ACLU SUMMARY

of the

2009 SUPREME COURT TERM

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Major Civil Liberties Decisions

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CASES

FIRST AMENDMENT

A. Freedom of Speech

In *Citizens United v. Federal Elections Comm'n*, 130 U.S. 876 (Jan. 21, 2010) (5-4), a deeply divided Court ruled that the federal ban on independent campaign expenditures by corporations is unconstitutional, overruling *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and the relevant portion of *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203-209 (2003). (Both corporations and unions are allowed to make such expenditures under existing law if they use a PAC.) Writing for the majority, Justice Kennedy began with the proposition that the First Amendment generally disfavors speech restrictions based on the identity of the speaker. He therefore concluded that restrictions on corporate campaign speech abridge core First Amendment values and trigger strict scrutiny. Applying strict scrutiny, Justice Kennedy rejected each of the justifications offered in support of the corporate speech ban as constitutionally inadequate. Citing *Buckley* for the proposition that the government's interest in leveling the playing field does not justify restrictions on speech, he held that the government could not ban corporate campaign speech to prevent the distorting influence of corporate wealth. He then rejected the anti-corruption rationale offered by the government on the ground that the Court had never found independent expenditures corrupting. Finally, the majority held that the disclaimer and disclosure requirements that apply to independent expenditures under current law, and that the Court upheld by an 8-1 vote, were a more narrowly tailored response to the government's asserted interest in shareholder protection. Justice Stevens wrote a lengthy dissent in which he disputed each of the majority's contentions. In particular, he criticized the majority for disregarding *stare decisis*, equating corporate speech with individual speech for First Amendment purposes, and underestimating the corrupting influence of large corporate expenditures on political decision-making. The ACLU submitted an *amicus* brief urging the Court to narrowly confine any restrictions on corporate speech if it reaffirmed *Austin*, which the Court did not do.

In *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324 (Mar. 8, 2010)(9-0), the Court ruled that bankruptcy lawyers qualify as "debt relief agencies" under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, that the Act constitutionally prohibits "debt relief agencies" from advising creditors to incur more debt prior to filing for bankruptcy, and that the mandatory disclosure requirements of the Act are consistent with the First Amendment because they are reasonably related to the government's legitimate interest in regulating potentially misleading commercial speech. Justice Sotomayor wrote the Court's opinion.

In *United States v. Stevens*, 130 S.Ct. 1577 (April 20, 2010)(8-1), the Court struck down a federal statute criminalizing depictions of "animal cruelty" as substantially overbroad. Writing for the majority, Chief Justice Roberts began by rejecting the government's claim that the speech at issue was unprotected by the First Amendment because its value was outweighed by its social cost. The Chief Justice described that proposition as "startling and dangerous," explaining that "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of social costs and benefits." *Id.* at 1585. Applying traditional First Amendment analysis, the Court then concluded that the statute's reach included a substantial amount of protected speech. In particular, he noted that the statute on its face would criminalize the sale of hunting magazines or videos in the District of Columbia because D.C. law prohibited hunting, even if the pictures or videos were taken in a jurisdiction where hunting was legal and portrayed the killing of an animal but not its torture or mutilation. Only Justice Alito

dissented. The ACLU submitted an amicus brief urging the Court to invalidate the law as unconstitutional and focusing on the breadth of the government's argument.

In *Holder v. Humanitarian Law Project*, 130 U.S. 2705 (June 21, 2010)(6-3), the Court rejected an as-applied challenge to sections of the material support law, 18 U.S.C. §2339B, that make it a crime to provide "training," "expert advice or assistance," "service" and "personnel" to a designated foreign terrorist organization (FTO). The law was challenged by humanitarian groups in the U.S. that, among other things, wanted to provide FTOs in Turkey and Sri Lanka with training on how to use international law to resolve their disputes peacefully, and how to bring their grievances to the United Nations Writing for the majority, Chief Justice Roberts first held that plaintiffs' proposed activities were plainly covered by the statute, and declined to consider whether the statute might be unconstitutionally vague in other applications. Having limited the vagueness challenge to these facts, the majority then went on to hold that the government's compelling interest in responding to terrorism allowed it to penalize even pure speech that qualified as material support under the statute without requiring the government to show that the speech was intended by the speaker to promote the terrorist goals of the designated organization. The Court justified this result by noting that even speech promoting the peaceful aims of an FTO can provide legitimacy to the FTO. As the dissent pointed out, however, if the government's concern is with legitimating an FTO, then the line the Court drew between independent advocacy and coordinated advocacy makes little sense since independent advocacy (which the Court deemed protected) can provide even greater legitimacy than speech directed by the FTO itself. In addition, the Court offered very little guidance on the meaning of coordination in this context. Finally, the majority showed substantial deference to the political branches on the need for a broad interpretation of the material support statute as an anti-terrorism tool. The ACLU submitted an *amicus* brief on behalf of several human rights groups, including the Carter Center and Human Rights Watch, explaining how their human rights and humanitarian work would be jeopardized by a broad reading of the law.

