The Kennedy Court

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We have now entered the era of the Kennedy Court. The recently completed Supreme Court term shows that Justice Anthony Kennedy is clearly the swing vote and likely will determine the outcome of most high profile cases so long as these remain the nine Justices on the high court.

Chief Justice John Roberts and Samuel Alito were every bit as conservative as conservatives had hoped and progressives had feared. In virtually every important case they made common cause, at least in outcomes, with Justices Antonin Scalia and Clarence Thomas.[1] In many important cases, Justice Kennedy joined them to produce conservative rulings.[2] Sometimes, though, Justice Kennedy joined with Justices Stevens, Souter, Ginsburg, and Breyer to produce more progressive results.[3] Sometimes, when Justice Kennedy was the tie-breaking vote, he wrote separately and determined the scope of the Court's holding.[4] Conservatives may have reason to celebrate the appointment of two conservative justices this year, but those appointments will have little immediate ef-

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1 The only case that I can identify in which either Chief Justice Roberts or Justice Alito did not come to the conclusion that would be regarded as the "conservative result" was Chief Justice Roberts majority opinion in Jones v. Flowers, 126 S.Ct. 1708 (2006). Chief Justice Roberts, joined by Justices Stevens, Souter, Ginsburg, and Breyer held that, after an initial mailed notice is returned to the state unclaimed, due process requires reasonable additional efforts at notice be taken before a person's house is sold by the government for unpaid taxes.

2 See, e.g., Garcetti v. Ceballos, 126 S.Ct. 1951 (2006) (limiting speech rights of government employees); Kansas v. Marsh, 126 S.Ct. 2516 (2006) (upholding death sentences if the jury is evenly divided between aggravating and mitigating circumstances); League of United Latin American Citizens v. Perry, 126 S.Ct. 2594 (2006) (upholding partisan gerrymandering as constitutional).

3 See, e.g., Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006) (striking military commissions created by presidential order as inconsistent with the Uniform Code of Military Justice and the Geneva Conventions); House v. Bell, 126 S.Ct. 2064 (2006) (reducing barriers to satisfying the "actual innocence" standard for allowing a procedurally defaulted claim to be raised in habeas corpus).

4 See, e.g., Hamdan, 126 S.Ct. at 2808–09 (Kennedy, J., concurring in part) (agreeing that the military commissions are illegal, but refusing to find that international law requires particular procedures

fect unless the Court's conservative wing can also win Justice Kennedy's vote, a vote that Justice Kennedy has demonstrated repeatedly cannot be taken for granted. The one conclusion that seems clear from October Term 2005 is that, at least for now, it is the Kennedy Court.

Civil Liberties and the War on Terrorism

The most important decision in October Term 2005 was *Hamdan v. Rumsfeld*.[5] The Supreme Court held that the military commissions created by the Bush administration for those detained in Guantanamo Bay, Cuba, violate American and international law. Although the immediate effect of the decision is limited to the ten individuals who so far have been designated for trial in these tribunals, the larger significance of the case cannot be overstated.

Starting in January 2002, when the first prisoners were brought to Guantanamo, the Bush administration has claimed that the detainees are not protected by the Geneva Conventions and further that there can be no judicial review of its actions. Two years ago, in *Rasul v. Bush*,[6] the Court ruled against the Bush administration on the latter question, holding that those detained in Guantanamo could bring habeas corpus petitions into federal courts. In *Hamdan v. Rumsfeld*, the Court ended lingering speculation on the former, holding emphatically that American and international law do apply to, and can be enforced by the federal courts to protect the rights of, those held in Guantanamo.

These cases are enormously important because they make clear that even in the war on terrorism, even when the government is pursuing the essential mission of protecting public safety, the rule of law applies. Actions of the President and the executive branch, no matter how noble and important the objectives, are subject to judicial review and must comply with the law.

