ACLU SUMMARY

of the

2005 SUPREME COURT TERM

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Major Civil Liberties Decisions

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FIRST TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

MILITARY COMMISSIONS.....1

FIRST AMENDMENT.....1

A. Freedom of Speech and Association.....1

FOURTH AMENDMENT.....3

SIXTH AMENDMENT.....4

A. Confrontation Clause.....4

B. Jury Trial.....5

C. Right to Counsel.....5

DEATH PENALTY.....5

ABORTION.....6

ELEVENTH AMENDMENT/IMMUNITY.....6

FEDERALISM.....7

DUE PROCESS.....7

STATUTORY CIVIL RIGHTS CLAIMS.....8

A. Americans with Disabilities Act.....8

B. Individuals with Disabilities Education Act.....8

C. Religious Freedom Restoration Act.....8

D. Title VII.....9

E. 42 U.S.C. 1981.....9

F. Voting Rights Act.....10

TREATIES.....10

HABEAS CORPUS.....10

FEDERAL CRIMINAL LAW.....11

FEDERAL CRIMINAL PROCEDURE.....12

PRISON LITIGATION.....12

FEDERAL CIVIL PROCEDURE.....12

IMMIGRATION LAW.....13

JURISDICTION & STANDING.....13

CASES

Arbaugh v. Y & H Corp.,
126 S.Ct. 1235 (Feb. 22, 2006) 9

Arlington Central School District Board of Education v. Murphy,
2006 WL 1725053 (June 26, 2006) 8

Ash v. Tyson Foods,
126 S.Ct. 1195 (Feb. 21, 2006) 9

Ayotte v. Planned Parenthood of Northern New England,
126 S.Ct. 961 (Jan. 18, 2006) 6

Beard v. Banks,
2006 WL 1749604 (June 28, 2006) 3, 12

Bradshaw v. Richey,
126 S.Ct. 602 (Nov. 28, 2005) 10

Brigham City v. Stuart,
126 S.Ct. 1943 (May 22, 2006) 3

Brown v. Sanders,
126 S.Ct. 884 (Jan. 11, 2006) 5

Burlington Northern and Santa Fe Railway Co. v. White,
2006 WL 1698953 (June 22, 2006) 9

Central Virginia Community College v. Katz,
126 S.Ct. 990 (Jan. 23, 2006) 7

Clark v. Arizona
2006 WL 1764372 (June 29, 2006) 8

Daimler Chrysler Corp. v. Cuno,
126 S.Ct. 1854 (May 15, 2006) 14

Davis v. Washington, and *Hammon v. Indiana*,
126 S.Ct. 2266 (June 19, 2006) 4

Day v. McDonough,
126 S.Ct. 1675 (April 25, 2006) 11

Dixon v. United States,
2006 WL 1698998 (June 22, 2006) 12

Domino's Pizza, Inc. v. McDonald,
126 S.Ct. 1246 (Feb.22, 2006) 9

Dye v. Hofbauer,
126 S.Ct. 414 (Oct. 11, 2005) 10

Eberhart v. United States,
126 S.Ct. 403 (Oct. 31, 2005) 12

Evans v. Chavis,
126 S.Ct. 846 (Jan. 10, 2006) 11

Fernandez-Vargas v. Gonzales,
2006 WL 1698970 (June 22, 2006) 13

Garcetti v. Ceballos,
126 S.Ct. 1951 (May 30, 2006) 2

Georgia v. Randolph,
126 S.Ct. 1515 (Mar. 22, 2006) 3

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV),
126 S.Ct. 1211 (Feb. 21, 2006) 8

Gonzales v. Oregon,
126 S.Ct. 904 (Jan. 17, 2006) 7

Gonzales v. Thomas,
126 S.Ct. 1613 (April 17, 2006) 13

Hamdan v. Rumsfeld,
2006 WL 1764793 (June 29, 2006) 1

Hartman v. Moore,
126 S.Ct. 1695 (April 26, 2006) 2

Hill v. McDonough,
126 S.Ct. 2096 (June 12, 2006) 6

Holmes v. South Carolina,
126 S.Ct. 1727 (May 1, 2006) 7

House v. Bell,
126 S.Ct. 2064 (June 12, 2006) 5

Hudson v. Michigan,
126 S.Ct. 2159 (June 15, 2006) 3

Jones v. Flowers,
126 S.Ct. 1708 (April 26, 2006) 7

Kane v. Espitia,
126 S.Ct. 407 (Oct. 31, 2005) 10

Kansas v. Marsh,
2006 WL 1725515 (June 26, 2006) 6

Lance v. Dennis,
126 S.Ct. 1198 (Feb. 21, 2006) 13

LULAC v. Perry,
2006 WL 1749637 (June 28, 2006) 3, 10

Marshall v. Marshall,
126 S.Ct. 1735 (May 1, 2006) 14

Northern Insurance Co. of New York v. Chatham County,
126 S.Ct. 1689 (April 25, 2006) 6

Oregon v. Guzek,
126 S.Ct. 1226 (Feb. 22, 2006) 5

Randall v. Sorrell,
2006 WL 1725360 (June 26, 2006) 2

Rice v. Collins,
126 S.Ct. 969 (Jan. 18, 2006) 11

Rumsfeld v. FAIR,
126 S.Ct. 1297 (March 6, 2006) 1

Samson v. California,
126 S.Ct. 2193 (June 19,2006) 4

Schaffer v. Weast,
126 S.Ct. 528 (Nov. 14, 2005) 8

Scheidler v. National Organization for Women,
126 S.Ct. 1264 (Feb. 28, 2006) 11

Schriro v. Smith,
126 S.Ct. 7 (Oct. 17, 2005) 10

United States v. Georgia,
126 S.Ct. 877 (Jan. 10, 2006) 8

United States v. Gonzalez-Lopez,
2006 WL 1725573 (June 26, 2006) 5

United States v. Grubbs,
126 S.Ct. 1494 (Mar. 21, 2006) 3

Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,
126 S.Ct. 980 (Jan. 23, 2006) 12

