

Mass Dissent

Massachusetts Chapter

National Lawyers Guild

14 Beacon St., Boston, MA 02108

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BOARD MEETING

September 16, 6:00pm

14 Beacon St., 1st Fl.
Boston

The Supreme Court Issue

September is traditionally our Supreme Court issue, where we try to look at the Court's past term from a Guild perspective. Each new term brings mostly expected results, typically (in recent years) depressing, together with some happy surprises. This term was no exception, with the Court generally maintaining its right-of-center majority but handing down welcome decisions on, for instance, the Guantanamo detainees' right to challenge their detention in federal court and the death penalty in one case (*see Kennedy v. Louisiana*, page 8.) But *see also* page 9, where Jessie Hahn writes on another important death penalty case, *Medellin v. Texas*, where the Court decided that a Mexican citizen on Texas's death row was not entitled to a new hearing despite an international judgment; and page 7, where Laura Alfring writes on *Baze v. Rees*, where the Court upheld lethal injection as practiced against an 8th Amendment challenge.

While this was the Roberts Court's third term, Justice Kennedy was, once again, often the Court's defining vote, and while the Chief Justice was in the majority 90 percent of the time (tops on the Court), the conservative coalition (we cannot yet call it Roberts's conservative coalition) lost important cases, includ-

ing two of the four referred to directly above. Justice Kennedy, who, remarkably, voted with the majority on every 5-to-4 decision last term (24 cases), this year found himself with the minority in those cases four times and dissented a total of ten times. Justice Kennedy was, however, in the majority on arguably the Court's two most important decisions, *Boumediene*, where he wrote for the Court, and *Heller v. Washington D.C.*, where he was, once again, the swing vote. Craig Yankes writes in this issue about *Heller*, likely this term's decision the Court will be most remembered for and, as have other commentators, he finds the majority's decision has aspects potentially pleasing to both conservatives and liberals, while it also leaves many questions to be resolved in future decision.

The Court, of course, remains sharply divided ideologically on the most important cases (*see* Justice Scalia's extraordinary warning that the Guantanamo ruling "will almost certainly cause more Americans to be killed"). But (thankfully) the right is not firmly in control, and (hopefully) the next president appointing Supreme Court justices will not be John McCain, who does indeed seem a true believer in a conservative judiciary.

- David Kelston -

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Join a Guild Committee

Street Law Clinic Project: The Street Law Clinic project provides workshops for Massachusetts organizations that address legal needs of various communities. Legal education workshops on 4th Amendment Rights (Stop & Search), Landlord/Tenant Disputes, Workers' Rights, Civil Disobedience Defense, Bankruptcy Law, and Immigration Law are held at community organizations, youth centers, labor unions, shelters, and pre-release centers. If you are a Guild attorney, law student, or legal worker interested in leading a workshop, please contact the project at 617-723-4330 or nlgmass-slc@igc.org.

Lawyer Referral Service Panel (LRS): Members of the panel provide legal services at reasonable rates. Referral Service Administrative/Oversight Committee members: Neil Burns, Neil Berman, Joshua Goldstein, Jeremy Robin, and Azizah Yasin. For more information, contact the Referral Service Coordinator at 617-227-7008 or nlgmass@igc.org.

"No to MBTA Searches": Works in coalition with the American Arab Anti-Discrimination Committee, American Friends Service Committee and American Civil Liberties Union of Massachusetts to stop searches on the MBTA. If you would like to be involved in the campaign, either on its political or legal end, please call the office at 617-227-7335.

Independent Civilian Review Board: In coalition with the American Friends Service Committee and Greater Boston Civil Rights Coalition, the NLG has been pushing for the creation of an independent civilian board to review complaints against Boston police officers. To get involved in the campaign, please contact the office at 617-227-7335.

NLG National Immigration Project: Works to defend and extend the human and civil rights of all immigrants, both documented and undocumented. The Committee works in coalition with community groups to organize support for immigrant rights in the face of right-wing political attacks. Ongoing projects include asylum advocacy and the rights of immigrant minors. For more information contact the NLG National Immigration Project at 617-227-9727.

NLG Military Law Task Force: Provides legal advice and assistance to those in the military and to others, especially members of the GIRights Hotline, who are counseling military personnel on their rights. It also provides legal support and helps to find local legal referrals when needed. The MLTF and the Hotline exchange many questions and information through their listserves. Calls to the GIRights Hotline from phones in New England are handled from the AFSC office in Cambridge. To get involved, please contact Neil Berman (njberman2@juno.com) or Marguerite Helen (mugsm@mindspring.com).

COALITIONS:

Jobs with Justice, a coalition-based organization addressing workers' rights. The NLG is a member of Jobs with Justice; any interested Guild members can attend meetings & events.

