

Supreme Court Roundup

The 2003-2004 term brought significant challenges to federal powers — Charles F. Williams

There was much going on as the Court closed out its term in June. Among the more significant rulings was *Tennessee v. Lane*, No. 02-1667, in which the Court upheld Congress's authority to subject states to damage suits for violations of Title II of the Americans with Disabilities Act (ADA). Three other cases important to the administration's "War on Terror" were also widely watched: *Hamdi v. Rumsfeld*, No. 03-6696, *Rumsfeld v. Padilla et al.*, No. 03-1027, *Rasul et al. v. Bush et al.*, No. 03-334. In these cases, the Court ruled that citizens and non-citizens alike may challenge their designation as "enemy combatants." Yet one of the most important opinions issued by the Court all term was one of its least expected, *Blakely v. Washington*, No. 02-1632, which called into question the constitutionality of the Federal Sentencing Guidelines.

Federalism

Tennessee v. Lane was brought by George Lane and other paraplegics who use wheelchairs and are unable to climb stairs. They claimed that they were denied access to the Tennessee state court system in violation of Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity."

Lane's predicament made news when he appeared in court to face criminal charges and had to crawl up the steps of a county courthouse that lacked an elevator. When he returned to the courthouse at a later date for another hearing, he refused the options of either again crawling up the steps or being carried to the courtroom by officers. He was then arrested and jailed for failure to appear in the courtroom.

Lane and his co-plaintiffs sued for money damages under the ADA. They argued that Title II requires states to provide reasonable accommodations, or "modifications," to allow otherwise eligible persons to participate fully in public services, programs, or activities. The plaintiffs

contended that an elevator was exactly the kind of reasonable modification the state had a duty to provide.

Tennessee responded that it was immune from this suit under the Eleventh Amendment to the Constitution, a provision that has been interpreted as barring suits from being brought in federal court against state governmental entities unless either the state consents to being sued or Congress validly abrogates the states' immunity. Lane countered that in adopting Title II, Congress did clearly state its intention to abrogate the states' immunity when it provided in the law itself that "A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in federal or state court of competent jurisdiction for a violation of this chapter." 42 U.S.C. § 12202.

The state, however, cited an earlier Supreme Court case, *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), in which the Court ruled by a 5-4 vote that even though Congress sought to abrogate the states' immunity from suit under the employment provisions of Title I of the ADA, it lacked the power to do so. Likewise, Tennessee argued, Congress

also lacked the power to abrogate states' immunity under Title II despite its desire to do so. On appeal, the Sixth Circuit ruled for Lane.

Because the resolution of this argument could affect the balance of power between the state and federal governments, the Supreme Court agreed to review the case. In an opinion released May 17, 2004, the justices voted 5-4 that Congress did have the power to abrogate states' immunity from suit under Title II. For the source of that power, the Court pointed to Section 5 of the Fourteenth Amendment, which gives Congress "the power to enforce, by appropriate legislation, the provisions of" the rest of the Fourteenth Amendment. In the majority were Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer. Justices Rehnquist, Kennedy, Scalia and Thomas opposed the decision.

Why did the Court find that Congress had the power to abrogate state immunity in this case but that it lacked that power in *Garrett*? Numerous commentators have noted that Justice Sandra Day O'Connor switched her vote between the cases, and that the record of constitutional violations by the states looked stronger in *Lane* than in *Garrett* because the Court was willing to take into account more evidence in *Lane* than it did in *Garrett*. Whereas the *Garrett* Court only looked at the actions of state officials, the *Lane* Court also considered the actions of municipal and county officials. And whereas the *Garrett* Court limited its analysis to discrimination in the workplace, the *Lane* Court took note of a wide "pattern of disability discrimination" that included "unequal treatment in a wide range of public services, programs and activities."

Writing in the ABA's *Preview of*



Physically disabled demonstrators crawl on their hands and knees across the plaza of the U.S. Supreme Court to the courthouse steps to raise attention to the *Tennessee v. Lane* case that the court heard in Washington on Tuesday, January 13, 2004. Disabled people should not have to ask police to carry them up the stairs of a public courthouse when there is no other way to get there, a lawyer for George Lane, a disabled man, argued at the Supreme Court.

