ACLU SUMMARY

of the

2007 SUPREME COURT TERM

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Major Civil Liberties Decisions

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In *Boumediene v. Bush*, 128 S.Ct. 2229 (June 12, 2008). (5-4), the Court ruled that detainees who are being held at Guantanamo Bay as "enemy combatants" have a right to challenge their detention in habeas corpus proceedings and that Section 7 of the Military Commissions Act (MCA) of 2006, which strips the federal courts of jurisdiction to hear those claims, is unconstitutional. Writing for the Court, Justice Kennedy began by rejecting the government's fundamental claim that the Constitution does not apply to non-citizens outside the United States and thus the Guantanamo detainees may not invoke the constitutional right to habeas protected by the Suspension Clause. As the Court had done four years earlier in *Rasul v. Bush*, 542 U.S. 466 (2004), Justice Kennedy noted that the U.S. exercises total control over Guantanamo even though it lacks formal sovereignty. He also concluded that extending habeas corpus rights to the Guantanamo detainees would be neither "impracticable nor anomalous." In response to the dueling histories presented by the parties, he wrote that the unique situation presented by this case did not permit an easy answer to whether the common law writ of habeas corpus would have been available to "enemy combatants" under these circumstances. He therefore turned to the framers' historical understanding of habeas corpus as a critical component of separation of powers and vital safeguard against arbitrary executive detention. Finally, Justice Kennedy considered the procedures established by Congress for designating detainees as "enemy combatants" – namely, the Combatant Status Review Tribunals (CSRT) followed by limited appellate review in the D.C. Court of Appeals – and concluded that they did not provide an adequate substitute for habeas corpus. In particular, he stressed that the detainees were not entitled to counsel in the CSRT proceedings and had only a limited opportunity to see the government's evidence against them and present evidence on their own behalf. Responding to the dissent's contention that recognizing a right of habeas corpus would threaten national security, Justice Kennedy wrote: "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." *Id.* at *47. The ACLU submitted an *amicus* brief supporting the right of the Guantanamo detainees to seek habeas relief.

In *Munaf v. Geren*, 128 S.Ct. 2207 (June 12, 2008). (9-0), the Court upheld the right of two American citizens detained in Iraq by U.S. forces to file a habeas petition, but then ruled that petitioners were not entitled to an injunction barring their transfer to Iraqi authorities for prosecution in the Iraqi courts based on crimes allegedly committed in Iraq. On the jurisdictional question, Chief Justice Roberts rejected the government's claim that petitioners were being held by the Multinational Force – Iraq and thus were not in U.S. custody for habeas purposes. As Chief Justice Roberts pointed out, the MNF-I reports to an unbroken U.S. chain of command. On the merits, however, he concluded that Iraqi authorities have a sovereign right to try individuals in their country for offenses allegedly committed there and that a habeas petition could not be used to interfere with that right, regardless of whether Iraq's judicial procedures comply with U.S. due process standards. In a separate concurring opinion, Justice Souter (joined by Justices Ginsburg

and Breyer) noted that the result might well be different if it were likely that the transfer from U.S. custody would result in torture.

FIRST AMENDMENT

A. Freedom of Speech

In *United States v. Williams*, 128 S.Ct. 1830 (May 19, 2008)(7-2), the Court rejected a facial challenge to a federal statute that makes it a crime to promote or solicit child pornography. The Eleventh Circuit struck down the challenged provision as vague and overbroad in violation of the First Amendment. Writing for the Court, however, Justice Scalia construed the statute to cover only speech that (1) the defendant believes to be child pornography and describes in a manner that reflects that belief, or (2) is intended to cause that belief in someone who receives the defendant's communication. Thus construed, the Court held that the statute was neither vague nor unconstitutionally overbroad. Justice Scalia acknowledged that a person could be convicted under the statute for a communication that rested on the false belief that the material being offered was child pornography when in fact it was not. He dismissed that concern by analogizing it to a drug dealer who is convicted for offering to sell what he believes to be cocaine but is in fact baking soda. Justice Souter disputed this analogy in his dissent, arguing that speech is constitutionally protected but drug sales are not. In his view, if a defendant cannot be penalized for possessing a picture that he believes to be child pornography but is not, he cannot constitutionally be punished for promoting or soliciting it. He also predicted that the Court's decision would provide prosecutors with a road map for circumventing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which barred Congress from criminalizing child pornography that does not involve the sexual exploitation of actual children.