GUILD NEWS

NLG HAPPY HOUR

The NLG Massachusetts Chapter's Happy Hour - for Guild members and non-Guild members - takes place on the **2nd Wednesday of every month, 5:30 - 7:30pm, at Felt Billiards Club** (533 Washington St., Downtown Crossing, next to Paramount). We hope you will join us for the next NLG Happy Hour on **September 10th** - and bring friends!

MEMBERSHIP MEETING

All Guild members are invited to this year's Membership Meeting on **Tuesday, October 7**. We will start at **5:30pm with a cheese & wine reception and continue with the**

meeting at 6:00pm (14 Beacon St., Boston). On the agenda - a discussion of the NLG resolutions and amendments submitted for a vote at the National Convention (info below). We will also hear brief reports on the current political and legal work of the Chapter. Please join us.

NATIONAL CONVENTION

This year's NLG National Convention will be held in Detroit between **Wed., October 15 - Sun., October 19**, at the **Marriott Detroit** (Renaissance Center). To register and for more information, please contact the National Office at 212-679-5100 x.13. Please make your hotel reservation soon to secure a discount rate.

Street Law Clinic Report

The following Guild members conducted clinics for members of Boston area community organizations and agencies:

May 13: *Stop & Search* clinic at Boston Hope Found, by **Myong Joun**; ; *Stop & Search* clinic at Tempo Youth Center, by **David Nathanson** *Tenants' Rights* clinic at Somerville Center for Adult Learning Experience, by **Mark Stern**.

May 15: *Immigration Law* clinic at Boston Early Intervention, by **Liliana Mangiafico**.

May 17: *Immigration Law* clinic at Committee of Refugees from El Salvador, by **Susan Church**.

May 19: *Immigration Law* clinic at the Kennedy Center of Charlestown, by **Halim Morris**.

May 20: *Bankruptcy Law* clinic at City Life/Vida Urbana, by **Neil Berman** and **Deborah Roher**; *Stop & Search* clinic at Somerville Center for Adult Learning Experience, by **Benjamin Falkner**.

May 22: *Stop & Search* clinic at Hyde Square Task Force, by **Bob Cohen**.

June 9: *Immigration Law* clinic at Cape Verde Unido, by **Josh Goldstein**.

June 25: *Bankruptcy Law* clinic at Tempo Youth Center, by **Deborah Roher**.

June 28: *Stop & Search* clinic at ACE-Environmental Justice, by **Carl Williams**.

July 7: *Tenants' Rights* clinic at Crossroads Family Shelter, by **Neil Berman**.

July 22: *Foreclosure & Evictions* clinic at Community Action Agency of Somerville, by law students **Lori Hill** and **Margaret Schroeder**.

August 5: *Tenants' Rights* clinic at the Kennedy Center in Charlestown, by **Neil Berman**.

August 6: *Stop & Search* clinic at the Phillips Brooks Summer Camp (Boston), by **Carl Williams**.

August 18: *Stop & Search* at the Phillips Brooks Summer Camp (Cambridge), by **Carl Williams**.

ARTICLES FOR MASS DISSENT

The October issue of *Mass Dissent* will focus on the rights and lives of Massachusetts prisoners.

If you are interested in submitting an article, essay, analysis, or art work (cartoons, pictures) related to the topic, please e-mail the articles to nlgmass-director@igc.org.

The deadline for articles is September 15th.

Farewell to two NLG Legal Interns

In August, **Charlotte (Charlie) Noss** (Northeastern law student) and **Margaret (Meg) Schroeder** (Boston College law student) completed their work and internships with the Guild.

Charlie had worked as a Street Law Clinic Coordinator since January. She did outstanding work for the SLC expanding the pool of organizations that receive the clinics; creating a new clinic on bankruptcy law; adding a new, Pro-Bono Service element to the clinics; and coordinating updates for written materials for four clinics. In August, Charlie left for Zacatecas, Mexico, where she will stay until November and work with Centro de los Derechos del Migrante. Her job will be to work with migrant Mexican guest workers who have legal claims from their work in the U.S. She will also assist litigation efforts to enforce Mexican labor law.

Meg started her internship with the Guild in May and spent the whole summer working with the NLG Foreclosure and Evictions Project - a new project established in April. (Lori Hill, a Suffolk law student, has been involved in the project as well and will continue through the fall.) Meg's contribution to the project has been immense. Working with the team, she established contacts and built a working network with local organizations that provide services to tenants and

low-income homeowners, lobbied in support of three bills introduced to the state legislature, created a booklet for a new clinic on foreclosure and eviction issues, and organized training sessions on foreclosure and eviction for law students and Guild lawyers.