United States Supreme Court Cases, Hastings College of Law Professor Vikram Amar also suggested that:

Perhaps most important in explaining or trying to reconcile the outcomes in *Garrett* and *Lane* is the fact that *Lane* involved an especially important setting—access to political institutions and, in particular, the courts. Of course, it is important for historically excluded groups such as the disabled to have access to employment (the setting in *Garrett*). Nevertheless, the Court has repeatedly shown a greater concern in response to lack of access by out-groups to political institutions such as legislatures, juries, and courts.¹

Enemy Combatants

In April the Court heard arguments in three “War on Terror” cases. Two were brought by American citizens to challenge the government’s right to hold them indefinitely as “enemy combatants.” A third was brought by foreign nationals who were captured abroad and are now imprisoned at Guantanamo Bay, Cuba. All three cases were decided on June 28, 2004, the very last day of the Court’s term.

The Taliban Fighter

The man at the heart of *Hamdi v. Rumsfeld*, No. 03-6696, was Yaser Esam Hamdi, a United States citizen captured in Afghanistan in late 2001. According to the government, Hamdi was armed with an AK-47 assault rifle and fighting as a member of the Taliban army when his unit surrendered.

The U.S. military determined that

Hamdi was an enemy combatant—that is, that he “was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.”

The government claimed that Hamdi identified himself as a Saudi citizen. In January of 2002, he was transferred to Guantanamo Bay, Cuba, where foreign nationals captured in Afghanistan are being held. At Guantanamo, the military for the first time obtained records indicating that although Hamdi was a Saudi national, he had been born in Baton Rouge, Louisiana, and therefore was a United States citizen. Thus in April 2002, the military transferred Hamdi from Guantanamo Bay to the U.S. Naval Brig in Norfolk, Virginia.

On January 8, 2003, the U.S. Court of Appeals for the Fourth Circuit ruled that Hamdi was properly detained pursuant to the war power entrusted to the executive

by the Constitution and that he could not contest the factual basis for his detention in court.

The Supreme Court granted his petition for *certiorari*. At oral arguments, Hamdi's attorney argued that his client deserved a hearing at which he could try to show that he never was an enemy combatant. His attorney told the Court that "we have never authorized detention of a citizen in this country without giving him an opportunity to be heard, to say, hey, I am an innocent person."

The government's attorney countered that "it has been ... long established that the government has the authority to hold both unlawful enemy combatants and lawful prisoners of war captured on the battlefield in order to prevent them from returning to the battle. ... No principle of law or logic requires the United States to release an individual from detention so that he can rejoin the battle against the United States."

The Court ruled that although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention.

The "Dirty Bomb" Suspect

Another American being detained indefinitely was the alleged enemy combatant in *Rumsfeld v. Padilla et al.*, No. 03-1027. Unlike Hamdi, Jose Padilla—the "dirty bomb" suspect whom the government believes was plotting to detonate a radioactive bomb in the United States—was arrested in America.

On May 8, 2002, Padilla flew from Pakistan to Chicago, where he was arrested under a warrant issued in connection with the September 11 attacks. The government cited intelligence "that Padilla is closely associated with al Qaeda and came to the United States to advance the conduct of terrorist operations on al Qaeda's behalf."

The Second Circuit Court of Appeals ruled that the president lacks inherent constitutional authority as commander-in-chief to detain American citizens on

American soil "outside a zone of combat." The Supreme Court granted the government's petition to review that decision.

The government argued that the president does have such authority pursuant to Congress's post-September 11 "Authorization for Use of Military Force," Pub. L. No. 107-40, 115 Stat. 224. That law authorizes the president to take "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and "to take action to deter and prevent acts of international terrorism against the United States."

Representing Padilla during oral arguments, however, Stanford Law Professor Jennifer Martinez countered,

There is simply no indication that when Congress passed the authorization for use of military force which enabled us to deploy our troops overseas, the Congress also thought that they were authorizing the indefinite military detention without trial of American citizens on American soil. There was no debate of such a dramatic departure from our constitutional traditions.

