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Charles W. "Rocky" Rhodes on Holder v. Humanitarian Law Project

2010 Emerging Issues 5393

Charles W. "Rocky" Rhodes on Balancing Freedom of Speech and National Security in Holder v. Humanitarian Law Project

By Charles W. "Rocky" Rhodes

November 9, 2010

SUMMARY: Charles W. "Rocky" Rhodes on Holder v. Humanitarian Law Project, ___ U.S. ___, *130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010),* provides an initial glimpse regarding the Roberts Court's view on the appropriate balance between freedom of speech and national security in the post-9/11 world.

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ARTICLE: *Holder v. Humanitarian Law Project*, ___ U.S. ___, *130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010),* provides an initial glimpse regarding the Roberts Court's view on the appropriate balance between freedom of speech and national security in the post-9/11 world. The majority essentially deferred to the government's articulation of national security interests, but cautioned that its holding was limited to the particular activities the plaintiffs desired to pursue without resolving "the more difficult cases" that could arise in the future.

The case concerned the constitutionality of a federal statute, *18 U.S.C. § 2339B*(a)(1), which criminalizes "knowingly provid[ing] material support or resources to a foreign terrorist organization" designated by the Secretary of State. Plaintiffs, who wanted to provide material support in the form of training and expert advice to the lawful, nonviolent activities of two designated foreign terrorist organizations, the Partiya Karkeran Kurdistan and the Liberation Tigers of Tamil Eelam, challenged the statute for vagueness under the Fifth Amendment and for violating their free speech and associational rights under the First Amendment. The Supreme Court, though, rejected both challenges. First, the Court held that, because the statute clearly applied to plaintiffs' proposed conduct, the vagueness challenge could not be sustained. Next, the majority reasoned that the government's interest in combating terrorism, "an urgent objective of the highest order," authorized criminalizing conduct materially supporting the lawful activities of foreign terrorist organizations in light of congressional and executive findings that these organizations frequently employed the support received for their lawful activities to advance terrorism. The Court then concluded that the proposed training and advice the plaintiffs desired to furnish, such as using international law and the United Nations to resolve disputes and obtain relief, could be redirected towards the organizations' promotion of terrorism. Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented, urging that the government had not sufficiently justified its intrusion on the plaintiffs' expression.

The Court thus had to resolve two primary constitutional issues in *Humanitarian Law Project*: vagueness and the

appropriate balance between freedom of speech and national security. Some background regarding both of these issues will be provided before discussing in more detail the Court's constitutional holdings.

Vagueness

A regulation of expression is unconstitutionally vague under the Due Process Clause if a person of ordinary intelligence must guess as to its scope. Although absolute precision in language is unattainable, the premise is that at least fair notice must be provided regarding what is proscribed before subjecting contrary actions to punishment. The doctrine is especially important when the statute interferes with freedom of speech and association, because too much uncertainty in the reach of the statute may stifle expression and risk selective prosecution against those with unpopular views. As a result, a statute will be invalidated as unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams, 553 U.S. 285, 304 (2008).* But there are limits to the doctrine-a vagueness challenge cannot be maintained when uncertainty only exists regarding the speech and actions of others rather than the speech and actions of the plaintiff. In other words, a successful vagueness challenge requires either a lack of fair notice or of enforcement standards with respect to actions that the plaintiff-instead of someone else-has undertaken or desires to undertake.

The *Humanitarian Law Project* Court held that, under these principles, § 2339B(a)(1) was not vague as applied to the plaintiffs' desired actions. The plaintiffs did not allege that the material-support statute provided too much enforcement discretion to the government, so the Court only considered the fair notice question. In contrast to some earlier decisions that had invalidated entirely subjective standards that were untethered to a statutory definition or particular context, including statutes criminalizing "annoying" conduct or "indecent" conduct, Congress here, the Court noted, had intermittently incorporated definitions of prohibited actions such as "training" and "expert advice or assistance," narrowing the statute's scope and adding clarity to its reach. While the Court acknowledged that § 2339B(a)(1)'s scope may not be clear in every situation, the training and teaching activities that the plaintiffs proposed "readily" fell within the scope of the statutory prohibitions. The plaintiffs' hypotheticals regarding the statute's application in other potential contexts were thus simply "beside the point" when the plaintiffs had not indicated specific plans to engage in such actions.

Freedom of Speech v. National Security

After rejecting the vagueness challenge, the Court had to consider the more difficult issue in the case-the appropriate balance between freedom of speech and the governmental interests at stake. Chief Justice Roberts' opinion first explained that the issue was more nuanced than the arguments of either party acknowledged. Contrary to the plaintiffs' position, the material-support statute did not ban "pure political speech," because the plaintiffs could still engage in independent advocacy on behalf of the organizations, express their opinions regarding the organizations, or even join the organizations. The only thing § 2339B(a)(1) prohibited, the Court continued, was "material support" for designated terrorist organizations, which usually did not take the form of speech at all and, even when it did, covered only speech that was coordinated with known foreign terrorist groups. But, on the other hand, the government's position that the material-support statute only proscribed conduct instead of speech was similarly untenable. Rather, the statute criminalized communications based on the message imparted, and therefore constituted a content-based regulation of expression. As a result, a "more demanding" standard than intermediate scrutiny had to be applied.

The parties all recognized that the government's interest in combating terrorism involved "an urgent objective of the highest order." The question was whether the statutory ban on providing support for even the lawful activities of foreign terrorist organizations was "necessary" to further this interest. In answering this "empirical question," the Court relied heavily on congressional and executive findings regarding the connection between material support for the lawful activities of designated foreign terrorist organizations and their terrorist objectives. The Court pointed out that Congress found that terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Antiterrorism and Effective Death Penalty Act of 1996 § 301(a) (7), *110 Stat. 1247*, note

following *18 U.S.C. § 2339B.* In addition, the State Department submitted an affidavit echoing the congressional findings. The Court reasoned that such factual evaluations by Congress and the Executive were "entitled to deference" when the case implicated "sensitive and weighty interests of national security and foreign affairs." Such concerns cautioned against substituting a judicial evaluation of the evidence "for a reasonable evaluation" by the other branches. While maintaining that this did not mean the Court would defer to the government's "reading of the First Amendment," it did mandate respect for the government's evidence and factual conclusions, especially when the material-support statute had been narrowly crafted to apply only to certain coordinated support activities with known foreign terrorist organizations.

The Court then examined the particular expression the plaintiffs proposed to coordinate with the designated foreign terrorist groups. The Court first reasoned that Congress could prohibit the training of members of terrorist organizations on using legal avenues to peacefully resolve disputes because such skills could be used by the terrorists "as part of a broader strategy to promote terrorism" by pursuing peaceful negotiations to buy time for renewed attacks. Likewise, Congress could bar teaching terrorists on using representative bodies to acquire "relief," which might include monetary or other aid which could be used to assist in violent activities. Finally, the Court explained that the plaintiffs' proposed "political advocacy" on behalf of the foreign terrorist groups was not sufficiently specific and detailed to support their pre-enforcement challenge. As a result, the statute's application to the actions the plaintiffs desired to pursue did not violate the plaintiffs' freedom of speech, nor did the statute violate the plaintiffs' freedom of association when it did not penalize associating with foreign terrorist organizations.

The dissent disagreed that the government had sufficiently justified criminalizing the coordinated teaching and advocacy proposed by the plaintiffs. Because it was not obvious that such training and teaching would be used for terrorist objectives, Justice Breyer, joined by Justices Ginsburg and Sotomayor, maintained that the government needed to produce evidence regarding the connection. The government's affidavits and findings in this respect were too generic, according to the dissent, to satisfy the government's evidentiary burden. Moreover, the government's claim that such activities might help "legitimize" terrorist organizations contravened earlier decisions authorizing citizens to become members in the American Communist Party-despite any legitimizing impact of membership-as long as the member did not share the party's unlawful purposes. To avoid such constitutional difficulties, the dissent preferred to read the material-support statute narrowly to apply only when the defendant knew or intended that pure speech or associational activities would assist the organization's unlawful terrorist objectives.

Future Controversies

The Court declared that its holding was narrow, only applying to the plaintiffs' specific proposals to train and teach foreign terrorist organizations on peacefully resolving disputes and acquiring relief through representative bodies. The Court even specified that it was not suggesting that Congress could apply a similar prohibition on independent advocacy on behalf of foreign terror organizations, or ban the material support of domestic terrorist groups.

But the difficulty with the Court's announced limitations is that much of the majority's rationale appeared broad enough to encompass these other situations, assuming Congress made the requisite findings. To illustrate, even independent advocacy on behalf of a foreign terror group could "free up other resources within the organization that may be put to violent ends" and lend "legitimacy to foreign terrorist groups-legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds." If Congress amended the statute to prohibit independent advocacy and incorporated findings that such a prohibition was necessary to serve the government's compelling interest in preventing terrorism, why wouldn't such a "reasonable evaluation" also be "entitled to deference" by the judiciary?

Only if the Court adopted some type of per se rule of invalidity against prohibiting independent advocacy supporting a foreign terrorist organization would it appear that the result might be different in such a situation. Perhaps the Court, in the appropriate case, will adopt such a per se rule, as some Justices have contended that content-based restrictions on pure political speech can never be justified. *Cf. Citizens United v. Federal Elec. Comm'n,* ___ U.S. ___, *130 S. Ct. 876, 898, 175 L. Ed. 2d 753 (2010)* (noting it could be "maintained that political speech simply cannot be

banned or restricted as a categorical matter"). Or perhaps the Court is merely hoping that its warning, combined with the statute's current limited scope, will prevent such issues from ever arising.

Nevertheless, equally difficult issues addressing the distinction between independent and coordinated advocacy will likely arise in future cases. The material-support statute only applies when the expression is coordinated with or directed or controlled by the foreign terrorist group, but the Court did not provide any real guidance on how to ascertain whether the advocacy is truly independent. This issue has been troublesome in election law, and presumably will be equally-if not more-troublesome in the national security context in future litigation.

The Court's narrow holding also provides minimal guidance for resolving future controversies regarding the balance between free speech and national security, which could consider, among other issues, gag orders against recipients of national security letters or the speech limitations on lawyers representing Guantanamo detainees. The most notable clue *Humanitarian Law Project* provided regarding the outcome of such future cases is the deference accorded to the findings of the legislative and executive branches. It will be interesting to see if this deference is extended to other situations involving the balance between national security and free speech, or if this was a truly unique case based on the Court's view that Congress had been conscious of its own responsibility to abide by First Amendment limitations in narrowly crafting the material-support statute.

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Charles W. "Rocky" Rhodes is the Godwin Ronquillo PC Research Professor and Professor of Law at South Texas College of Law, where he teaches Constitutional Law, First Amendment Law, Civil Procedure, State Constitutional Law, and Complex Litigation. He is the co-author of two LexisNexis textbooks on constitutional law, *Cases and Materials on Constitutional Law* and *Skills & Values: The First Amendment*, and the author of more than fifteen articles and book chapters on a wide variety of constitutional and procedural issues. He is a frequent media commentator, including television and radio appearances on CNN, NPR's Morning Edition, BBC Radio's World Business News, NPR's Day to Day, and Bloomberg Radio, along with interviews in newspapers and magazines across the United States, such as the *Washington Post*, *USA Today*, *American Lawyer*, *Dallas Morning News*, *Washington Times*, *ABA Journal*, *Christian Science Monitor*, and *Houston Chronicle*. He earned his undergraduate degree *summa cum laude* while on a National Merit Scholarship at Baylor University before enrolling at Baylor Law School, where he was Editor-in-Chief of the *Baylor Law Review*, the President's Award recipient as the outstanding third-year student, and valedictorian of his graduating law school class. Before becoming a professor, he served as a briefing and staff attorney at the Supreme Court of Texas, practiced appellate law at a national law firm, and earned his board certification in Civil Appellate Law by the Texas Board of Legal Specialization.