In *Doe v. Reed*, 130 U.S. 2811 (June 24, 2010)(8-1), the Court ruled that individuals who sign their names to a referendum petition to place an initiative on the ballot are engaged in an expressive act protected by the First Amendment and that disclosure of those names by the state must satisfy "exacting scrutiny." In an opinion written by Chief Justice Roberts, however, the Court held that the state's interest in publicly disclosing the names of petition signers as a way of verifying their validity is sufficiently related to the state's interest in preventing election fraud that it meets the state's burden. At the same time, the majority recognized that its prior cases required an exception for instances in which public disclosure would lead to harassment and retaliation. Because that issue was not reached below, the majority remanded the case to determine whether the plaintiffs in this case could establish a reasonable probability that disclosure of their names in support of a ballot initiative to overturn Washington State's domestic partnership law would in fact expose them to retaliation and harassment. In separate concurring opinions, four Justices (Stevens, Ginsburg, Breyer, Sotomayor) expressed skepticism that plaintiff's could make that showing. Justice Alito expressed the opposite view. Justice Scalia thought the act of signing a petition was not even protected by the First Amendment and thus did not trigger any retaliation inquiry. Justice Thomas felt that signing a petition was not only protected by the First Amendment but that the names of petition signers should never be disclosed by the state because there were less restrictive alternatives to combat fraud. Only Chief Justice Roberts and Justice Kennedy expressed no view on the as-applied question.

In *Christian Legal Society v. Martinez*, 130 U.S. 2971 (June 28, 2010)(5-4), the Court held that Hastings College of the Law, part of the California state university system, did not

infringe the First Amendment rights of the Christian Legal Society (CLS) when it insisted that it comply with a non-discrimination policy applicable to all student clubs in order to receive official recognition and funding. Characterizing the school's system of Registered Student Organizations as a limited public forum, Justice Ginsburg's majority opinion upheld the "all-comers" rule as reasonable and viewpoint-neutral. She also stressed that disqualifying CLS from official recognition and funding did not prohibit it from continuing to meet on campus and from continuing to exclude gay and lesbian students from membership, if it chose to do so. The ACLU submitted an *amicus* brief supporting the law school's neutral application of its non-discrimination policy.

B. Establishment Clause

In *Salazar v. Buono*, 130 S.Ct. 1803 (April 28, 2010)(5-4), the Court considered whether a congressional statute authorizing the transfer of one acre of land in the Mojave National Preserve to private ownership adequately complied with a prior injunction directing the government to remove a Latin cross erected by the VFW from the land because it was an Establishment Clause violation. In a fractured decision, the Court remanded for further proceedings to determine whether the land transfer statute would alter the perception of a reasonable observer that the government's activities with regard to the cross (which included a second statute designated the cross as a National War Memorial) represented an impermissible endorsement of religion. Although the propriety of the original injunction ordering removal of the cross was not technically before the court, Justice Kennedy's lead opinion and Justice Stevens' principal dissent expressed very different views on the symbolic meaning of the cross. Justice Kennedy argued that "a Latin cross is not merely a reaffirmation of Christian beliefs," *id.* at 1820, but can be viewed in certain contexts as a religiously neutral tribute to the war dead. Justice Stevens on the other hand, wrote: "Making a plain, unadorned Latin cross a war memorial does not make the cross secular. It makes the memorial sectarian." *Id.* at 1835. The ACLU represented Frank Buono, who brought the Establishment Clause challenge and sought in this proceeding to enforce the original injunction in his favor.

SECOND AMENDMENT

In *McDonald v. City of Chicago*, 130 U.S. 3020 (June 28, 2010)(5-4), the Court ruled that the Second Amendment's guarantee of an individual right to bear arms, which the Court first announced two years ago in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), applies to state and local governments as well as the federal government. Writing for a four-person plurality, Justice Alito concluded that the Second Amendment was incorporated as a protection against state and local governments by the Due Process Clause of the Fourteenth Amendment. While concurring in the judgment, Justice Thomas based his opinion on the Privileges and Immunities Clause, which required a reconsideration of the Court's historic understanding of the Privileges and Immunities Clause that the plurality was unwilling to undertake. In his final dissent on the Court, Justice Stevens concluded that the right to bear arms is not embraced within the liberty protected by the Due Process Clause. But in so doing, he offered a passionate defense of the broader proposition that our understanding of "liberty" under the Constitution is not static and cannot be based solely on a search for the original intent of the framers. "The judge who would outsource the interpretation of 'liberty' to historical sentiment," he wrote, "has turned his back on a task the Constitution assigned to him and drained the document of its intended vitality." *Id.* at 3099.

FOURTH AMENDMENT

In *City of Ontario v. Quon*, 130 U.S. 2619 (June 17, 2010)(9-0), the Court unanimously held that a police department's decision to review the text messages of employees who exceeded the monthly limit on their office pagers in order to determine whether the monthly limit should be raised was reasonable under the Fourth Amendment. Hence, the Court ruled, it was unnecessary to resolve the threshold issue of whether the officers had a reasonable expectation of privacy in their text messages under the somewhat idiosyncratic facts of this case. Writing for the majority, Justice Kennedy explained the Court's narrow and fact-based approach by noting that this "case touches issues of far-reaching significance." *Id.* at 2624. He therefore cautioned that "[t]he Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer." *Id.* at 9. The ACLU submitted an *amicus* brief arguing that the search was unreasonable but urging the Court to avoid, as it did, broad pronouncements about the privacy protections that apply to electronic communications.

FIFTH AMENDMENT

In *Florida v. Powell*, 130 S.Ct. 1195 (Feb. 23, 2010)(7-2), the Court held that police warnings that a custodial suspect had a right "to talk to a lawyer before answering any questions" and could invoke that right "at any time . . . during the [police] interview" adequately complied with *Miranda* even though it did not explicitly inform the suspect that he had a right to have his lawyer present during questioning. Writing for the majority, Justice Ginsburg observed that "[t]he four warnings that *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed." *Id.* at 1204. She then concluded that the actual warnings in this case "communicated the same essential message" that *Miranda* requires. *Id.* at 1206.