Washington v. Recuenco,
2006 WL 1725561 (June 26, 2006) 5

Will v. Hallock,
126 S.Ct. 952 (Jan. 18, 2006) 13

Wisconsin Right to Life, Inc. v. FEC,
126 S.Ct. 1016 (Jan.23, 2006) 1

Woodford v. Ngo,
2006 WL 1698937 (June 22, 2006) 12

Zedner v. United States,
126 S.Ct. 1976 (June 5, 2006) 11

MILITARY COMMISSIONS

In *Hamdan v. Rumsfeld,* 2006 WL 1764793 (June 29, 2006)(5-3), the Court ruled that the military commissions established by President Bush to try Guantánamo detainees are unlawful on two grounds. First, Congress has required that military commissions follow the same rules as courts-martial "insofar as practicable." In fact, the rules governing military commissions at Guantánamo offer significantly less protection, as the Court noted. Among other things, the defendant does not have a right to be present at all proceedings, does not have a right to see all the evidence against him, and does not have an automatic right of appeal to the civilian courts. In addition, Congress stipulated that military commissions must act in accordance with the laws of war. In an important ruling, the Court then held that the Geneva Conventions are part of the laws of war that must be respected by military commissions, that the military commissions at Guantánamo do not meet the minimum standards set by the Geneva Conventions, and that the Geneva Conventions apply to Al Qaeda members held at Guantánamo, despite the government's claim to the contrary. Finally, the Court rejected the government's argument that Congress had stripped the Court of jurisdiction to hear this case when it adopted the Detainee Treatment Act (DTA) after *certiorari* was granted. Instead, the Court held, the jurisdictional provisions of the DTA apply to cases filed after the Act was adopted. The ACLU filed an *amicus* brief supporting Hamdan's challenge to the military commissions.

FIRST AMENDMENT

A. Freedom of Speech and Association

In *Wisconsin Right to Life, Inc. v. FEC,* 126 S.Ct. 1016 (Jan.23, 2006)(9-0), the Court unanimously ruled that its decision in *McConnell v. FEC,* 540 U.S. 93 (2003), rejecting a facial challenge to the ban on "electioneering communications" in the Bipartisan Campaign Reform Act of 2002, did not bar as-applied challenges like the one presented in this case. Under BCRA, corporations may not use general treasury funds to pay for broadcast ads referring to a clearly identified candidate for federal office either 30 days before a primary or 60 days before a general election. As explained in *McConnell,* the ban was prompted by congressional concern over so-called "sham" issue ads. By permitting as-applied challenges, the Court has now given corporate speakers, including nonprofit corporations like the ACLU, an opportunity to prove that their proposed ads are in fact "genuine" issue ads that cannot constitutionally be proscribed by BCRA's ban. The Court's two and one-half page *per curiam* opinion, however, provided no criteria for distinguishing between "genuine" issue ads and "sham" issue ads. That issue will presumably be explored on remand. The ACLU submitted an *amicus* brief urging the Court to allow as-applied challenges.

In *Rumsfeld v. FAIR,* 126 S.Ct. 1297 (March 6, 2006)(8-0), a unanimous Court upheld the constitutionality of the Solomon Amendment, which requires universities to provide military recruiters with the same access to students as other employers or forfeit substantial federal funding. The Amendment was challenged by a collection of law schools contending that the military's "Don't Ask, Don't Tell" policy was inconsistent with the non-discrimination rules that they applied to all employers who sought to engage in campus recruiting. Chief Justice Roberts began his opinion for the Court by noting that judicial deference is "at its apogee" when Congress is acting pursuant to its constitutional power over military affairs. *Id.* at 1306. He then

held that the Solomon Amendment does not represent a form of compelled speech because it does not require universities to endorse the military's recruiting message; to the contrary, they remain free to criticize it if they choose. Alternatively, he noted, a university can reject federal funding if it believes that the mere presence of the military on its campus is incompatible with the university's core values. Finally, he held that limited "interaction" between the military and the university did not violate the university's associational rights The ACLU submitted an *amicus* brief arguing that the Solomon Amendment was unconstitutional both because it commandeered the university's resources to support the military's message and because it represented a form of viewpoint discrimination by favoring the military over other employers (who are bound by the universities' nondiscrimination rules).

In *Hartman v. Moore,* 126 S.Ct. 1695 (April 26, 2006)(5-2), the Court held, in an opinion by Justice Souter, that a plaintiff alleging that he was subject to criminal prosecution in retaliation for his criticism of the government must also allege and prove that the prosecution was brought without probable cause in order to succeed under either *Bivens* or § 1983. Justices Ginsburg and Breyer dissented on the ground that the burden of proving probable cause should rest with the defense rather than the plaintiff under a traditional *Mt. Healthy* analysis.