Charles W. "Rocky" Rhodes on United States v. Stevens

2010 Emerging Issues 5227

Charles W. "Rocky" Rhodes on The Historical Approach to Unprotected Speech and the Quantitative Analysis of Overbreadth in United States v. Stevens, ___ U.S. ___, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)

By Charles W. "Rocky" Rhodes

July 30, 2010

SUMMARY: United States v. Stevens very well could be one of the two most doctrinally significant constitutional opinions of the Supreme Court's October 2009 Term. Its significant holdings include employing a "longstanding traditions" approach to First Amendment analysis and providing additional guidance on the First Amendment overbreadth doctrine. Unless overruled, modified, or subsequently ignored, its impact should be felt for decades to come.

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ARTICLE: *United States v. Stevens*, __ U.S. __, *130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)*, very well could be one of the two most doctrinally significant constitutional opinions of the Supreme Court's October 2009 Term, despite its relatively sparse press coverage in comparison to the Term's other high profile cases. Its significant holdings include employing a "longstanding traditions" approach for determining whether a category of speech is excluded from First Amendment protection and providing additional guidance on the First Amendment overbreadth doctrine. Unless overruled, modified, or subsequently ignored, its impact should be felt for decades to come.

The case addressed Stevens' challenge on free speech grounds to his federal conviction for selling dog fight videos in violation of a congressional statute criminalizing the commercial creation, sale, or possession of certain depictions of animal cruelty. Stevens maintained that the statute's prohibition on portrayals of acts of animal cruelty was facially invalid and substantially overbroad under the First Amendment. The government responded that, as a class, depictions of animal cruelty were categorically unprotected by the First Amendment because the value of such speech was minimal compared to its societal costs. But the Supreme Court rejected the government's proposed balancing test, instead reasoning that, for a category of speech to be unprotected by the First Amendment, there must be a longstanding historical tradition of excluding such speech from the free expression guarantee. Because there was not a First Amendment tradition of prohibiting *portrayals* of animal cruelty (even though the underlying *acts* of cruelty have long been outlawed), depictions of animal cruelty were not one of those classes of speech-like obscenity, fraud, or incitement-outside the reach of the First Amendment. The Court further held that, due to the breadth of the statute's text as construed, its impermissible applications far outnumbered the permissible ones, mandating its invalidity under the substantial overbreadth doctrine.

Two important First Amendment doctrines, then, were at issue in *Stevens*: unprotected speech categories and overbreadth. Some background regarding both of these doctrines will be provided before discussing in more detail the *Stevens* holding.

Unprotected Speech Categories

A longstanding principle in the Supreme Court's First Amendment jurisprudence is that "certain well-defined and narrowly limited classes of speech" may be prohibited or punished without "rais[ing] any constitutional problem." *Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).* Speech falling within one of these unprotected classes or categories of speech is outside the normal reach of the First Amendment and does not receive the benefit of the typical heightened judicial scrutiny applicable to First Amendment claims. The Supreme Court has described these categories of speech as a "'First Amendment Free Zone.'" *Stevens, 130 S. Ct. at 1585, 176 L. Ed. 2d at 444* (quoting *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987)).* The government has free reign to regulate, punish, or prohibit such speech, with the only limitation that the government may not discriminate based on the content of the ideas, messages, or viewpoints within the proscribed category. *R.A.V. v. City of St. Paul, 505 U.S. 377, 383-92 (1992)* (holding that, while a general prohibition on fighting words would be constitutional, punishing only those fighting words based on race, gender, or religion was unconstitutional).

Chaplinsky v. New Hampshire provides an early illustration of this categorical exclusion doctrine. Chaplinsky's conviction for deriding a city official to his face as a "God damned racketeer" and "damned fascist" was upheld on the basis that the government could criminalize such "fighting words" as one of those classes of speech "which has never been thought to raise any constitutional problem." *315 U.S. at 572.* The government thus did not have to satisfy any type of heightened judicial scrutiny to have Chaplinsky's conviction upheld for uttering fighting words-such words were simply outside the typical First Amendment protection for "speech."

The significance of this classification requires careful attention to identifying these categories of unprotected speech. *Chaplinsky* listed the "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' . . . ." *Id.* Subsequent decisions have narrowed the scope of some of these traditional categorical exceptions, while also recognizing that the *Chaplinsky* list was not itself complete. *See, e.g., United States v. Williams, 553 U.S. 285, 297 (2008)* ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *Virginia v. Black, 538 U.S. 343, 359-60 (2003)* (recognizing "true threats" as an unprotected speech category); *R.A.V., 505 U.S. at 382-83* (acknowledging the Court's narrowing "of the scope of the traditional categorical exceptions for defamation and obscenity"); *New York v. Ferber, 458 U.S. 747, 763-64 (1982)* (holding child pornography unprotected by First Amendment). Although sometimes listed or grouped in a slightly different manner, the unprotected categories recognized before *Stevens* included incitement of illegal activity, fighting words, true threats, defamation, obscenity, child pornography, fraud, and speech integral to criminal conduct.

***Stevens*' Approach to Unprotected Speech Categories**

The government argued for another category to be added to this list in *Stevens*: depictions of animal cruelty. The government proposed that such depictions could be excluded from typical First Amendment protection due to their slight social value compared to their societal costs. But the Supreme Court emphatically rejected the government's proposed balancing test, describing it as a "startling and dangerous" approach to the First Amendment. Chief Justice Roberts, writing for the Court, explained that the First Amendment itself was the American people's balance of the social costs and benefits of free speech, foreclosing "any attempt to revise that judgment on the basis that some speech is not worth it."

The Court acknowledged that the government correctly asserted that its prior precedents had repeatedly emphasized that the unprotected categories of speech were """of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."'" *Stevens, 130 S. Ct. at 1585, 176 L. Ed. 2d at 445* (quoting *R.A.V., 505 U.S. at 383* (quoting *Chaplinsky, 315 U.S. at 572)).* But the

Court characterized its prior statements as "descriptions" rather than "a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor." Instead, according to the Court, a category of speech is only outside the usual protections of the First Amendment when there is a longstanding historical tradition of its exclusion from the principles of free expression.

The government urged the 1982 decision in *New York v. Ferber*-where the Court had relied in part on a "balance of competing interests" to hold, for the first time, that child pornography was a category of unprotected speech-supported its proposed test. The *Stevens* Court responded that *Ferber* did not rely on this "balance" alone, but instead presented a "special case" where the child pornography market "was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *Stevens, 130 S. Ct. at 1586, 176 L. Ed. 2d at 445-46* (quoting *Ferber, 458 U.S. at 759, 761). Stevens* opined that the child pornography exception was thus grounded in the exception for speech integral to criminal conduct, "a previously recognized, long-established category of unprotected speech."

As a result, the Court did not view any of its prior decisions identifying categories of speech outside the protection of the First Amendment as dependent on a simple cost-benefit analysis. Indeed, such an analysis, the Court maintained, would impermissibly establish "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." While recognizing that it was conceivable that some categories of speech may have been historically unprotected but not yet specifically identified in the case law, there was "no evidence that 'depictions of animal cruelty' is among them." Without a basis for holding depictions of animal cruelty outside the protection of the First Amendment, the Court then turned to Stevens' overbreadth challenge to the statute.

The Overbreadth Doctrine

The core concept of overbreadth is not difficult-a law that curtails substantially more speech than allowed by the Constitution is unconstitutionally overbroad on its face, authorizing even those whose speech could be constitutionally regulated to challenge the law. But because the overbreadth remedy-resulting in the facial invalidation of a statute in a challenge by a person who could otherwise be lawfully punished-is "strong medicine," the overbreadth of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma, 413 U.S. 601, 613-16 (1973).* This has raised the difficult specter of distinguishing between some conceivable impermissible applications of a statute and the "substantial" overbreadth necessary to invalidate a statute.

The Court in *City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984),* admitted that this distinction "is not readily reduced to an exact definition." Instead, the Court continued, the analysis depends on the existence of a "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id. at 801.* It is not enough, the Court has recognized, for the unconstitutional applications of the statute to amount to "a tiny fraction" of the statute's reach, *Ferber, 458 U.S. at 773,* but instead the statute must be "susceptible of regular application to protected expression." *City of Houston v. Hill, 482 U.S. 451, 466-67 (1987).* The prior decisions of the Roberts Court have reinforced the difficulty of satisfying this standard. *See, e.g., United States v. Williams, 553 U.S. 285, 292-93 (2008).*

The Overbreadth of the *Stevens* Statute

Nevertheless, *Stevens* held that the congressional statute at issue, *18 U.S.C. § 48,* was substantially overbroad. The Court began by construing the reach of § 48, because "'it is impossible to know whether a statute reaches too far without first knowing what the statute covers.'" *Stevens, 130 S. Ct. at 1587, 176 L. Ed. 2d at 447* (quoting *Williams, 553 U.S. at 293).* After carefully parsing the text of § 48, the Court viewed it as a "criminal prohibition of alarming breadth," outlawing depictions of hunting, slaughtering of animals for food, and customary veterinary and agricultural husbandry practices. The Court explained that the statutory text applied to any depiction of an animal being "wounded" or "killed" in violation of the law where the depiction was created, sold, or possessed. The Court continued that this text, plus the

"bewildering maze of regulations from at least 56 separate jurisdictions" on the treatment of animals, meant that § 48 criminalized numerous commonplace depictions of hunting and livestock practices. These commonplace depictions exceeded the estimated demand for the government's stated concerns with animal fighting videos and "crush videos" (in which women slowly crush small animals to death under their feet) "by several orders of magnitude." As a result, the Court reasoned that § 48's presumptively impermissible applications far outnumbered any permissible ones.

The government argued that the statute would not reach these commonplace depictions, relying on the "exception" clause in the statute-which authorized an exemption for depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value"-and prosecutorial discretion. But the Court rejected both of these contentions. Although recognizing that, under its prior decisions, "serious value" protected graphic sexual depictions from being considered obscene, the Court explained that the serious value principle was not "a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical or artistic value' (let alone serious value), but it is still sheltered from government regulation." The Court thereby indicated its view that the serious value exception is limited to the obscenity context. The Court then concluded its response to the government's arguments by paying little heed to the promise of prosecutorial restraint, pointing out that the government was prosecuting Stevens for animal fighting videos when Congress and the Executive originally focused solely on crush videos.

The Court's broad construction of § 48 as reaching hunting and similar depictions resolved the constitutional question. When the presumptively unconstitutional applications of the statute greatly exceeded the permissible applications, the statute was substantially overbroad and invalid under the First Amendment. The Court clarified that it was not deciding "whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional," leaving open the possibility that a narrowly crafted statute might survive scrutiny.

Justice Alito dissented, primarily disagreeing with the Court's construction of § 48 to reach such a broad number of depictions. He viewed the statute as having a "substantial core of constitutionally permissible applications" to crush videos and animal fighting videos, which he believed were intrinsically related to criminal acts and caused harms greatly exceeding any value of the depictions. He accordingly would have rejected Stevens' facial claims and remanded to determine whether the particular videos sold by Stevens were protected by the First Amendment due to their alleged educational nature.

The Impact and Puzzles of *Stevens*

Stevens announced a sea change in the Court's approach to identifying categories of unprotected speech. The commonly accepted view before *Stevens* comported with the government's position-that unprotected categories of speech were identifiable through a cost-benefit analysis, allowing for the expansion of such classes to new modes of expression and communication. Assuming the Court continues to adhere to the *Stevens* approach, no additional classes of unprotected speech will be recognized unless the classification is supported by a longstanding historical tradition, or unless it can be creatively shoehorned into a pre-existing unprotected category.