In *Maryland v. Shatzer*, 130 S.Ct. 1213 (Feb. 24, 2010)(9-0), the Court held that the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which generally prohibits the police from re-interrogating a suspect who has invoked his *Miranda* rights, could not be invoked by a suspect who made incriminating statements to the police 2 ½ years after his initial interrogation. Writing for the majority, Justice Scalia concluded that *Edwards* no longer applies once the suspect has been out of custody for 14 days on the theory that the risk of coercion inherent in custodial interrogation has dissipated by then. He acknowledged that the 14 day period represented an act of judicial legislating but justified it on the ground that the *Miranda* warnings were themselves judicially created. He also concluded that the defendant in this case had been out of custody for more than 14 days for *Miranda* purposes even though he was incarcerated for another crime during the entire period between his first and second interrogation. Justice Stevens concurred with the result in this case but rejected the 14 day rule. Instead, he argued, the police should normally be required to allow a suspect who has invoked his *Miranda* rights to consult with an attorney before he is subject to re-interrogation.

In *Berghuis v. Thompkins*, 130 U.S. 2250 (June 1, 2010)(5-4), the Court ruled that an accused wishing to invoke his *Miranda* rights must do so explicitly, but the prosecution need not establish an explicit waiver of those rights to introduce a defendant's statements at trial. Writing for the majority, Justice Kennedy held that "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Id*. at 1. In this case, the allegedly uncoerced statement came after nearly three hours of silence in response to police questioning.

The majority nonetheless construed this course of conduct as an implied waiver of the defendant's Fifth Amendment rights. Justice Sotomayor's dissent characterized the majority opinion as "a substantial retreat from the protection against compelled self-incrimination that *Miranda* . . . has long provided during custodial interrogation." *Id.* at 15. The ACLU submitted an *amicus* brief arguing that the defendant's Fifth Amendment rights had been violated on these facts.

SIXTH AMENDMENT

A. Ineffective Assistance of Counsel

In *Bobby v. Van Hook*, 130 S.Ct. 13 (Nov. 9, 2009)(*per curiam)*, the Court summarily reversed the Sixth Circuit's finding that the defendant had received ineffective assistance of counsel during the mitigation phase of his capital trial. More broadly, the Court disagreed with the Sixth Circuit's use of the ABA guidelines on habeas review. First, the Court noted, the Sixth Circuit had improperly relied on guidelines issued in 2003 to evaluate defense counsel's conduct nearly 20 years earlier. Second, the Court emphasized that the ABA standards are "only guides" to reasonable representation, "not its definition." *Id.* at 17. Justice Alito underscored this latter point in a separate concurrence.

In *Wong v. Belmontes*, 130 S.Ct. 383 (Nov. 16, 2009)(*per curiam*), the Court summarily reversed a Ninth Circuit decision granting a writ of habeas corpus in this capital case. The Ninth Circuit rested its decision on the theory that the defendant had received ineffective assistance of counsel because, in its view, Belmonte's trial counsel had failed to present the jury with important mitigating evidence. After reviewing the record, the Court disagreed. Instead, it concluded that the introduction of additional mitigating evidence would likely have triggered the admissibility of even more damaging evidence of a prior murder. Based on that premise, the Court then ruled that the defendant failed to satisfy the *Strickland* standard for ineffective assistance, which requires a reasonable probability that the jury would have reached a different verdict or imposed a different sentence.

In *Porter v. McCollum*, 130 S.Ct. 447 (Nov. 30, 2009)(*per curiam*), the Court summarily reversed the Eleventh Circuit's finding on ineffective assistance of counsel, but this time in favor of the capital defendant. Specifically, the Court held that the defense counsel's failure to investigate the defendant's military service during Korean War, and the evidence of post-traumatic stress disorder that he suffered afterward, fell short of professional standards and therefore violated the Sixth Amendment. In addition, the Court ruled that the Florida Supreme Court's conclusion on direct appeal that the additional mitigation evidence would not have affected the outcome was unreasonable, thus justifying federal habeas relief. As the Court noted, "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines . . ." *Id*. at 455.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (Mar. 31, 2010)(7-2), the Court held that the alien defendant in this case – a lawful permanent resident for 40 years who pled guilty to narcotics trafficking – was denied the effective assistance of counsel when his lawyer incorrectly advised him that he was unlikely to face deportation because of his long stay in the United States. Writing for a five-person majority, Justice Stevens held that criminal defense counsel are constitutionally required to advise their alien clients that a conviction will render them eligible for deportation when the law is clear, as it was here. When the immigration consequences are

less clear, the Sixth Amendment requires defense counsel to advise their clients to seek immigration advice from an immigration expert. Justice Alito construed defense counsel's obligation more narrowly in a concurring opinion joined by Chief Justice Roberts. According to Justice Alito, a defense lawyer may not misinform a client; thus, he joined in the judgment on these facts. But short of misinformation, a defense lawyer's only obligation in Justice Alito's view is to inform the client that a criminal conviction may have immigration consequences and that the client should seek immigration advice.