B. Freedom of Association

In *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (March 18, 2008)(7-2), the Court rejected a facial challenge to Washington State's nonpartisan blanket primary. Under the challenged law, candidates for office are listed on the primary ballot with their party preference, and any voter can vote for any candidate. The two top candidates then advance to the general election regardless of party affiliation; in other words, it is possible for the two general election candidates to describe themselves as affiliated with the same political party. Both major parties complained that the law violated their right to choose their own party's candidate and thus violated their constitutional right to political association. The majority opinion, written by Justice Thomas, began by restating the Court's increasingly evident hostility to facial challenges. In particular, Justice Thomas noted that the assertion that the voters would perceive the self-designation of the candidates as equivalent to party endorsement was based on mere speculation, and that any voter confusion resulting from the ballots could not be assessed until the ballots were in fact designed (something that had not yet happened) and, presumably, at least one election conducted under the new law. The Court did not explain how voter confusion would be assessed after the fact. Chief Justice

Roberts and Justice Alito concurred with the Court's disposition of the facial challenge but expressed skepticism that the law would survive an eventual as-applied attack. Justices Scalia and Kennedy dissented on the ground that the law represented a form of compelled association that was unconstitutional on its face.

In *Davis v. Federal Election Comm'n*, 128 S.Ct. 2759 (June 26, 2008)(5-4), the Court struck down a provision a federal law intended to offset the advantage of self-financed candidates. Specifically, the so-called "Millionaire's Amendment" allows federal candidates to solicit contributions at three times the normal limit ($6,900 rather than $2,300) if their opponent has contributed more than $350,000 to his or her own campaign. Congress viewed the Amendment as an effort to level the playing field. Writing for the majority, however, Justice Alito rejected that as a legitimate governmental objective and held instead that the Millionaire's Amendment placed an unconstitutional burden on the right of candidates to contribute to their own campaigns. The dissent challenged the notion that differential contribution limits burden self-financed candidates who remain free to spend as much of their own money as they choose. Writing for himself, Justice Stevens also disagreed with the view, which has been a staple of the Court's campaign finance jurisprudence since 1973, that the First Amendment prohibits limits on campaign expenditures.

SECOND AMENDMENT

In *District of Columbia v. Heller*, 128 S.Ct. 2783 (June 26, 2008) (5-4), the Court held, for the first time, that the Second Amendment protects an individual right to bear arms and is not limited, as the Court had previously suggested (when it last considered the question almost seventy years ago) to service in a state militia. Applying constitutional scrutiny, the majority then struck down D.C.'s handgun ban. Writing for the majority, Justice Scalia did not specify the level of constitutional scrutiny that must now be applied to gun control legislation. Instead, he ruled that D.C.'s total ban could not be upheld under "any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at __. At the same time, Justice Scalia stressed that the right to bear arms is not absolute, and does not extend to "dangerous and unusual weapons" that were not in common use when the Second Amendment was adopted. He made clear, however, that burdens on the newly-announced Second Amendment right must be justified by more than a mere rational basis. Justices Stevens and Breyer both wrote lengthy dissents, joined by Justices Souter and Ginsburg.

FOURTH AMENDMENT

In *Virginia v. Moore*, 128 S.Ct. 1598 (April 23, 2008)(9-0), the Court held that drugs seized from the defendant after a probable cause arrest for a minor traffic offense were not excludable under the Fourth Amendment even though the initial arrest was prohibited by state law, which required the police to issue a summons instead. Writing for the Court, Justice Scalia concluded that the state's self-imposed restriction on its arrest authority was irrelevant to the Fourth Amendment analysis, and that the critical issue in assessing constitutional reasonableness is whether the arrest was supported by probable cause, not whether it was authorized by state law.

SIXTH AMENDMENT

A. Right to Counsel

In *Rothgery v. Gillepsie County*, 128 S.Ct. 2578 (June 23, 2008) (8-1), the Court ruled that the Sixth Amendment right to counsel attaches when a criminal defendant initially appears before a judge, is informed of the charges against him and can be deprived of his liberty. At that point, an indigent defendant has the right to seek the appointment of counsel, regardless of whether the prosecutor's office is yet aware of the arrest. In Rothgery's case, however, counsel was not actually appointed for six more months, at least a portion of which Rothgery spent in jail. Writing for the majority, Justice Souter declined to address whether Rothgery was prejudiced by the six month delay or what standards should be used in making that determination. Justice Alito was less reticent. In a concurring opinion joined by Chief Justice Roberts and Justice Scalia, he argued that the critical question in assessing prejudice is not how much time has elapsed since the initial hearing (even if the defendant has been jailed during the interim), but whether the delay deprived the defendant of the effective assistance of counsel at what the Court has elsewhere described as a critical stage of the proceedings leading to trial. Justice Thomas was the sole dissenter.