Stevens itself exhibited such creativity in its reasoning justifying *Ferber*'s child pornography exception. Although a part of *Ferber* does support the proposition that child pornography depictions are an integral part of illegal production activities involving the sexual abuse of children, this is only one of the five stated justifications for the Court's holding, with *Ferber* primarily emphasizing that "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *458 U.S. at 761-64.* Moreover, *Ferber* never mentioned at all the need to ground a new unprotected speech category into a pre-existing category with a longstanding tradition of exclusion. Thus, although *Ferber* may not be inconsistent with the *Stevens* historical approach, it certainly does not support it.

The *Stevens* Court also did not attempt to justify some of the other previously recognized categories of unprotected speech under its historical traditions approach. If the Court abides by the list of unprotected categories listed in *Stevens*

(obscenity, defamation, fraud, incitement, and speech integral to criminal conduct), the "speech integral to criminal conduct" exception will presumably be interpreted to encompass other previously recognized types of unprotected speech (such as true threats). The criminal conduct exception will also be the primary vehicle going forward for attempts to expand the application of the unprotected speech doctrine. But the difficulty is the extent of this exception-and its precise meaning-is somewhat shrouded in mystery. While the Court has frequently mentioned that the First Amendment does not apply "to speech or writing used as an integral part of conduct in violation of a valid criminal statute," *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)*, neither the historical nor the precedential scope of this exception has been definitively resolved, which will be a fertile ground for future litigation.

But despite these difficulties and uncertainties, there is an appeal to the *Stevens* historical approach. The basic premise is that some words or utterances have never been considered "speech" within the meaning of the First Amendment, so it is not inconsistent to view them as outside the scope of free expression. The historical approach also restrains judges from arbitrarily weighing the costs and the benefits of new forms of speech. If the costs are high enough, the government may be able to regulate under the strict scrutiny standard applicable to content-based regulation, *see Holder v. Humanitarian Law Project*, 130 S. Ct. __, 177 L. Ed. 2d __, *2010 U.S. LEXIS 5252 (2010)*, but the courts should not summarily excise some speech from any protection based on their own personal weighing of the costs and benefits of the expression.

Stevens also provides some guidance regarding the Roberts Court's understanding of the substantial overbreadth doctrine. The Roberts Court-at least for the most part-has been hesitant to invalidate statutes facially, preferring as-applied challenges. *Stevens* was the first time the Roberts Court struck down a statute on its face due to overbreadth concerns. In doing so, the Court took great pains to identify specific, concrete applications of § 48 that would be constitutionally impermissible. Next, the Court compared the frequency of these applications to the presumptively permissible applications of the statute, concluding that the impermissible applications far outnumbered the permissible ones. This approach provides a good roadmap for litigants asserting a substantial overbreadth challenge. Litigants should be as specific as possible regarding the impermissible applications of the challenged statute and attempt to provide data quantifying the relationship of the unconstitutional applications to the constitutional ones. Such data regarding the relative frequency of hunting and other similar depictions to animal fighting and crush videos was a key ingredient of the Court's conclusion that the statute's impermissible applications far outnumbered its permissible applications, which led to its invalidity. Although the Court did not state this type of quantitative relationship was required for a statute to be substantially overbroad, *Stevens* indicates that it is a sufficient basis for applying the "strong medicine" of overbreadth.

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Charles W. "Rocky" Rhodes on McDonald v. City of Chicago

2010 Emerging Issues 5195

Charles W. "Rocky" Rhodes on McDonald v. City of Chicago: The Second Amendment Applies to State and Local Governments

By Professor Charles W. "Rocky" Rhodes

July 14, 2010

SUMMARY: On June 28, 2010, the United States Supreme Court decided McDonald v. City of Chicago, 561 U.S. __, 177 L. Ed. 2d __, *2010 U.S. LEXIS 5523 (2010)*, regarding the scope of Second Amendment rights. But while McDonald settled one issue left open by the Court in D.C. v. Heller, 554 U.S. __, *128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*, many fundamental issues regarding the scope of the right to keep and bear arms for self-defense remain unresolved.

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ARTICLE: On June 28, 2010, the Supreme Court of the United States decided *McDonald v. City of Chicago*, 561 U.S. __, 177 L. Ed. 2d __, *2010 U.S. LEXIS 5523 (2010)*, its eagerly anticipated follow-up to *District of Columbia v. Heller*, 554 U.S. __, *128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008)*, regarding the scope of Second Amendment rights. But while *McDonald* settled one issue left open by *Heller*, many fundamental issues regarding the scope of the right to keep and bear arms for self-defense remain unresolved. Indeed, *McDonald*'s primary legacy will be that the Court incorporated-for the first time in approximately forty years-a provision of the Bill of Rights to apply against the states.

The underlying facts were rather simple. Residents of Chicago and Oak Park, Illinois challenged, under the right to keep and bear arms for the purpose of self-defense protected by the Second and Fourteenth Amendments, municipal handgun possession bans that allegedly left them vulnerable to criminals. The district court and the court of appeals-relying on earlier Supreme Court precedents-held that the Second Amendment did not apply against the states. But the Supreme Court reversed and held in a 5-4 decision that "the Second Amendment right is fully applicable to the States." Yet while the Court resolved the Second Amendment's application to state and local governments, numerous other questions remain unanswered. The clues the Supreme Court left regarding the resolution of these issues will become more apparent after a brief review of the jurisprudential debates regarding both the meaning of the Second Amendment and the appropriate process for incorporating provisions of the Bill of Rights to the states.

The Second Amendment's Right to Bear Arms

The text of the Second Amendment has always been somewhat of an enigma. It provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be

infringed." This grammatical structure, with its introductory prefatory clause referencing the "Militia" and state "security," led to a heated debate. Does this introductory clause, in conjunction with the subsequent text, mandate that the right to keep and bear arms is only constitutionally protected if connected to militia service? Or is the preface merely a statement of purpose, explaining that this preexisting defensive right to use arms for traditionally lawful purposes was detailed in the foundational charter of liberties as a result of concerns that a tyrannical government could disarm the citizenry and then trample on all of their rights?

The Supreme Court never resolved the individual right versus militia right question in the relatively few decisions addressing the Second Amendment pronounced before the 21st Century. The answer was finally forthcoming in 2008, when *District of Columbia v. Heller* held that the Second Amendment protected an individual right to keep and bear arms for self-defense. In that case, the District of Columbia essentially banned all handguns within its boundaries, and required that all other firearms be nonfunctional. The Supreme Court, in an opinion by Justice Scalia, held that these regulations violated the Second Amendment. The Court first examined the text of the Second Amendment, explaining that, by its terms, it protected "the right of the people," wording which, in other parts of the Constitution, refers unambiguously to an individual right. The Court continued that the most natural meaning of the next phrase, "to keep and bear arms," was to possess and carry weapons in case of confrontation. In light of this operative scope of the right, the prefatory clause, according to the Court, merely announced the purpose for which the right was codified in the Constitution-to prevent elimination of an armed citizenry militia. But this did not change that "the central component" of the preexisting right to keep and bear arms was for individual self-defense. This inherent right to self-defense was violated when the District's ordinances totally banned handgun possession or operable firearms in the home, where "the need for defense . . . is most acute." According to the Court, the ordinances were invalid under any level of scrutiny applicable to enumerated constitutional rights.

The Court cautioned, though, that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." As a result, its holding did not, for example, "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." And it also limited its rationale to arms for self-defensive purposes "in common use at the time," rather than those that were "dangerous or unusual." But it provided little other guidance on the contours of the right to keep and bear arms for self-defense, explaining that the resolution of those issues would have to wait for subsequent cases.

The Incorporation of the Bill of Rights

One of these unresolved issues was whether the Second Amendment right would apply with equal force against regulations by state or local governments when the Bill of Rights does not directly apply to the states. The first ten federal constitutional Amendments were adopted shortly after the Constitution's ratification to appease fears that the federal government would trample upon the "inalienable rights" of its citizens. The purpose, text, and structure of these Amendments established, as the Supreme Court decided in the early case of *Barron v. Mayor of Baltimore, 32 U.S. 243, 247-48 (1833),* that they constrained only the federal government, with the states constrained by their own state constitutions.

The Reconstruction Amendments, however, fundamentally altered this structure. As the states failed to protect the civil rights of the freed former slaves and other citizens, the Fourteenth Amendment was ratified to prohibit the states from denying or abridging "the privileges or immunities of citizens of the United States," "life, liberty, or property, without due process of law," or "the equal protection of the laws." But despite the majesty of these clauses and the wishes of their primary proponents in Congress, the original judicial interpretation of the Fourteenth Amendment was extremely narrow. The *Slaughter-House Cases, 83 U.S. 36; 21 L. Ed. 394 (1873),* decided less than five years after the Amendment's ratification, held that the Privileges or Immunities Clause only protected those rights of national citizenship that were wholly distinct from those inalienable, fundamental rights of state citizenship that predated the creation of the federal government. Soon thereafter, a series of cases confirmed this narrow interpretation, and

specifically held that the right to keep and bear arms was not one of the rights of national citizenship protected by the Privileges or Immunities Clause. *United States v. Cruikshank, 92 U.S. 542, 553 (1876); Presser v. Illinois, 116 U.S. 252, 265 (1886); Miller v. Texas, 153 U.S. 535, 538 (1894).* The Court reasoned that the right to keep and bear arms for a lawful purpose was a preexisting right predating the existence of the Constitution, not a right owing its existence to the federal government. *Cruikshank, 92 U.S. at 553.* As a result, the Second Amendment-and the other provisions of the Bill of Rights-continued only to prohibit infringement by Congress; such rights were not protected by the Privileges or Immunities Clause against state and local government action.

But slamming the door on the Privileges or Immunities Clause left litigants searching for another method of having the fundamental guarantees contained in the Bill of Rights made applicable to the states, which was eventually found in the Due Process Clause. The Court gradually began to read the "liberty" protected against state deprivation without the required process to include certain fundamental and essential rights-whether enumerated in the Bill of Rights or not-that were "of such a nature that they are included in the conception of due process of law." *See, e.g., Twining v. New Jersey, 211 U.S. 78, 99 (1908).* Gradually (and unevenly), the Court moved to a process of "selective incorporation," under which those rights contained in the first eight Amendments that are fundamental to the American scheme of liberty or deeply rooted in American history and tradition are incorporated within due process. While Justice Black would have gone even further under his view that the Fourteenth Amendment completely incorporated all the guarantees in the first eight Amendments in the Bill of Rights to apply to the states, the Supreme Court never adopted his theory. But, in practical effect, Justice Black almost got his wish. By 1968, the Court had employed the selective incorporation process to hold that almost every provision in the first eight Amendments applied against states and localities. The following were the only provisions yet to be incorporated: the Second Amendment's right to bear arms, the Third Amendment's prohibition on quartering soldiers in time of peace, the Fifth Amendment's grand jury requirement, the Seventh Amendment's civil jury requirement, and the Eighth Amendment's excessive fines prohibition (while the Court has in some cases assumed without deciding that the excessive fines ban applied against the states, it has never squarely resolved the question).

The Court's prior refusal to incorporate the Second Amendment led to the dispositive issue in *McDonald*. *Cruikshank*, *Presser*, and *Miller* declined to apply the Second Amendment to the states under the Privileges or Immunities Clause, and no subsequent Supreme Court decision had incorporated the Second Amendment within the concept of due process. As a result, when residents challenged the handgun prohibitions in Chicago and Oak Park that were similar in many respects to the handgun ban invalidated in *Heller*, the municipalities' primary defense was that the Second Amendment's guarantees did not apply to the actions of state and local governments. While acknowledging that the logic of *Heller* might portend a different result, the lower federal courts concluded that they were bound to agree with the municipalities by directly applicable precedent that only could be modified by the United States Supreme Court.

