to report back on March 27.

Padilla was born in Brooklyn and raised in Chicago. He was once jailed as a teenager for killing a rival gang member.

Out of jail at 18, he moved to Florida, where he also served a prison sentence and converted to Islam. He later traveled to Egypt, Saudi Arabia, Pakistan and Afghanistan, acquiring the name Abdullah al-Muhajir.

In a six-page memo by a Pentagon official, the government has alleged that while in Afghanistan, Padilla discussed plans with Abu Zubaydah, a senior figure in Al Qaeda, to detonate a so-called dirty bomb in the United States. According to government officials, he also researched the bomb plan and had discussions with Al Qaeda leaders in Pakistan.

In revealing Padilla's detention on June 10, 2002, Ashcroft called him a "known terrorist" capable of causing "mass death and injuries." But a top Pentagon official later said Padilla's alleged plot was nothing more than "some fairly loose talk."

U.S. officials last week drew links between the alleged dirty bomb plot involving Padilla and Khalid Shaikh Mohammed, the mastermind of the Sept. 11 attacks apprehended in Pakistan this month.

In arguing for not letting Padilla meet with his lawyers, the government contended such meetings could "jeopardize the two core purposes of detaining enemy combatants: gathering intelligence about the enemy and preventing the detainee from aiding in any further attacks against Americans."

Mukasey rejected those arguments. "Those to whom images of catastrophe come that easily might take comfort in recalling that it is a year and a half since
Sept. 11, 2001, and Padilla's is not only the first, but also the only case of its kind," he wrote.

Mukasey suggested that if allowed to meet with his lawyers, Padilla "might then seek to better his lot by cooperating with his captors."

Civil libertarians hailed Tuesday's ruling.

"This is a good day for the Bill of Rights," said Neal Sonnett, chair of the American Bar Association's Task Force on Treatment of Enemy Combatants. "Padilla has to have an opportunity to present facts relevant to his case and respond. He has got to have a lawyer to do that."

But some legal scholars said they fear the ruling could make it more difficult for the government to wage war on terrorism. Douglas Kmiec, dean of the Catholic University Law School, said allowing enemy combatants to confer with lawyers could prove "militarily unworkable."

The courts should ultimately side with the government, Kmiec said, noting that the legal system customarily defers to the government in wartime.

"In this individual case, the ruling may do justice," Kmiec added. "In the long term, it may do harm to U.S. interests in preventing terrorist activity."

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WASHINGTON -- Times of war and emergency jeopardize civil liberties. Ironically, it is precisely at such moments, when we most need independent judges to check executive abuse, that judicial safeguards are weakest. Protections must therefore come from outside the courts. That has been the pattern in the past, and it appears, thus far, to be the record after the Sept. 11 terror attacks on New York and the Pentagon. Whatever moxie exists in the courts is likely to come from district judges or circuit courts, which are then typically reversed on appeal.

The Justice Department has not adopted consistent or even understandable principles in its prosecution of "terrorist" suspects.

* John Walker Lindh, born in California but captured in Afghanistan among Taliban forces, was tried and convicted in civil court.

* Yasser Esam Hamdi, born in Louisiana and captured in the same Afghan prison rebellion as Lindh, is being detained at the Norfolk Naval Station without being charged.

* Zacarias Moussaoui, a French citizen of Moroccan descent, was arrested in Minnesota as the "20th hijacker." He has been charged and is being tried in civil court.

* Richard C. Reid, the British "shoe bomber," was tried and convicted in civil court.

* Jose Padilla, born in New York, was held as a suspect in a plot to detonate a "dirty bomb" in the United States. Although arrested by the FBI on May 8, 2002, and incarcerated since then, he has yet to be charged with a crime.

Whoever fits the category of "enemy combatant," like Hamdi and Padilla, can be held without charge and has no right to an attorney, and, according to the Justice Department, federal judges have no right to interfere with executive judgments. A Justice Department brief for the 4th Circuit Court of Appeals in Richmond, Va., argued: "The court may not second-guess the military's enemy combatant determination." The administration applies the term "enemy combatant" to a member, agent or associate of Al Qaeda or the Taliban.

In the Hamdi case, District Judge Robert G. Doumar several times rejected the broad arguments put forth by the Justice Department, insisting that Hamdi had a right of access to a public defender and to confer with that lawyer without the presence of military personnel.
However, Doumar was regularly reversed by the 4th Circuit.