B. Right to Impartial Jury

In *Berghuis v. Smith*, 130 S.Ct. 1382 (Mar. 30, 2010)(9-0), the Court unanimously reversed a decision granting habeas corpus relief based on the habeas petitioner's claim that the state court jury that convicted him of murder had not been drawn from a fair cross-section of the community. Writing for the Court, Justice Ginsburg ruled that the Michigan Supreme Court had reasonably concluded that the habeas petitioner had not met his burden of showing that the under-representation of African-Americans was due to an identifiable policy or practice of the state that led to their systematic exclusion from the jury venire. Having reached that conclusion, she declined to decide whether the threshold question of under-representation should be analyzed based on absolute disparities or comparative disparities. In response to a brief submitted by the state's *amici*, the ACLU submitted an *amicus* brief urging the Court to uphold the basic principle that the Sixth Amendment imposes a fair cross-section requirement. The Court's decision implicitly did so, despite a concurrence by Justice Thomas stating that he would be prepared to reconsider the fair cross-section requirement in an appropriate case.

Skilling v. United States, 130 S.Ct. 2896 (June 24, 2010) – *see* summary on p.14.

C. Public Trial

In *Presley v. Georgia,* 130 S.Ct. 721 (Jan. 19, 2010)(7-2)(*per curiam*), the Court concluded that the defendant's Sixth Amendment right to a public trial had been violated when the public was excluded from the jury *voir dire* and summarily reversed his conviction for drug trafficking. The Court began by noting that the right to a public trial is grounded in both the Sixth Amendment (for the defendant) and the First Amendment (for the public). Having long ago ruled that the First Amendment right to a public trial extends to jury *voir dire,* the Court observed in this case that "there is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." *Id.* at 724. In addition, the Court held, trial judges have an independent obligation to consider alternatives to closure regardless of whether any alternatives are proposed by the defendant.

EIGHTH AMENDMENT

In *Wilkins v. Gandy*, 130 S.Ct. 1175 (Feb. 22, 2010)(9-0)(*per curiam*), the Court reaffirmed that an Eighth Amendment claim of excessive force does not depend on the existence of a significant injury but on whether the force was inflicted maliciously and sadistically. Citing *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court explained that "[a]n inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." 130 S.Ct. at 1178-79.

In *Graham v. Florida*, 130 S.Ct. 2011 (May 17, 2010)(6-3), the Court held that the Eighth Amendment categorically prohibits the government from sentencing juveniles who have

not committed murder to life without parole. (The Court did not decide whether juveniles convicted of homicide could be sentenced to life without parole.) Writing for the majority, Justice Kennedy relied heavily on the Court's opinion striking down the juvenile death penalty in *Roper v. Simmons*, 543 U.S. 551 (2005). As in *Roper*, Justice Kennedy stressed that juveniles have diminished culpability. In addition, he noted that the law has traditionally distinguished between homicide and other crimes. Finally, he concluded that none of the traditional justifications for punishment – retribution, deterrence, or incapacitation – justifies imposing on juveniles what Justice Kennedy described as the second most severe punishment. The decision marks the first time that the Court has ever deemed a punishment other than the death penalty categorically unconstitutional for a class of defendants. The majority opinion is also noteworthy for its reference to international law and practice as "support" for its holding." 130 S.Ct. at 2033-34. Chief Justice Roberts wrote a separate concurrence, which agreed that life without parole was disproportionate on these facts but did not address the larger question of whether it is categorically unconstitutional. While narrower than the majority, the concurrence by the Chief Justice is nonetheless significant since it has been more than 25 years since the Court has struck down a criminal sentence on the grounds of disproportionality.

DEATH PENALTY

In *Smith v. Spisak*, 130 S.Ct. 676 (Jan. 12, 2010)(9-0), the Court reversed the Sixth Circuit's grant of habeas corpus. Writing for eight members of the Court in this death penalty case, Justice Breyer concluded that the jury instructions, read as a whole, did not mistakenly lead the jury to believe that each mitigating factor had to be found unanimously in order to be weighed against the aggravating factors during the sentencing phase. In addition, he concluded that there was no reasonable probability that the jury's decision to impose death would have been different if defense counsel had not given what Justice Breyer assumed to be a constitutionally inadequate closing argument during the sentencing phase. On both grounds, therefore, the Court disagreed with the Sixth Circuit's view that the Ohio state courts had unreasonably applied established law.

Corcoran v. Levenhagen, 130 S.Ct. 8 (Oct. 20, 2009) – *see* summary on p.11.

Bobby v. Van Hook, 130 S.Ct. 13 (Nov. 9, 2009) – *see* summary on p.8.

Wong v. Belmontes, 130 S.Ct. 383 (Nov. 16, 2009) – *see* summary on p.8.

Porter v. McCollum, 130 S.Ct. 447 (Nov. 30, 2009) – *see* summary on p.8.

Wood v. Allen, 130 S.Ct. 841 (Jan. 20, 2010)(7-2) – *see* summary on p.12.

Jefferson v. Upton, 130 U.S. 2217 (May 24, 2010)(7-2) – *see* summary on p.13.

EQUAL PROTECTION

In *Thaler v. Haynes*, 130 S.Ct. 1171 (Feb. 22, 2010)(9-0)(*per curiam*), the Court summarily reversed a federal habeas grant, holding that its prior decisions did not categorically bar a state trial judge from crediting a prosecutor's race-neutral explanation for a peremptory challenge merely because that explanation rested on demeanor evidence that the trial judge did not actually observe because he was not present for the excluded juror's voir dire.