The Opinions in *McDonald*

The Supreme Court granted the residents' petition for certiorari and reversed, holding that the Second Amendment right applied against state and local governments. However, the five Justices supporting this result splintered on the appropriate rationale. A plurality opinion, authored by Justice Alito for Chief Justice Roberts and Justices Scalia and Kennedy, concluded that the Second Amendment right was incorporated through the Due Process Clause under the Court's prior selective incorporation precedents, while Justice Thomas in his concurrence maintained that the right should be incorporated under the Privileges or Immunities Clause.

Justice Alito's plurality opinion, after tracing the development of the incorporation debate, refused to revitalize the Privileges or Immunities Clause and "disturb the *Slaughter-House* holding," instead concluding that the right to keep and bear arms is incorporated in the concept of due process because it is fundamental to the American scheme of liberty and deeply rooted in the Nation's history and tradition. In sections of the opinion joined by Justice Thomas, the majority reviewed the *Heller* decision and reaffirmed that the "central component" of the Second Amendment right is "individual self-defense,"a right fundamental in American history and tradition since the founding era and Reconstruction.

The Court's conclusion that the Second Amendment protected a fundamental right became the key factor in the plurality's incorporation analysis. The plurality reasoned that, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States . . . ." Although the plurality hinted *stare decisis* concerns might counsel against incorporating the Fifth Amendment grand jury right or the Seventh Amendment civil jury right because many states had relied on earlier Supreme Court decisions refusing to incorporate these rights, such precedential concerns did not prevent the incorporation of the Second Amendment right recognized in *Heller*.

Justice Thomas concurred that the arms right was applicable to the states, but maintained that the proper vehicle for incorporation was not the Due Process Clause, but rather the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Thomas accordingly wanted to reconsider the scope of the Privileges or Immunities Clause as established in *Slaughter-House*, *Cruikshank*, and subsequent cases, and he devoted his lengthy concurring opinion to a textual and historical justification for modifying or overruling these earlier decisions.

Justice Stevens dissented, arguing that the incorporation of substantive rights (as distinguished from procedural rights) through the Due Process Clause did not require jot-for-jot incorporation, and the analysis should depend on whether there is a constitutionally protected liberty to keep handguns in the home under substantive due process principles, which he did not believe existed due to the "fundamentally ambivalent relationship" of firearms to liberty. Justice Breyer, joined by Justices Ginsburg and Sotomayor, also dissented, arguing that the right to keep and bear arms should not be incorporated under the Due Process Clause because it did not protect the politically powerless, was outside the scope of judicial expertise, and intruded upon state police power concerns regarding the public safety.

Some Key Remaining Questions on the Second Amendment

McDonald's holding was limited to applying the Second Amendment right recognized in *Heller* to the states. As a result, the Court did not resolve a number of other issues left open by *Heller*, even though the Court's written opinion offers an occasional potential hint on these issues.

(1) Does the right of self-defense extend only to the home?

Both *Heller* and *McDonald* involved handgun bans encompassing the home. As the Court recognized in *Heller*, because "the need for defense . . . is most acute" in the home, the self-defense right of the Second Amendment unquestionably protects law-abiding citizens in using "arms in defense of hearth and home." But does the Second Amendment include a similar protective right in a vehicle, in a temporary place of abode, in a place of business, or in public places outside of sensitive areas such as schools and government buildings?

Heller mentioned the possibility that the self-defense right has the logical potential to extend further, upon "future evaluation." Nothing in *McDonald*'s limited holding cast doubt on this possibility. Indeed, similar concerns for the safety of the individual and family might arise during vehicular travel or temporary stays with friends and relatives. Moreover, business establishments, especially those located in high crime areas, may also have legitimate self-defense concerns. While the need for self-defense in public places may not be as acute, at least in areas with a sufficient law enforcement presence, there still may be situations implicating similar concerns. As a result, despite the fact that the current holdings of the Supreme Court extend only to the home, some expansion of the self-defensive right to other contexts is very probable. An absolute ban on firearms outside the home will probably not survive constitutional scrutiny, although states and local governments should have considerably more leeway to regulate firearms outside the home under the weighing of competing private and governmental interests. *Cf. Heller*, 554 U.S. at __, *128 S. Ct. at 2816, 171 L. Ed. 2d at 678* (noting history of state prohibitions on carrying concealed weapons in public).

(2) Which weapons fall within the parameters of the Second Amendment?

Heller determined that the Second Amendment does not protect those weapons "not typically possessed by law-abiding citizens for lawful purposes." To be protected, weapons instead must be "in common use at the time" and

not "dangerous and unusual."

Handguns, according to *Heller*, are the epitome of a commonly used and lawful weapon-as the Court remarked, the District of Columbia handgun ban prohibited "an entire class of 'arms' that is overwhelmingly chosen by American society" for the lawful purpose of self-defense. On the other hand, though, *Heller* maintained that the Second Amendment excluded protection for short-barreled shotguns and other similar weapons that are typically used for criminal, rather than lawful, purposes.

Heller thus indicates that the Court will categorically exclude certain weapons from the scope of the Second Amendment, similar to how certain forms of speech (such as threats and incitement of illegal activity) are categorically excluded from the First Amendment. But the more difficult question will be defining those "dangerous and unusual weapons" excluded from lawful self-defense rights. Some weapons, including machine guns and short-barreled shotguns (along with missiles, bombs, and grenade launchers), will undoubtedly be excluded, while others, such as handguns, rifles, and standard shotguns, will be protected. But there is a large area of uncertainty for other types of weapons, such as so-called "assault" weapons, martial arts weapons, and clubs, which will have to be adjudicated on a case-by-case basis.

(3) Will scope limitations also categorically exclude some individuals from Second Amendment rights?

Both *Heller* and *McDonald* emphasized that the Second Amendment did not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," but the Court did not explain the rationale supporting this exclusion. Is this because felons and the mentally ill have not traditionally had the right to keep and bear arms, such that the Second Amendment right simply does not apply to them, even though the text mentions "the right of the people"? If so, are there other categories of individuals who have traditionally been excluded from the possession of firearms, such as minors?

On the other hand, was the basis for the Court's statement the government's interest in preventing the heightened dangers from the possession of guns by felons and the mentally ill? This would place felons and the mentally ill within the ambit of the Second Amendment, but recognize that the government has the authority to prohibit them from owning weapons because public safety concerns outweigh their self-defensive rights.

Although either rationale provides the same outcome for felons and the mentally ill, the choice may have broad implications in other contexts. The Court has not, however, provided a hint on the resolution of this issue in either *McDonald* or *Heller*. But there is one possible factor favoring a categorical exclusion of individuals traditionally prohibited from possessing weapons-its consistency with the Court's recently clarified historical approach for defining categories of traditionally unprotected speech in *United States v. Stevens*, 559 U.S. __, *130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).*

(4) What types of regulations are burdensome enough to infringe the Second Amendment right?

Mere regulation of a right, or ordinances that make a right slightly more difficult to exercise, are not necessarily sufficient "infringements" on the right implicating heightened constitutional scrutiny. For example, a reasonable licensing fee and a short waiting period for a marriage license are not viewed as infringements on the fundamental right to marry. In a similar vein, some regulations of firearms will not sufficiently burden the Second Amendment right to keep and bear arms for lawful self-defensive purposes.

The Supreme Court in *Heller* recognized this fact. The majority countered a key argument of the dissent-that certain founding-era gun storage laws and ordinances imposing fines for the unauthorized discharge of a weapon were inconsistent with a right of self-defense-by arguing these colonial ordinances did not "remotely burden the right of self-defense as much as an absolute ban on handguns." In other words, more than regulation will be required-the regulation must also substantially burden the self-defensive right.

This appears consistent with the repeated assurances in *Heller* and *McDonald* that the right would not impact "laws imposing conditions and qualifications on the commercial sale of arms." As long as such conditions and qualifications serve a legitimate purpose-and not merely serve to substantially burden Second Amendment rights-they should be upheld. This would presumably include reasonable licensing fees, a limited waiting period for conducting a background check, and registration requirements before purchasing a firearm. But unduly burdensome regulations regarding these matters will infringe on Second Amendment rights.

(5) What level of scrutiny will apply to regulations implicating the Second Amendment?

Heller did not specify a particular level of scrutiny for arms regulations, instead concluding that the handgun ban violated the Constitution "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." The Court did, however, reject Justice Breyer's proposed "interest-balancing inquiry," which would have examined whether the regulation burdened a protected interest disproportionally in light of the regulation's beneficial effects. The Court viewed this approach as improperly allowing the judiciary on a case-by-case basis to determine whether the right should be enforced.

McDonald reinforced the rejection of an interest-balancing approach, but again did not specify a particular level of scrutiny. The Court did, however, provide one hint, by describing the right of individual self-defense as a "fundamental" right. Fundamental constitutional rights typically receive at least some form of heightened judicial scrutiny. Often, this heightened scrutiny requires that governmental regulations substantially burdening a fundamental right be narrowly tailored to serve a compelling governmental interest. But there are also fundamental rights subject to a lesser degree of scrutiny, usually requiring a substantial relationship between the governmental regulation and an important governmental interest.

Courts considering state constitutional arms rights have typically employed a reasonable regulation standard, although this standard emerged in the late nineteenth century before the formulation of the often-employed modern tiers of strict, intermediate, and rational basis constitutional scrutiny. During the late nineteenth and early twentieth centuries, judicial review frequently depended on a formalistic categorical approach rather than the modern tiered weighing of interests. Thus, a law was either a reasonable exercise of the police power to protect the health, welfare, and public safety, or it was unconstitutional as invading self-defensive rights. This type of review was not nearly as deferential as modern rationality review, probably most closely resembling modern intermediate scrutiny. While this does not mean that the Supreme Court will adopt an intermediate review standard for the Second Amendment, it would provide a means to respect two longstanding American traditions-gun ownership for lawful purposes and legitimate gun regulation.

The Remaining Questions on Incorporation

The remaining incorporation issues are less consequential. Despite a torrent of academic commentary castigating the *Slaughter-House Cases*, the only Justice in *McDonald* inclined to reconsider the Privileges or Immunities Clause as a vehicle for incorporation was Justice Thomas. Thus, due process incorporation appears here to stay for the foreseeable future, with only four guarantees in the first eight Amendments of the Bill of Rights yet to be incorporated. Of these four, a relatively safe assumption is that the Fifth Amendment's grand jury requirement and the Seventh Amendment's civil jury trial requirement will not be incorporated. Justice Alito's plurality opinion highlighted the extensive reliance by the states in creating and establishing civil and criminal judicial systems that deviate from federal norms based on earlier Court decisions refusing to apply these rights to the states, and no other Justice took issue with this characterization. On the other hand, the other two provisions of the Bill of Rights that have not been incorporated-the Third Amendment and the Eighth Amendment's excessive fines clause-do not have the same *stare decisis* concerns, and would presumably be incorporated by the Court in an appropriate case.

Although it certainly appears unlikely that a Third Amendment case will reach the Court in the foreseeable future, the same probably would have been said about a Second Amendment case fifteen to twenty years ago. Now that the

Second Amendment has been incorporated, the real judicial work begins in earnest, as the courts will discern the parameters of this right through case-by-case adjudication.