In its most recent ruling -- Jan. 8, 2003 -- again overturning the district court, the 4th Circuit juggled two values: the judiciary's duty to protect constitutional rights versus the judiciary's need to defer to military decisions by the president. It came down squarely in favor of presidential power.

The 4th Circuit arrived at its conclusion through a strange reading of separation of powers. It cites an opinion by the U.S. Supreme Court in Metropolitan Washington Airports Authority (1991) that the "ultimate purpose of this separation of powers is to protect the liberty and security of the governed." Instead of reading this language as an affirmation of the checks and balances that prevent an accumulation of power in a single branch, the 4th Circuit interprets the sentence as a warning to the federal judiciary not to interfere with powers vested in another branch: "For the judicial branch to trespass upon the exercise of the war-making powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical."

The reading is bizarre: Although the 4th Circuit acquiesces wholly to the president's judgment, the Supreme Court expressly intervened in the 1991 case to strike down a statutory procedure adopted by Congress. No philosophy of deference appears in that decision.

Compare the treatment of Hamdi with that of Padilla. The FBI arrested Padilla in Chicago on a material-witness warrant, but after President Bush designated him an enemy combatant, the warrant was withdrawn and the government moved Padilla to a Navy brig in Charleston, S.C. On Dec. 4, 2002, District Judge Michael B. Mukasey in New York ruled that Padilla had a right to consult with counsel under conditions that would minimize the likelihood that he could use his lawyers as "unwilling intermediaries for the transmission of information to others." The court held that Padilla had a right to present facts, and the most convenient way to do that was to present them through counsel.

After Sept. 11, the Immigration and Naturalization Service began to close deportation proceedings to the press and the public. Rabih Haddad, a co-founder of a Muslim charity based in Illinois, was held for nine months because the government suspected that he had supplied money to terrorist organizations. He was finally able to testify at an open hearing after District Judge Nancy G. Edmunds ordered the Justice Department to either give him an open hearing or release him.

Her decision was affirmed by the 6th Circuit, which found that the 1st Amendment entitled the press and the public access to deportation proceedings. Judge Damon J. Keith explained why the press had to watch executive branch decisions: "Democracies die behind closed doors."

In the one case that reached the Supreme Court -- a district court decision in New Jersey that supported open deportation hearings -- justices stayed the decision pending appeal. Chief Judge Edward R. Becker of the 3rd Circuit Court of Appeals in Philadelphia overturned the
district court decision. He found that the tradition of open hearings for criminal and civil trials did not apply to the same extent as to administrative hearings, although, procedurally, "deportation hearings and civil trials are practically indistinguishable," and that openness in deportation hearings offers all the salutary values recognized in civil and criminal trials.

Becker declined to "lightly second-guess" the national security concerns of Atty. Gen. John Ashcroft. In a dissent, Judge Anthony J. Scirica agreed with Becker that judicial deference to the executive branch is appropriate, but not to the extent of "abdicating our responsibilities under the 1st Amendment."

With the likelihood of judicial relief for litigants small, safeguards for civil liberties will depend largely on the efforts of citizens, organizations and the media to challenge practices by the executive branch. Public pressures could compel Congress to hold oversight hearings and adopt statutory protections.

Writing for the New York University Law Review in 1962, Earl Warren, then-chief justice of the United States, warned that courts are unreliable in time of war or emergency, and that "other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution." In a democracy, "it is still the Legislature and the elected executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution." Moreover, "the day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen," Warren said.

Warren's message reappears in the 6th Circuit decision on deportation proceedings. Although Keith opened the proceedings, he cautioned: "In our democracy, based on checks and balances, neither the Bill of Rights nor the judiciary can second-guess government's choices. The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardian of their liberty."

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The American Bar Association has entered the fray over the president's detention of enemy combatants in the war on terrorism. At its recent meeting in Seattle, ABA delegates helpfully urged the administration to do what it is already doing -- namely, allowing Americans captured with the Taliban or al Qaeda to seek "meaningful judicial review" of their legal status. In addition, suggested the ABA, any U.S. citizens or residents captured as combatants should be granted access to defense counsel in a way that "accommodates the needs of the detainee and the requirements of national security." 