Wright v. Van Patten, 128 S.Ct. 743 (Jan. 7, 2008)(9-0) – for a full summary, *see* p. 10.

B. Self-Representation

In *Indiana v. Edwards,* 128 S.Ct. 2379 (June 19, 2008). (7-2), the Court held that a state may conclude that a criminal defendant who is competent to stand trial because he understands the charges against him and is able to assist counsel in his defense, is nonetheless incompetent to represent himself at trial because he is not mentally capable of conducting his own defense. The majority opinion, written by Justice Breyer, did not specify a standard for determining a defendant's capacity for self-representation. It also did not hold that this two-step inquiry is constitutionally required, only that it is constitutionally permissible. Finally, the majority expressly declined to overrule *Faretta v. California*, 422 U.S. 806 (1975), which established the right to self-representation.

C. Confrontation

In *Giles v. California,* 128 S.Ct. 2678 (June 25, 2008) (6-3), the Court held the Confrontation Clause prohibited the admission of statements by the murder victim, overheard several days before her death and thus not qualifying as dying declarations, absent a showing that the defendant killed his victim to prevent her from testifying under the common law "waiver by forfeiture" doctrine. Justice Scalia wrote the majority opinion. In a separate concurring opinion, Justice Souter (joined by Justice Ginsburg) wrote that "the element of intention would normally be satisfied by the intent inferred on the part of the domestic abuser in the classic abusive relationship, which is meant to

isolate the victim from outside help, including the aid of law enforcement and the judicial process. If the evidence for admissibility shows a continuing relationship of this sort, it would make no sense to suggest that the oppressing defendant miraculously abandoned the dynamics of abuse the instant before he killed his victim, say in a fit of anger." *Id.* at *15.

DEATH PENALTY

In *Baze v. Rees*, 128 S.Ct. 1520 (April 16, 2008).(7-2), the Court upheld the constitutionality of the lethal injection protocol widely used throughout the country as a method of capital punishment. Chief Justice Roberts, joined by Justices Kennedy and Alito, concluded in a plurality opinion that the death row inmates in this case had not established that the three drug combination used in lethal injection – including an anesthetic, a paralytic, and a drug that causes cardiac arrest – creates a substantial risk of severe pain that could be alleviated by a readily available alternative. He referred to the fact that 23 states, including Kentucky, prohibit veterinarians from using the same protocol to put pets to sleep as a rhetorical but ultimately unpersuasive point. Justice Stevens concurred in the result, based on existing precedents, but made clear that he was prepared to strike the death penalty down as unconstitutional in an appropriate case. Justice Scalia accused Justice Stevens of usurping the role of the political branches and Justice Thomas reiterated his view that the Eighth Amendment only prohibits punishments that are intentionally designed to inflict pain. Justice Ginsburg wrote the lone dissent, joined by Justice Souter. She argued that the Eighth Amendment prohibits methods of execution that create an "untoward" risk of severe and unnecessary pain and would have remanded for the district court to consider the severity of the pain, the risk of it occurring, and the availability of other options. Justice Breyer agreed with Justice Ginsburg's standard but nonetheless concurred in the Court's result because of what he regarded as insufficiencies in the factual record. The ACLU submitted an *amicus* brief urging the Court to strike down Kentucky's lethal injection protocol and stressing the secrecy surrounding the adoption and implementation of lethal injection in most states.

In *Kennedy v. Louisiana*, 128 S.Ct. 2641 (June 25, 2008) (5-4), the Court struck down the death penalty for child rape, three decades after holding that the death penalty could not be imposed for raping an adult woman in *Coker v. Georgia*, 433 U.S. 584 (1977). Writing for the majority, Justice Kennedy noted that only six states authorize the death penalty for child rape, no one has been executed for the rape since 1964, and there are only two defendants now on death row for raping a child (both in Louisiana). He also noted that "[c]onsensus is not dispositive," *id.* at 10, and that the Court must apply its own judgment when interpreting the Eighth Amendment in addition to surveying contemporary practice. He then concluded that "[e]volving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force when no life was taken in the commission of the crime." *Id.* at *19. Among other things, Justice Kennedy observed that allowing the death penalty for child rape can deepen the trauma suffered by the child victim as she is forced to recount the details of her crime in multiple proceedings, that it may encourage underreporting of the crime in

cases where the perpetrator is a family member who may face the death penalty, and that the potential unreliability of child testimony increases the risk of an erroneous death sentence. Finally, Justice Kennedy added an unexplained caveat to his opinion by stating: "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity." *Id.* at *20. But, he added, "[a]s it relates to crimes against individuals, the death penalty should not be expanded to instances where the victim's life was not taken." *Ibid.* Justice Kennedy's opinion did not cite any foreign law, in contrast to his decision striking down the juvenile death penalty three years ago. Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas.