STATUTORY CIVIL RIGHTS CLAIMS

Title VII

In *Lewis v. City of Chicago*, 130 U.S. 2191 (May 24, 2010)(9-0), the Court held that the 300-day statute of limitation for filing a EEOC charge based on the discriminatory impact of an employment test begins each time the test is used to hire new employees. Three years ago, the Court reached the opposite conclusion in *Ledbetter v. Goodyear Tire and Rubber Co.*, 550 U.S. 618 (2007), when it ruled that a discrimination claim under the Equal Pay Act accrues when the employee's initial compensation is set and is not renewed with each subsequent paycheck. Writing for a unanimous Court in *Lewis*, Justice Scalia distinguished the two cases on the ground that *Ledbetter* involved a discriminatory treatment claim (requiring proof of intent), while *Lewis* involved a discriminatory impact claim (where proof of intent is not required). The ACLU joined an *amicus* brief filed by a broad coalition of civil rights groups arguing that plaintiffs' claim in *Lewis* had been timely filed.

IMMUNITY

In *Hui v. Castaneda*, 130 S.Ct. 1845 (May 3, 2010)(9-0), the Court unanimously held that Public Health Service employees providing medical care in an immigration detention facility could not be sued under *Bivens* for deliberate indifference to a detainee's medical needs in violation of the Eighth Amendment. Writing for the Court, Justice Sotomayor concluded that the Federal Tort Claims Act is the "exclusive" remedy against PHS employees under the plain language of 42 U.S.C. § 233(a) even though that interpretation of the statute means that PHS employees are immune from constitutional tort suits that can still be brought against medical officers employed directly by the Immigration Service or the Bureau of Prisons. The ACLU filed an *amicus* brief supporting Castaneda's right to bring a *Bivens* claim.

In *Samantar v. Yousuf*, 130 S.Ct. 2278 (June 1, 2010)(9-0), the Court unanimously held that the Foreign Soverign Immunities Act (FSIA) provides immunity to foreign states for their public acts (subject to certain exceptions) but does not apply to foreign officials sued in their individual capacities. Writing for the Court, Justice Stevens held that the immunity of foreign officials, as opposed to foreign states, is governed by the common law rather than FISA. The Court then remanded the common law question to the lower courts for their consideration.

FEDERALISM

In *United States v. Comstock*, 130 S.Ct. 1949 (May 17, 2010)(7-2), the Court concluded that Congress had not exceeded its powers under the Necessary and Proper Clause when it authorized the civil commitment of federal prisoners at the expiration of their prison terms if they are deemed mentally ill and sexually dangerous. Writing for the majority, Justice Breyer emphasized that the Court was not reviewing the constitutionality of the procedures adopted by Congress but only whether the challenged statute had a sufficient nexus to the federal government's constitutionally enumerated powers. As Justice Thomas noted in dissent, the majority opinion adopts an expansive view of federal authority that, at a minimum, is very different in tone than the view often expressed by the Rehnquist Court in its federalism cases.

HABEAS CORPUS

In *Corcoran v. Levenhagen*, 130 S.Ct. 8 (Oct. 20, 2009)(*per curiam*), the Court summarily reversed a Sixth Circuit decision dismissing the writ of habeas corpus in this capital

case. As the Court noted, petitioner had raised six separate constitutional objections in his habeas petition. As the Court pointed out, only one claim was ever considered by the district court (which granted the writ) and by the Sixth Circuit (which denied it). Under those circumstances, the Court held, the proper course was to remand the habeas petition to the district court for consideration of the remaining claims, rather than dismiss the petition outright as the Sixth Circuit had done.

In *Beard v. Kindler*, 130 U.S. 612 (Dec. 8, 2009)(9-0), the Court unanimously held that state rules barring review of certain claims can constitute an independent and adequate state ground foreclosing federal habeas even if the state rule is a discretionary one. In this case, the state courts relied on a discretionary fugitive forfeiture rule to hold that the capital defendant waived his post-conviction challenge when he escaped before his challenge could be heard.

In *McDaniel v. Brown*, 130 S.Ct. 665 (Jan. 11, 2010)(9-0)(*per curiam)*, the Court unanimously held that the Ninth Circuit erred in concluding that no reasonable jury could have found the defendant guilty beyond a reasonable doubt when that conclusion rested on an expert report questioning the DNA testimony used at the defendant's rape trial 11 years earlier that was introduced for the first time in federal habeas proceedings. Rather, the Court ruled, an insufficiency claim under *Jackson v. Virginia*, 443 U.S. 307 (1979), must be evaluated based on the evidence actually presented to the jury.

In *Wellons v. Hall*, 130 S.Ct. 727 (Jan. 19, 2010)(5-4)(*per curiam)*, the Court vacated the Fifth Circuit decision denying habeas relief in this death penalty case and directed the Firth Circuit on remand to consider anew whether the petitioner was entitled to an evidentiary hearing on his claim of jury bias. The dissent argued that the Fifth Circuit had already addressed that question in its prior ruling. However, the majority concluded that the Fifth Circuit's decision was skewed by its mistaken belief that petitioner's claims were procedurally barred, a conclusion that all sides now conceded was inconsistent with last Term's decision in *Cone v. Bell*, 129 S.Ct. 1769 (2009).

In *Wood v. Allen*, 130 S.Ct. 841 (Jan. 20, 2010)(7-2), the Court rejected the petitioner's habeas challenge to his death sentence based on a claim of ineffective assistance of counsel. The ineffectiveness claim revolved around the issue of whether petitioner's trial counsel had made a strategic decision not to introduce evidence of petitioner's mental retardation during the sentencing phase and, if so, whether that decision was a reasonable one. Writing for the Court, Justice Sotomayor first ruled that the state courts had reasonably decided that trial counsel made a strategic decision about the presentation of retardation evidence. Given that conclusion, she found it unnecessary to decide whether those state court findings should be reviewed in federal habeas under a standard of reasonableness, as set forth in 28 U.S.C. § 2254(d)(2), or with a presumption of correctness, as set forth in 28 U.S.C. § 2254(e)(1), since the reasonableness standard the Court applied is the more stringent one. She then held that the issue of whether trial counsel's strategic decision was in fact reasonable was not properly before the Court because it was not fairly encompassed by the questions presented. The ACLU submitted an *amicus* brief in support of petitioner arguing that the reasonableness standard of § 2254(d)(2) applied in this case and had not been met.