Salim Ahmed Hamdan, a Yemeni national, was captured by militia forces in Afghanistan in November 2001 and turned over to the United States military. There is no dispute that for a time he was a driver for Osama Bin Ladin, though Hamdan disputes the charge that he was ever involved in terrorist activity. On November 13 of that year, President Bush issued an executive order providing for the use of military commissions to try non-citizens for terrorist activity.[7] In June 2002, Hamdan was transported to Guantanamo Bay and over a year later, he was determined by the President to be eligible for trial by military commission, although the crimes for which he was to be tried had not yet been specified. It was not until another year had passed that Hamdan

be followed by courts trying detainees for violations of the law of war or that the crimes Hamdan was charged with cannot be tried by military commission); Rapanos v. United States, 126 S.Ct. 2208 (2006) (Kennedy, J., concurring in the judgment) (rejecting the "continuous surface" test for the application of the federal Clean Water Act); Hudson v. Michigan, 126 S.Ct. 159 (2006) (Kennedy, J., concurring and concurring in the judgment) (agreeing that the exclusionary rule does not apply to violations of "knock and announce" requirements but stressing that the continued application of the exclusionary rule is not in doubt).

5 126 S.Ct. 2749 (2006). I should disclose that I filed an amicus brief in the case in favor of reversal and that I represent another Guantanamo detainee whose case is currently pending before the United States Court of Appeals for the District of Columbia Circuit and thus is likely to be effected by the *Hamdan* decision.

6 542 U.S. 466 (2002).

7 "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833.

was eventually charged with one count of conspiracy "to commit … offenses triable by military commission."

Hamdan brought a habeas corpus petition in the United States District Court for the District of Columbia challenging the legality of the military commission under American and international law. The District Court ruled in Hamdan's favor, but the United States Court of Appeals for the District of Columbia Circuit reversed. One of the three judges ruling against Hamdan was then D.C. Circuit Judge John Roberts, who recused himself from the case when the Supreme Court granted certiorari in November of 2005.

In December 2005, Congress passed and President Bush signed the "Detainee Treatment Act of 2005."[8] The Act, in part, prevents federal courts from exercising jurisdiction over habeas corpus petitions filed by those detained in Guantanamo Bay, Cuba. The Act amends the habeas corpus statute to provide that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."[9] Under the Act, detainees may obtain federal court review only in the District of Columbia Circuit after a decision of a military commission. Review is of right for any alien sentenced to death or a term of imprisonment of 10 years or more, but is at the Court of Appeals' discretion in all other cases. The government moved to dismiss Handan's case based on these provisions of the Detainee Treatment Act.

In a 5–3 decision the Court ruled in favor of Hamdan. Justice Stevens wrote the majority opinion, which was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justices Scalia, Thomas and Alito each wrote separate dissenting opinions. Three aspects of the Court's decision are particularly important:

First, the Court held, based on principles of statutory interpretation, that the restrictions of jurisdiction in the Detainee Treatment Act do not apply retroactively to cases pending at the time that it was adopted. The Court explained that there is a firmly established principle that statutes changing substantive rights are applied retroactively only if the statute clearly provides for this. The Court stated that "[t]he Act is silent about whether paragraph (1) of subsection (e) 'shall apply' to claims pending on the date of enactment" and therefore should not be read to apply to then-pending petitions[10] In fact, the Court noted that the primary sponsors of the bill disagreed over whether the Act was to apply to pending cases. The Court thus found it unnecessary to consider Hamdan's argument that the Detainee Treatment Act's restrictions on jurisdiction were an unconstitutional suspension of the right of habeas corpus.

The Court's holding with regard to the Detainee Treatment Act has significance beyond just Hamdan's case. Over 100 habeas corpus petitions were brought on behalf of Guantanamo detainees before the passage of the Detainee Treatment Act, cases that are now pending before the United States Court of Appeals for the District of Columbia Circuit. After the adoption of the Detainee Treatment Act, the government argued that it required that all of these cases be dismissed, but the Supreme Court's decision means that the pending cases will go forward.

8 Pub.L. 109–148, 119 Stat. 2739.

9 Id. at §1005(e), amending 28 U.S.C. § 2241.

10 Hamdan, 126 S.Ct. at 2763.

Second, the Supreme Court held that the military commissions created by presidential executive order violated federal statute. By resting its holding on statutory grounds, the Court expressly said that it did not need to consider the broader question of whether President may constitutionally convene military commissions "without the sanction of Congress"; the Court said that this is a question that it "has not answered definitively, and need not answer today."[11] Military commissions are specifically authorized and defined by Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ),[12] rendering irrelevant the question of what power the President might otherwise have had to establish and set the rules of military commissions in the absence of such a statute. In an important footnote, the Court said: "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. The Government does not argue otherwise."[13]

The statutory nature of the case likewise limits likewise limits the applicability of some frequently cited, but pre-UCMJ, cases on military commissions. During World War II, in *Ex parte Quirin*, the Supreme Court upheld the use of military tribunals for Nazi saboteurs.[14] Justice Stevens said: "We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions."[15] As the Court explained, Article 21 of the UCMJ conditions the President's use of military commissions on compliance with the "law of war," which includes the four Geneva Conventions.

