Law-Related Education

State Bar of Texas

OYEZ! OYEZ! THE COURT IS NOW IN SESSION!! THE 2007-08 TERM OF THE U. S. SUPREME COURT

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SESSION AGENDA

1. The United States Supreme Court 2007-08

2. Statistics

3. Student Questions

4. 2007-08 Term Cases:

First Amendment Case:
Washington State Grange
v.
Washington State Republican Party

Second Amendment Case:
District of Columbia
v.
Heller

Sixth Amendment Case:
Giles v. *California*

Eighth Amendment Cases:
Baze
v.
Rees

Kennedy v. *Louisiana*

Fourteenth Amendment Case:
Crawford v. *Marion County Election Board*

Question of Law:
Boumediene v. *Bush*

4. Sources

THE UNITED STATES SUPREME COURT

Name of Justice	Year of Birth	Law School Attended	Home State	Position Prior to Appointment	Appointed By	Year Service Began
John G. Roberts, Jr. Chief Justice	1955	Harvard	Indiana	U.S. Court of Appeals	George W. Bush (R)	2005
Stevens, John Paul	1920	Northwestern	Illinois	U.S. Court of Appeals	Ford (R)	1975
Scalia, Antonin	1936	Harvard	New Jersey	U.S. Court of Appeals	Reagan (R)	1986
Kennedy, Anthony	1936	Harvard	California	U.S. Court of Appeals	Reagan (R)	1988
Souter, David	1939	Harvard	New Hampshire	U.S. Court of Appeals	George H.W. Bush (R)	1990
Thomas, Clarence	1948	Yale	District of Colombia	U.S. Court of Appeals	George H.W. Bush (R)	1991
Ginsburg, Ruth	1933	Columbia	New York	U.S. Court of Appeals	Clinton (D)	1993
Breyer, Steven	1938	Harvard	Massachusetts	U.S. Court of Appeals	Clinton (D)	1994
Samuel A. Alito, Jr.	1950	Yale	New Jersey	U. S. Court of Appeals	Geroge W. Bush (R)	2006

Ideological Make-Up

Liberal		Middle	Conservative	
Stevens, Souter	Ginsburg, Breyer	Kennedy	Roberts, Alito	Scalia, Thomas

SUPREME COURT STATISTICS 2007-2008 TERM

OPINIONS WRITTEN 2007-2008

Opinions	Total	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Majority	67	8	7	9	6	7	8	8	8	6
Dissents	67	3	13	8	4	7	9	8	8	7
Abstentions	4	1	0	0	0	0	0	0	2	1

VOTING RECORD 2007-2008 TERM
MAJORITY OPINIONS

	Majority/ # Cases	Majority %	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	59/66	89.4	--	43	51	51	44	47	43	45	51
Stevens	50/67	74.6	43	--	38	43	44	33	42	44	40
Scalia	54/67	80.6	51	38	--	47	38	47	39	38	47
Kennedy	57/67	85.1	51	43	47	--	43	41	43	46	47
Souter	51/67	76.1	44	44	38	43	--	35	46	44	39
Thomas	50/67	74.6	47	33	47	41	35	--	34	34	44
Ginsburg	51/67	76.1	43	42	39	43	46	34	--	44	40
Breyer	51/65	78.5	45	44	38	46	44	34	44	--	40
Alito	54/66	81.8	51	40	47	47	39	44	40	40	--

DISSENTING OPINIONS 2007-2008 TERM

	Minority/ # Cases	Minority %	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	7/66	10.6	--	0	5	2	0	5	0	1	4
Stevens	17/67	25.4	0	--	1	3	9	0	7	7	2
Scalia	13/67	19.4	5	1	--	3	0	10	1	0	5
Kennedy	10/67	14.9	2	3	3	--	2	1	2	5	3
Souter	16/67	23.9	0	9	0	2	--	0	10	7	1
Thomas	17/67	25.4	5	0	10	1	0	--	0	0	6
Ginsburg	16/67	23.9	0	7	1	2	10	0	--	7	1
Breyer	14/65	21.5	1	7	0	5	7	0	7	--	1
Alito	12/66	18.2	4	2	5	3	1	6	1	1	--

SUPREME "BATTING AVERAGES" 2007-2008 TERM

(The chart shows how many times each justice voted in the majority and the percentages of cases he/she agreed with other members of the Court.)

	Majority/ # Cases	Majority %	Dissent/ # Cases	Dissent %	Roberts	Roberts %	Stevens	Stevens %	Scalia	Scalia %	Kennedy	Kennedy %
Roberts	59/66	89.4	7/66	10.6	--	--	43	65.2	51	77.3	51	77.3
Stevens	50/67	74.6	17/67	25.4	43	64.2	--	--	38	56.7	43	64.2
Scalia	54/67	80.6	13/67	19.4	51	76.1	38	56.7	--	--	47	70.1
Kennedy	57/67	85.1	10/67	14.9	51	76.1	43	64.2	47	70.1	--	--
Souter	51/67	76.1	16/67	23.9	44	65.7	44	65.7	38	56.7	43	64.2
Thomas	50/67	74.6	17/67	25.4	47	70.1	33	49.3	47	70.1	41	61.2
Ginsburg	51/67	76.1	16/67	23.9	43	64.2	42	62.7	39	58.2	43	64.2
Breyer	51/65	78.5	14/65	21.5	45	69.2	44	67.7	38	58.5	46	70.8
Alito	54/66	81.8	12/66	18.2	51	77.3	40	60.6	47	71.2	47	71.2