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CITIZENS UNITED V. FEC: INDEPENDENT POLITICAL ADVERTISING BY CORPORATIONS

2010 Emerging Issues 4875

JAN BARAN ON CITIZENS UNITED V. FEC: INDEPENDENT POLITICAL ADVERTISING BY CORPORATIONS IN SUPPORT OF OR IN OPPOSITION TO CANDIDATES MAY NOT BE PROHIBITED

By Jan Baran

February 22, 2010

SUMMARY: The Supreme Court recently issued its widely anticipated ruling in Citizens United v. Federal Election Commission. Election law expert Jan Witold Baran discusses the vehicle by which the Court revisits its First Amendment jurisprudence and somewhat dramatically reverses Austin and part of another campaign finance case in order to reestablish a principal that independent political speech, even that of corporations and unions, may not be banned.

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ARTICLE: On January 21, 2010, the Supreme Court of the United States issued its widely anticipated ruling in *Citizens United v. Federal Election Commission*. __ U.S. __, *175 L. Ed. 2d 753, 2010 U.S. LEXIS 766 (2010).* The incorporated not-for-profit organization, Citizens United, wished to distribute and advertise a 90 minute video it had produced entitled "Hillary, The Movie." The case implicated both federal campaign finance laws and the First Amendment of the Constitution. The documentary was sponsored and produced by a corporation with corporate funds, and Hillary Clinton at the time was a candidate for the Democratic Party nomination for President. Even though "Hillary, The Movie" was produced independently of any candidate or political party, federal law (and the law in 24 states) generally prohibited corporate financed messages that urged the public to vote for or against a candidate. Many laws also banned similar messages from labor unions. While the Court had previously upheld a First Amendment right of individuals, political committees, and political parties to make unlimited "independent expenditures" it had denied such a right to corporations in the 1990 case of *Austin v. Michigan Chamber of Commerce*. Thus, *Citizens United* became the vehicle by which the Court revisited its First Amendment jurisprudence and somewhat dramatically reversed *Austin* and part of another campaign finance case in order to reestablish a principal that independent political speech, even that of corporations and unions, may not be banned.

In order to appreciate the Court's ruling in this 5-4 decision, it is helpful to summarize the following: 1) the basic terms used in campaign finance law, 2) the history of campaign finance regulation, and 3) prior Supreme Court determinations. For the legal practitioner, the final portion of this article addresses the practical implications of the *Citizens United* decision and some issues that remain outstanding.

WHAT ARE CONTRIBUTIONS, EXPENDITURES, INDEPENDENT EXPENDITURES AND ELECTIONEERING COMMUNICATIONS?

Campaign finance laws regulate the receipt and spending of money in connection with election campaigns. Over the course of several decades, specific terms have been used to identify certain financial aspects of campaigns. Perhaps the most frequently used term is "contribution." A contribution is variously defined in federal or state laws but, in essence, refers to "something of value" that is given to or made available to a candidate or political committee. A contribution includes cash as well as checks, credit and loans as well as tangible goods and services such as office space, furniture, transportation or compensated workers. The laws often define "expenditures" in a similar fashion, i.e., money or something of value that is disbursed by or for the benefit of a candidate or committee. Expenditures that are incurred by third parties for the benefit of a candidate or committee and at their request or with their approval or participation are usually referred to as contributions in-kind. Expenditures that are not coordinated with a candidate or committee are considered "independent" and not contributions.

Since the case of *Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 1690, 48 L. Ed. 2d 190 (1976)* (which will be discussed below), expenditures for public communications which contain language that expressly advocates the election or defeat of a clearly identified candidate are called "independent expenditures." As the definition states, a message must contain "express advocacy" in order to qualify as an independent expenditure. In 2002, Congress (and subsequently 13 states) inserted into campaign finance laws the term "electioneering communication" which refers to messages that merely "refer" to a candidate or political party. Federal law banned such messages if distributed 30 days before a primary election or 60 days before a general election via the media of television, radio, satellite or cable. Some state laws apply the term more broadly or to longer pre-election periods. In any event, an electioneering communication encompasses content that is broader than an independent expenditure which contains express advocacy only. Significantly, both electioneering communications and independent expenditures are not contributions because they must be undertaken without collaboration with a candidate or political party.

THE HISTORY OF CAMPAIGN FINANCE LAWS

The Tillman Act of 1907 is considered the first major federal campaign finance law. It prohibited for the first time contributions by corporations to political parties. In 1947 the Taft Hartley Act expanded the statute to both prohibit expenditures as well as contributions to parties or candidates and to include labor unions within the prohibition. In the aftermath of the so-called Watergate scandal of the early 1970's, Congress enacted extensive campaign finance regulation which included public financing of presidential campaigns, financial reporting by campaigns and committees, limits on contributions, limits on expenditures including independent expenditures, and the creation of a civil enforcement agency, the Federal Election Commission (FEC). The limits on expenditures were declared unconstitutional in *Buckley*, but otherwise the reforms generally were upheld. In 2002 Congress passed and President George W. Bush signed the Bipartisan Campaign Reform Act (BCRA) which popularly is often called the McCain-Feingold law in recognition of the Senate sponsors of the bill. BCRA tightened the prohibition on corporate and union donations to national political parties and instituted the first ban on electioneering communications sponsored or financed by corporations or unions.

SUPREME COURT RULINGS ON CONTRIBUTIONS AND EXPENDITURES

Prior to the Watergate reforms, the Supreme Court rarely addressed campaign finance laws. When it did so, the cases almost always involved unions and whether their expenditures were subject to the federal ban. Invariably the Court concluded that the spending at issue, such as money spent on candidate endorsements to union members, *United States v. CIO, 335 U.S. 106, 68 S. Ct. 1349, 92 L. Ed. 1849 (1948)*, or for the administrative costs of operating a political action committee *Pipefitters v. United States, 407 U.S. 385, 92 S. Ct. 2247, 33 L. Ed. 2d 11 (1972)* was not banned thereby avoiding any ruling on whether the bans violated the First Amendment freedom of speech.

In *Buckley v. Valeo*, the Court had to review the reforms and confront the constitutional issues directly. The court

applied strict constitutional scrutiny to restrictions on campaign money, equating financing with speech. In doing so it required the government to establish a compelling justification for any restriction on money. The government argued that the justification was the prevention of corruption or the appearance of corruption. When applied to campaign contributions, the Court concluded that a limit on the amount that an individual or group could donate to a candidate or committee was a reasonable manner of preventing potential corruption. However, the Court held that the same was not true of expenditures. Accordingly, the Court struck down the federal laws that limited the amount that a candidate could spend on his or her own campaign, that limited the amount that a candidate's campaign could spend and that limited to $1000 the amount that an individual could spend on an independent expenditure. These limits did not prevent corruption and therefore, the Court concluded, violated the First Amendment.

In cases subsequent to *Buckley*, the Court struck down limits on independent expenditures by political committees, by certain not-for-profit ideological corporations, and by political parties. The Court also recognized that corporations could not be prohibited from spending money on communications that urge the public to vote for or against ballot issues. *First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).* But in the 1990 *Austin* decision, the Court concluded that a Michigan statute that prohibited independent expenditures by corporations was constitutional. *Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990).* Surprisingly, the Court did not reason that the ban was necessary to prevent corruption. Instead, the Court determined that a ban was justified because it prevented distortion of the political process resulting from the aggregation of wealth that can be achieved through the corporate form. In *McConnell v. FEC, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003),* the Court extended the effect of *Austin* by upholding the BCRA ban on corporate or union electioneering communications. However, the ban was deemed unconstitutional as applied to "issue advertising" in the case of *FEC v. Wisconsin Right to Life, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007).*

Thus the stage was set for Citizens United and "Hillary, The Movie."

THE HOLDINGS IN *CITIZENS UNITED*

Because Citizens United was a corporation and received funding from other corporations, it was subject to the federal ban on corporate contributions and expenditures. "Hillary, The Movie" was a communication that referred to a candidate and was to be distributed as a video on demand via a cable system within 30 days prior to the 2008 Democratic primary elections. Therefore, it was an electioneering communication. Moreover, the content was in the words of the Court "pejorative" and the lower court determined that it constituted "express advocacy" of Senator Clinton's defeat. Thus the documentary arguably was an independent expenditure. Either as an electioneering communication or as an independent expenditure the video was prohibited by federal law.

After initial briefing and argument in March 2009, the Court ordered additional briefing and additional oral argument in September on the question of whether it was necessary to overrule the *Austin* case and the holding in *McConnell* regarding corporate independent political speech. In its decision, the Court in fact overruled those cases. The Court concluded that *Austin* was wrongly reasoned and that the "antidistortion rationale" was in conflict with *Buckley* and *Bellotti* and, more important, irreconcilable with the First Amendment which was intended to restrain government from banning speech just because it was being exercised by an association with a corporate form. As a result, corporations (and presumably unions) may engage in independent speech in the same way as individuals, committees, and political parties. Prohibitions and limits on such speech, whether independent expenditures or electioneering communications, violate the First Amendment.

Citizens United also challenged the disclosure and disclaimer statutes. These laws required the filing of reports regarding electioneering expenditures with the FEC and notices on advertising identifying the sponsoring organization and related information. The Court upheld the provisions on the same grounds that *Buckley* upheld more general election-related disclosures by candidates, political parties and independent spenders. Unlike prohibitions, disclosures

and disclaimers did not prohibit speech, were subject to less restrictive constitutional scrutiny than expenditures, and served a public informational interest.

THE PRACTICAL CONSEQUENCES OF *CITIZENS UNITED* ON CORPORATE POLITICAL ACTIVITIES

While the *Citizens United* decision may be significant with respect to the Supreme Court's First Amendment jurisprudence, its practical significance is less certain. Although corporations and unions had been subject to a ban on "express advocacy," both types of entities have financed political advertising that avoid the so-called "magic words." Also, many ads escaped the prior ban on electioneering communications because they qualified as issue advertising. In recent federal elections incorporated entities and unions have spent tens of millions of dollars. Therefore, it remains to be seen whether the Court's decision will directly lead to more spending or to different content in political advertising or a combination of both.

Corporations and unions are no longer subject to bans on independent spending for campaign advertising but these and other political activities continue to be highly regulated. The following is a partial list of current legal considerations when corporations or unions engage in campaign politics:

1. NO CONTRIBUTIONS. Contributions by corporations are still banned under federal law and under the laws of 22 states. Accordingly, a corporation still may not donate corporate money to candidates in these jurisdictions nor coordinate their political spending with candidates. For this reason, political action committees (PACs) remain the only legal vehicle by which a corporation may contribute to candidates from the proceeds of voluntary individual donations that are donated to the PAC by stockholders and management.

2. NO COORDINATED SPENDING. The type of spending protected under the First Amendment by the *Citizens United* decision must be independent of candidates or political parties. This means that the spending may not be coordinated with these persons or entities. The FEC rules on "coordination" are extensive and detailed and subject to revision. *See* 11 C.F.R. Part 109. Any applicable coordination rules must be followed when spending is subject to contribution bans or limits.

3. REPORTS MUST BE FILED. Independent expenditures and electioneering communications are subject to disclosure laws. Reports disclosing such spending must be filed with applicable government agencies.

4. DONORS MAY HAVE TO BE REPORTED AND DISCLOSED. Money that is donated to a corporation for the purpose of financing independent expenditures or electioneering communications may be subject to disclosure. This provision is most applicable to not-for-profit corporations that may rely on voluntary donations. Fundraising practices should be reviewed for compliance with any law that requires disclosure of contributors to organizations that finance political advertising.

5. ADVERTISING MUST CONTAIN DISCLAIMERS. Specific notices or disclaimers are required on political advertising. Both campaign finance and, where applicable, communications laws should be consulted to ensure complete compliance.