In *Garcetti v. Ceballos,* 126 S.Ct. 1951 (May 30, 2006)(5-4), the Court held that the Constitution does not protect public employees who report wrongdoing in the course of their official duties. Ceballos claimed retaliation after he urged his superiors in the Los Angeles County District Attorney's Office to dismiss a pending criminal case based on alleged inaccuracies in the search warrant affidavit. Writing for the Court, Justice Kennedy held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. That holding creates what Justice Stevens described as a "perverse" incentive for public employees to speak to the press before they speak to their bosses about alleged wrongdoing. In addition, courts will now be required to determine the scope of an employee's official duties in order to determine the scope of that employee's First Amendment rights. The ACLU submitted an *amicus* brief arguing that the First Amendment applies whenever public employees speak on matters of public concerns, whether they do so publicly or privately, and whether or not it is part of their official job duties.

In *Randall v. Sorrell,* 2006 WL 1725360 (June 26, 2006)(6-3), the Court struck down a Vermont campaign finance law that contained both expenditure limits and the lowest campaign contribution limits in the country. The plurality opinion, written by Justice Breyer, concluded that the expenditure limits were indistinguishable from expenditure limits struck down in *Buckley v. Valeo,* 424 U.S. 1 (1976), and that the contribution limits were unconstitutional because they unreasonably hampered the ability of candidates (and, more particularly, challengers) to get their message to the voters. More generally, the decision revealed the Court's deep and continuing schism over *Buckley*. Three members of the Court appear to believe that *Buckley* did not give sufficient constitutional protection to campaign contributions; three other members of the Court appear to believe that *Buckley* gave too much constitutional protection to campaign expenditures. The ACLU represented one of two sets of plaintiffs that challenged the Vermont law.

In *LULAC v. Perry,* 2006 WL 1749637 (June 28, 2006), the Court considered a series of challenges to a mid-decade redrawing of congressional lines by the Texas State Legislature. By a 7-2 vote, the Court first ruled that the redistricting plan was not unconstitutional as a partisan gerrymander even though it was undertaken for the "sole purpose" of increasing Republican representation. A majority of the Court agreed that partisan gerrymander claims are "justiciable," but for the third time in three decades the Court was unable to agree on any judicially manageable standards. By separate 5-4 majorities, the Court then upheld a vote dilution claim under § 2 of the Voting Rights Act raised by Latino voters in a redrawn district outside Houston, but rejected a § 2 claim raised by African-American voters in a redrawn district outside Dallas.

Beard v. Banks, 2006 WL 1749604 (June 28, 2006) – *see* p.12 for a complete summary.

FOURTH AMENDMENT

In *United States v. Grubbs,* 126 S.Ct. 1494 (Mar. 21, 2006)(8-0), the Court upheld the constitutionality of anticipatory warrants and further held that the warrant need not specify the triggering condition to satisfy Fourth Amendment standards. Writing for the plurality, Justice Scalia noted that an anticipatory warrant presumes that the magistrate has found probable cause to believe that seizable items will be found at the identified location if a triggering condition occurs, and probable cause to believe that the triggering condition will in fact take place. Both conditions were met in this case. The warrant authorized a search of the defendant's home for obscene materials, but only after the delivery of obscene materials that the defendant had ordered by mail. The fact that the warrant did not identify the triggering condition was immaterial, Justice Scalia ruled, because the particularity requirement of the Fourth Amendment applies only to the place to be searched and the items to be seized. In a separate concurring opinion, Justice Souter (joined by Justices Stevens and Ginsburg) stressed that the Court had not yet resolved whether the police are obligated to show their warrant before beginning a search.

In *Georgia v. Randolph,* 126 S.Ct. 1515 (Mar. 22, 2006)(5-3), the Court held that the police cannot rely on the consent of a co-tenant (in this case, an estranged wife) to search a home when the other co-tenant is physically present and objects. Justice Souter's majority opinion found a reasonable expectation of privacy in what he described as a widely shared social expectation that co-tenants have an equal right to bar unwelcome visitors. He distinguished prior decisions allowing the police to rely on one tenant's consent when the co-tenant is absent, although acknowledging that the line was a formalistic one. And, in contrast to the position taken by Chief Justice Roberts in dissent, he concluded that the Court's holding would not interfere with the ability of the police to investigate domestic violence complaints.

In *Brigham City v. Stuart,* 126 S.Ct. 1943 (May 22, 2006)(9-0), the Court unanimously ruled that the police may enter a home without a warrant "when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with injury," *id* at 1944, regardless of whether the officer's subjective motivation was to assist the threatened occupant or make an arrest. Chief Justice Roberts wrote the Court's opinion.

In *Hudson v. Michigan,* 126 S.Ct. 2159 (June 15, 2006) (5-4), the Court ruled that the exclusionary rule does not apply to violations of the Fourth Amendment's knock-and-announce

requirement. Writing for the majority, Justice Scalia concluded that the social costs of applying the exclusionary rule in this context outweigh the deterrent benefits. He rested this conclusion, in part, on the availability of civil remedies, which have never been shown to be effective in the past. He also seemed to lay the groundwork for a broader attack on the exclusionary rule by noting that even *Mapp* was decided at a time when § 1983 litigation was still relatively undeveloped. Justice Kennedy joined the portion of Justice Scalia's opinion containing this broad language, but seemed more hesitant in his own concurrence where he observed that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *Id.* at 2170. The ACLU represented Hudson.

In *Samson v. California,* 126 S.Ct. 2193 (June 19,2006) (6-3), the Court ruled that parolees may be subject to suspicionless searches by law enforcement officers because they have a diminished expectation of privacy. According to Justice Thomas, who wrote the majority opinion, this diminished expectation of privacy rests on the fact that parolees in California (although not in most other states) are told that they can be subject to suspicionless searches when released for prison. Justice Stevens, in dissent, described the majority's reasoning as "circular." *Id.* at 2202. The ACLU submitted an *amicus* brief supporting the defendant's motion to dismiss.