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	Majority/ # Cases	Majority %	Dissent	Dissent %	Souter	Souter %	Thomas	Thomas %	Gins-burg	Gins-burg %	Breyer	Breyer %	Alito	Alito %
Roberts	59/66	89.4	7/66	10.6	44	66.7	47	71.2	43	65.2	45	68.2	51	77.3
Stevens	50/67	74.6	17/67	25.4	44	65.7	33	49.3	42	62.7	44	65.7	40	59.7
Scalia	54/67	80.6	13/67	19.4	38	56.7	47	70.1	39	58.2	38	56.7	47	70.1
Kennedy	57/67	85.1	10/67	14.9	43	64.2	41	61.2	43	64.2	46	68.7	47	70.1
Souter	51/67	76.1	16/67	23.9	--	--	35	52.2	46	68.7	44	65.7	39	58.2
Thomas	50/67	74.6	17/67	25.4	35	52.2	--	--	34	50.7	34	50.7	44	65.7
Ginsburg	51/67	76.1	16/67	23.9	46	68.7	34	50.7	--	--	44	65.7	40	59.7
Breyer	51/65	78.5	14/65	21.5	44	67.7	34	52.3	44	67.7	--	--	40	61.5
Alito	54/66	81.8	12/66	18.2	39	59.1	44	66.7	40	60.6	40	60.6	--	--

2007-2008 VOTES

9-0	20	29.85
8-1	6	8.96
7-2	17	25.37
6-3	10	14.93
5-3	2	2.98
5-4	11	16.42
5-2	1	1.49
	67	**100.00%**

VOTING BLOCKS IN 5-TO-4 VOTES

4	Roberts, Scalia, Thomas, Ginsburg, Alito
3	Roberts, Scalia, Kennedy, Thomas, Alito
1	Roberts, Scalia, Thomas, Ginsburg, Alito
1	Roberts, Stevens, Scalia, Thomas, Alito
1	Roberts, Stevens, Thomas, Souter, Breyer
1	Stevens, Scalia, Thomas, Souter, Ginsburg

SUPREME COURT STATISTICS 2006-2008 TERMS

OPINIONS WRITTEN 2006-2008

Opinions	Total	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Majority	134	15	14	17	14	14	16	15	16	13
Dissents	125	6	28	17	5	13	16	13	16	11
Abstentions	11	4	0	0	1	0	1	0	4	1

VOTING RECORD 2006-2008 TERM
MAJORITY OPINIONS

	Majority/ # Cases	Majority %	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	115/130	88.5	--	74	101	104	85	95	78	82	104
Stevens	90/134	67.2	74	--	67	81	82	60	81	80	73
Scalia	107/134	79.9	101	67	--	97	76	97	74	71	96
Kennedy	121/133	91.0	104	81	97	--	91	90	87	91	104
Souter	102/134	76.1	85	82	76	91	--	71	91	88	82
Thomas	101/133	75.9	95	60	97	90	71	--	67	65	92
Ginsburg	98/134	73.1	78	81	74	87	91	67	--	86	79
Breyer	98/130	75.4	82	80	71	91	88	65	86	--	79
Alito	112/133	84.2	104	73	96	104	82	92	79	79	--

DISSENTING OPINIONS 2006-2008 TERMS

	Minority/ # Cases	Minority %	Roberts	Stevens	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer	Alito
Roberts	15/130	11.5	--	1	13	2	1	12	0	1	10
Stevens	44/134	32.8	1	--	3	4	23	2	26	22	4
Scalia	27/134	20.1	13	3	--	3	1	22	3	0	11
Kennedy	12/133	9.0	2	4	3	--	2	1	2	6	5
Souter	32/134	23.9	1	23	1	2	--	1	24	20	2
Thomas	32/133	24.1	12	2	22	1	1	--	2	0	12
Ginsburg	36/134	26.9	0	26	3	2	24	2	--	21	2
Breyer	32/130	24.6	1	22	0	6	20	0	21	--	2
Alito	21/133	15.8	10	4	11	5	2	12	2	2	--

SUPREME "BATTING AVERAGES" 2006-2008

(The chart shows how many times each justice voted in the majority and the percentages of cases he/she agreed with other members of the Court.)

	Majority/ # Cases	Majority %	Dissent/ # Cases	Dissent %	Roberts	Roberts %	Stevens	Stevens %	Scalia	Scalia %	Kennedy	Kennedy %
Roberts	115/130	88.5	15/130	11.5	--	--	74	56.9	101	77.7	104	80.0
Stevens	90/134	67.2	44/134	32.8	74	55.2	--	--	67	50.0	81	60.4
Scalia	107/134	79.9	27/134	20.1	101	75.4	67	50.0	--	--	97	72.4
Kennedy	121/133	91.0	12/133	9.0	104	78.2	81	60.9	97	72.9	--	--
Souter	102/134	76.1	32/134	23.9	85	63.4	82	61.2	76	56.7	91	67.9
Thomas	101/133	75.9	32/133	24.1	95	71.4	60	45.1	97	72.9	90	67.7
Ginsburg	98/134	73.1	36/134	26.9	78	58.2	81	60.4	74	55.2	87	64.9
Breyer	98/130	75.4	32/130	24.6	82	63.1	80	61.5	71	54.6	91	70.0
Alito	112/133	84.2	21/133	15.8	104	78.2	73	54.9	96	72.2	104	78.2

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	Majority/ # Cases	Majority %	Dissent/ # Cases	Dissent %	Souter	Souter %	Thomas	Thomas %	Gins-burg	Gins-burg %	Breyer	Breyer %	Alito	Alito %
Roberts	115/130	88.5	15/130	11.5	85	65.4	95	73.1	78	60.0	82	63.1	104	80.0
Stevens	90/134	67.2	44/134	32.8	82	61.2	60	44.8	81	60.4	80	59.7	73	54.5
Scalia	107/134	79.9	27/134	20.1	76	56.7	97	72.4	74	55.2	71	53.0	96	71.6
Kennedy	121/133	91.0	12/133	9.0	91	68.4	90	67.7	87	65.4	91	68.4	104	78.2
Souter	102/134	76.1	32/134	23.9	--	--	71	53.0	91	67.9	88	65.7	82	61.2
Thomas	101/133	75.9	32/133	24.1	71	53.4	--	--	68	51.1	65	48.9	92	69.2
Ginsburg	98/134	73.1	36/134	26.9	91	67.9	68	50.7	--	--	86	64.2	79	59.0
Breyer	98/130	75.4	32/130	24.6	88	67.7	65	50.0	86	66.2	--	--	79	60.8
Alito	112/133	84.2	21/133	15.8	82	61.7	92	69.2	79	59.4	79	59.4	--	--