EQUAL PROTECTION

In *Snyder v. Louisisana*, 128 S.Ct. 1203 (March 19, 2008)(7-2), the Court overturned a murder conviction and death sentence based on the prosecutor's discriminatory use of peremptory challenges during jury selection. The majority opinion, written by Justice Alito, closely scrutinized the prosecutor's race-neutral explanation for the jury strikes and concluded they were pre-textual, in large part by comparing the treatment of similarly situated white jurors. Justices Thomas and Scalia dissented.

In *Engquist v. Oregon Dep't of Agriculture***,** 128 S.Ct. 2146 (June 12, 2008)(6-3), the Court held that public employees may not raise an equal protection challenge to an employment decision absent an assertion that the allegedly discriminatory treatment was based on membership in a particular class. Writing for the majority, Chief Justice Roberts concluded that "the class of one theory of equal protection – which presupposes that the individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review – is simply a poor fit in the public employment context." *Id.* at *9. The ACLU submitted an *amicus* brief urging the Court to preserve, as it has, class-based claims beyond the traditional suspect classifications of race, religion, etc.

STATUTORY CIVIL RIGHTS CLAIMS

A. 42 U.S.C. § 1981

In *CBOCS West, Inc. v. Humphries*, 128 S.Ct. 1951 (May 27, 2008) (7-2), the Court held that 42 U.S.C. § 1981, which prohibits discrimination in the "mak[ing] and enforce[ing] of contracts" also protects an employee from retaliation for reporting discrimination, either against the employee herself or another employee. Writing for the Court, Justice Breyer acknowledged that § 1981 does not contain an explicit anti-retaliation provision. He nevertheless held that the statute should be construed to include an anti-retaliation provision on the basis of *stare decisis*, since numerous other civil rights laws had been construed in the same way. The ACLU advocated in favor of the Court's eventual ruling in an *amicus* brief submitted by the Leadership Conference for Civil Rights

B. Voting Rights Act

In *Riley v. Kennedy,* 128 S.Ct. 1970 (May 27, 2008), the Court held that a state supreme court decision reinstating the practice of filling temporary vacancies on the Mobile County Commission rather than gubernatorial appointment did not require preclearance under Section 5. Writing for the majority, Justice Ginsburg reasoned in a fact-based opinion that because the law changing the practice for filling temporary vacancies was challenged immediately and struck down by the State Supreme Court at the first opportunity, it never took "force and effect" for purposes of the Voting Rights Act and thus did not change the baseline for determining whether Section 5 applies. Thus, the state supreme court decision reinstating the gubernatorial appointment rule merely restored the baseline practice rather than alter it. The ACLU submitted an *amicus* brief arguing that state judicial decisions altering election methods and procedures are generally subject to preclearance, a proposition that the Court did not dispute. As Justice Ginsburg explained, "our reasoning and the particular facts of this case should make the narrow scope of our holding apparent . . . ." *Id.* at 1986.

C. Age Discrimination in Employment Act

In *Sprint/United Management Co. v. Mendelsohn,* 128 S.Ct. 1140 (Feb. 26, 2008)(9-0), the Court unanimously concluded that the Tenth Circuit inappropriately ordered the admission of so-called "me too" evidence in this age discrimination suit. According to the Court, the question of whether evidence that other employees may have been victimized by age discrimination in the same company is relevant to proving plaintiff's individual discrimination claim requires a fact-specific inquiry that should be conducted in the first instance by the district judge. As Justice Thomas explained, "Rules 401 and 403 [of the Federal Rules of Evidence] do not make such evidence *per se* admissible or *per se* inadmissible . . . " *Id.* at 1147.