SIXTH AMENDMENT

A. Confrontation Clause

In the companion cases of *Davis v. Washington* (9-0), and *Hammon v. Indiana* (8-1), 126 S.Ct. 2266 (June 19, 2006), the Court reaffirmed that the Confrontation Clause normally prohibits the introduction at trial of "testimonial" statements from absent witnesses. Previously, however, the Court had not attempted to define with any precision the characteristics of a "testimonial" statement for Confrontation Clause purposes. Writing for the majority in this case, Justice Scalia provided a basic template. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 2268. By contrast, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id* at 2269. Applying that test, the Court then held in *Davis* that a wife's 911 phone call to the police seeking protection from an assaultive husband who was still on the scene was nontestimonial and therefore admissible. On the other hand, similar statements in *Hammon* were treated as testimonial and thus inadmissible because they were made in response to police questioning after the emergency had ended. At the conclusion of his majority opinion, Justice Scalia also noted that a defendant "who obtains the absence of a witness by wrongdoing," *id* at 2280, could forfeit his Confrontation Clause rights. The ACLU submitted an *amicus* brief arguing that the challenged statements should have been excluded in both cases because they were inculpatory and a reasonable person would understand under all the circumstances that the statements could be used for criminal investigation or prosecution.

B. Jury Trial

In *Washington v. Recuenco,* 2006 WL 1725561 (June 26, 2006)(7-2), the Court held that a violation of the rule announced in *Blakely v. Washington,* 542 U.S. 296 (2004) – which generally prohibits a trial judge from enhancing a defendant's sentence beyond the maximum allowed based on facts found by the jury or admitted by the defendant – is not "structural" and is therefore subject to harmless error analysis. The majority opinion was written by Justice Thomas.

C. Right to Counsel

In *United States v. Gonzalez-Lopez,* 2006 WL 1725573 (June 26, 2006)(5-4), the Court ruled that the erroneous deprivation of a defendant's counsel of choice is a structural error that requires automatic reversal without a separate showing of prejudice. Writing for the majority, Justice Scalia stressed that the Sixth Amendment's counsel provisions guarantee two separate rights: the right to choose one's own counsel (subject to reasonable regulations) and the right to effective assistance of counsel. He then concluded that the latter right is violated only when prejudice is shown while the former right is violated as soon as a defendant's chosen counsel is erroneously disqualified. The dissent was written by Justice Alito.

DEATH PENALTY

In *Brown v. Sanders,* 126 S.Ct. 884 (Jan. 11, 2006)(5-4), the Court announced a new rule in death penalty cases, holding that a jury's consideration of an improper sentencing factor does not require reversal of a death sentence if the same facts and circumstances could have been considered by the jury under another sentencing factor that was properly before it. Under the Court's prior rule, the jury's consideration of an improper sentencing factor required reversal in a so-called "weighing state" unless it was harmless beyond a reasonable doubt. In his first death penalty decision, Chief Justice Roberts joined in Justice Scalia's majority opinion.

In *Oregon v. Guzek,* 126 S.Ct. 1226 (Feb. 22, 2006)(8-0), the Court unanimously held that the Constitution did not guarantee the capital defendant in this case a right to present alibi evidence at his sentencing hearing when that evidence was available at trial and went to the question of innocence that had already been resolved by the guilty verdict against him. In a separate concurring opinion, Justices Scalia and Thomas expressed the view that the Eighth Amendment never guarantees a right to present residual doubt evidence at the sentencing phase of a capital trial, but Justice Breyer's majority opinion found it unnecessary to reach that ultimate question on these facts.

In *House v. Bell,* 126 S.Ct. 2064 (June 12, 2006) (5-3), the Court ruled that DNA and other new evidence presented by a Tennessee death row inmate raised sufficiently serious questions about his actual innocence that he was entitled to a federal habeas hearing despite his state procedural default. Although describing it as a "close" question, Justice Kennedy's majority opinion concluded, based on a standard first announced in *Schlup v. Delo,* 513 U.S. 298 (1995), that "this is the rare case where – had the jury heard all the conflicting testimony – it is more likely than not that no reasonable juror viewing the record as a whole would lack

reasonable doubt." *Id.* at 2086. Chief Justice Roberts dissented, along with Justices Scalia and Thomas.

Hill v. McDonough, 126 S.Ct. 2096 (June 12, 2006) (9-0), the Court unanimously held that a death row inmate's challenge to the particular drug protocol used by Florida during lethal injections could be brought as a civil rights claim under 42 U.S.C. § 1983 rather than as a habeas petition (which would have been procedurally barred in this case) because it challenges the method of execution not the death sentence itself. Justice Kennedy's opinion for the Court relied heavily on Justice O'Connor's prior opinion in *Nelson v. Campbell,* 541 U.S. 637 (2004), and specifically rejected the state's contention that any inmate raising a civil rights claim should be required to propose an alternative method of lethal injection that would be constitutionally acceptable. On the other hand, the Court stressed that it was not expressing any opinion on the underlying merits of the claim, and that an inmate's delay in raising the claim could be considered by the lower courts in deciding whether to grant a stay of execution.

In *Kansas v. Marsh,* 2006 WL 1725515 (June 26, 2006)(5-4), the Court concluded, in an opinion by Justice Thomas, that a state may constitutionally impose the death penalty in cases where the jury finds that the aggravating and mitigating circumstances are evenly balanced. Beyond disagreeing with this specific holding, Justice Souter's dissent engaged in a broader discussion of the death penalty. Joined by Justices Stevens, Ginsburg and Breyer, he highlighted the fact that "the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests." *Id.* at *26. Justice Scalia responded in a concurring opinion that defended the death penalty and closed by observing: "It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution." *Id.* at *21.