The Supreme Court ruled that the Second Circuit lacked jurisdiction to rule in this case because, while Padilla named Secretary of Defense Donald H. Rumsfeld as the respondent to his *habeas corpus* petition, the proper respondent was actually Padilla's immediate custodian, who is the commander of the Navy brig in South Carolina. Because the Court answered the jurisdictional question in the negative, it did not reach the substantive question of whether the president had the authority to detain Padilla militarily.

Guantanamo Bay

Finally, the prisoners in *Rasul et al. v. Bush et al.* No. 03-343, claimed they were wrongly imprisoned as well. The specific legal question they posed for the Court, however, was whether United States courts even have jurisdiction to consider suits from foreign nationals captured abroad and incarcerated at the Guantanamo Bay

Naval Base in Cuba.

The government said in its brief that the military was currently detaining about 650 aliens at Guantanamo Bay. The government claims that the Guantanamo Bay prison contains "direct associates of Osama Bin Laden; al Qaeda operatives with specialized training; bodyguards, recruiters, and intelligence operatives for al Qaeda; and Taliban leaders."

Guantanamo Naval Base is technically on Cuban soil and under Cuban sovereignty. The base is operated by the U.S. military pursuant to a 1903 lease agreement with Cuba. From the government's perspective, there were a number of benefits to imprisoning captured foreign nationals at Guantanamo Bay rather than in a U.S. prison. Chief among them was that the lower courts had ruled that under the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), "if an alien is outside the country's sovereign territory, then ... the alien is not permitted access to the courts of the United States to enforce the Constitution."

The Supreme Court decided this case by ruling that United States courts do have jurisdiction to consider the petitioner's challenges to the legality of their detention. The Court noted that the prisoners have been detained for more than two years in territory over which the United States exercises exclusive jurisdiction and control, and it reasoned that *habeas corpus* acts upon the person holding the prisoner, not the prisoner himself, so that the court acts within its jurisdiction if the custodian can be reached by service of process.

Sentencing Guidelines

Pandemonium ensued this summer after Justice Scalia wrote for a 5-4 Court in *Blakely v. Washington* that a defendant's sentence under Washington State's sentencing guidelines violated his Sixth Amendment right to trial by jury. The constitutional violation occurred, Justice Scalia wrote, because a judge rather than a jury had found the "aggravating factor" (deliberate cruelty) that increased Ralph Howard Blakely Jr.'s sentence for the kidnapping of his estranged wife. Justices Scalia, Stevens, Souter, Thomas and Ginsburg were in

Teaching Activities

Michelle Parrini

ACCESS TO THE COURTS

1 Provide students with background about the Americans with Disabilities Act (ADA). Title II of the ADA stipulates, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.”

2 Discuss the facts in the case mentioned on page 408, *Tennessee v. Lane*, No. 02-1677 (2004).

3 Explain that the Eleventh Amendment generally gives states immunity from lawsuits in federal courts. When considering racial discrimination cases during the Civil Rights era, however, the Court decided that states could be sued for racial discrimination as a way to ensure equal rights and access to a variety of public services for persons of color.

4 Review the provisions of the Fourteenth Amendment, emphasizing section five.

5 Ask students to pair off and research and prepare reports about the level of accessibility of courthouses in states across the country. Each pair should research a different state. Make sure one pair covers the courthouses in your state.

6 After students present their reports, discuss the Court ruling. Remind them that Justice Stevens wrote in the Court opinion that “many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities. A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities...”

7 Ask students if they agree with Justice Stevens that the states have been excluding disabled people from “courthouses and court proceedings?” Do they believe that the Court should consider the extent to which disabled persons have been excluded from courthouses when determining if Congress has the constitutional authority to enforce the right of access to the courts against the states? Ask students to support their positions.

8 Activity Extension: Have students compare the Court’s decision in *Board of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), with its decision in *Tennessee v. Lane*, comparing the arguments offered by the justices in each decision. In *Garrett*, the Court ruled that under the Eleventh Amendment people can only sue states in federal court under the Americans with Disabilities Act if a pattern of discrimination exists and the congressional remedy is “proportional to the targeted violation.” (For more information see the OYEZ website: www.oyez.org/oyez/frontpage.) Ask students, what accounts for the different outcomes in the two cases?