Unfortunately for the rest of us, this second step involves a balancing act that isn't so easy. Americans hold liberty dear, but they also are acutely aware that the need for intelligence on anticipated attacks by al Qaeda is urgent, and the supply is scarce. The prime source of intelligence will be captured combatants; and lawyers, alas, will inevitably turn off that flow of time-critical information.

In the near term, we will have few professional agents or informants infiltrated into the al Qaeda network. Recruitment takes time and is a deadly game. But we have captured hundreds of Taliban and al Qaeda field operatives -- in Afghanistan and Pakistan, Bosnia, Indonesia and Yemen.

The president has employed his constitutional power as commander-in-chief to treat al Qaeda and Taliban fighters as combatants, to keep them from returning to the battlefield. Under the established law of armed conflict, he can civilly intern a captured combatant until the end of active hostilities. Military commanders are entitled to interrogate all combatants at length, to learn as much as possible about al Qaeda's cells, weapons and future plans for attack.

In a conventional war, a habeas corpus petition by enemy soldiers would likely be dismissed out-of-hand. With an enemy who does not wear any distinctive insignia or uniform (contrary to the laws of war) and who makes the world a 24/7 battlefield, the inquiry can be more delicate. But not always. Consider the situation in Virginia, where the federal appeals court cut the Gordian knot after three rounds of appeals related to Yaser Hamdi, a Saudi-American found on the Afghan battlefield carrying an AK-47.

Hamdi, now in the Norfolk naval brig, was born in Baton Rouge and raised in Saudi Arabia. He traveled to Afghanistan to take weapons training with the Taliban and was captured by the Northern Alliance "in a zone of active combat in a foreign theater of conflict."

Hamdi admitted to military intelligence
teams that he'd trained and deployed with the Taliban, and carried an automatic weapon until his capture.

The Fourth Circuit found no reason to reject the factual or legal basis of the president's decision to detain Hamdi as a combatant, in light of his out-of-court admissions and the recorded circumstances of his capture. The appellate court rebuffed the district judge's hunting-call for more battlefield details, including whether Hamdi had actually fired his gun in battle or was merely held in ready reserve.

The proposed "excavation" of battlefield scenes from a half-world away might be characteristic of a criminal investigation, but wasn't adapted to the "rubble of war," ruled Judge J. Harvie Wilkinson and his colleagues. There are, after all, no crime-lab investigators on an Afghan battlefield ready to record whether a combatant's clothing has powder residue. So, too, the demand for review of all classified screening criteria for the transfer of combatants, all raw intelligence interviews of Hamdi, and the names and addresses of all interviewers, was held to be an unwarranted excursion into the president's domain.

The principle of separation of powers unavoidably has a large footprint in wartime. It is the president who is constitutionally charged with successfully prosecuting a war and protecting the American people against renewed attacks.

The Fourth Circuit isn't alone in its view of the president's power in wartime. A highly-regarded district judge in Manhattan has issued an equally blunt opinion in the case of Jose Padilla, the alleged al Qaeda "dirty bomber" arrested last year at O'Hare airport. Judge Michael Mukasey, sitting in a courthouse near Ground Zero, recently ruled that Padilla could be held as a military combatant, even though he was originally subpoenaed as a grand jury material witness. The president's decision was supported by Padilla's plan to set off a radiological dispersal device within the U.S.

Padilla presents the perfect dilemma of apparent truth vs. admissible criminal proof. Senior al Qaeda planner Abu Sabaydah described Padilla's role in the dirty bomb plot to intelligence officials while under interrogation abroad, and the description was corroborated. The applicable test, ruled Judge Mukasey, is whether "some evidence" supports the president's designation of Padilla as a combatant. The Abu Sabaydah treasure trove appears to meet the standard.

Judge Mukasey's one doubtful step has been challenged in a government petition. Concluding that Padilla had no constitutional right to consult defense counsel in a wartime military interrogation or even in habeas review, Judge Mukasey nonetheless resorted to the All Writs Act to appoint counsel "only for purposes of presenting facts to the court." This does not readily square with the judge's chosen standard of review, requiring only "some evidence" to support the president's determination. But more importantly, Judge Mukasey was evidently unaware that inserting defense counsel into the military brig as a combatant's best friend can turn off an essential spigot of intelligence information on al Qaeda's existing plans for attack. Habeas proceedings and
appeals can drag on for months, if not years. Any lawyer worth his salt will deliver standard-form advice to a client: Keep your mouth shut. Don't talk. Not in court and not in military interviews.