ABORTION

In *Ayotte v. Planned Parenthood of Northern New England,* 126 S.Ct. 961 (Jan. 18, 2006)(9-0), the Court unanimously ruled that New Hampshire's parental notification law must contain a medical emergency exception and remanded to determine whether one can be written into the law or whether, instead, the lower courts were initially correct in striking down the law in its entirety. Writing her final opinion for the Court, Justice O'Connor concluded that the remedy question ultimately turns on legislative intent: would the New Hampshire legislature have preferred a parental notification law with a medical emergency exception or no law at all? Significantly, the Court's opinion began with the observation that "[w]e do not revisit our abortion precedents today." *Id.* at 964. The ACLU represented Planned Parenthood in its challenge to the New Hampshire law.

ELEVENTH AMENDMENT/IMMUNITY

In *Northern Insurance Co. of New York v. Chatham County,* 126 S.Ct. 1689 (April 25, 2006)(9-0), the Court unanimously reaffirmed that a state's Eleventh Amendment immunity does not apply to counties unless they are acting as arms of the state and, in an opinion by Justice Thomas, held that counties are equally barred from claiming a "residual" immunity from suits authorized by federal law that allegedly predates the Eleventh Amendment.

FEDERALISM

In *Gonzales v. Oregon*, 126 S.Ct. 904 (Jan. 17, 2006)(6-3), the Court ruled that the Attorney General had exceeded his authority under the federal Controlled Substances Act (CSA) by threatening to suspend the federal license of any doctor who prescribed narcotic drugs as part of a physician-assisted suicide under Oregon's Death With Dignity Act. Writing for the majority, Justice Kennedy rejected the Attorney General's assertion that the CSA "delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality." *Id.* at 925. Chief Justice Roberts joined in the dissent written by Justice Scalia. The ACLU submitted a brief supporting the majority's conclusion on the theory that a contrary result would have raised serious questions about the scope of the constitutional liberty interest in physician-assisted suicide.

In *Central Virginia Community College v. Katz,* 126 S.Ct. 990 (Jan. 23, 2006)(5-4), the Court held that states waived their sovereign immunity defense in bankruptcy proceedings when they adopted the provision in Article I granting Congress the power to enact "uniform" bankruptcy laws. The majority opinion, written by Justice Stevens, relied heavily on evidence of original intent. Based on that intent, it distinguished between the Bankruptcy Clause and other Article I provisions, including the Commerce Clause and the Patent Clause, which do not override a state's sovereign immunity. Justice Stevens acknowledged that prior decisions had embodied the "assumption" that the Bankruptcy Clause was subject to the same sovereign immunity defense as other congressional powers under Article I. But, he concluded, that "assumption was erroneous" and "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Id.* at 996. Chief Justice Roberts joined in the dissent written by Justice Thomas.

DUE PROCESS

In *Jones v. Flowers,* 126 S.Ct. 1708 (April 26, 2006)(5-3), the Court ruled that the due process requirement of fair notice is not met when the state forfeits a homeowner's property for tax delinquency after mailing a certified letter that is returned undelivered. Writing for the majority, Chief Justice Roberts began by noting that due process does not require actual notice. It does, however, require the government to take steps reasonably calculated to provide notice. In this case, the majority held, that constitutional duty obligated the state to pursue additional and readily available options - such as sending a second notice by regular mail that does not require a signature - when it learned that its certified letter had not reached its intended target long before the actual sale of the property.

In *Holmes v. South Carolina,* 126 S.Ct. 1727 (May 1, 2006)(9-0), the Court unanimously struck down a state evidentiary rule that barred a criminal defendant from introducing evidence that someone else committed the crime if the state has relied on forensic evidence against the defendant that, if believed, would strongly support a guilty verdict. In his first opinion for the Court, Justice Alito wrote that the challenged rule unconstitutionally deprived the defendant of a meaningful opportunity to mount a complete defense, without specifying whether that right is

rooted in the Due Process Clause of the Fourteenth Amendment, or the Compulsory Process or Confrontation Clauses of the Sixth Amendment.

In *Clark v. Arizona,* 2006 WL 1764372 (June 29, 2006)(6-3), the Court held that a state rule providing that evidence regarding a defendant's lack of mental capacity can be used to support an insanity defense but not to question the existence of *mens rea* does not violate due process.

STATUTORY CIVIL RIGHTS CLAIMS

A. Americans with Disabilities Act

In *United States v. Georgia,* 126 S.Ct. 877 (Jan. 10, 2006)(9-0), the Court ruled that the Eleventh Amendment does not bar damage suits against state officials by disabled prisoners to the extent that the claimed violations of Section II of the ADA also violate the Eighth Amendment. Writing for the majority, Justice Scalia left unresolved the question of whether state officials could be sued for damages under the ADA based on claims that do not otherwise violate the Constitution, on the theory that no such claims were presented by this record. The ACLU submitted an *amicus* brief urging the Court to uphold the plaintiff's right to sue under the ADA.

B. Individuals with Disabilities Education Act

In *Schaffer v. Weast,* 126 S.Ct. 528 (Nov. 14, 2005)(6-2), the Court ruled, in an opinion by Justice O'Connor, that the party challenging an Individual Education Program (IEP) under the IDEA carries the burden on proof. In most cases, as the Court recognized, that will be the student's parent. The statute itself is silent on the burden of proof, but the Court found no reason to depart from the general rule that the burden of proof falls to the party seeking relief.