The Guild is grateful for Charlie's and Meg's contributions, and we wish them success in their future endeavors.



Meg Schroeder (l.) and Charlie Noss (r.) in the the Guild office enjoying a cup of afternoon tea.
Photo by Urszula Masny-Latos

Mass Dissent - an electronic option

A number of Guild members have approached the office with a request to receive **ONLY** an electronic version of *Mass Dissent*. The idea is very appealing as the cost of monthly printing and mailing of the newsletter is quite high and ever growing. (The electronic version would also be more eco-friendly!)

We would like to hear from you and all NLG Massachusetts Chapter members what you think about this idea and what would be your preference.

Please e-mail (nlgmass-director@igc.org) or call (617-227-7335) us and let us know how you would like to receive *Mass Dissent* - as a **printed OR electronic version**.

Foreclosure and Evictions Project Report

by Meg Schroeder

This summer the Guild started a Foreclosures and Evictions project to help our communities fight the problems associated with the foreclosure crisis. Lori Hill and I served as interns for the Guild, and we worked closely with Jeff Feuer and Lee Goldstein to develop an educational program for those affected by the current housing crisis.

When a home is lost to foreclosure it affects more than just the former owner. There are often tenants living in that home left looking for a new place to live, and vacant homes left boarded up drive down the property values of neighboring houses. We focused our efforts on helping tenants who unfortunately have been affected by the foreclosure crisis.

Banks and loan servicers are currently unwilling to continue to accept rent from tenants living in foreclosed properties until they are able to sell the home. This occurs because they are not prepared to be landlords, and because they insist that properties are significantly harder to sell with people living in them. However, many of the homes remain vacant for months or even longer after the tenants are evicted and they become hot spots for other problems, including drugs, fires and theft. Part of our project is aimed at encouraging banks to accept rent from tenants, or at least help tenants receive enough money in a settlement to facilitate a comfortable move to a new residence.

Our efforts will include clinics to advise tenants of their legal rights following the foreclosure of their building, focusing initially on Somerville, which is largely not being helped by other organizations. Trainings of attorneys and students to run the clinics have already begun, and we are on track

to start regular clinics in September.

Also as part of our work in protecting tenants and encouraging banks to accept rent from tenants, we have been working with the Massachusetts Alliance Against Predatory Lending (MAAPL) in their lobbying efforts this summer. They



Blocking of the eviction of a Dorchester family.

Photos by Jonathan McIntosh

were advocating three pieces of legislation that would help alleviate the foreclosure crisis in Massachusetts.

One of the bills is a six month moratorium on foreclosures, the second will create a system of judicial foreclosure in the state, and the third will protect tenants living in foreclosed properties from eviction without cause. Lori and I participated in a lobby day at the State House for the bills, which was an exciting way for the Guild to be involved in their



Eviction blocking in Dorchester.

work. A large group of supporters went from office to office speaking with senators and representatives, encouraging them to support the bills. Although the bills did not make it out of committee before the formal session ended, we

did raise consciousness and made the representatives aware that there is a problem requiring their attention. There are currently Homerule Petitions in the legislature with the same provisions as the three bills for several cities in Massachusetts, including Boston.

We also worked with the organization City Life, a grassroots group that uses community organizing to pressure banks into allowing tenants and former owners to pay rent until the house is sold. When legal avenues are unsuccessful in keeping a former owner or tenant in their home, City Life

will host an eviction blocking in front of the home when the constable arrives to evict. At the most recent eviction blocking, two Guild attorneys, Neil Berman and Lee Goldstein, were available for any individuals arrested. Fortunately, no arrests were necessary when Bank of America agreed to negotiate with the homeowner.

Finally, we participated in the Lawyer for a Day program at the Boston Housing Court. It gives law students and attorneys the opportunity to help *pro se* tenants and landlords when they appear in Housing Court. The Guild is hoping to continue to participate in the program and is looking for students and attorneys who would be interested in working in the Court on Thursdays.

The Foreclosures and Evictions Project has been exciting, and we look forward to an active and productive year. If you would like to participate in any of the upcoming clinics or be a part of the Lawyer for a Day program, please contact the SLC at 617-723-4330 or email nlgmass-slc@igc.org.

Meg Schroeder is a 2L student at Boston College School of Law.

District of Columbia et al. v. Heller

by Craig Yankes

“U

ndoubtedly some think that the 2nd Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the 2nd Amendment extinct. We affirm the judgment of the Court of Appeals. *It is so ordered.*” District of Columbia v. Heller. With these words, Justice Scalia concluded an opinion that, regardless of one’s view on private gun ownership, was a historic one: in the 227 years since the Bill of Rights was adopted, this is the first case in which the Supreme Court addressed the central meaning of the 2nd Amendment. No other Amendment or major area of the Constitution has waited so long for such a review.