6. TAX LAWS MAY APPLY. Tax laws still govern corporations that have been granted tax exemptions. Various exemptions impose conditions on political activities. For example, charities and religious organizations are barred from intervening in any political campaigns. Accordingly, they may not finance independent expenditures or electioneering communications without risking their exempt status. Other entities, such as unions or trade associations, must have purposes other than influencing elections as their primary purpose in order to preserve their tax status. If a trade association spends a majority of its money on independent expenditures and political contributions it risks losing its exempt status. An incorporated association whose primary purpose is to influence elections may qualify for exemption under section 527 of the Internal Revenue as a "political organization." It then is subject to filing financial disclosure reports with the IRS as well as potential campaign finance reports each of which are publicly available.

7. PUBLIC COMPANIES MAY HAVE DISCLOSURE POLICIES. Business corporations may be subject to company policies as well as shareholder resolutions regarding political activities. Many public corporations have adopted policies voluntarily or in response to shareholder requests and obligate the company to disclose their political contributions. Such policies may also apply to independent expenditures and electioneering communications and therefore should be reviewed and perhaps updated.

8. MONITOR LEGISLATION. The *Citizens United* decision will prompt legislative proposals in Congress and in state legislatures. Future bills and enactments may increase disclosure requirements or attempt to impose additional regulatory burdens on independent political spending and therefore should be monitored closely.

9. FOREIGN CORPORATIONS AND THEIR SUBSIDIARIES ARE STILL SUBJECT TO SPENDING BANS. The status of foreign corporations and U.S. subsidiaries of foreign corporations was not at issue in the *Citizens United* case. Those persons are regulated by a separate provision of federal law which prohibits foreign nationals and foreign money from making any contributions or expenditures in connection with any election in the U.S. whether federal, state or local. Under restrictive rules a U.S. subsidiary may sponsor a political action committee.

RELATED LINKS: See Jan Witold Baran's Emerging Issues Analysis accompanying Citizens United v. FEC on lexis.com at

- 175 L. Ed. 2d 753 (2010)

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Freiman on Habeas Corpus for Alleged Enemy Combatants: Boumediene v. Bush

2008 Emerging Issues 2517

Jonathan M. Freiman on Habeas Corpus for Alleged Enemy Combatants: Boumediene v. Bush, 553 U.S. __ ; 2008 U.S. LEXIS 4887, *; (2008)

By Jonathan M. Freiman

July 19, 2008

SUMMARY: Suspected terrorists detained without charge at Guantanamo Bay have a constitutional right to challenge the legality of their detentions in federal court through the writ of habeas corpus. So the Supreme Court holds in Boumediene v. Bush, 553 U.S. __; *2008 U.S. LEXIS 4887, *;* (2008). This commentary discusses the import and potential extensions of this important decision.

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ARTICLE: Suspected terrorists detained without charge at Guantanamo Bay have a constitutional right to challenge the legality of their detentions in federal court through the writ of habeas corpus. So holds the Supreme Court in *Boumediene v. Bush*, 553 U.S. __; *2008 U.S. LEXIS 4887, *;* (2008), having never before found non-citizens detained by the government outside the U.S. to have a constitutional right to habeas corpus. *Boumediene* at *83; *see also Boumediene* (Scalia, dissenting) at *177.

Background. In the wake of the terrorist attacks of September 11, 2001, Congress passed the Authorization for the Use of Military Force (AUMF), §2(a), *115 Stat. 224*, note following *50 U.S.C. § 1541* (2000 ed., Supp. V). Shortly thereafter, the federal government began transferring suspected terrorists captured outside the United States to an off-shore penal colony located on a naval station at Guantanamo Bay, Cuba. Guantanamo is not sovereign U.S. territory but the U.S. exercises complete jurisdiction and control there. *Boumediene* at *56.

Prisoners held at Guantanamo challenged their detentions by filing petitions for the writ of habeas corpus. Though no law other than the laws of the United States applies at the naval station, *Boumediene* at *50, the government argued that detainees could not file habeas petitions. In *Rasul v. Bush, 542 U.S. 466 (2004),* the Supreme Court held that the habeas corpus statute, *28 U.S.C. § 2241*, permitted non-citizens imprisoned by the U.S. on Guantanamo to challenge their detentions in federal court. Congress responded to *Rasul* by passing the Detainee Treatment Act of 2005 (DTA), *119 Stat. 2739*, which amended the habeas corpus statute to preclude habeas petitions by non-citizens outside the U.S. In *Hamdan v. Rumsfeld, 548 U.S. at 576-77 (2006),* the Supreme Court held that the DTA applied to new habeas cases but had no retroactive effect on existing ones. Congress then passed the Military Commissions Act of 2006 (MCA),

which further amended the habeas statute to preclude existing habeas actions. *Boumediene* at *24-29. For information on the Military Commissions Act of 2006, see Privacy Law and the USA PATRIOT Act § 6.11 (LexisNexis Matthew Bender).

Controversial issue that had divided the courts. The question then became whether aliens designated as enemy combatants and detained at Guantanamo have the *constitutional* privilege of habeas corpus. *Boumediene* at *19 (emphasis added). The writ of habeas corpus was understood by the Framers as a vital instrument to secure the fundamental freedom from unlawful restraint, *Boumediene* at *30, and as an essential mechanism in the separation-of-powers scheme that undergirds the American democratic system, *Boumediene* at 37. Yet the government claimed that the detainees status as designated enemy combatants and physical location outside the United States meant they had no constitutional right to petition for the writ. Brief for the Respondents at *14, *37, *Boumediene v. Bush, No. 06-1195, 2007 U.S. S.Ct. Briefs LEXIS 1280* at **32, **66-68.

The Court considers the extent of the writ at the time the Constitution was ratified, *Boumediene* at *4142, but finds history inconclusive. *Boumediene* at *4152. Two of the Courts observations of that historical precedent may prove important in later cases. The Court acknowledged the possibility that the writ may not have been available to prisoners of war in the context of declared wars with other nation states. *Boumediene* at *44. There, the Court noted, there was greater justification because [j]udicial intervention might have complicated the militarys ability to negotiate exchange of prisoners with the enemy. The Court may therefore be less willing to recognize a constitutional right of habeas corpus in a traditional war. But in a war without prisoner exchanges, where prisoners are held indefinitely, the Court will exercise greater scrutiny of detentions of presumed enemies. Of course, in a declared war with another nation as opposed to an undeclared war with a non-governmental terrorist organization the protections of the Geneva Conventions would likely apply. The lesson to be learned seems to be that, one way or another, adequate protections for wartime prisoners must exist. Practitioners whether government lawyers or policymakers or those representing detainees should bear this important fundamental concept in mind.

Practical concerns, not formalism, carry the day. The Courts flexible approach to protection of detainees becomes evident when the Court rejects a formal sovereignty test, under which non-citizens would have a constitutional right to habeas only on U.S. sovereign territory. Because the Executive Branch determines whether an area is sovereign U.S. territory, a formal sovereignty test would give the political branches the power to switch the Constitution on or off at will. *Boumediene* at *74.

The Court instead opts for a functional approach. *Boumediene* at *71. [P]ractical concerns, not formalism, are paramount when determining whether non-citizens detained by the U.S. have the right to challenge their detentions via habeas. *Boumediene* at *72. The generality of the Courts language suggests the flexibility of the approach. Borrowing from the early twentieth century Insular Cases, which decided whether residents of war-spoil territories like the Philippines were entitled to constitutional rights, *see e.g., De Lima v. Bidwell, 182 U.S. 1 (1901)*, the Court asks whether extension of Suspension Clause protections to Guantanamo detainees would be impracticable and anomalous. *Boumediene* at *64, *82. *See generally* Gerald L. Neuman, Anomalous Zones, *48 Stanford Law Review 1197 (1996).* Two formal factors, the detainees citizenship and the sovereignty of the detention site, help answer that question. *See Boumediene* at *7576. But there are many other factors: the status of the detainees, the adequacy of the process for determining enemy combatant status, the nature of the sites where apprehension and then detention took place, and the practical obstacles inherent in resolving the prisoners entitlement to the writ. *Boumediene* at *7576.

These multiple factors make appropriate the extension of Suspension Clause protections to Guantanamo, the Court holds. The detainees claim they are not enemy combatants, and the process created by the Executive Branch to determine prisoners status, known by the acronym CSRT, is inadequate. *Id.* Detainees lack counsel and cannot confront

the evidence against them. Moreover, [t]he Governments evidence is accorded a presumption of validity. *Boumediene* at *77. And while the Court does not say so directly, the nature of the apprehension sites may also have played a role. While some detainees were seized on the battlefield, many were apprehended in civilian settings far from any battlefield. Boumediene is Bosnian, arrested by Bosnian forces, released by the Bosnian Supreme Court and then seized by U.S. agents who rendered him to Guantanamo, a detention site that [i]n every practical sense . . . is not abroad. *Boumediene* at *79. That habeas proceedings would cost money and might divert the attention of military personnel from other pressing tasks, *Boumediene* at *80, is not a sufficient practical obstacle to bar the extension of habeas to Guantanamo. Unlike post-World War II Germany, where military forces holding suspected enemy combatants had to contend with enemy elements, guerilla fighters, and were-wolves in the occupied territory, *Boumediene* at *81 (quoting *Ex Parte Quirin, 317 U.S. 1 (1942))*, the mission of Guantanamos secure island prison would not be undermined by habeas rights. Nor would habeas rights cause friction with the host government, since the U.S. is in no way answerable to Cuba. *Boumediene* at *82. Finally, the Court found compelling that many of the prisoners had waited as long as six years for any meaningful review of their status. *See Boumediene* at *123; *see also Boumediene* (Souter, J., concurring) at *132. For those litigating the applicability of habeas to other prisons outside the U.S., best practice dictates briefing as many of these factors as possible.

Eroding the World War II era precedents. In adopting a multi-factor functional test, the Court explicitly rejects a formalist reading of *Johnson v. Eisentrager, 339 U.S. at 768, 770-71 (1950),* which denied habeas rights to aliens outside the U.S. *See Boumediene* *68-77 (finding that *Eisentrager* applied a multi-factor test, not formal criteria of citizenship and location); *but see Boumediene* (Scalia, dissenting) at *202. This reasoning by the Court continues a departure from *Eisentrager* begun in *Rasul*. *See 542 U.S. at 475-76; see also id. at 486* (Kennedy, J., concurring in the judgment). Indeed, the World War II era habeas cases seem generally to have fallen from favor, with the Court going out of its way to note that *In re Yamashita, 327 U. S. 1 (1946)* had been sharply criticized by Members of this Court. *Boumediene* at *109. And while the Court finds that it need not revisit *Yamashita* and *Ex parte Quirin, 317 U. S. 1 (1942),* it obliquely implies that revisiting is exactly what those cases need. *Boumediene* at *109-110. The practitioner is therefore cautioned not to rely too heavily on these cases.

Curative measures for Congress? The applicability of the Suspension Clause to the Guantanamo detainees does not necessarily mean that their habeas rights cannot be stripped. The Court recognizes that Congress can strip habeas rights without suspending habeas so long as it establishes an adequate substitute for habeas. *Boumediene* at *84; *see also Swain v. Pressley, 430 U.S. 372 (1977); United States v. Hayman, 342 U. S. 205 (1952).* The doctrine might best be understood as a clear statement rule with an out. Congress can formally suspend the writ only if it does so clearly; it can, however, avoid this clear statement rule and still strip habeas rights if an adequate substitute is provided.

The Courts decision suggests that adequate substitutes in this context are unlikely. Any adequate substitute must give detainees a meaningful chance to challenge the governments evidence and introduce their own evidence, including new evidence, in a forum that can order their release. *See Boumediene* at *96-97, *109-110. And in a phrase that Congress may find less than helpful, the Court warns that more may be required. *Boumediene* at *97. Most important, the Court finds that there is considerable risk of error in any process that . . . is closed and accusatorial, *Boumediene* at *107-108 (quotation omitted), and concludes that because the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore. *Boumediene* at *108. Congress should be forewarned: any significant deviation from habeas probably would not pass muster.