In *Arlington Central School District Board of Education v. Murphy,* 2006 WL 1725053 (June 26, 2006)(6-3), the Court held that the provision of the IDEA that entitles prevailing plaintiffs to recover attorney's fees does not include the right to recover the cost of expert witnesses. Writing for the majority, Justice Alito began with the proposition that the IDEA was enacted pursuant to the Spending Clause and therefore subject to the clear statement rule. He then found that the obligation to pay expert witness costs to a prevailing plaintiff was not clearly stated in the statute, notwithstanding some strongly suggestive language in the conference report.

C. Religious Freedom Restoration Act

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (UDV),* 126 S.Ct. 1211 (Feb. 21, 2006)(8-0), the Court unanimously upheld the right of a small Brazilian religious sect to import a hallucinogenic tea used as a sacrament in its religious ceremonies. The tea, known as hoasca, is banned under the federal Controlled Substances Act and the federal government refused the sect's request for a religious exemption. The sect then sued under the Religious Freedom Restoration Act. The government conceded that the ban placed a substantial burden on the religion but contended that the government had a compelling interest in uniform enforcement of the drug laws. That claim was rejected by the Court in an opinion written by Chief Justice

Roberts. First, he noted that allowing the government to defeat a RFRA claim by citing its interest in uniform law enforcement would effectively eliminate the strict scrutiny that Congress required for each claimed exemption from otherwise generally applicable law. Second, he observed that the government's asserted interest in uniformity was in fact overstated given its 35-year exemption for peyote use in Native American ceremonies. The ACLU submitted an *amicus* brief supporting the church.

D. Title VII

In *Ash v. Tyson Foods,* 126 S.Ct. 1195 (Feb. 21, 2006)(9-0), a unanimous Court ruled, in a *per curiam* opinion, that the Eleventh Circuit had improperly reversed a jury verdict for the plaintiffs in this employment discrimination case. The Court cited two errors. First, the Eleventh Circuit dismissed the significance of the fact that a plant manager referred to one of the plaintiffs as "boy." While agreeing that the term is not always probative of bias, the Court rejected the notion that it is never probative of bias, standing alone. Second, the Eleventh Circuit held that a discrimination plaintiff seeking to establish that an employer's race-neutral explanation for a challenged hiring decision is pretextual must show that "the disparity in qualifications [between the plaintiff and the person selected for the job] is so apparent as to virtually jump off the page and slap you in the face." The Court described that standard as "unhelpful and imprecise" without, however, suggesting an alternative.

In *Arbaugh v. Y & H Corp.,* 126 S.Ct. 1235 (Feb. 22, 2006)(8-0), the Court unanimously held that the need to establish that a Title VII defendant has at least 15 employees goes to the adequacy of the legal claim and not to the jurisdiction of the court. Hence, the defendant must raise the defense in a timely fashion or it is waived.

In *Burlington Northern and Santa Fe Railway Co. v. White,* 2006 WL 1698953 (June 22, 2006)(9-0), the Court unanimously agreed that the respondent employee had stated a claim for retaliation under Title VII. In an opinion written by Justice Breyer, eight members of the Court held that the appropriate test for judging retaliation under Title VII is whether a reasonable employee under the circumstances would be deterred from reporting discrimination. In a separate concurrence, Justice Alito took a narrower view, arguing that the retaliation must be employment related in order to violate Title VII. The ACLU submitted an *amicus* brief urging the position adopted by the majority.

E. 42 U.S.C. § 1981

In *Domino's Pizza, Inc. v. McDonald,* 126 S.Ct. 1246 (Feb.22, 2006)(8-0), the Court unanimously held that the president and sole shareholder of a corporation cannot sue a third party for breaching a contract with the corporation based on racial discrimination in violation of 42 U.S.C. § 1981. As Justice Scalia explained for the Court, § 1981 protects the rights to make and enforce contracts and therefore extends only to those who have rights under the contract. In this case, the plaintiff was acting as an agent for the corporation. In his capacity as an agent, he was not personally liable for any breach of the contract and could not legally claim any benefit under it.

F. Voting Rights Act

LULAC v. Perry, 2006 WL 1749637 (June 28, 2006) – *see* p.2 for a complete summary.

TREATIES

In *Sanchez-Llamas v. Oregon,* 2006 WL 1749688 (June 28, 2006)(5-3), the Court resolved an issue of treaty interpretation that has been the subject of much litigation in recent years. Pursuant to the Vienna Convention on Consular Relations, a foreign national arrested in this country has a right to contact his consulate and to be informed of that right. Writing for the Court, Chief Justice Roberts assumed that this treaty right is judicially enforceable, but ultimately found it unnecessary to resolve the issue in this case. That is because a majority of the Court concluded that the exclusionary rule is a disproportionate remedy for violations of the Convention and that claimed violations of the Convention are subject to the normal rules of procedural default. Those holdings were sufficient to dispose of the two claims actually before the Court. Significantly, the entire Court agreed that decisions by the International Court of Justice interpreting the Convention are not binding on American courts, although they are entitled to "respectful consideration." The majority thus felt free to disagree with the ICJ's holding, several years ago, that procedural default rules must give way if necessary to give "full effect" to the Convention's requirement of consular notification.