In *Federal Express Corp. v. Holowecki,* 128 S.Ct. 1147 (Feb. 27, 2008)(7-2), the Court rejected the company's claim that plaintiff's ADEA complaint case should be dismissed because the plaintiff had allegedly failed to wait 60 days after filing a "charge" of unlawful discrimination with the agency, as required by statute. The dispute turned on the meaning of the word "charge," since the plaintiff had plainly filed some EEOC forms within the designated period. Writing for the Court, Justice Kennedy deferred to the agency's conclusion that the forms that had been filed constituted a "charge" under the ADEA and thus satisfied the jurisdictional prerequisite to seeking federal court relief. At the same time, he urged the agency "to determine what additional revisions in its forms and procedures are necessary or appropriate" in order "[t]o reduce the risk of further misunderstandings by those who seek its assistance." *Id.* at 1161.

In *Gomez-Perez v. Potter,* 128 S.Ct. 1931 (May 27, 2008) (6-3), the Court ruled that the ADEA protects federal employees against retaliation for filing age discrimination complaints. Issued on the same days as *CBOCS West,* the two decisions reflect a broad

consensus on the Court that anti-discrimination laws should generally be read to protect against retaliation absent a strong legislative indication to the contrary. In this case, defendants relied on the fact that Congress had included an anti-retaliation provision for private employees but not for federal employees. Writing for the Court, Justice Alito dismissed the significance of that fact noting that the two provisions were drafted at different times and contained different language.

In *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (June 19, 2008) (7-1), the Court held that an employer sued for age discrimination under the ADEA has the burden of proving that the challenged employment decision was based on "reasonable factors other than age," once a prima facie case has been made, just as the employer has the burden of showing that the challenged employment decision rests on a "bona fide occupational qualification." The Court's opinion was written by Justice Souter.

PUNITIVE DAMAGES

In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605 (June 25, 2008) (5-3), the Court again demonstrated its uneasiness with large punitive damage awards by ruling that the punitive damages awarded as a result of the Exxon Valdez oil spill were excessive. Unlike previous cases, this challenge to a punitive damage award arose under federal maritime law rather than the Due Process Clause. With Justice Alito recused, the Court divided 4-4 on whether federal maritime law permits punitive damages, thus affirming (without precedential effect) the Ninth Circuit's ruling that it does. Writing for the majority, Justice Souter then adopted a 1:1 ratio as a matter of federal common law, holding that punitive damages in maritime cases should not exceed compensatory damages, which had the effect of reducing the punitive damage award in this case from $2.5 billion to $507.5 million. The dissenters principally argued that any such limit under maritime law should be established by Congress rather than the Court.

ELECTIONS

In *New York State Board of Elections v. Lopez Torres*, 128 S.Ct. 791 (Jan. 16, 2008) (9-0), the Court unanimously upheld New York State's method of selecting judicial nominees for its principal trial court. Specifically, New York law requires political parties to select their candidates at a convention composed of delegates elected by party members in a state-run primary. Although acknowledging that the system of electing convention delegates makes it extremely difficult for any judicial candidate to secure the party's nomination without the backing of the party leaders, Justice Scalia ruled for the Court that the Constitution does not guarantee a "fair shot" at winning the party's nomination." *Id.* at 799. In a concurring opinion, Justices Stevens and Souter expressed skepticism about the practice of electing judges and noted that the Court's ruling "should not be misread as endorsement of the electoral system under review." *Id.* at 801. In a separate concurring opinion, Justices Kennedy and Breyer expressed their concern about the unfairness of the delegate selection process but concluded that those concerns were ameliorated in this case because New York law provides an alternative method for judicial candidates to get on the ballot through a petition process that, in their

view, "has not been shown to be unreasonable." *Id.* at 802. The ACLU submitted an *amicus* brief supporting plaintiffs' challenge on the theory that the state should not be able to run an election that is demonstrably unfair.

In *Crawford v. Marion County Election Board,* 128 S.Ct. 1610 (April 28, 2008)(6-3), the Court rejected a facial challenge to Indiana's voter ID law in a fractured decision. The lead opinion was written by Justice Stevens, and joined by Chief Justice Roberts and Justice Kennedy. Applying a balancing test, it held that the state's asserted interest in preventing in-person voter fraud was legitimate, even though there was no evidence of in-person voter fraud in Indiana; in the plurality's view, it was also sufficient to outweigh the speculative burden on voters, even though the district court concluded that at least 43,000 registered voters in Indiana lack the required ID. At the same time, Justices Stevens' opinion was careful to leave open the possibility of a future as-applied challenge based on a more fully developed record. By contrast, the concurring opinion written by Justice Scalia, and joined by Justices Thomas and Alito, concluded that Indiana's law was categorically reasonable and thus constitutional regardless of its impact on individual voters. The principal dissent, written by Justice Souter and joined by Justice Ginsburg, argued that Indiana's law places a real and severe burden on thousands of voters that was not justified by any actual evidence of voter fraud. Justice Souter also noted that the impact of Indiana's law will fall disproportionately on voters who are poor, elderly, belong to racial minorities, or have disabilities. The final dissent was written by Justice Breyer, who stressed that Indiana's law is more onerous than other voter ID laws around the nation and that Indiana had not adequately justified the additional burdens it imposes on voters. The ACLU represented plaintiffs who challenged the Indiana law in one of two consolidated cases.