2006-2008 VOTES

9-0	40	29.85
8-0	1	.75
8-1	14	10.45
7-0	1	.75
7-1	2	1.49
7-2	25	18.65
6-2	1	.75
6-3	12	8.95
5-3	3	2.24
5-4	34	25.37
5-2	1	.75
	134	**100.00%**

VOTING BLOCKS IN 5-TO-4 VOTES

16	Roberts, Kennedy, Scalia, Thomas, Alito
10	Stevens, Kennedy, Souter, Ginsburg, Breyer
2	Roberts, Kennedy, Souter, Breyer, Alito
1	Roberts, Scalia, Thomas, Ginsburg, Alito
1	Roberts, Stevens, Thomas, Souter, Breyer
1	Roberts, Scalia, Thomas, Ginsburg, Alito
1	Stevens, Scalia, Thomas, Souter, Ginsburg
1	Roberts, Kennedy, Scalia, Thomas, Breyer
1	Stevens, Kennedy, Ginsburg, Breyer, Alito

SUPREME STATISTICS

Review the Supreme Court Statistics based on the Court's 2006-08 terms. Then answer the following questions.

1. Approximately 8,000 cases are appealed to the Court each year. What percentage resulted in written opinions in 2006-08?

2. What percentage of the Court's decisions were unanimous (i.e., without any dissent) in 2006-08?

3. What percentage of the Court's decisions were decided by five-to-four splits of the justices in 2006-08?

4. Which justice authored the most majority decisions for the two terms? Which justice wrote the most dissents for the six terms?

5. Which justice was most often in the majority? Which justice was most often in the minority?

6. Assume that Justice Thomas is the most conservative and that Justice Stevens is the most liberal on the current Court. Which two justices most often voted with Justice Thomas? Which two justices most often voted with Justice Stevens?

7. Based on your analysis of the statistics, would you describe these past two terms as being characterized by more liberal, more conservative, or more moderate decisions? Explain your answer.

8. Speculate as to the most common voting blocks for five-to-four decisions. Explain.

9. For the 2006-08 terms, considering both majority and dissenting opinions, which two justices voted together most often? Which two justices voted together least often?

10. Which justice authored the fewest majority opinions? What is a logical explanation for this fact?

Use the 2007-08 Supreme Court Statistics to answer the next two questions.

11. Which justice most often voted with the majority during the 2007-08 term?

12. Which justice abstained the most often during the 1007-08 term? Can you come up with a possible explanation for this?

SUPREME STATISTICS
Key

1. Approximately 8,000 cases are appealed to the Court each year. What percentage resulted in written opinions in 2006-08? *(.84%)*

2. What percentage of the Court's decisions were unanimous (i.e., without any dissent) in 2006-08? *(29.85%)*

3. What percentage of the Court's decisions were decided by five-to-four splits of the justices in 2006-08? *(25.37%)*

4. Which justice authored the most majority decisions for the two terms? Which justice wrote the most dissents for the two terms? *(Scalia wrote 17 majority opinions; Stevens wrote 28 dissents.)*

5. Which justice was most often in the majority? Which justice was most often in the minority? *(Kennedy was most often in the majority; Stevens was most often in the minority.)*

6. Assume that Justice Thomas is the most conservative and that Justice Stevens is the most liberal on the current Court. Which two justices most often voted with Justice Thomas? Which two justices most often voted with Justice Stevens? *(Scalia voted with Thomas 72.4% of the time and Alito voted with Thomas 69.2% of the time; Breyer voted with Stevens 61.5% of the time and Souter voted with Stevens 61.2% of the time.)*

7. Based on your analysis of the statistics, would you describe these past two terms as being characterized by more liberal, more conservative, or more moderate decisions? Explain your answer. *(Answers will vary.)*

8. Speculate as to the most common voting blocks for five-to-four decisions. Explain. *(Answers will vary but should mention that Roberts, Kennedy, Scalia, Thomas and Alito voted together in 16 out of the 34 5-to-4 decisions during the two years. Since Thomas, Scalia, Alito and Roberts are the more conservative justices, when the more moderate Kennedy joins them, they form a strong voting block.)*

9. For the 2006-08 terms, considering both majority and dissenting opinions, which two justices voted together most often? Which two justices voted together least often? *(Considering both majority and dissenting opinions, Roberts and Alito voted together in 108 cases during the two years; Stevens and Thomas voted least often together, in only 60 cases.)*

10. Which justice authored the fewest majority opinions? What is a logical explanation for this fact? *(Alito, possibly because he is the newest justice.)*

Use the 2007-08 Supreme Court Statistics to answer the next two questions.

11. Which justice most often voted with the majority during the 2007-08 term? *(Chief Justice Roberts, who voted in the majority in 59 of the 66 cases in which he took part.)*

12. Which justice abstained the most often during the 1007-08 term? Can you come up with a possible explanation for this? *(Breyer abstained in four cases. Possible explanations could include that he or a family member had financial ties with one of the parties, or he or a family member had been a judge or attorney in the case at a lower level.)*

WASHINGTON STATE GRANGE
v.
WASHINGTON STATE REPUBLICAN PARTY

No. 06-713
Argued October 1, 2007
Decided March 18, 2008

In *California Democratic Party* v. *Jones* (2000), the Supreme Court held that primaries permitting voters to cast ballots for candidates of any party—whether or not they are registered party members—violated the political parties' right of free association under the First Amendment. The Court explained that this action forced political parties to allow nonmembers to participate in selecting the parties' nominees. In 2003, Washington State's blanket primary was also struck down on the ground that it was nearly identical to the California system.