The government claimed that there was other statutory authority for the military commissions created in the presidential executive order, especially the Joint Resolution Authorizing the Use of Military Force (AUMF) adopted after September 11.[16] The Court expressly rejected this argument and declared that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."[17]

This, too, is important beyond *Hamdan* because the Bush administration has repeatedly pointed to the AUMF as legislative authorization for other actions in the war on terrorism, including warrantless electronic eavesdropping. Justice Stevens' majority opinion makes it clear that the Supreme Court is unwilling to read the AUMF as a blank check for presidential actions, especially those that contradict other, explicit statutory provisions.

Third, the Court held that the procedures for the military commissions provided by presidential order violate the requirements of the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. One of the provisions of Common Article 3 requires the use of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable

11 Id. at 2774.

12 10 U.S.C. §§ 821 and 836(b).

13 Hamdan, 126 S.Ct. at 2774 n.23.

14 317 U.S. 1 (1942).

15 Hamdan, 126 S.Ct. at 2774.

16 The government also argued that the Detainee Treatment Act authorized the military commissions. The Supreme Court rejected that argument as well.

17 Hamdan, 126 S.Ct. at 2775.

by civilized peoples."[18] Hamdan conceded that a regularly constituted court would include military courts martial following their usual procedures. But the Court held that they do not include the military commissions created by executive order.

The Court stressed the ways in which the procedures provided for in the military commissions did not comply with the UCMJ and Common Article 3 of the Geneva Conventions. For example, the Court pointed out that the military commissions could exclude a defendant from proceedings and even from knowing the evidence against him. The Court also noted that the Commission Order dispenses with virtually all of the rules of evidence followed in court martial proceedings. Although the UCMJ itself permits military commissions to deviate from certain procedures should it be necessary, the Court rejected the government's claim that it was impracticable to comply with the requirements of the UCMJ's normal procedures and protections.

The Court's analysis again has significance beyond *Hamdan* itself. The Bush administration repeatedly has claimed that the Geneva Conventions do not apply to members of Al Queda because they were not fighting for a nation. The Supreme Court expressly rejected this contention and held that Common Article 3 of the Geneva Conventions apply, at least as to the military commissions being used to try Hamdan and others.

Writing for just a plurality of four, Justice Stevens also concluded that conspiracy charges could not be brought in the military commissions. Under the UCMJ, the type of military commission established by the President may only try violations of the law of war. Conspiracy to violate the law of war, according to the plurality, is not itself a violation of the law of war and therefore is not triable by an this type of military commission. The force of this *substantive* limitation on military commissions may be limited, though, as Justice Kennedy wrote separately on this point to say that there was no need for the Court to reach this issue.

While the case is a strong statement of the Court's unwillingness to give the administration free reign over the Guantanamo detainees, it leaves several important questions unanswered. Whether the Geneva Conventions apply more broadly to those in Guantanamo and to those in other military prisons run by the government outside the United States is a question that was not before the Court and thus was not addressed. The Court also stressed that it was not considering the legality of detaining Hamdan or others at the prison in Guantanamo. Justice Stevens concluded his majority opinion by declaring: "It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent [him from participating in hostilities against the United States]. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[19]

Long ago, *Marbury v. Madison* established the power of judicial review and declared the basic principle that no person, not even the President, is above the law. *Hamdan v. Rumsfeld* is important because it reaffirms this principle and clearly holds that the actions of the President, even in the war on terrorism, even as to alleged members of Al Queda, and even outside the continental United States, must comply with the rule of

18 Id. at 2795, citing the Geneva Conventions of 1949, 6 U.S.T. at 3320 (Art.3(1)(d)).

19 Hamdan, 126 S.Ct. at 2798.

law as embodied in the Constitution, statutes, and treaties of the United States.