HABEAS CORPUS

In *Dye v. Hofbauer,* 126 S.Ct. 414 (Oct. 11, 2005)(9-0), the Court's *per curiam* opinion summarily reversed a Sixth Circuit decision dismissing the habeas petition in this case for allegedly failing to preserve a federal claim of prosecutorial misconduct. The Sixth Circuit relied on the fact that the federal claim was not addressed by the state appellate courts. As the Court noted, however, the federal claim was clearly raised in petitioner's state appellate briefs, and that is sufficient.

In *Schriro v. Smith,* 126 S.Ct. 7 (Oct. 17, 2005)(9-0), the Court summarily reversed a Ninth Circuit decision directing Arizona officials to conduct a jury trial to determine whether the habeas petitioner in this capital case is mentally retarded and thus ineligible for the death penalty under *Atkins v. Virginia,* 536 U.S. 304 (2002). The Court's *per curiam* opinion was procedural rather than substantive. It noted that the retardation issue had not yet been tried because it arose post-conviction, and that any habeas challenge to the adequacy of Arizona's method for resolving that question was therefore premature. According to the Court, the Ninth Circuit's preemptive ruling "exceeded its limited authority on habeas review." *Id.* at 9..

In *Kane v. Espitia,* 126 S.Ct. 407 (Oct. 31, 2005)(9-0), the Court held, in a *per curiam* opinion, that a pro se defendant who chose to represent himself at trial did not have a "clearly established" right to access a law library in order to prepare his defense, and thus the Ninth Circuit erred in reversing a state court's denial of his appeal on these grounds in this habeas corpus proceeding.

In *Bradshaw v. Richey,* 126 S.Ct. 602 (Nov. 28, 2005)(9-0), the Court summarily vacated a writ of habeas corpus in this murder case on the theory that the Sixth Circuit's interpretation of

Ohio's law on transferred intent was contrary to the clear and binding view of the Ohio Supreme Court.

In *Evans v. Chavis,* 126 S.Ct. 846 (Jan. 10, 2006)(9-0), the Court began by noting that the one-year statute of limitations for filing a federal habeas petition under AEDPA is tolled during the pendency of state post-conviction proceedings. The question before the Court was how to determine whether a state court proceeding is still pending. In most cases, that determination is simple because state law provides a set period of time to appeal within the state court system. Once that time has elapsed, the state court proceedings are no longer pending and the one-year limitations period begins to run. California law is less clear. It merely requires that a state court appeal be filed in a reasonable time. Given that ambiguity, Justice Breyer concluded that the federal courts in California have no choice but to decide whether a state appeal was timely filed in determining whether the federal limitations period has expired. Here, the Court held, a 4-year delay in seeking state court review was not reasonable, and therefore the federal habeas petition had to be dismissed.

In *Rice v. Collins,* 126 S.Ct. 969 (Jan. 18, 2006)(9-0), a unanimous Court held that the Ninth Circuit erred when it granted habeas relief in this *Batson* case based on its belief that the state court had unreasonably credited the prosecution's explanation for challenging a black juror. According to Justice Kennedy, the circuit's "attempt to use a set of debatable inferences to set aside the conclusion reached by the state court does not satisfy AEDPA's requirements for granting a writ of habeas corpus." *Id.* at 976. In a separate concurrence, Justice Breyer and Souter suggested that peremptory challenges might need to be eliminated in order to ensure non-discriminatory jury selection.

In *Day v. McDonough,* 126 S.Ct. 1675 (April 25, 2006)(5-4), the Court ruled that a federal district court may, in its discretion, dismiss a federal habeas petition as untimely even if the state never asserts a statute of limitations defense or (as in this case) erroneously waives it based on a calculation error. On the other hand, Justice Ginsburg's majority opinion concluded that the district court lacks authority to overrule a state's knowing and express waiver of the one-year statute of limitations embodied in AEDPA. The principal dissent, written by Justice Scalia, argued that AEDPA's statute of limitations is an affirmative defense that is waived if not raised, and that the state's omission cannot be corrected by the district court.

FEDERAL CRIMINAL LAW

In *Scheidler v. National Organization for Women,* 126 S.Ct. 1264 (Feb. 28, 2006)(8-0), the Court unanimously held that the Hobbs Act criminalizes violence or threats of violence only if those acts are in furtherance of a plan to commit robbery or extortion. The Court's conclusion that the Hobbs Act does not otherwise reach violence and threats of violence by abortion opponents puts an end to this RICO action that has been to the Court on two prior occasions. Subsequent to the filing of this lawsuit, however, Congress specifically prohibited such actions when it enacted the Freedom of Access to Clinic Entrances (FACE) Act.

In *Zedner v. United States,* 126 S.Ct. 1976 (June 5, 2006)(9-0), a unanimous Court held that: (a) a criminal defendant cannot prospectively waive his rights under the Speedy Trial Act; (b) a continuance that serves the "ends of justice" can be excluded from calculations under the

Speedy Trial Act only if it is supported by the required judicial findings on the record; and (c) a trial judge's failure to make the required findings cannot be excused as harmless error. The Court's opinion was written by Justice Alito.

In *Dixon v. United States,* 2006 WL 1698998 (June 22, 2006)(7-2), the Court held that a defendant charged with illegally purchasing firearms was properly required to prove duress by a preponderance of the evidence, and that the jury instruction imposing that burden on the defense rather than the prosecution did not violate either the Due Process Clause or federal common law.

FEDERAL CRIMINAL PROCEDURE

In *Eberhart v. United States,* 126 S.Ct. 403 (Oct. 31, 2005)(9-0), the Court held, in a *per curiam* opinion, that the government can forfeit an objection to an untimely motion to vacate a conviction under Fed.R.Crim.P. 33(a) if it does not raise its objection in the trial court. The Seventh Circuit had described Rule 33(a) as jurisdictional and thus capable of being raised at any point in the appellate process for the first time. The Court disagreed, describing Rule 33(a) instead as a "claim-processing rule" that can be waived because it does not define the scope of adjudicatory authority, in contrast to personal and subject matter jurisdiction.