Washington voters responded in 2004 by approving Initiative 872, which provided that candidates be identified on the primary ballot by their self-designated party preference; that voters may vote for any candidate; and that the two top votegetters for each office, regardless of party preference, advance to the general election. This meant that both general election candidates could possibly be members of the same political party.

The Washington State Republican Party, joined later by the Washington State Democratic Central Committee and the Libertarian Party of Washington State, filed suit challenging the law. They contended that the new system violated a party's associational rights by usurping its right to nominate its own candidates and by forcing it to associate with candidates it did not endorse.

Both the district court and the Ninth Circuit struck down the Washington initiative. The circuit court explained that allowing candidates to have their party preference printed on the ballot would infringe on the political parties' right to associate only with candidates of its own choosing.

- ISSUE: Does a system that permits the names and political parties of the top two votegetters in the primary election to appear on the general election ballot violate the political parties' First Amendment right of association?

WASHINGTON STATE GRANGE
v.
WASHINGTON STATE REPUBLICAN PARTY
Decision

The Supreme Court upheld the state plan, ruling seven-to-two that to overturn it would have been an "extraordinary and precipitous nullification of the will of the people." Justice Thomas, in his majority opinion, compared this case to *Jones*, writing, "unlike the California primary, the I-872 primary does not … choose parties' nominees…. The law never refers to the candidates as nominees of any party, nor does it treat them as such." He continued:

> *… There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate….*

Thomas was joined by Justices Stevens, Souter, Ginsburg, Breyer, Alito and Chief Justice Roberts. The Chief Justice was joined by Justice Alito in his concurring opinion, in which he stated:

> *Voter perceptions matter, and if voters do not actually believe the parties and the candidates are tied together, it is hard to see how the parties' associational rights are adversely implicated….*

In dissent, Justice Scalia, joined by Justice Kennedy, wrote:

> *Among the First Amendment rights that political parties possess is the right to associate with the persons whom they choose and to refrain from associating with persons they reject….*

DISTRICT OF COLUMBIA, ET AL.,
v.
DICK ANTHONY HELLER

No. 07-290
Argued March 18, 2008
Decided June 26, 2008

Long troubled by violence, in 1976 the District of Columbia banned residents from keeping handguns for private use. The ordinance not only banned ownership of handguns, but also required other guns that might be legally kept in the home, such as rifles and shotguns, to be disassembled or kept under a trigger lock. When the prohibition—one of the nation's strictest—was enacted, officials pointed to the "particularly serious threat" handguns pose. They said handguns were used in 88 percent of armed robberies, 91 percent of armed assaults and more than 50 percent of murders.

The Supreme Court's last major ruling on gun rights came in 1939 in *United States* v. *Miller*, when the Court held that a sawed-off shotgun was not one of the "arms" to which the Second Amendment referred. Robert A. Levy, a wealthy libertarian who was a senior fellow in constitutional studies at the Cato Institute, financed and recruited the plaintiffs in the lawsuit for the purpose of getting a Second Amendment case before the Supreme Court. Dick Heller, a security guard at the Federal Judicial Center, was one of six plaintiffs in the case.

Heller applied for and was denied a license to keep a gun at home for personal safety. Based on prior rulings, a trial court dismissed Heller's case. The U.S. Court of Appeals for the District of Columbia first threw out the claim of the other five plaintiffs for lack of standing. It then reversed the trial court ruling in Heller's case by a vote of two-to-one, emphasizing the Second Amendment "right of the people" phrase as an individual one that was not tied to membership in a state militia.

- ISSUE: Does the District of Columbia ordinance forbidding individuals from keeping firearms in their homes violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

D.C. V. *HELLER* (2008)
Decision

By a five-to-four vote, the Supreme Court struck down the Washington, D.C. ban on handguns. The majority opinion, written by Justice Scalia, established for the first time in U.S. history that the Constitution's Second Amendment gives individuals the right to keep guns at home for self-defense. The ruling was signed by the Court's most conservative justices—Scalia, Chief Justice Roberts, Kennedy, Thomas and Alito—and vehemently protested by the Court's more liberal members—Stevens, Souter, Ginsburg and Breyer.

Scalia suggested that the Second Amendment "could be rephrased, 'Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.'" He noted that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."

Scalia stated that an individual right to possess a gun "for traditionally lawful purposes, such as self-defense within the home" is not unlimited. "It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," Justice Scalia wrote. He went on to indicate that:

> *… [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.*

Scalia said this decision wasn't providing the last word in the Second Amendment's reach. "Since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field," he said.

One key to his ruling was Scalia's interpretation of a "militia," which traditionally is a unit outside the regular army and that could today be compared with state National Guard units. He said:

> *… The "militia" in colonial America consisted of a subset of "the people"—those who were male, able bodied, and within a certain age range. Reading the Second Amendment as protecting only the right to "keep and bear Arms" in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as "the people."*

The Court also said that the law's requirement that lawful weapons be rendered essentially inoperable by trigger locks or disassembly was unconstitutional because that "makes it impossible for citizens to use them for the core lawful purpose of self-defense…."