Freedom of Speech

It was a tough year for freedom of speech in the Supreme Court. Almost all of the major speech cases were decided against the free speech claims. From a practical perspective, the most significant of the decisions likely was *Garcetti v. Ceballos*, in which the Supreme Court greatly restricted the free speech rights of government employees.[20] In a 5–4 decision written by Justice Kennedy, the Supreme Court held that the government does not violate the First Amendment when it punishes an employee for speech in the performance of his or her duties.

The case involved Richard Ceballos, a supervising district attorney in Los Angeles County, who concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth. He wrote a memo to this effect and felt that the Constitution required him to inform the defense of this. Ceballos alleged that, as a result of this speech, his employers retaliated against him, including by transferring him to a less desirable position and denying him a promotion.

The issue before the Supreme Court was whether Ceballos's speech was protected by the First Amendment. Although the Supreme Court long has held that there is constitutional protection for the speech of government employees,[21] it ruled against Ceballos. The Court drew a distinction between speech "as a citizen" as opposed to "as a public employee"; only the former is protected by the First Amendment. Justice Kennedy wrote: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[22]

The Court's opinion rests on a false and unprecedented distinction between individuals speaking as "citizens" and as "government employees." Never before has the Supreme Court held that only speech "as citizens" is safeguarded by the First Amendment. For example, in prior decisions holding that speech by corporations is constitutionally protected, the Court emphasized the public's interest in hearing the speech. The fact that corporations are not citizens did not matter because it is the right of listeners, according to the Supreme Court, that is paramount.[23]

Justice Kennedy's opinion thus signals a significant shift away from free speech rights for government employees and, even worse, a restriction on the ability of the public to learn of government misconduct. Many fewer whistleblowers are likely to come forward without constitutional protection. Several years ago, I did a study of the Los Angeles Police Department,[24] during which I learned that officers who reported misconduct by other officers often suffered reprisals, including being transferred to precincts far from their homes. This practice even had a name: "freeway therapy." *Garcetti v. Ceballos* means that there is no First Amendment

20 126 S.Ct. 1951 (2006).

21 See, e.g., Pickering v. Board of Education, 391 U.S. 563 (1968) (A government employee's speech is protected by the First Amendment if it involves a matter of public concern and does not unduly interfere with the functioning of the workplace.).

22 Garcetti, 126 S.Ct. at 1959.

23 See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

24 Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545 (2001).

protection for such officers or other government employees who expose wrong-doing on the job, even when it is truthful and of great public concern.

In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*,[25] the Supreme Court upheld the Solomon Amendment, which requires institutions of higher learning to provide military recruiters access "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." If the any part of an institution fails to provide equal access, the entire institution will be denied several forms of federal funding.[26]

Beginning in the 1970s, law schools began to adopt policies to exclude from school facilities employers who discriminate on the basis of race, gender, or religion. In 1990, the Association of American Law Schools voted unanimously to include sexual orientation among the types of prohibited discrimination.

Many law schools consequently barred the military, which by statute excludes openly gay and lesbian members,[27] from using their placement facilities, and in response, Congress passed an earlier version of the Solomon Amendment in 1999 denying funding to schools that have policies preventing military recruiters from "gaining entry to campuses, or access to students".[28] Schools varied in the extent of their exclusion, but most law schools restricted the ability of military recruiters to use law school career services offices for interviewing. The military could interview students off-campus, or at campus ROTC offices, but not within law school facilities, a state of affairs that allowed the law schools to implement their policies without running afoul of the statute. Following the September 11 attacks, the Department of Defense became insistent that military recruiters be given not just access but *equal* access, a position Congress supported by amending the statute in 2004 to require just that,[29] directly attacking the law schools' ability to implement their anti-discrimination policies in any meaningful way against the military.

In 2003, a lawsuit challenging the Solomon Amendment was brought by an association of law schools and law faculty, the Forum for Academic and Institutional Rights, two named law professors (Sylvia Law, from New York University and me), and three named law students. The United States Court of Appeals for the Third Circuit found the Solomon Amendment to be unconstitutional.