ENEMY COMBATANTS

1 Ask students to research one of these three cases in small groups. Make sure each case is covered.

- *Rasul et al. v. Bush et al.*, No. 03-6696 (2004)
- *Hamdi v. Rumsfeld*, No. 03-6696 (2004)
- *Rumsfeld v. Padilla*, No. 03-1027 (2004)

Students should identify

- The facts in the case
- The legal questions considered in the case
- The legal arguments offered by the petitioner
- The legal arguments offered by the respondent
- The main points of the U.S. Supreme Court ruling
- The rights the alleged enemy combatants will now have because of the Court ruling
- The legal questions that remain unanswered by the ruling.

Students should also attempt to define particular terms that arise in these cases, such as

- writ of *habeas corpus*
- neutral decision-maker
- enemy combatant or unlawful combatant
- separation of powers
- checks and balances
- incommunicado and indefinite detention
- military tribunal

2 After students present their reports, brainstorm the practical considerations arising from the questions that remain unanswered in the rulings. Ask students how much our rights can be curtailed in the fight against terrorism. Do students agree with the Court’s decisions in these three cases? Why or why not? How much deference should have been given to the president by the Court in its decisions?

3 Conclude by noting that in his *Hamdi* dissent, Justice Scalia wrote “If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.” Conclude by asking students what they think Justice Scalia meant by “openly and democratically.” Do they agree or disagree with his position?

4 Activity Extension: Ask students to compare for themselves the Non-Detention Act of 1971 (18 U.S.C. § 4001(a)) with the Authorization for Use of Military Force, (S.J. Resolution 23), a congressional resolution of September 18, 2001. Do they think that the September 18, 2001, resolution meets the requirements of the Non-Detention Act? Why or why not?

MERIT BRIEF

1 Ask students to write an abbreviated merit brief of no more than four pages about the consolidated Sixth Amendment cases *United States v. Booker*, No. 04-104 and *United States v. Fanfan*, No. 04-105. In these cases, the Court will decide a number of questions raised about federal sentencing guidelines by its *Blakely* decision. (For more information, see the OYEZ website: www.oyez.org/oyez/frontpage). Oral arguments before the U.S. Supreme Court are expected on October 4, 2004.

2 Merit briefs focus on the proper resolution of the questions of law the Court has agreed to consider, and fashion legal arguments based on precedent and logic. To prepare to write their briefs, students should research the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, No. 02-1632. In *Apprendi* the Court ruled that juries rather than judges must consider facts other than a prior conviction to increase a statutory maximum sentence for a crime. (For more information on *Apprendi*, see the OYEZ website. Please note: Merit briefs for *Blakely v. Washington* may be found on the ABA Division for Public Education's Preview of U.S. Supreme Court Cases website: w3.abanet.org/publiced/preview/home.html. Have them identify

- The questions of law in the cases
- The main argument of the petitioner and respondent in the cases
- The main points of the Court's rulings
- The main points of the dissenters in the cases.

3 Next, ask students to research *Booker* and *Fanfan*. They should identify

- The facts of the consolidated case
- The questions of law to be decided by the Court.

4 Have half of the class write a brief presenting the petitioner's argument and have the other half of the class write a merit brief presenting the respondent's argument.

5 Students should address only *one* question of law in their briefs and draw upon their research on the reasoning offered by the Court in its majority and dissenting opinions in *Apprendi* and *Blakely*.

6 Note the following about the briefs:

- The first paragraph should present the question of law that is being presented to the Court for its decision, written so as to call for a "yes" or "no" answer.
- The second paragraph should explain the facts of the case, including the criminal activity involved.
- The third paragraph should describe the decisions of the lower courts.
- The fourth paragraph should clearly summarize in outline format the writer's position and arguments on the points of law.
- The remaining portion of the brief should argue the student's position on the point of law, making reference to legal precedent by citing previous cases and describing how the precedents established by previous cases apply to this new scenario.
- Student work should demonstrate logical argumentation.