Concluding his opinion, Justice Scalia wrote:

> *[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.*

The dissenting justices, led by Justice Stevens, scoffed at the majority's historical analysis of the Second Amendment. "There is no indication that (the amendment's drafters) intended to enshrine the common-law right of self-defense in the Constitution," wrote Stevens. Justice Stevens read his dissent from the bench, an unmistakable signal that he disagreed deeply with the majority. He wrote:

> *When each word in the text is given full effect, the Amendment is most naturally read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia….*
>
> *Indeed, not a word in the constitutional text even arguably supports the Court's overwrought and novel description of the Second Amendment as "elevat[ing] above all other interests" "the right of law-abiding, responsible citizens to use arms in defense of hearth and home.*

In a footnote, Stevens said the majority opinion "calls to mind the parable of the six blind men and the elephant," in which each of the sightless men had a different conception of the animal. "Each of them, of course, has fundamentally failed to grasp the nature of the creature," Justice Stevens wrote.

Stevens warned the ruling would launch new judicial involvement in an issue he said should be left to legislators. "I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table," he wrote.

In a separate dissent, Breyer indicated his agreement with Stevens' arguments but also stated that even if possession were to be allowed for other reasons, any law regulating the use of firearms would have to be "unreasonable or inappropriate" to violate the Second Amendment. In Breyer's view, the D.C. laws at issue in this case were both reasonable and appropriate. He attacked the majority opinion for its lack of standards and its hurdles for officials trying to fight crime. Breyer noted that "handguns are involved in a majority of firearm deaths and injuries in the United States." He continued:

> *…[T]he District's objectives are compelling; its predictive judgments as to its law's tendency to achieve those objectives are adequately supported; the law does impose a burden upon any self-defense interest that the Amendment seeks to secure; and there is no clear less restrictive alternative….*

"I cannot understand how one can take from the elected branches of government the right to decide whether to insist upon a handgun-free urban populace in the city now facing a serious crime problem," he wrote, criticizing the majority for casting uncertainty over what gun regulations would be permissible. He concluded, "In my view, there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas."

DWAYNE GILES v. *CALIFORNIA*

No. 07-6053
Argued April 22, 2008
Decided June 25, 2008

Dwayne Giles was charged with the murder of his former girlfriend, Brenda Avie, in 2002. At his trial, Giles described Avie as jealous and said that she had once shot a man, that he had seen her threaten people with a knife, and that she had vandalized his home and car on prior occasions. He said that on the day of the shooting, Avie came to his grandmother's house and threatened to kill him and his new girlfriend. Giles testified that after Avie threatened him at the house, he went into the garage, got a gun, and started walking toward the back of the house. He said that Avie charged at him and that he thought she had something in her hand.

Prosecutors then introduced evidence of a conversation between Avie and a police officer responding to a domestic-violence report about three weeks before the shooting. Avie claimed that Giles had assaulted her and threatened to kill her. Over objections by the defense, the trial court admitted these statements into evidence and Giles was convicted of first-degree murder.

While Giles' appeal was pending, the U.S. Supreme Court announced its decision in *Crawford* v. *Washington*, 2004. This decision held that unless the witness is available for cross-examination, the state cannot ordinarily introduce any incriminating statements the witness made before disappearing.

On appeal to the California Supreme Court, Giles argued that the police conversation should have been excluded from trial based on his Sixth Amendment right to confront witnesses against him. The state responded that Giles forfeited that right by killing the witness. The California Supreme Court concluded that the Sixth Amendment's confrontation clause allowed the trial court to admit the witness's statements under the doctrine of forfeiture by wrongdoing. In other words, Giles had forfeited his confrontation rights because he had killed the witness and thus made her unavailable to testify.

- ISSUE: Does a criminal defendant forfeit his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial?

GILES v. *CALIFORNIA* (2008)
Decision

Writing for the six-to-three Supreme Court, Justice Scalia said:

> *The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct designed to prevent the witness from testifying….*

Scalia said Giles' intention in the shooting death was never probed, and he was essentially presumed guilty. Scalia concluded:

> *… (A) murderer can and should be punished, without regard to his purpose, after a fair trial. But a legislature may not "punish" a defendant for his evil acts by stripping him of the right to have his guilt in a criminal proceeding determined by a jury, and on the basis of evidence the Constitution deems reliable and admissible.*

Justice Thomas wrote a concurring opinion to stress his belief that "statements like those made by the victim in this case do not implicate the Confrontation Clause" because the police questioning was not a "formalized dialogue." Justice Alito also concurred, suggesting that the witness statements did not fall within the Confrontation Clause, but that neither party had made this argument before the Court.

Justice Souter, Joined by Justice Ginsburg, concurred in all parts of the majority opinion except one section that denounced the dissenting argument. Souter stated that he did not find the dissent as wrong as the majority suggested.

Justices Breyer, Stevens and Kennedy dissented. Breyer wrote:

> *This case involves a witness who, crying as she spoke, told a police officer how her former boyfriend (now, the defendant) had choked her, "opened a folding knife," and threatened to kill her. Three weeks later he did kill her…. The Court concludes that he may not have forfeited that right. In my view, however, he has.*

RALPH BAZE AND THOMAS C. BOWLING
v.
JOHN D. REES,
COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS

No. 07-5439
Argued January 7, 2008
Decided April 16, 2008

In the early to mid-twentieth century, states sought to implement a more humane execution method after the people learned how brutal a death by electrocution could be and how high the risk of error leading to agonizing pain was. A similar turn against hanging had earlier led to the development of the electric chair and the gas chamber.

Of the 36 death penalty states, 35 relied on lethal injection as their preferred method of execution at the time of this case (Nebraska was the exception). At least 30 of these states, including Kentucky, used the same combination of three drugs in their lethal injections. The states that provided the death penalty as a punishment for capital crimes adopted lethal injection at least in part because it was supposed to be more humane than other forms of the death penalty—less painful than the electric chair or the gas chamber. The federal government also used lethal injection.