The Supreme Court unanimously reversed. Chief Justice John Roberts wrote the opinion for the Court and early on in the opinion notes that, under the law, universities are fee to exclude the military if they choose to give up federal funds. However, this is not realistic given the dependence of major universities on federal funds. More importantly, it is well established in constitutional law that the government cannot require that a person or entity give up its constitutional rights in order to receive a government benefit.[30] The Court never fully addressed whether the form that the Solo-

25 126 S.Ct. 1297 (2006).

26 10 U.S.C. §983.

27 10 U.S.C. §654.

28 Pub. L. No. 106–65, 113 Stat. 609, codified as amended at 10 U.S.C. § 983.

29 Ronald Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 198–375, §552, 118 Stat. 1811, 1911 (2004), 10 U.S.C. §983(b).

30 See, e.g., FCC v. League of Women Voters, 468 U.S. 364 (1984) (The Federal Communications Commission cannot condition federal funds to radio stations based on their editorial content.); Speiser

mon Amendment is a reasonable or unreasonable condition on spending because the Court concluded that Congress could have required the access mandated by the Solomon Amendment directly, without resort to the spending power. But whether it is a direct regulation of law schools or a condition on funds, there are serious First Amendment problems with the Solomon Amendment that were not adequately addressed by the Supreme Court.

First, requiring law schools to permit military recruiters to use career services offices violates the First Amendment by requiring the law schools to engage in compelled speech. The Supreme Court long has ruled that the government may not force individuals or entities to express a message with which they disagree. The classic case is *West Virginia Board of Education v. Barnette*, in which the Court held that schools may not require students to pledge allegiance to the flag.[31] More recently, in *Pacific Gas & Elec. Co. v. Public Utility Comm'n of Cal.*, the Court held that a state agency cannot require a utility company to include a third-party's newsletter in its billing envelope,[32] and in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court unanimously ruled that it violated the First Amendment to force the organizers of the St. Patrick's Day parade in Boston to allow participation by the Irish-American Gay, Lesbian & Bisexual Group.[33]

The Solomon Amendment literally compels speech in that the law school must post notices and announcements of the military's presence on campus, just as it does for other employers. The Supreme Court said that there was no First Amendment violation because law schools also could communicate their message of disagreement with the military's policy.[34] But never before has the Supreme Court held that compelled speech is permissible just because the speaker can also express disagreement with the forced message. The Court did not say in *Barnette*, that children could be made to salute the flag if they also then could say they objected or in *Pacific Gas & Electric* that PG&E's ability to include a statement objecting to the third-party newsletter made the requirement constitutional.

Second, the Solomon Amendment impermissibly forces law schools to associate with the military in violation of their expressed anti-discrimination policy. The Court distinguished the Solomon Amendment from other cases by characterizing the statute as compelling not expression but access. But the Supreme Court has repeatedly held that access – and its denial – is expression. A group that has a clear expressive message has a constitutional right to implement it, even by excluding others.[35] Law schools are similarly engaged in expression when they promulgate anti-discrimination policies. Forcing law schools to allow military recruiters to use their facilities significantly undermines the ability of law schools to convey their viewpoint.

The Supreme Court rejected this argument and stated that the leading right-of-association case, *Boy Scouts of America v. Dale*, was different because it was forcing the Boy Scouts to accept members against their

v. Randall, 357 U.S. 513 (1958) (A state could not condition property tax exemption on individuals taking a loyalty oath.).

31 319 U.S. 624 (1943).

32 475 U.S. 1 (1986).

33 515 U.S. 557 (1995).

34 FAIR, 126 S.Ct. at 1307.

35 See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

will. However, this is a distinction without a difference. Although the Solomon Amendment does not compel membership, it does compel association in a manner that is inconsistent with the expressive message of law schools. The statute struck in *Hurley* did not require the South Boston Allied War Veterans Council (the organizers of the Boston St. Patrick's Day Parade) to give *membership* to GLIB, just access to the parade. No more is required to violate the First Amendment.

Why, then, did the Court unanimously abandon long-standing First Amendment principles? In part, the decision follows a long and disturbing pattern of judicial deference to the military, especially in wartime. Indeed, Chief Justice Roberts begins the substance of his opinion on the constitutional issue not with a citation to the First Amendment but rather to the Article I powers to raise, support, and maintain armies and a navy.[36] In part, too, the decision reflects a lack of sensitivity to the law schools' compelling interest in not being a party to discrimination against their students.