Of course a future Congress wanting to deny habeas rights to suspected enemy combatants without running afoul of *Boumediene* could simply suspend the writ. But there would be political costs and legal uncertainty accompanying such an effort. Politically, invoking the Suspension Clause and eliminating the oldest civil liberty in the Constitution would put Congress in the spotlight. That is of course a central purpose of a clear statement rule: to up the ante for Congress,

making sure it, not the Court, pays the political price for any misstep.

Congress would take that step in the face of constitutional uncertainty. The Suspension Clause permits the suspension of habeas only when in Cases of Rebellion or Invasion the public Safety may require it. Art. I, § 9, cl.2. The Court has never been asked to analyze those preconditions. What exactly qualifies as a Rebellion or Invasion? Does the mere possibility of another attack from al-Qaeda qualify as an invasion? Or does the lack of any active military forces on a field of battle within the U.S. mean that there is no invasion? And who determines whether public safety may require the suspension of habeas: are Congress factual findings entitled to deference, or would the Court independently analyze the threat to public safety? No one knows the answer to these questions. But in light of *Boumediene*, it seems likely they would be analyzed with a view to practical concerns, not formalism. Chief among those practical concerns might well be the fact that the war on al-Qaeda and the Taliban, authorized by the AUMF, is already among the longest wars in American history. *Boumediene* at *83. Suspending the writ of habeas corpus for the duration of that war, or the even broader war on terror, could be seen as a radical and unending alteration of our constitutional order, a world in which the political branches could govern without legal constraint, *Boumediene* at *73, where the considerable risk of error present in any unchecked system would run rampant.

After *Boumediene*. *Boumediene* leaves unanswered two of the most fundamental sets of legal questions in the war on terror. First, who can be detained without charge? *Hamdi* held that a combatant captured on a foreign battlefield could be detained without charge. *Hamdi v. Rumsfeld, 542 U.S. 507 (2004).* But nothing else is certain. Can the government militarily detain a U.S. citizen, seized not on a foreign battlefield but in a civilian setting in the U.S.? *Rumsfeld v. Padilla, 542 U. S. at 455 (2004)* (Stevens, J., dissenting) (lamenting that the Court avoided answering this question of profound importance to the Nation). What about a non-citizen seized from a civilian jail just before a federal criminal trial? *See* Al-Marri v. Pucciarrelli (06-7427) (Fourth Circuit en banc) (pending). What of non-citizens seized in civilian settings outside the U.S.? And outside the battlefield setting, what sort of suspicion (if any) is enough to justify military detention: must the individual be suspected of plotting acts of terror, belonging to a terrorist organization, supporting a terrorist organization, fraternizing with members or supporters? And how long can detention last? *See Boumediene* at *112 (Whether the President has such authority turns on whether the AUMF authorizes and the Constitution permits the indefinite detention of enemy combatants as the Department of Defense defines that term.).

The second set of unanswered questions involve process. How do we tell if a detainee is who the government says he is? Who has the burden of proof, what disclosures or discovery are proper, what evidentiary principles will be applied? Here the Court drops strong hints but will not yet set the rules. The habeas process depends in part on the Executive Branch process: the closer the Executives own process comes to a closed and accusatorial system, the closer the habeas process must come to a criminal trial. *Boumediene* at *103. Moreover, the Court finds that the need for collateral review is most pressing in the Executive detention context, contrasting that need with post-conviction habeas. *Boumediene* at *103. Counsel should consider arguing that this holding means that the Executive detention habeas cases must provide protections greater than those provided by the federal rules applicable to post-conviction habeas. *See generally* Rules Governing Habeas Corpus Cases Under Section 2254; Rules on Motion Attacking Sentence Under Section 2255.

The Court makes clear that, under the Suspension Clause, habeas review cannot occur in a system where there are in effect no limits on the admission of hearsay evidence. *Boumediene* at *105. *Boumediene* thus rejects the governments argument that *Hamdi* permits the consideration of hearsay evidence at enemy combatant habeas hearings, noting that the relevant language in *Hamdi* did not garner a majority of the Court and holding that the plurality had no occasion to define the necessary scope of habeas review, for Suspension Clause purposes, in the context of enemy combatant detentions. *Boumediene* at *105-106. In light of the Courts holding, practitioners should consider arguing that, regardless of the baseline protections against hearsay provided by the Suspension Clause and the Due Process Clause, the Federal Rules of Evidence provide additional protections against the use of hearsay in habeas proceedings. *See* Fed. R. Evid. 1101(e) (explicitly applying to federal habeas proceedings); *see also* Amici Curiae Br. of Professors of

Evidence and Procedure in Al-Marri v. Pucciarrelli (06-7427) (arguing that the Fed. R. Evid. barring hearsay provides protection above constitutional minimum). While the Government has a legitimate interest in protecting sources and methods of intelligence gathering and expects courts to accommodate this interest to the greatest extent possible, [s]ecurity subsists, too, in fidelity to freedoms first principals. *Boumediene* at *126-127. Liberty and security can be reconciled, the Court promises. *Boumediene* at *129. Weaving that reconciliation through the coverlet of procedure will be the work of the next few years.

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Jonathan M. Freiman is a partner at Wiggin and Dana, LLP, where he litigates appellate matters and complex cases, including transnational disputes. Also a Lecturer in Law at Yale Law School, Jonathan co-founded the National Litigation Project (NLP) of the Allard K. Lowenstein International Human Rights Clinic at Yale in 2002, directed the NLP's litigation work in post-9/11 cases, and has served as Senior Fellow in the Orville H. Schell, Jr. Center for International Human Rights at Yale. He has been listed in the last three editions of The Best Lawyers in America for his work as an appellate lawyer and has won numerous litigation awards. In addition to print and broadcast commentary, Jonathan has spoken on legal issues in Europe, Canada and the United States, at venues ranging from the Federalist Society to a United Nations Expert Roundtable. He earned his J.D. in 1998 from Yale Law School.

Chanin on Sole v. Wyner -- Attorney's Fees under § 1988 of the Civil Rights Act

2008 Emerging Issues 2205

Chanin on Sole v. Wyner -- Attorney's Fees under § 1988 of the Civil Rights Act

By James B. Chanin

April 28, 2008

SUMMARY: The U.S. Supreme Court has weighed in on the ever-changing landscape of attorneys fees for lawyers in civil rights matters. *Sole v. Wyner, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)* graphically illustrates the pitfalls facing civil rights attorneys and their clients who achieve only limited success in their lawsuit or fail to reach a final judicial determination of their claim.

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ARTICLE: The U.S. Supreme Court has weighed in on the ever-changing landscape of attorneys fees for lawyers in civil rights matters. *Sole v. Wyner, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)* graphically illustrates the pitfalls facing civil rights attorneys and their clients who achieve only limited success in their lawsuit or fail to reach a final judicial determination of their claim. The opinion is limited by various factors, however, and while this decision does not affect all civil rights attorneys who achieve only partial success on their claims or fail to obtain a final determination or judgment, all attorneys seeking fees under the Civil Rights Act are advised to familiarize themselves with the most recent developments in this important area of the law.

Defining the Prevailing Party. Title *42 U.S.C. Section 1988* states that a court in federal civil rights actions may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs. The fee provision of the Civil Rights Act was passed in 1975 in response to the case of *Alyeska Pipeline Service Co. v. Wilderness Society*, which reaffirmed the American Rule that each party in a lawsuit bears responsibility for their own attorneys fees absent specific statutory authority to the contrary. *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975).* This provision of *42 U.S.C. § 1988* serves the very important purpose of allowing civil rights attorneys to bring cases vindicating civil rights that might not otherwise be economically feasible. The provision has the parallel effect of allowing numerous civil rights plaintiffs with legitimate claims to be able to find capable attorneys to represent them.

See generally Joseph G. Cook & John L. Sobieski, *Civil Rights Actions, Vol. 7 F:14 Intro* (2007).

There have been many court decisions as to what constitutes the prevailing party. Perhaps the most significant is the United States Supreme Court decision in *Hensley et al. v. Eckerhart et al., 461 U.S. 424, 103 S. Ct. 1933; 76 L. Ed. 2d 40 (1983).* The *Hensley* Court focused on the extent of the plaintiffs success as the most significant factor in determining not only an attorneys entitlement to fees, but also the amount of fees to which the attorney is entitled. In evaluating the extent of success, the Court determined that the definition of prevailing party should examine whether the plaintiff has succeeded on all or only some of his claims for relief. *Id. at 434*. Another line of inquiry proffered by the Court is whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. *Id.* This analysis has the court focusing on the significance of the overall relief obtained by the plaintiff in relation to the hours expended on the litigation instead of relying on the more rigid approach based on a determination as to whether the plaintiff prevailed on every contention in their complaint. *Id. at 435*. Under this analysis, however, if a plaintiff does not prevail on a significant portion of their case, those hours are excluded from the fee award. The *Hensley* court emphasized that there is no precise rule or formula for making these determinations and thereby left considerable discretion to the District Court in deciding the key issues of prevailing party, entitlement to fees, and the size of the attorneys fee award.

Sole v. Wyner. In 2007, the Supreme Court again revisited the issue of entitlement to fees under Section 1988 of the Civil Rights Act regarding an attorney who initially obtained a preliminary injunction, but failed to obtain a permanent injunction. *Michael W. Sole, Secretary, Florida Department of Environmental Protection, et al., Petitioners v. T.A. Wyner, et al., 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007).* The plaintiff in the case notified the Florida Department of Environmental Protection that she intended to create a Valentines Day anti-war artwork consisting of nude individuals forming a peace sign. The Florida park rules mandate that patrons wear at least a thong, and if female, some sort of bikini top. On the plaintiffs motion to enjoin the Department from preventing the display, the District Court granted a preliminary injunction, allowing Wyner to hold the event as long as the event was screened off so that people who did not want to see it could also go to the park. Apparently, the participants in the happening did not stay behind the screen and went into the water in the nude. Wyner then moved the court for a permanent injunction since she wanted to hold the event on the following Valentines Day. The court denied the permanent injunction and granted summary judgment to the defendants in large part because of the previous violation of the courts order and the courts conclusion that the bathing suit rule was necessary to protect those members of the public who did not want to see nudity at the park.

The District Court then addressed the issue of attorneys fees and ruled that Wyners attorney was entitled to fees for the work that led to the successful granting of the preliminary injunction. Florida then appealed the ruling and the Eleventh Circuit sided with the lower court and Wyners attorney.

The U.S. Supreme Court reversed the lower courts, holding that Wyner was not a prevailing party and that Wyner was therefore not entitled to attorney fees. Justice Ruth Bader Ginsburg, writing for the court, stated that a plaintiff who secure[es] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her] has [won] a battle but los[t] the war. *Id. at 2196*. However, the courts ruling was very narrow and specifically expressed no view on whether a civil rights attorney who obtained a preliminary injunction could obtain fees in the absence of a final decision. *Id*. This issue remained undecided and lower courts have reached ostensibly contradictory conclusions as to whether an attorney is a prevailing party in such circumstances.