Kentucky's protocol was similar to that employed by other death penalty states: a combination of a short-acting anesthetic, a muscle paralyzer, and a heart-stopping drug. A physician was present to assist in any effort to revive the prisoner in the event of a last-minute stay of execution. By statute, however, the physician was prohibited from participating in the "conduct of an execution," except to certify the cause of death. Since adopting the method in 1998, Kentucky had carried out only one execution and only two since the death penalty was reinstated by the Supreme Court in 1976.

Ralph Baze, who was convicted of murdering a sheriff and his deputy in 1992, and Thomas Bowling, convicted of shooting and killing a couple in 1990, were both given the death penalty in Kentucky. They appealed, not challenging the constitutionality of the death penalty itself, but because of the details of the injection's administration: the chemicals used, the training of the personnel, the adequacy of medical supervision, and the consequences and risk of error. They argued that an insufficient dose of the anesthetic could leave an inmate conscious during the procedure and the muscle-blocker would mask the suffering. Thus, improperly anesthetized inmates could appear peaceful to witnesses but suffer excruciating pain or conscious suffocation before death. The Kentucky Supreme Court held that the death penalty system did not amount to unconstitutional cruel and unusual punishment.

- ISSUE: Does capital punishment by lethal injection violate the Eighth Amendment ban on cruel and unusual punishment?

BAZE v. *REES* (2008)
Decision

The Supreme Court upheld capital punishment by lethal injection by a vote of seven-to-two. Seven separate opinions were issued, and no more than three justices signed any one of the opinions. The controlling opinion, written by Chief Justice Roberts, was signed by only two others, Justices Kennedy and Alito.

Roberts observed that the Court had "never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." In 1879, the Supreme Court upheld the firing squad, and in 1890 and 1915 it turned down challenges to electrocution.

The Chief Justice wrote:

> *… Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.*
>
> *Petitioners do not claim that it does. Rather, they contend that the Eighth Amendment prohibits procedures that create an "unnecessary risk" of pain. …*

Roberts said that challengers must show not only that a state's method "creates a demonstrated risk of severe pain," but also that there were alternatives that were "feasible" and "readily implemented" that would "significantly" reduce that risk. "A slightly or marginally safer alternative" would not suffice, the chief justice said. He added:

> *Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual." In Louisiana ex rel. Francis v. Resweber (1947), a plurality of the Court upheld a second attempt at executing a prisoner by electrocution after a mechanical malfunction had interfered with the first attempt. The principal opinion noted that "[a]ccidents happen for which no man is to blame," and concluded that such "an accident," with no suggestion of malevolence, did not give rise to an Eighth Amendment violation.*

Justice Alito wrote a separate opinion suggesting that he regarded the chief justice's opinion as insufficiently conclusive and therefore is open to "misinterpretation" by those who might see it as an invitation to "litigation gridlock." Alito said. "The issue presented in this case—the constitutionality of a method of execution—should be kept separate from the controversial issue of the death penalty itself."
In his concurring opinion, Justice Stevens declared that he has reached the conclusion that:

> *…[T]he imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible*

> *returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment…*
>
> *The conclusion that I have reached with regard to the constitutionality of the death penalty itself makes my decision in this case particularly difficult. It does not, however, justify a refusal to respect precedents that remain a part of our law. This Court has held that the death penalty is constitutional, and has established a framework for evaluating the constitutionality of particular methods of execution.*

Justice Scalia, joined by Justice Thomas, wrote in a concurrence:

> *… It is simply not our place to choose one set of responsible empirical studies over another in interpreting the Constitution. Nor is it our place to demand that state legislatures support their criminal sanctions with foolproof empirical studies, rather than commonsense predictions about human behavior. ...*

Although he concurred with the chief justice, Justice Thomas, joined by Justice Scalia, said Robert's standard in the plurality left the death penalty too vulnerable to challenge. He preferred giving legislatures more latitude to allow for a painful execution. Thomas continued:

> *It is not a little ironic—and telling—that lethal injection, hailed just a few years ago as <u>the</u> humane alternative in light of which every other method of execution was deemed an unconstitutional relic of the past, is the subject of today's challenge. It appears the Constitution is "evolving" even faster than I suspected. …*

Justice Breyer concurred with the plurality, but he was obviously torn in his decision. He wrote:

> *… In respect to <u>how</u> a court should review such a claim, I agree with Justice Ginsburg. She highlights the relevant question, whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering. … At the same time, I believe that the legal merits of this kind of claim presented must inevitably turn not so much upon the wording of an intermediate standard of review as upon facts and evidence. And I cannot find, either in the record in this case or in the literature on the subject, sufficient evidence that Kentucky's execution method poses the "significant and unnecessary risk of inflicting severe pain" that petitioners assert.*

Dissenting Justice Ginsburg, joined by Justice Souter, wrote that Kentucky's method lacked "basic safeguards used by other States to confirm that an inmate is unconscious" before the second and third drugs are injected. Ginsburg said the Court should send the case back to the state court, instructing it to consider whether the state's omission of safeguards used by other states "poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain."

PATRICK KENNEDY v. *LOUISIANA*

No. 07-343
Argued April 16, 2008
Decided June 25, 2008

In 1977, the United States Supreme Court ruled that the death penalty is an excessive—and therefore, unconstitutional—punishment in a rape crime involving a sixteen-year-old, but the Court had never ruled on whether it was an appropriate penalty for rape of young children. In 2007, the fewest number of death sentences were handed down in the United States since capital punishment was reinstated in 1976. Even so, Louisiana and five other states, including Texas, changed their laws to allow executions of those who rape children.

At the time of this case, there were approximately 3,300 inmates on death row across the country but only two were there for crimes other than murder. All the executions carried out in the United States since the Supreme Court reinstated the death penalty in 1976 were for crimes involving homicide.