Finally, in *Beard v. Banks*, the Court upheld a prison regulation that deprived some inmates of access to all newspapers, magazines, and photographs.[37] In a 6–3 decision, with Justice Breyer writing for the majority, the Court expressed the need for great deference to prison authorities and their judgment that this restriction could provide an incentive for prisoners to improve their behavior in order to gain more reading privileges.

The Court and the Political Process

Two high profile cases involved important aspects of the political process. In *League of United Latin American Citizens v. Perry*, the Court ruled 5–4 to allow blatantly political legislative redistricting in Texas.[38] After Republicans gained control of the Texas legislature in 2002, they redrew congressional and state legislative districts to maximize seats for Republicans, replacing districts that had been drawn by a court after the 2000 census. The gerrymandering was very effective: After the 2002 elections, the Texas congressional delegation was 17 Democrats and 15 Republicans; after the 2004 elections, it was 21 Republicans and 11 Democrats. This is not unique to Texas, though it was more stark there than in many places. With increasingly sophisticated computer programs to draw safe districts, there are few contested races for seats in the House of Representatives and many state legislatures. But, for the second time in two years, the Court by a 5–4 margin rejected constitutional challenges to such partisan gerrymandering.[39] After these decisions, it is hard to imagine any successful challenge when the political party controlling a legislature draws districts to maximize its safe seats.

In *Randall v. Sorrell*, the Court declared unconstitutional a Vermont law that limited both the size of contributions to candidates and the amount each candidate could spend overall during a campaign.[40] Since *Buckley v. Valeo* in 1976, the Supreme Court has held that the government can limit the amount of

36 FAIR, 126 S.Ct. at 1306 (citing U.S. Const. art. I, § 8, cls. 1, 12–13).

37 126 S.Ct. 2572 (2006).

38 126 S.Ct. 2594 (2006).

39 Vieth v. Jubelirer, 541 U.S. 247 (2004) (dismissing a challenge to partisan gerrymandering in Pennsylvania as a non-justiciable political question).

40 126 S.Ct. 2479 (2006).

contributions a donor can make to a candidate or a committee for a candidate but cannot limit the total amount that a candidate may spend, so it was not surprising that the Court struck down the expenditure limits in the Vermont law.

Much more notable was that the Court, 6–3, also stuck the Vermont law's *contribution* limits as unconstitutional because they were too low. This is the first time that the Court ever has invalidated a contribution limit and the case thus likely opens the door to challenges to federal, state, and local campaign finance laws that set limits on contributions and that might be claimed to be too low.

Criminal Procedure

Criminal defendants had a mixed year in the Supreme Court. For example, this year, the Supreme Court decided five cases involving the Fourth Amendment and search and seizure. Four were won by the police and the fifth is unlikely to limit law enforcement behavior. This suggests that the Court is likely to remain very deferential to police in criminal procedure cases for the foreseeable future. It is in this area that the transition to the Kennedy Court is its most pronounced.

No case more vividly illustrates this as the Kennedy Court than *Hudson v. Michigan*.[41] For many years, the Supreme Court has held that the police usually must knock and announce before entering a residence.[42] In *Hudson v. Michigan*, the Supreme Court ruled 5–4 that the exclusionary rule does not apply when police violate the Fourth Amendment's requirement for "knock and announce." Justice Scalia wrote for a plurality of four and called into question the very existence of the exclusionary rule. He referred to it as a "last resort" and stressed the great costs of the exclusionary rule in terms of suppressing important evidence and potentially allowing dangerous people to go free while simultaneously pointing to the rule's redundancy. He argued that the exclusionary rule is unnecessary because of the availability of civil suits against the police and increased professionalization of police forces. Justice Scalia's arguments must be understood as calling for the complete elimination of the exclusionary rule.

Justice Kennedy provided the fifth vote for the conclusion that the exclusionary rule does not apply when police violate the knock and announce rule, but he stressed that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."[43] But the willingness of four Justices – Roberts, Scalia, Thomas, and Alito – to overrule decades-old precedents and eliminate the exclusionary rule certainly gives a sense that major changes are likely ahead in constitutional law in the years to come.

The one victory for a criminal defendant this year in a Fourth Amendment case is unlikely to be much of a constraint on police behavior.[44] In *Georgia v. Randolph*, the Court held that if both occupants of a residence are

41 126 S.Ct. 2159 (2006).