Defense Intelligence Agency director Lowell Jacoby, who heads the Humint program for the Defense Department, recently described the dilemma to the court. Creating a psychological relationship with a terrorist recruit is key to a successful debriefing, he noted. The process of gaining confidence can be long. (The Kuwaiti informant Omar al-Faruq, for example, didn't give up information on the plot to bomb U.S. embassies in Southeast Asia until his third month in custody.) A defense lawyer will displace the military interviewer as the focus of the combatant's hopes, and the questions about al Qaeda's plans will meet a studied silence.

The Fourth Circuit has noted that ping-pong litigation does not easily coexist with wartime intelligence-gathering. An affidavit setting forth the government's information may suffice to test the president's authority, concluded Chief Judge Wilkinson. That may hold true for Padilla, a volunteer who supped with al Qaeda in its Afghan redoubt and sought to bring the war home.

Al Qaeda has learned quickly. Its planners are smart enough to use American "mules" once they realize that stateside recruits are immune from effective interrogation. The government could create an expeditious surrogate procedure, using military commissions and counsel to establish the status of any citizen combatants, thus simplifying the federal courts' task of habeas review. But in the meantime, the dilemma remains. We have stationed anti-aircraft batteries around government buildings. We have tasked environmental clean-air sampling stations around the country to watch for biological reagents. Yet intelligence remains a key to citizen safety.

The federal courts will take this issue case-by-case and may vary their procedure according to the clarity of the government's affidavit. But journeys to Afghanistan and planning sessions with al Qaeda leave little room for doubt that someone has signed up with the bad guys.

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An evenly split federal appeals court yesterday upheld its decision striking down the Virginia Military Institute's suppertime prayers as unconstitutional, refusing to reconsider an earlier ruling that said the 50-year tradition violates the First Amendment rights of cadets. State Attorney General Jerry W. Kilgore (R) said he would seek a review of the hotly contested issue by the U.S. Supreme Court. Kilgore's office defended VMI in the lawsuit. The case was filed by the American Civil Liberties Union in 2002 against the state-financed school on behalf of two cadets, Neil Mellen and Paul Knick.

By a vote of 6 to 6, the Richmond-based U.S. Court of Appeals for the 4th Circuit declined to reconsider a ruling from a three-judge panel in April. Seven votes, a majority of the active judges, would have been required for a rehearing. The panel had said that VMI cadets are "plainly coerced into participating" in the prayers as part of an overall atmosphere that emphasizes "obedience and conformity."

Yesterday's decision marks the third judicial rejection of the suppertime prayers at VMI. In January, U.S. District Judge Norman K. Moon in Lynchburg called the ceremony a "state-sponsored religious exercise" that violates the separation of church and state.

And the prayers are the second of VMI's hallowed traditions to be struck down as unconstitutional by the federal courts. The college did not accept women until the Supreme Court mandated coeducation in 1996.

Kent Willis, executive director of the ACLU of Virginia, said he was "delighted with the court's decision. We believe it applied the correct legal standard." But Willis added: "Admittedly, the vote of the court reveals this is a controversial case. You can't get any closer than six to six."

Kilgore also cited the close vote in explaining why he will seek further review. "This case is one that should be heard by the United States Supreme Court," he said in a statement.

The three-judge panel of the 4th Circuit painted the issue in the context of an overall educational system at VMI that the court said emphasizes "obedience and conformity." "In this context," the court said, "VMI's cadets are plainly coerced into participating in a religious exercise" in violation of the separation of church and state.
For nearly three generations, students at VMI, based in Lexington, have been required to stand at attention after marching together into the mess hall. Cadets must stand, hands at their sides, while a "cadet chaplain" -- a student picked by the chaplain's office -- recites a prayer that invokes God, without any mention of Jesus.

VMI students are not required to bow their heads or actually recite the prayer during the exercise.


Niemeyer called the earlier panel decision "a major abandonment of values embraced by the founders and by our society during the 18th and 19th centuries . . . the panel opinion regrettably treats religion as a virus that somehow will infect the public square if acknowledged in even the most unobtrusive of circumstances."

Wilkinson called the prayers "the most benign form of religious observance" and expressed concern that the ruling is bound to affect religious observances at other military institutions, such as the U.S. Naval Academy in Annapolis. Although the 4th Circuit includes Maryland, the ACLU has said it has no plans to challenge prayers there, noting the difference is that VMI is supported by state funds.