TREATIES

In *Medellin v. Texas*, 128 S.Ct. 1346 (March 25, 2008)(6-3), the Court ruled that neither a decision by the International Court of Justice (ICJ) nor a "memorandum" from the President was sufficient to require Texas to "review and reconsider" a state court murder conviction to determine whether the defendant, a Mexican national, was prejudiced by the state's failure to inform him of his right to contact his consulate, as required by the Vienna Convention on Consular Relations. Writing for the Court, Chief Justice Roberts first concluded that the ICJ decision calling on the US to "review and reconsider" Medellin's conviction (and 50 others) was not binding in American courts. Roberts acknowledged that the U.S. had consented to the jurisdiction of the ICJ (a consent that the US has subsequently withdrawn) and that the U.N. Charter requires signatories, including the U.S., to "undertake to comply" with ICJ judgments. Nonetheless, he held, those treaties are not self-executing. In other words, they create international obligations but not binding domestic law. He then ruled that the President's effort to compel Texas to comply with the ICJ ruling exceeded the President's authority under Article II because it was not authorized explicitly or implicitly by Congress. "The president's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself,'" he wrote. *Id.* at 1368. (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 334 U.S. 579, 583 (1952), Justice

Stevens concurred in a separate opinion urging Texas to comply voluntarily with the ICJ decision. Justice Breyer's dissent, joined by Justices Souter and Ginsburg, faulted the majority for failing to give sufficient consideration to the Supremacy Clause which, in his view, makes treaties the supreme law of the land and thus enforceable in domestic courts without the need for further congressional action and in the absence of any countervailing considerations (akin to the political question doctrine).

HABEAS CORPUS

In *Allen v. Siebert*¸ 128 S.Ct. 2 (Nov. 5, 2007)(7-2), the Court summarily held in a *per curiam* opinion that the filing of an untimely state proceeding does not toll the one-year period for filing a federal habeas petition under AEDPA, regardless of whether state law defines its own limitations period as jurisdictional or as an affirmative defense. The Court based its decision on its ruling two years ago in *Pace v. DiGuglielmo*¸ 544 U.S. 408 (2005).

In *Wright v. Van Patten*, 128 S.Ct. 743 (Jan. 7, 2008) (9-0), the Court's *per curiam* decision summarily reversed a grant of habeas relief by the Seventh Circuit based on a claim of ineffective assistance of counsel. Noting that the Supreme Court had already held that the absence of counsel at a plea hearing is *per se* error that requires reversal without any separate inquiry into prejudice, the Seventh Circuit concluded that the defendant's constitutional rights were similarly violated in this case when his lawyer participated in the plea hearing by speaker phone. The Supreme Court, however, treated the two questions as analytically distinct and concluded on that basis that habeas relief was inappropriate in the absence of clearly established law. The Court expressly reserved any consideration of the merits of telephone participation "for another day." *Id.* at 747.

In *Danforth v. Minnesota*, 128 S.Ct. 1029 (Feb. 20, 2008)(7-2), the Court held that the bar against applying "new" constitutional rules of criminal procedure in federal habeas proceedings except under narrow and limited circumstances – first announced in *Teague v. Lane*, 489 U.S. 288 (1989) – does not prevent state courts from adopting a more generous rule of retroactivity in state post-conviction proceedings. Writing for the majority, Justice Stevens noted that *Teague* rested on concerns about comity and federalism that are not relevant when a state court is reviewing a state court conviction. The ACLU submitted an *amicus* brief supporting Danforth and urging the rule that the Supreme Court adopted.

Boumediene v. Bush,128 S.Ct. 2229 (June 12, 2008)(5-4) – for a full summary, *see* p.1.

*Munaf v. Geren***,** 128 S.Ct. 2207 (June 12, 2008)(9-0) – for a full summary, *see* p.1.