Distinguishing the *Sole* Decision. The Ninth Circuit has ruled that a party is a prevailing party under the Equal Access to Justice Act (EAJA *28 U.S.C. Section 2412 et seq*) when the INS agreed to stay the petitioners deportation order as part of his complaint and petition for habeas corpus. *Carbonell v. Immigration and Naturalization Service et al., 429 F.3d 894 (9th. Cir. 2005).* The award of attorneys fees was allowed even though the Petitioner dismissed his case without prevailing on his habeas corpus petition and his claim of ineffective assistance of counsel. The court reasoned that the stay had materially altered the relationship of the parties and that this alteration was judicially sanctioned. *Id. at 902*. Subsequently, a California District Court awarded attorneys fees when a preliminary injunction was achieved, and the defendants withdrew the challenged Record of Decision and the action was dismissed as moot without a permanent injunction being ordered. *Toxics v. United States Forest Service, 2007 U.S. Dist. LEXIS 78424*

(E.D. California 2007). See also, Californians for Alternatives to Toxics v. Troyer, 2006 U.S. Dist. LEXIS 56203. The distinction between these cases and *Sole v. Wyner, supra,* was there was no final judicial determination adverse to the party seeking fees. However, other jurisdictions outside of the Ninth Circuit have continued to require that a party does not prevail unless it obtains a judgment on the merits or a court ordered consent decree. *See, Lands Council v. Kimbell, 2005 U.S. Dist. LEXIS 43054, as cited in Klamath Siskiyou Wildlands Center, et al. v. Bureau of Land Management, 522 F.Supp.2d 1302, 1308 (D. Ore. 2007).*

Tips for Civil Rights Practitioners. Some courts have limited *Sole v. Wyner* to decisions where there is an adverse determination against the civil rights attorneys case. Others appear to require a judicial determination in favor of the attorney before fees can be awarded. This distinction can be critical when the attorney achieves a partial victory and the opposing party accedes to the lawsuits demands and the case is dismissed without a judicial determination in the plaintiffs favor.

Attorneys are strongly advised to examine their jurisdiction and determine if a final decision in their favor is required for a successful fee application. If such a decision is required, there remains the option of seeking interim fees (*See for example, League for Coastal Protection, et al. v. Dirk Kempthorne, Secretary of the Interior, et al. 2006 U.S. Dist. LEXIS 94530 (2006)),* or achieving some sort of consent decree or final order signed by the judge. Occasionally, opposing counsel will agree to a signed agreement without realizing that it is the absolute prerequisite for a fee award. Depending on the jurisdiction, this might be accomplished by having the interim agreement be part of the final order dismissing the case. *See Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).*

The argument that the case was somehow a catalyst to a desired result as a basis for a fee award has been specifically rejected by the United Stated Supreme Court. *Buckhannon Board and Care Home, Inc. et al., v. West Virginia Department of Health and Human Resources, et al. 532 U.S. 598, 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001).* However, if the plaintiff can return to court to have the settlement enforced, Buckhannon and Sole may be distinguished and the party would then be entitled to attorneys fees. *See Carbonell v. INS, supra,* at *429 F.3d 894, 901.*

In all circumstances, a final determination in the plaintiffs favor or a specific agreement stating that the plaintiff is a prevailing party and the attorney is entitled to reasonable attorneys fees is always desirable and should be sought whenever possible.

ABOUT THE AUTHOR(S):

James B. Chanin has been involved in police related litigation for nearly 30 years. Prior to that time, he helped write the Police Review Commission Ordinance in Berkeley, California. He served on the Commission for over five years and was twice elected chairman of the Commission. He is member of the California Bar and is admitted to practice in a number of Federal Courts.

While Mr. Chanin has represented a number of police officers in labor matters as well as race and sex discrimination cases, a significant part of his practice involves representing victims of police misconduct. He has litigated all or part of 12 wrongful death cases involving police officer shootings and has participated in a large number of other high profile police excessive force cases in Northern California. Mr. Chanin, along with co-counsel John Burris, settled a class action police case involving the "Riders" against the City of Oakland for $10.9 million. Mr. Chanin has also represented prisoners in shooting cases throughout California. Mr. Chanin graduated from the University of San Francisco Law School. He also has a BA, and MA and a Ph.C from the University of California at Berkeley.

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James B. Chanin on Wallace v. Kato, 127 S.Ct. 1091.

2008 Emerging Issues 1501

James B. Chanin on Wallace v. Kato, 127 S.Ct. 1091.

By James B. Chanin

December 14, 2007

SUMMARY: *James B. Chanin on Wallace v. Kato, 127 S.Ct. 1091,166 L.Ed.2d 973, 2007 U.S. LEXIS 2650 (2007),* which dramatically revised the statute of limitations regarding false imprisonment claims under *42 U.S.C. Section 1983.* The opinion overruled much of the existing precedent regarding this issue and created a whole series of complicated and dangerous consequences for civil rights attorneys and those they represent.

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ARTICLE: *Wallace v. Kato, 127 S.Ct. 1091, 166 L.Ed.2d 973, 2007 U.S. LEXIS 2650 (2007),* dramatically revised the statute of limitations regarding false imprisonment claims under *42 U.S.C. Section 1983*. The opinion, authored by Scalia and published on February 21, 2007, overruled much of the existing precedent regarding this issue and created a whole series of complicated and dangerous consequences for civil rights attorneys and those they represent.

However, depending on the state law governing this issue, the impact of this case may not be as far-reaching as appears on its face.

What the case said. The petitioner was arrested for murder in Chicago, Illinois in January 1994. He was tried and convicted but eventually was granted a new trial on appeal. See, *People v. Wallace, 299 Ill.App.3d 9, 701 N.E.2d 87 (1998)* and *People v. Wallace, 324 Ill.App.3d 1139, 805 N.E.2d 756 (2001).* All charges against the petitioner were dismissed on April 10, 2002.

On April 2, 2003, petitioner filed a section 1983 suit against the City of Chicago and several members of the Chicago Police Department. The defendants moved for summary judgment claiming that the lawsuit was barred by the statute of limitations. The petitioner claimed existing precedent, including *Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364 (1994),* dictated that a false arrest cause of action could not accrue until the charges against him were dropped.

The *Wallace* court concluded that the statute of limitations for petitioner's false arrest claim did not begin to run when the State dismissed all charges against him. Rather, the statute began to run when the petitioner was bound over for trial. The operable statute of limitations for this case was governed by the state law for personal injury cases. See,

Owens v. Okure, 488 U.S. 235, 109 S.Ct. 573 (1989). That statute was two years under Illinois law. Since more than two years had passed since the petitioner was bound over for trial, his false arrest claim was thus barred by the statute of limitations.

The significance of the case. Many civil right attorneys had traditionally assumed that a civil rights claim for false arrest could not proceed unless the underlying criminal charges had been fully resolved in the claimant's favor. This practice appeared to be validated by cases such as *Schilling v. White, 58 F.3d 1081 (6th Cir. 1995),* which concluded that "proof of the illegality of a conviction is a necessary element of the 1983 cause of action. Unless that conviction has been reversed, there has been no injury of constitutional proportions, and thus no 1983 suit may exist." *Id. at 1086.* See also, *Shamaeizadeh v. Cunigan, 182 F.3d 391 (6th Cir. 1999),* [appears to be overruled by *Wallace*].

Now, in one sweeping action, false arrest claimants will be forced to file a lawsuit within a statute that commences possibly as early as the time of the arrest itself. Clients with pending criminal charges could be forced to pursue civil actions at the same time their criminal charges are pending. This would create the potential for plea bargains conditioned on the dismissal of the civil case. Prosecutors and police could press for more severe sentences for those who dare to sue the police. And perhaps most significantly, criminal defendants could be forced to waive their Fifth Amendment privilege in order to pursue their civil action.

The *Wallace* Court did point out that the civil lawsuit could be stayed at the discretion of the district court, and this would obviate the need for the claimant to waive his Fifth Amendment privilege. However, there was no mandate that federal judges must stay cases under these circumstances. If the case is not stayed, any Fifth Amendment invocation would be held against the petitioner since (unlike criminal cases) a party's invocation of the Fifth Amendment testimonial privilege in a civil case is admissible and adverse inferences can be drawn from the party's invocation of the privilege. See, e.g., *SEC v. Colello, 139 F.3d 674, 677*--678 (9th Cir. 1998).

Exceptions to the Wallace rule and some solutions for the civil rights practitioner. The U.S. Supreme Court's provision that the statute of limitations in a 1983 suit is governed by the underlying state law will provide some civil rights attorneys with a means to ameliorate the impact of the *Wallace* decision in some significant cases. For example, in California, the tolling provisions regarding minors (California *Code of Civil Procedure Section 352(a)*) provides that the statute of limitations for minors likely will not begin to run until the minor reaches 18, regardless of the *Wallace* decision.

More significantly, California Government Code Section 945.3, which prohibits any person from bringing a civil action for money damages against police officers or public entities while the criminal charges are pending before a superior court, likely relieves California civil rights attorneys from having to either waive their clients' 5th Amendment rights or dismiss their lawsuit.

Prisoners incarcerated for sentences less than life will also appear to have their statute extended pursuant to California *Code of Civil Procedure 352.1* during the time they are in jail.

In Michigan, a recent court decision concluded that legal confusion surrounding the *Wallace* decision justified allowing the plaintiff to proceed with his civil right case. *Kucharski v. Leveille, 2007 U.S. Dist. LEXIS 89320 (E.D. Mich. 2007). Kucharski* concerned an alleged illegal search by police that occurred on March 24, 2001. The claimants were arrested and their case was not dismissed until September 30, 2004. Under Michigan law at the time, they could not have brought their case until the charges were dismissed. See, *Shamaeizadeh v. Cunigan, 182 F.3d 391, 396 (6th Cir. 1999).* However, under the *Wallace* decision, the claimants case was time barred. Thus, there was no time when the claimants could have brought their case.

The *Kucharski* court concluded that the understandable confusion of the law justified the late filing and allowed the case to proceed, thereby reconsidering its earlier ruling that the action violated the statute of limitations. See, *Kucharski v. Leveille, 478 F. Supp.2d 928 (E.D. Mich. 2007).*

Tips for civil right practitioners in the Post-Wallace era. State law tolling provisions and "no-win" situations, such as those faced by the Kucharski's, may provide false arrest civil rights claimants with the opportunity to have their criminal case resolved before filing their lawsuit. However, practitioners are strongly advised to examine the state law carefully in order to see if there is any potential for avoiding filing a civil lawsuit while criminal charges are pending. For example, in California, while there are grounds to delay the filing of a lawsuit in Federal Court, a governmental tort claim must be filed within six months of the incident in order to preserve the claimant's rights under state law. See, California Government Code Section 911.2.

Another possible solution is to accelerate the criminal process in order to complete the criminal proceedings prior to the expiration of the statute of limitations in the civil case. In California, for example, criminal defendants can refuse to "waive time" and force their case to trial in as little as 60 days in felony cases, or in 30 days for defendants in custody facing misdemeanor charges. California Penal Code Section 1382. This tactic is also beneficial since it provides the civil rights practitioner with valuable discovery prior to the commencement of the civil rights lawsuit. Unfortunately, accelerating the criminal process often runs counter to the interests of the client in the criminal process since there may not be enough time to get needed discovery for the criminal case. Also, many criminal lawyers often believe that protracted criminal proceedings create better conditions for a plea bargain or other resolution that can avoid substantial jail time.

The *Wallace* court also left open the possibility that civil rights litigants could commence a malicious prosecution case after the underlying criminal case is resolved in their favor. However, there is no assurance that the Court will not rule in the future that such cases must be brought in the same manner as false arrest cases. Furthermore, malicious prosecution cases under federal law require an additional element that the malicious prosecution action allege a violation of a specific constitutional right. See, *Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004).*

Civil rights practitioners are strongly advised to explain all the consequences of the *Wallace* decision to clients with pending criminal charges and, if necessary, to get their informed consent either to proceed with a civil case while criminal charges remain unresolved, or to abandon the idea of bringing a civil case completely. In any event, it is imperative to get such clients' written acknowledgment that all the consequences of proceeding with a civil rights case have been explained to them.

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ABOUT THE AUTHOR(S):

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