In *Renico v. Lett*, 130 S.Ct. 1855 (May 3, 2010)(6-3), the Court held that a state trial judge's decision to declare a mistrial based on a hung jury after only 4 hours deliberation was debatable but not clearly unreasonable, and therefore the Sixth Circuit erred in granting habeas corpus. Under AEDPA, Chief Justice Roberts wrote, "state-court decisions must be given the benefit of the doubt," and "an *unreasonable* application of federal law is different than an

incorrect application of federal law." *Id.* at 1862. Having concluded that the state ruling was not unreasonable, the Court declined to decide whether it was correct.

In *Jefferson v. Upton*, 130 U.S. 2217 (May 24, 2010)(7-2), the Court summarily reversed the denial of habeas corpus in this death penalty case. The central issue in the case was whether petitioner had received ineffective assistance of counsel because his trial lawyers had failed to investigate a childhood head injury as potential mitigating evidence. In rejecting that claim, the state courts found that counsel's decision not to investigate the injury was reasonable under the circumstances. The Eleventh Circuit, in turn, held that the decision by the state courts was supported by the record and entitled to a presumption of correctness in federal habeas proceedings. The Supreme Court did not disagree with the Eleventh Circuit's review of the record. Instead, it faulted the Eleventh Circuit for failing to consider whether the fact that the state trial judge had asked the prosecutors in an *ex parte* conversation to prepare his opinion and order, which he then adopted verbatim even though it referred to the testimony of a witness that never testified at trial, rendered the state court process so inadequate that the findings resulting from that process were not entitled to a presumption of correctness under a well-recognized exception to the normal rule of deference. Accordingly, the Court remanded the case to the Eleventh Circuit for consideration of the process question.

In *Holland v. Florida*, 130 U.S. 2549 (June 14, 2010)(7-2), the Court held that the one-year statute of limitations for filing a federal habeas petition under AEDPA is subject to equitable tolling and then remanded to determine whether equitable tolling was justified in this capital case. Writing for the majority, Justice Breyer did not articulate a specific standard for when tolling is appropriate. Rather, he said, equity requires a close consideration of the facts and strongly suggested that the facts in this case were extraordinary. Among other things, the death row inmate had repeatedly written to his lawyer asking for updates on the progress of his state post-conviction proceedings, which he did not receive, and repeatedly reminded his lawyer of the need to calculate and comply with AEDPA's filing deadline. On the other hand, it seems reasonably clear that a lawyer's failure to meet a filing deadline is not, by itself, sufficient to justify equitable tolling. The ACLU submitted an *amicus* brief arguing that equitable tolling was allowed as a matter of law under AEDPA, and justified on these facts.

Berghuis v. Smith, 130 S.Ct. 1382 (Mar. 30, 2010)(9-0) – *see* summary on p.9.

FEDERAL CRIMINAL LAW

In *Johnson v. United States*, 130 S.Ct. 1265 (Mar. 2, 2010)(7-2), the Court held that the sentencing enhancement provisions of the federal Armed Career Criminal Act (ACCA), which require three prior convictions involving physical force, are not triggered by a misdemeanor conviction for simple battery under Florida law. Writing for the majority, Justice Scalia construed ACCA's reference to physical force to mean violent force and then noted that Florida's misdemeanor battery statute permitted conviction based on any intentional touching, no matter how minor. In this case, there were no further details about Johnson's battery conviction in the record, and thus no reason to assume that violent force was used. The Court therefore reversed Johnson's enhanced ACCA sentence.

In *United States v. O'Brien*, 130 S.Ct. 2169 (May 24, 2010)(9-0), a unanimous Court ruled that the question of whether a defendant used a machine gun or some other weapon while committing a crime of violence is an element of the offense under 18 U.S.C. § 924(c) and not a sentencing factor. Thus, as Justice Kennedy explained for the Court, it is a fact that must be

found by the jury beyond a reasonable doubt rather than determined by the judge following conviction based on a mere preponderance of the evidence.

In *Carr v. United States*, 130 U.S. 2229 (June 1, 2010)(6-3), the Court ruled that a provision of federal law making it a crime for sex offenders who are required to register in one state to fail to register when they travel to another state only applies to interstate travel occurring after passage of the Sex Offender Registration and Notification Act (SORNA) in 2006. Because Justice Sotomayor's majority opinion rested on its interpretation of SORNA's statutory language, the Court did not reach the ex post facto claim that petitioner raised as an alternative argument.

In *Skilling v. United States*, 130 S.Ct. 2896 (June 24, 2010), the Court unanimously reversed the conviction of Jeffrey Skilling, former CEO of Enron, for conspiracy to commit wire fraud. Writing for a six-member majority, Justice Ginsburg construed the "honest services" provision of the federal mail and wire fraud statutes, 18 U.S.C. § 1346, to avoid vagueness problems by limiting it to bribery and kickback schemes. She then remanded the case to the lower courts to determine whether the trial court's erroneous instruction was harmless error because theft of honest services was only one of three objects of the conspiracy alleged in Skilling's indictment. In a concurring opinion, Justices Scalia, Thomas and Kennedy agreed that Skillings conviction should be reversed but would not have remanded the case since they rejected the majority's effort to save § 1346 by judicial construction. Writing for a different six-member majority, Justice Ginsburg also ruled that Skilling's conviction was not tainted either by pre-trial publicity or an inadequate voir dire. On that point, Justices Sotomayor, Stevens and Breyer dissented.