Police were called to investigate the rape of Patrick Kennedy's eight-year-old stepdaughter on March 2, 1988. The injuries inflicted were so severe that they required emergency surgery. The girl initially told investigators that two neighborhood boys had raped her after dragging her to a side yard. Police, however, found evidence of blood in her bedroom that Kennedy apparently had tried to clean up. The stepdaughter testified later that Kennedy had raped her and urged her to relate a false account to police. Several months after the rape, the victim recorded her accusation in a videotaped interview with the Child Advocacy Center.

A jury convicted Kennedy in 2003 and unanimously sentenced him to death, under a new Louisiana statute that permitted the death penalty for anyone found guilty of raping someone under twelve years of age. The Louisiana Supreme Court rejected Kennedy's appeal that his death sentence violated the Eighth Amendment, emphasizing the need to protect children.

- ISSUE: Is the death penalty a permissible sentence under the Eighth Amendment ban on cruel and unusual punishment for the crime of child rape, when the crime did not result in the death of the victim?

KENNEDY v. *LOUISIANA* (2008)
Decision

The Supreme Court ruled, five-to-four, that sentencing someone to death for raping a child is unconstitutional. Justice Kennedy wrote for the Court and was joined by Justices Stevens, Souter, Ginsburg and Breyer.

Justice Kennedy, while in no way minimizing the heinous nature of child rape, wrote that executing someone for that crime, assuming the victim was not killed, violates the Eighth Amendment's ban on cruel and unusual punishment, which draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." Justice Kennedy wrote, "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."

Kennedy recognized that since 1972, nine states (Florida, Georgia, Louisiana, Mississippi, Montana, Oklahoma, South Carolina, Tennessee and Texas) had, for varying lengths of time, permitted capital punishment for adult or child rape. However, Kennedy explained, "no individual has been executed for the rape of an adult or child since 1964, and no execution for any other nonhomicide offense has been conducted since 1963." He continued:

> *… In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense. Difficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim.*

The dissenters were Chief Justice Roberts and Justices Scalia, Thomas and Alito. Alito wrote a dissent lamenting that the majority had ruled out executing someone for raping a child:

> *The Court today holds that the Eighth Amendment categorically prohibits the imposition of the death penalty for the crime of raping a child. This is so, according to the Court, no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator's prior criminal record may be….*

NOTE: In October, 2008, the State of Louisiana and the Bush Administration asked the justices to "revisit" this decision. This action would have taken five votes, including that of at least one justice who voted to ban the death penalty for rapists. The Court, meeting in conference, declined the request.

WILLIAM CRAWFORD v. *MARION COUNTY ELECTION BOARD*

INDIANA DEMOCRATIC PARTY v. *TODD ROKITA, INDIANA SECRETARY OF STATE*

No. 07-21
Argued January 9, 2008
Decided April 28, 2008

In years leading up to this case, more than twenty states had passed laws requiring some form of identification at the polls beyond the simple signature that had traditionally been required. Voters in Indiana, Florida, Georgia, Hawaii, Louisiana, Michigan and South Dakota required voters to provide photo identification before casting a ballot.

In 2005, Indiana passed a law requiring voters who cast ballots in person to present government-issued photo IDs at the polls. Under the law, the photo ID had to be current. A person who was no longer driving would not have been able to use an expired license as identification, but the state's motor vehicle agency would provide a free photo ID card of people who did not drive. However, obtaining it required a primary document, such as an original birth certificate or a passport. The photo ID requirement did not apply to absentee ballots submitted by mail, and there was an exception for persons living and voting in a state-licensed facility such as a nursing home.

The Indiana law was challenged in separate suits. William Crawford, an Indiana legislator who represented one of the state's poorest districts, and groups representing the elderly and homeless, were represented by the ACLU. Another suit was filed by the Indiana Democratic Party against the Indiana Secretary of State. Plaintiffs argued that the law placed a particular burden on eligible voters who were poor or elderly and who lacked drivers' licenses and ready access to substitute forms of identification. At trial, the plaintiffs did not produce any witnesses who claimed they would be unable to meet the law's requirements.

The law was upheld by both the federal district court and the United States Court of Appeals for the Seventh Circuit.

- ISSUE: Does a law that requires voters to present either state or federal photo identification unduly burden citizens' rights to vote in violation of the Fourteenth Amendment?

CRAWFORD v. *MARION COUNTY* (2008)
Decision

The Supreme Court upheld Indiana's voter identification law, concluding in a splintered six-to-three decision that the challengers failed to prove that the law's photo identification requirement placed an unconstitutional burden on the right to vote. In the lead opinion, written by Justice Stevens and joined by Chief Justice Roberts and Justice Kennedy, the Court acknowledged that the record of the case contained "no evidence" of the type of voter fraud the law was supposedly devised to detect and deter—the effort by a voter to cast a ballot in another person's name. Stevens explained:

> *The only kind of voter fraud that (the law) addresses is in-person voter impersonation at polling places. The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history. Moreover, petitioners argue that provisions of the Indiana Criminal Code punishing such conduct as a felony provide adequate protection against the risk that such conduct will occur in the future….*

The three others who made up the majority, Justices Scalia, Thomas and Alito, said in an opinion written by Scalia that the law was so obviously justified as "a generally applicable, nondiscriminatory voting regulation"that there was no basis for scrutinizing the record to access the impact on any individual voters." Scalia continued:

> *… A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a general applicable law with disparate impact is not unconstitutional….*

In a dissenting opinion, Justice Souter said:

> *Indiana's "Voter ID Law" threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens … and a significant percentage of those individuals are likely to be deterred from voting….*

Souter was joined by Justice Ginsburg, who also signed Justice Breyer's dissent.