FEDERAL CRIMINAL LAW

In *Logan v. United States*, 128 S.Ct. 475 (Dec. 4, 2007)(9-0), a unanimous Court ruled that the sentencing enhancement provisions of the federal Armed Career Criminal Act can be triggered by predicate convictions that do not involve the loss of civil rights even though it cannot be based on predicate convictions involving the loss of civil rights that are later restored. Writing for the Court, Justice Ginsburg said that it is up to Congress, not the Court, to correct any anomalies in the current statutory language.

In *Watson v. United States*, 128 S.Ct. 579 (Dec. 10, 2007)(9-0), the Court unanimously held that a person who trades drugs for a gun has not "used" the gun in relation to a drug trafficking crime and is therefore not subject to the minimum sentence that applies under those circumstances. By contrast, in *Smith v. United States*, 508 U.S. 223 (1993), the Court held that a person who trades a gun for drugs has used the gun in relation to a drug trafficking crime. Justice Souter, who wrote for the Court in *Watson*, reconciled both decisions by referring to the ordinary meaning of the word "use."

In *Begay v. United States*, 128 S.Ct. 1581 (April 16, 2008)(6-3), the Court held, in an opinion written by Justice Breyer, that a New Mexico state conviction for DUI does not qualify as a violent felony leading to an enhanced sentence under the federal Armed Career Criminal Act.

In *Burgess v. United States*, 128 S.Ct. 1572 (April 16, 2008)(9-0), the Court held, in an opinion by Justice Ginsburg, that the sentencing enhancement provisions of the Controlled Substances Act, which are triggered by a prior "felony drug offense," apply to any drug conviction in state or federal court that carries a sentence of more than one year even if state law characterizes the offense as a misdemeanor.

In *United States v. Ressam*, 128 S.Ct. 1858 (May 19, 2008)(8-1), the Court ruled that the so-called Millenium Bomber, who allegedly planned to explode a bomb at Los Angeles Airport during the millennium celebration, was properly subject to a 10 year enhanced sentence for carrying concealed explosives in his car when he crossed the border and gave false statements to immigration officials about his identity and nationality. Writing for the Court, Justice Stevens held that the relevant sentencing statute, 18 U.S.C. § 844(h)(2), requires proof that the explosives are carried "during" the commission of a felony but does not require proof that the explosives were "related" to the crime that led to defendant's felony conviction.

In *United States v. Rodriguez*, 128 S.Ct. 1783 (May 19, 2008)(6-3), the Court held, in an opinion by Justice Alito, that the sentencing enhancement provisions of the Armed Career Criminal Act can be triggered by a prior conviction that carried a maximum ten years of more only because the prior conviction was also subject to a sentencing enhancement.

In *Cuellar v. United States*, 128 S.Ct. 1994 (June 2, 2008) (9-0), the Court unanimously ruled that the federal money laundering statute requires more than proof that

the defendant attempted to hide funds that he was transporting across the border. Rather, Justice Thomas wrote for the Court, the government must prove under the plain language of the statute that the money was hidden "in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." The fact that the money was hidden may be evidence of that ultimate fact but the ultimate fact must still be found by the jury.

In *United States v. Santos*, 128 S.Ct. 2020 (June 2, 2008) (5-4), the Court held that a conviction under the federal money laundering statute must be based on evidence that the defendant tried to conceal profits, rather than gross receipts, from a criminal enterprise. The statute itself refers to criminal proceeds. Writing for a four-person plurality, Justice Scalia invoked the rule of lenity by noting: "From the face of the statute, there is no more reason to think that 'proceeds' means 'receipts' than there is to think that 'proceeds' means 'profits.' Under a long line of our decisions, the tie must go to the defendant." *Id.* at 2025. In a separate opinion that provided the critical fifth vote, Justice Stevens concurred in the judgment on the ground that there was no legislative history to the contrary.

FEDERAL SENTENCING

In *Kimbrough v. United States*, 128 S.Ct. 558 (Dec. 10, 2007)(7-2), the Court held that trial judges could reasonably conclude that the 100:1 crack/powder cocaine disparity embodied in the Federal Sentencing Guidelines was greater than necessary to serve the general sentencing objectives set forth by Congress, and thus decline to follow those Guidelines in a particular case so long as the trial court adequately justified its reasoning. Writing for the Court, Justice Ginsburg noted that trial judges normally have more discretion to depart from the now-advisory Guidelines based on the particular facts of a case than based upon a policy disagreement with the Sentencing Commission; she also noted, however, that this distinction does not apply to the crack/powder cocaine disparity, which the Commission has itself disavowed. The ACLU submitted an *amicus* brief endorsing the position that the Court ultimately adopted.