FEDERAL SENTENCING

In *Barber v. Thomas*, 130 U.S. 2499 (June 7, 2010)(6-3), the Court considered a technical but important question about how to calculate good time credits under the federal sentencing laws. Writing for the majority, Justice Breyer endorsed the method used by the Bureau of Prisons, which makes a prisoner serving a 10 year sentence eligible for 470 days of good time credit, and rejected petitioners' alternative that would have granted 540 days of good time credit under the same circumstances. In dissent, Justice Kennedy proposed a third method of calculation that would lead to 533 days of good time credit for a federal prisoner sentenced to 10 years. Summarizing this dispute, Justice Kennedy said: "The Court has interpreted a federal sentencing statute in a manner that disadvantages almost 200,000 federal prisoners." *Id.* at 13. The ACLU submitted an *amicus* brief supporting petitioners' construction of the statute.

In *Dolan v. United States*, 130 U.S. 2533 (June 14, 2010)(5-4), the Court construed a provision of the federal Mandatory Restitution Act, which provides that the trial judge "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing," 18 U.S.C. § 3664(d)(5). Justice Breyer characterized this language as creating "a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." *Id.* at 5. Thus, under Justice Breyer's interpretation, either party can demand that the judge set the final restitution amount within 90 days but, barring a demand, 90 days is more of a goal than a deadline. Justice Breyer's majority opinion was joined by Justices Thomas, Ginsburg, Alito and Sotomayor, in an unusual coalition.

In *Dillon v. United States*, 130 U.S. 2683 (June 17, 2010)(7-1), the Court held that its decision in *United States v. Booker*, 543 U.S. 220 (2005), which made the federal sentencing

guidelines advisory rather than mandatory as a means of preserving the jury's constitutional fact-finding role, does not apply to motions for a sentencing modification based on a retroactive reduction in the minimum guideline sentence under 18 U.S.C. § 3582(c). In the latter context, the Court ruled, the sentencing judge is bound by the minimum set by the Sentencing Commission (with one exception that was not relevant on these facts.) Writing for the Court, Justice Sotomayor distinguished the two situations by noting that sentence modification proceedings "are not constitutionally compelled," *id.* at 2691, and thus "do not implicate the Sixth Amendment right to have essential facts found by the jury beyond a reasonable doubt." *Id.* at 7. The change in the sentencing guidelines in this case involved a reduction in the crack/powder cocaine disparity.

FEDERAL CRIMINAL PROCEDURE

In *Bloate v. United States*, 130 S.Ct. 1345 (Mar. 8, 2010)(7-2), the Court considered a provision of the Speedy Trial Act that requires the government to try a federal defendant within 70 days after he is charged or makes an initial appearance. Writing for the majority, Justice Thomas held that the period after a defendant files a pretrial motion and before it is decided is automatically excluded from the 70 day calculus, but a continuance for the purpose of preparing pretrial motions is only excluded if the district court makes a specific finding under the Act that the continuance serves the ends of justice and outweighs the defendant's interest in a speedy trial.

In *United States v. Marcus*, 130 S.Ct. 2159 (May 24, 2010)(8-1), the Court held that the Second Circuit had erred in applying the plain error rule set forth in Fed.R.Crim.Proc. 52(b), to reverse a conviction under the Trafficking Victims Protection Act (TVPA). It was undisputed that the evidence relied on by the government at trial consisted in part of conduct that occurred before the TVPA was enacted, and that the defendant failed to object at trial to the introduction of the evidence. After reviewing these facts, the Second Circuit concluded that the "possibility" that the jury may have considered improperly admitted evidence satisfied the plain error rule and required reversal. Writing for the majority, Justice Breyer interpreted Rule 52(b) to require instead "a reasonable probability that the error affected the outcome of the trial" *id.* at 3, unless the error is "structural," which the Court concluded this error was not.

FEDERAL CIVIL PROCEDURE

In *Krupski v. Costa Crociere S.P.A.*¸ 130 U.S. 2485 (June 7, 2010)(9-0), a unanimous Court held that the relevant question in deciding whether a proposed amendment adding a new party to the complaint after the statute of limitations has expired relates back to the filing of the original complaint, and is thus timely under Rule 15 (c), is what the defendant knew and not what the plaintiff knew. Specifically, Justice Sotomayor wrote for the Court, the issue is whether the defendant knew that the action would have been brought against it but for a mistake, and not whether the plaintiff knew or should have know the identity of the proper party within the limitations period.

EVIDENCE

Mohawk Industries, Inc. v. Carpenter, 2009 WL 4573276 (Dec. 8, 2009)(9-0) – *see* full summary on p.16.

IMMIGRATION

In *Kucana v. Holder*, 130 S.Ct. 827 (Jan. 20, 2010)(9-0), the Court unanimously held that a statutory provision stripping courts of jurisdiction to review immigration decisions that Congress has declared "to be in the discretion of the Attorney General," does not preclude review of the denial of a motion to open removal proceedings, which is not statutorily committed to the Attorney General's discretion. Writing for the Court, Justice Ginsburg invoked the "presumption favoring interpretations of statutes [to] allow judicial review of administrative action." *Id.* at 831 (citations omitted). She also stressed that "[s]eparation-of-powers concerns . . . caution us against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary's domain. *Id.* The ACLU submitted an *amicus* brief supporting judicial review in this case.