Breyer, in a separate dissent, compared Indiana's law with those in Georgia and Florida, which also required photo identification but accepted more broadly accessible documents. Indiana had not justified its "significantly harsher" requirements, Breyer wrote. He explained that he believes "the statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID."

LAKHDAR BOUMEDIENE, ET AL.,
v.
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES

No. 06-1195
Argued December 5, 2007
Decided June 12, 2008

The United States has maintained compete and uninterrupted control over 45 square miles of land and water leased from Cuba for a U.S. Naval Base at Guantanamo Bay for over 100 years. After the terrorist attacks on the United States on September 11, 2001, a prison was established there to detain enemy combatants.

In October, 2001, Lakhdar Boumediene and five other Algerian natives, legal residents of Bosnia, were arrested by Bosnian police on suspicion of plotting to attack the United States embassy in Sarajevo. The Supreme Court of Bosnia and Herzegovina ordered them released three months later for lack of evidence. The Bosnian police again seized them and turned them over to the U.S. military. The U.S. government classified the men as enemy combatants in the war on terror and detained them in prison on Guantanamo Bay.

Boumediene filed a petition for a writ of habeas corpus, alleging violations of the Constitution's Due Process Clause, various statutes and treaties, the common law, and international law. Boumediene's case concerned the combatant review tribunals which were set up to validate the determination that a detainee was an enemy combatant. The tribunals were panels of military officers who were not required to disclose to the detainee details of the evidence or witnesses against him. The military assigned a "personal representative" to each detainee, but defense lawyers could not participate.

The federal district court granted the government's motion to have all the claims dismissed on the ground that Boumediene, as an alien detainee at an overseas military base, had no right to a habeas petition. The U.S. Court of Appeals for the D.C. circuit affirmed the dismissal, but the Supreme Court reversed in *Rasul* v. *Bush* (2004), which held that the habeas statute extends to non-citizen detainees at Guantanamo. The decision also determined that federal judges could review the legality of the Guantanamo detentions, rejecting the administration's position that the detainees' fate was a question for the executive branch alone. Congress responded by enacting the Detainee Treatment Act of 2005, which provided procedures for reviewing detainee status.

In 2006, in *Hamdan* v. *Rumsfeld*, the Supreme Court ruled that the Detainee Treatment Act did not apply to pending cases. A Republican Congress responded to the *Hamdan* decision by passing the Military Commissions Act. This new law authorized limited judicial review of combatant status determinations and military trials only after the completion of those proceedings.

When Boumediene's case was appealed to the D.C. Circuit for a second time, he argued that the MCA did not apply to his petition, and that if it did, it was unconstitutional under the Suspension Clause. The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The D.C. Circuit ruled in favor of the government.

- ISSUES:

(1) Do detainees at Guantanamo Bay have a constitutional privilege of the writ of habeas corpus (the ability to try to prove before an independent judge that they are unlawfully held)?

(2) For constitutional purposes, should Guantanamo Bay be treated as part of the sovereign territory of the United States?

(3) Does the Military Commissions Act of 2006 violate the constitutional provision governing the circumstances under which the privilege of the writ of habeas corpus may be suspended?

(4) Are detainees at Guantanamo Bay entitled to the protection of the Fifth Amendment right not to be deprived of liberty without Due Process of Law and of the Geneva Conventions?

BOUMEDIENE v. *BUSH* (2008)
Decision

The Supreme Court reversed the D.C. Circuit's ruling, finding in favor of the detainees. It ruled five-to-four that foreign terror suspects held at the Guantanamo Bay United States Naval Base in Cuba have constitutional rights to challenge their detention in U.S. courts. Justice Kennedy wrote for the Supreme Court:

> *It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel…. The detainees … are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government….*

The Court declared unconstitutional a provision of the Military Commissions Act of 2006 that stripped the federal courts of jurisdiction to hear habeas corpus petitions from the detainees seeking to challenge their designation as enemy combatants. Justice Kennedy said the procedure set up in the MCA "falls short of being a constitutionally adequate substitute" because it failed to offer "the fundamental procedural protections of habeas corpus."

Kennedy said:

> *The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional. While we would have found it informative to consider the reasoning of the Court of Appeals on this point, we must weigh that against the harms petitioners may endure from additional delay.*

Defending the Court's separation-of-powers application, Kennedy wrote:

> *Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of these powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person….*

Justice Kennedy declared, "[P]rotection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." He continued:

> *…The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.*

> *The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.*

The decision, which was joined by Justices Stevens, Souter, Ginsburg and Breyer, repudiated the fundamental legal basis for the administration's strategy of housing prisoners captured in Afghanistan and elsewhere at Guantanamo Bay.

Justice Souter, in a concurring opinion, said the ruling was "no bolt out of the blue," but rather should have been anticipated by anyone who read the Court's 2004 decision in *Rasul* v. *Bush*.

Dissenting justices said judges should not "second-guess" the military. Two dissenting opinions were written, one by Chief Justice Roberts and the other by Justice Scalia. Each signed the other's dissent, and Justices Thomas and Alito signed both.

Chief Justice Roberts said, "Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants," and in doing so, had left itself open to "charges of judicial activism." The decision, he said, "is not really about the detainees at all, but about control of federal policy regarding enemy combatants." The public will "lose a bit more control over the conduct of this nation's foreign policy to unelected, politically unaccountable judges," Roberts said.

The chief justice said the majority had gutted the Detainee Treatment Act without really giving it a chance. "And to what effect?" he asked. "The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date." Roberts then asked:

> *So who has won? Not the detainees…. Not Congress…. Not the Great Writ…. Not the rule of law…. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges."*

In his dissent, Justice Scalia began by declaring:

> *Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.*

Scalia predicted "devastating" and "disastrous consequences" from the decision. "It will almost certainly cause more Americans to be killed," he said. Scalia ended with these words: "The nation will live to regret what the Court has done today."

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