In *Gall v. United States*, 128 S.Ct. 586 (Dec. 10, 2007)(7-2), decided on the same day as *Kimbrough*, the same majority ruled that appellate review of sentencing decisions in a post-*Booker* world is based on abuse-of-discretion, and while the degree of departure from the Sentencing Guidelines may be considered as one factor on appeal, appellate courts may not require "extraordinary" justification for "extraordinary" departures.

In *Irizarry v. United States*, 128 S.Ct. 2198 (June 12, 2008) (5-4), the Court held that district court judges are not required to give defendants advance notice before imposing a sentence above the recommended Guideline range but within the statutorily authorized range because compliance with the Guidelines is no longer mandatory after *United States v. Booker*, 543 U.S. 220 (2005), and thus does not create the same "expectancy." Writing for the majority, Justice Stevens nevertheless suggested that it would be good practice to grant a continuance under these circumstances. Justice Breyer dissented, joined by Justices Kennedy, Souter, and Ginsburg.

In *Greenlaw v. United States*, 128 S.Ct. 2559 (June 23, 2008) (6-3), the Court ruled that a federal appeals court may not correct a sentencing error in the defendant's favor unless the government has filed an appeal or cross-appeal. The government had defended the appellate court's action by relying on the "plain error" rule. Writing for the majority, however, Justice Ginsburg held that the "plain error" rule does not assist a party who has not properly invoked the court's jurisdiction.

FEDERAL CRIMINAL PROCEDURE

In *Gonzalez v. United States*, 128 S.Ct. 1765 (May 12, 2008)(8-1), the Court ruled that the decision to have a federal magistrate judge preside over voir dire in a felony trial can be made by counsel without the express consent of the defendant (but, presumably, not over the objection of the defendant). Writing for the Court, Justice Kennedy characterized the decision as a trial management issue that did not require the defendant's personal involvement. Justice Scalia, concurring, argued that counsel is empowered to waive any of the defendant's rights at trial regardless of whether they are deemed "tactical" or "fundamental." Justice Thomas was the lone dissenter. In his view, federal magistrate judges cannot constitutionally preside over jury selection in felony cases and thus the question of waiver never arises.

FEDERAL CIVIL PROCEDURE

In *Taylor v. Sturgell*¸ 128 S.Ct. 2151 (June 12, 2008) (9-0), the Court unanimously rejected the concept of "virtual representation" as a basis for issue or claim preclusion. Writing for the Court, Justice Ginsburg reiterated the fundamental due process principle that each person is entitled to his or her day in court subject to certain narrow and well-recognized exceptions, such as class actions or situations in which the plaintiff in the second case is acting as an agent for the plaintiff in the first case. In adhering to its traditional position, the Court expressly disagreed with several circuits that had developed the concept of "virtual representation" to permit preclusion when there is an identity of interests between the plaintiffs in successive lawsuits and the interests of the second plaintiff were adequately represented in the first litigation. The Court also declined to create a special, and broader, preclusion rule for public law cases.

FEDERAL TORT CLAIMS

In *Ali v. Federal Bureau of Prisons*, 128 S.Ct. 831 (Jan. 22, 2008)(5-4), the Court broadly construed an exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(c), to bar a suit against the United States based on the "detention of property" by "any law enforcement officer." The Court's opinion was written by Justice Thomas. In a rare dissenting opinion in a 5-4 case, Justice Kennedy argued that the term "any" was limited by its context and, in context, was meant to apply only to law enforcement officers involved "in the assessment or collection of any tax or customs duty." Justice Kennedy also warned that the majority's method of statutory interpretation could affect other

cases. "So," he said, "this case is troubling not only for the result the Court reaches but also for the analysis it employs." *Id.* at 841.

IMMIGRATION

In *Dada v. Mukasey*, 128 S.Ct. 2307 (June 16, 2008) (5-4), the Court ruled that an alien who agrees to voluntarily departure in lieu of removal may unilaterally withdraw his agreement at any point prior to his scheduled departure date in order to pursue a motion to reopen his removal proceedings, which would otherwise be abandoned by statutory command. Writing for the majority, Justice Kennedy described the Court's holding as a reasonable response to an otherwise "untenable" statutory conflict.

ATTORNEY'S FEES

In *Richlin Security Service Co. v. Chertoff*, 128 S.Ct. 2007 (June 2, 2008)(9-0), the Court unanimously held, in an opinion by Justice Alito, that a prevailing party is entitled under the Equal Access to Justice Act to recover paralegal fees from the federal government at market rates (subject to the statutory cap).