In *Carchuri-Rosendo v. Holder*, 130 U.S. 2577 (June 14, 2010)(9-0), a unanimous Court ruled that petitioner's conviction in state court for possession of a single Xanax tablet without prescription, following an earlier state court conviction for possession of less than two ounces of marijuana, did not qualify as an aggravated felony under federal immigration law, and thus did not render the petitioner ineligible for discretionary relief from removal. In rejecting the government's position, Justice Stevens concluded that the fact that petitioner's second arrest could have led to a felony conviction in federal court based on the earlier state court conviction did not automatically convert the second conviction into an "aggravated felony" for immigration purposes when, as here, the state prosecuted petitioner on misdemeanor charges that did not even refer to his prior conviction.

Hui v. Castaneda, 130 S.Ct. 1845 (May 3, 2010)(9-0) – *see* full summary on p.11.

SEPARATION OF POWERS

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 U.S. 3138 (June 28, 2010)(5-4), the Court held that a statute providing that members of the PCAOB can be removed only for good cause by Commissioners of the Securities and Exchange Commission, who themselves can only be removed for good cause, violates the constitutional principle that the executive power is vested in the President. Describing the Board's structure as "novel," and invoking the language of the unitary executive, Chief Justice Roberts wrote that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 3147. Justice Breyer's dissent urged a more "functional approach [that] permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances." *Id.* at 3168. However, the Court unanimously agreed that "the Sarbanes-Oxley Act remains 'fully operative as a law' with these tenure restrictions excised." *Id.* at 3161.

JURISDICTION

In *Mohawk Industries, Inc. v. Carpenter*, 130 U.S. 599 (Dec. 8, 2009)(9-0), the Court unanimously ruled in the first opinion by Justice Sotomayor that disclosure orders denying a claim of attorney-client privilege are not immediately appealable under the collateral order doctrine. More specifically, the Court held that delaying appeal until a final judgment was unlikely to chill attorney-client communications because, "in deciding how freely to speak, clients and counsel are unlikely to focus on the remote prospect of an erroneous disclosure order, let alone the timing of an appeal." *Id.* at 607.

In *Alvarez v. Smith*, 130 U.S. 576 (Dec. 8, 2009)(8-1), the Court ruled that a dispute over the constitutionality of Illinois' forfeiture procedures had become moot after the state settled with each of the individual litigants. Writing for the majority, Justice Breyer held that the proper course, in light of these settlements, was to vacate the lower court ruling under *Musingwear*. Although Justice Breyer acknowledged that *Munsingwear* typically does not apply when a case has been voluntarily settled, he concluded that the settlements in this case were more like "happenstance" since they were negotiated in separate state court proceedings. Justice Stevens agreed that the case was moot but would not have vacated the lower court decision. The ACLU filed an *amicus* brief arguing that the challenged Illinois procedures violated due process on the merits.

ATTORNEY'S FEES

In *Perdue v. Kenny A.*, 130 S.Ct. 1662 (April 21, 2010)(9-0), the Court issued a major attorney's fee decision, unanimously reaffirming the basic lodestar method of calculating fees as well as the district court's authority, in the exercise of its sound judgment, to award a fee enhancement in rare and exceptional circumstances. Writing for a five person majority, Justice Alito explained that the lodestar is presumptively sufficient to establish a reasonable fee but that enhancement may be appropriate under three circumstances: (1) where the hourly rate used to calculate the lodestar does not adequately measure plaintiff's counsel's true market value (because, for example, it is mechanically based on years out of law school); (2) where plaintiff's counsel incurred extraordinary expenses in litigation that was extraordinarily protracted, in which case an enhancement to recover lost interest may be justified; and (3) where there is an exceptional delay in the payment of fees, which also may justify an enhancement for lost interest. The majority then remanded to the district court to reassess its enhancement in light of these specified factors. Justice Breyer, joined by Justices Stevens, Ginsburg and Sotomayor, dissented on the need for a remand. Rather, they argued, the enhancement award in this case was adequately justified on the existing record. The ACLU submitted an *amicus* supporting the enhanced fee award.

In *Astrue v. Ratliff*, 130 U.S. 2521 (June 14, 2010)(9-0), the Court unanimously held that any attorneys' fees awarded under EAJA belong to the client, and can therefore be offset against enumerated debts that the client previously owed the federal government under 31 U.S.C. § 3791(b). The decision that attorneys' fees under EAJA belong to the client rather than the lawyer – although the client can assign those rights to the lawyer or otherwise agree to pay the fees to the lawyer – is consistent with the Court's interpretation of 42 U.S.C. § 1988. Justice Sotomayor concurred in the judgment but worried that offset statute, as construed, would discourage lawyers from handling civil rights cases. She therefore urged Congress to exempt EAJA fees from offset in the future.

PATENTS

In *Bilski v. Kappos*, 130 U.S. 3218 (June 28, 2010)(9-0), a unanimous Court ruled that "a claimed invention that explains how buyers and sellers of commodities in the energy market can protect, or hedge, against the risk of price changes," *id.* at 3223, was not patentable. Writing for a five-person majority, Justice Kennedy rejected the patent claim on the ground that you cannot patent an abstract idea. The four concurring Justices would have gone further and categorically barred any "business method" patents. Significantly, the Court declined to address more broadly the patentability of Information Age technologies, including computer software and diagnostic medical techniques.