42 See, e.g., Wilson v. Arkansas, 514 U.S. 927 (1995) (articulating the requirement for knock and announce before searches of dwellings).

43 Hudson, 126 S.Ct. at 2169 (Kennedy, J., concurring and concurring in the judgment).

44 The other Fourth Amendment cases ruling against criminal defendants were Samson v. California, 123 S.Ct. 2193 (2006) (The Fourth Amendment does not prohibit the police from conducting warrantless and suspicionless searches and seizures of parolees.); United States v. Grubbs, 126 S.Ct. 1494 (2006) (An "anticipatory search warrant" need not state the conditions that would trigger the police having authority to search.); and Brigham City, Utah v. Stuart, 126 S.Ct. 943 (2006) (Police officers

present, there is not valid consent if even one objects to the search.[45] The case involved a situation in which the wife consented to the police search, but the husband, who was the target, refused. The Court, in a 5–3 decision with the majority written by Justice Souter, said that there was not valid consent.

But police can easily circumvent this ruling by simply waiting until the husband is absent and then coming back and asking the wife for permission to enter and search. The Court was clear that if only one occupant of a residence is present and that person gives consent, that is sufficient to meet the requirements of the Fourth Amendment.

There were, however, some important victories for criminal defendants.

House v. Bell is another example of Justice Kennedy casting the decisive vote in a 5–4 decision.[46] House was convicted of murder and sentenced to death but produced strong evidence of his actual innocence. At trial, the prosecutor said that the motive for the crime was rape and pointed to the rape as the key aggravating factor justifying the death penalty. On habeas corpus, the defendant produced DNA evidence that showed conclusively that the semen on the victim's clothes, the basis for the rape charge, was from the victim's husband. The defendant also produced other evidence of his innocence, including two witnesses who heard the victim's husband confess to the murder. Justice Kennedy authored the Supreme Court's 5–4 decision, finding that this was sufficient evidence of actual innocence to allow the defendant to bring his constitutional claims.

In *United States v. Gonzalez-Lopez*, the Court held that the Sixth Amendment guarantee of a criminal defendant's right to "have the assistance of Counsel for his defense" includes the right to counsel of one's choice.[47] The Court, in a 5–4 decision, with Justice Scalia writing for a majority that included Justices Stevens, Souter, Ginsburg, and Breyer, held that the trial judge violated the defendant's Sixth Amendment rights by denying a motion for *pro hac vice* admission of a qualified attorney whom defendant had hired. The Court concluded that the defendant was not required to demonstrate prejudice in order to establish a Sixth Amendment violation; this type of constitutional infringement is a structural error and thus not subject to harmless error analysis.

Conclusion

These, of course, are just some of the important cases of the 69 decided by the Supreme Court this term. Besides their doctrinal and practical significance, they also give our first indication of the new Supreme Court.

In practical terms, Justice Kennedy has replaced Justice Sandra Day O'Connor as the swing vote on the Court. These cases show the impact that we can expect Justice Kennedy to have on this new court and, of course, there are others in other important areas in which Kennedy was and will continue to be the key fifth vote between the progressive and conservative wings of the Court, such as *Kansas*

may enter a residence without a warrant if they believe someone is in danger, even if it is not danger of serious injury.).

45 126 S.Ct. 1515 (2006).

46 126 S.Ct. 2064 (2006).

47 126 S.Ct. 557 (2006). See also Michael R. Dreeben, *The Right to Present a Twinkie Defense*, 9 Green Bag 2d ___ (2006).

48 126 S.Ct. 2516 (2006).

v. Marsh[48] (death penalty) and *Rapanos v. United States*[49] (environmental regulation and federalism). The changes in constitutional law are likely to occur in the areas Justice Kennedy is more conservative than Justice O'Connor was. For example, Justice Kennedy was more willing than Justice O'Connor to allow regulation of abortion, to strike down affirmative action programs, and to permit religious displays on government property.

Already for next year, the Court has on its docket important cases concerning abortion rights and the use of race in assigning pupils. In all likelihood, in these cases and many others, it will be Anthony Kennedy casting the deciding vote and determining the meaning of the Constitution. GB

49 126 S.Ct. 2208 (2006).