PRISON LITIGATION

In *Woodford v. Ngo,* 2006 WL 1698937 (June 22, 2006)(6-3), the Court held that the Prison Litigation Reform Act (PLRA) requires the timely exhaustion of administrative remedies as a condition for filing a federal court challenge to prison conditions. Writing for the Court, Justice Alito rejected the argument that even an untimely grievance satisfies the exhaustion requirement because it gives prison officials an opportunity to resolve the prisoner's complaint prior to litigation, if they choose to do so. The majority's ruling means that prisoners must now file an administrative grievance within a matter of weeks in most states, or forever lose their ability to challenge prison conditions in federal court. The ACLU filed an *amicus* brief supporting the prisoner in this case.

In *Beard v. Banks,* 2006 WL 1749604 (June 28, 2006)(6-2), the Court ruled that Pennsylvania's policy of denying newspapers and magazines to its most incorrigible prisoners was reasonably related to its legitimate penological interest in rehabilitation, absent any contrary evidence by the prisoner challenging the policy, and thus did not violate the First Amendment. As Justice Stevens noted in dissent, however, the rehabilitation justification has no "limiting principle . . . and would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior." *Id.* at *17. The ACLU submitted an *amicus* brief supporting the prisoner's First Amendment challenge.

FEDERAL CIVIL PROCEDURE

In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.,* 126 S.Ct. 980 (Jan. 23, 2006) (7-2), the Court ruled that a federal appeals court cannot enter judgment for an appellant or order a new trial based on insufficiency of the evidence if the appellant has not moved in the district

court, post-verdict, for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.

IMMIGRATION LAW

In *Gonzales v. Thomas,* 126 S.Ct. 1613 (April 17, 2006), the Ninth Circuit's grant of political asylum was unanimously reversed in a *per curiam* opinion on the ground that the court of appeals should have remanded the unanswered question of whether respondents' family constituted a "particular social group" for purposes of asylum rather than deciding the question itself in respondents' favor. As the Court explained, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* at 1615.

In *Fernandez-Vargas v. Gonzales,* 2006 WL 1698970 (June 22, 2006)(8-1), the Court held that an alien who had been deported and then re-entered the country illegally prior to 1996 was nonetheless subject to a 1996 amendment to the immigration law that had two important consequences. First, it made such aliens subject to removal based on the prior deportation order and without the need for any further proceedings. Second, it made such aliens ineligible for any discretionary relief from removal. Writing for the majority, Justice Souter concluded that the law was not impermissibly retroactive because it punished the alien for remaining in the country illegally after 1996 rather than for the pre-1996 entry. The ACLU took the opposite position in an *amicus* brief supporting petitioner, a Mexican who has lived in the United States for 20 years and whose wife and child are both United States citizens.

JURISDICTION & STANDING

In *Will v. Hallock,* 126 S.Ct. 952 (Jan. 18, 2006)(9-0), the Court unanimously held that a district court's refusal to dismiss a *Bivens* action against federal officials based on a prior judgment in the government's favor under the Federal Tort Claims Act – the so-called judgment bar – is not subject to an immediate appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Stressing that *Cohen's* exception to the normal finality rule should be narrowly construed, Justice Souter wrote that "it is not mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 959.

In *Lance v. Dennis,* 126 S.Ct. 1198 (Feb. 21, 2006)(8-1), the Court ruled that the *Rooker-Feldman* doctrine does not bar a federal court challenge to the legality of Colorado's mid-decennial redistricting despite a prior state supreme court decision on the same question. At a minimum, *Rooker-Feldman* requires that the plaintiff in the federal action was also a plaintiff in the state action. That was plainly not true here. Relying on Colorado law, defendants argued that all Colorado citizens are in privity with the state, which was a party to the earlier proceedings. The Court rejected that reasoning in a *per curiam* opinion, noting that Colorado law may be relevant to applying preclusion rules but not to application of the *Rooker-Feldman* doctrine. Justice Stevens dissented on other grounds, but his observation that the Court has effectively "interred" the *Rooker-Feldman* doctrine except in the most limited circumstances seems correct.

In *Marshall v. Marshall,* 126 S.Ct. 1735 (May 1, 2006)(9-0), the Court continued a recent trend by narrowly construing the "probate exception" to federal jurisdiction in this long-running dispute between Anna Nicole Smith, the widow of J. Howard Marshall II, and Marshall's son. According to Justice Ginsburg, the probate exception bars federal courts from validating or annulling a will but it did not bar the federal courts in this case from ruling (in the context of a bankruptcy proceeding) that Marshall's son had tortiously interfered with an intended gift from Marshall to Smith prior to Marshall's death.

In *Daimler Chrysler Corp. v. Cuno,* 126 S.Ct. 1854 (May 15, 2006)(9-0), the Court unanimously ruled that state taxpayers lacked standing to challenge the state tax credit given to an automobile manufacturer as an alleged violation of the Commerce Clause. Writing for the Court, Chief Justice Roberts noted that taxpayer standing had previously been approved only in Establishment Clause cases. The Court declined to broaden that exception for other taxpayer suits, which it described as a form of generalized grievance. Justice Ginsburg wrote a separate concurrence endorsing the Court's actual holding in the case but expressing her disagreement with much of the Court's modern standing jurisprudence.