7 After students complete their briefs, hold a discussion about the arguments made by the "petitioners" and the "respondents." Ask students as a class to make a reasoned prediction about the Court's decision in the case.

8 Once the Court releases its ruling, compare the class prediction with the Court's actual ruling. Compare arguments made by students in their briefs with arguments made by the justices in their opinions.

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the majority. The four dissenting judges were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

Washington State's guidelines are similar to the Federal Sentencing Guidelines as well as the guidelines of perhaps a dozen other states that also permit a judge to find the facts that require him or her to lengthen ("enhance") a defendant's sentence. Thus the majority's ruling in *Blakely* could affect thousands of criminal cases. In dissent, Justice O'Connor concluded that the practical consequences of the majority opinion would be "disastrous."

Did the Court mean to call into question all of these sentencing schemes and

all of these cases? Since the Court didn't say (Justice Scalia wrote in a footnote that "The Federal Guidelines are not before us, and we express no opinion on them") no one can be sure—not even the United States government, which filed expedited petitions for *certiorari* in two post-*Blakely* sentencing cases (*United States v. Booker*, No. 03-104 and *United States v. Fanfan*, No. 03-105) in the hopes of obtaining some quick guidance.

In *Booker*, Judge Richard Posner wrote for the 7th U.S. Circuit Court of Appeals that "*Blakely* dooms the [federal] guidelines insofar as they require that sentences be based on facts found by a judge."

In *Fanfan*, a U.S. district court judge in Maine who had intended to sentence a defendant to 15-16 years instead settled for just a 6-year sentence in the belief that *Blakely* forbade him from enhancing the sentence on the basis of facts that were not found by the jury.

The Federal Sentencing Guidelines were established by the U.S. Sentencing Commission, which in turn was created by the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984. The stated purpose of the guidelines is to avoid any unwarranted disparity among offenders with similar characteristics convicted of similar criminal con-

duct, while permitting sufficient judicial “flexibility” to take into account relevant “aggravating” and “mitigating” factors.

On August 2, 2004, the Court granted the United States government’s petitions to review both cases in order to clarify *Blakeley*’s effect on the Federal Sentencing Guidelines. It ordered expedited briefing so that oral arguments could be held on the first day of the new term on October 4.

The government wants to know whether *Blakeley* renders the Federal Sentencing Guidelines unconstitutional insofar as they permit a judge rather than a jury to find the “aggravating factors” that call for an enhanced sentence. If the Court concludes that *Blakeley* does affect those guidelines, the government would also like to know whether the guidelines are altogether unconstitutional, or whether courts can respond to the Supreme Court’s decision by simply discarding (“severing”) the guidelines’ provisions regarding when a defendant’s sentence should be lengthened beyond the standard range for the offense that was found by the jury or admitted by a guilty plea.

The New Term

A number of other new cases bear watching. In *Roper v. Simmons*, No. 03-633, the Court will explore whether imposing the death penalty on a person who commits a murder at age 17 is “cruel and unusual” and thus barred by the Eighth Amendment. And a trio of cases pose important questions for immigrants: Is a person’s conviction of driving under the influence and causing serious bodily injury, a “crime of violence” that renders the person deportable under the immigration laws as an “aggravated felon” (*Leocal v. Ashcroft*, No. 03-583)? Can the attorney general deport an alien to a country without obtaining that country’s acceptance of the alien prior to removal (*Jama v. INS*, No. 03-674)? And when must the government release an arriving alien who was apprehended at the border of the United States, denied admission, and ordered removed from the United States (*Clark v. Martinez*, No. 03-378, and *Benitez v. Rozos*, No. 03-7434)?

Finally, in a presidential election year that comes on the heels of so many 5-4 decisions, the justices are likely to

find themselves being scrutinized for any signs of wear and tear. When the new term opens, Chief Justice Rehnquist will have just turned 84, and it will have been more than 10 years since the newest justice—Justice Breyer—was nominated by President Clinton. 🌐

Note

1. Amar, “Federalism in the 2003 Term—Revisiting Some Old Battles and Setting Up Some New Ones,” 8 *Preview* 486, 488 (2004).

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