While the wording of the 2nd Amendment might have been clear to the Founders, today’s usage of the English language renders its text difficult to understand: “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.” At the heart of the uncertainty is the relationship between the phrases “[a] well regulated Militia” and “the People.” Does this mean that the right belongs to “the People” who are part of “a well regulated Militia” or does the “well regulated Militia” describe “the People” who are, and have the right to be, armed? These interpretations, respectively, have given rise to the philosophies of Collective Right and Individual Right. The conflict between these philosophies was not settled by the Court in *United States v. Miller*, 307 U.S. 174, 179 (1939), when it enigmatically stated that “the Militia comprised all males physically capable of acting in concert for the

common defense” (meaning already organized for the common defense or capable of becoming an organized body?) and discussed weapons appropriate for military use. Proponents of both philosophies pointed to *Miller* as backing their view during the nearly 70 years since that decision while the Courts of Appeal held the view that the right was collective.

Into this sea of 2nd Amendment uncertainty came Dick Heller, a District of Columbia special police officer who was refused a permit to register a handgun to be kept at home. He, and several others similarly refused permits, sued the District on the basis that its prohibition of possessing firearms in the home violated the 2nd Amendment. The District Court dismissed the suit, but upon appeal the Court of Appeals for the D.C. Circuit held that the language of the 2nd Amendment, when interpreted in light of contemporary colonial writings, affirmed the right of individuals to own and possess operable firearms for home self-defense. The District appealed and thus the stage was set for a case of first impression before the Supreme Court.

The Court’s Opinion and the two dissents argued three main points: the contemporaneous meaning of the words when the Amendment was written, the degree to which *Miller* set a precedent, and whether the District’s handgun licensing rules were reasonable. Justices Stevens and Breyer each wrote a dissent that essentially formed two parts of a unitary dissent. Both were signed by Justices Stevens, Souter, Ginsburg, and Breyer.

Much of the argument centered on whether the correct interpretive starting point is the preamble (“A well regulated Militia, being necessary to the security of a free State”) or the operative phrase (“the right of the People to keep and bear Arms, shall not be infringed”). The dissent championed starting with the pre-

amble due to standard rules of interpretation, which puts the emphasis on the Militia, and thus membership in the Militia. The Court, in describing why the proper starting point is the operative phrase, noted that every other usage of “the People” in the Constitution refers to everyone in the national community and thus it is illogical to subset the 2nd Amendment’s “the People” to only those in the Militia.

The second main argument was the degree to which *Miller* must be followed. The dissent argued *stari decisis*, emphasizing that the decision has been used by “hundreds of judges” and in every relevant Court of Appeals decision prior to 2001. The Court, however, noted that *Miller* did not address the issue of collective right versus individual right, but rather its decision was based on whether the firearm in question, a short-barreled shotgun, had any military value or not, which the *Miller* Court determined it did not. The *Heller* Court separated itself from the collective rights view by distinguishing *Miller* as being about the class of firearm and not the class of person possessing a firearm.

Lastly, the opinions addressed whether the District’s prohibition on possession of handguns in the home was a reasonable restriction. The dissent argued that the prohibition is reasonable in light of the high D.C. crime statistics and a string of cases in which restrictions on where firearms may be carried or discharged have been upheld. The majority analyzed the D.C. prohibition through the lens of the law’s longstanding deference to the right of the individual to self-defense and found that an all-encompassing prohibition against possessing handguns violated the right to self-defense and was thus an excessive restriction on the law-abiding citizen’s 2nd Amendment rights.

What will *Heller* likely lead to?

Continued on page 8

Baze v. Rees

by Laura Alfring

On April 16, 2008, The Supreme Court ended a months-long moratorium on executions around the country by declaring lethal injection, as administered in Kentucky, constitutional.

Twenty seven of the 36 states that have the death penalty require lethal injection as the sole method of carrying out an execution. Lethal injection involves the administration of a three drug cocktail. First, sodium thiopental is injected, which is intended to render the inmate unconscious to prevent him from experiencing the extreme pain and anguish that the second and third drugs cause. The second drug, Pavulon, paralyzes all muscular-skeletal movements, slowly stopping respiration and rendering the inmate completely unable to communicate pain or consciousness. The third drug is potassium chloride, which causes cardiac arrest and would cause intense, searing pain if administered to a conscious person. The determination that this method is not violative of the 8th Amendment hinges narrowly on the first drug being administered properly. As Justice Ginsberg pointed out in her dissent, a warden and a deputy, both lacking any medical training, simply observed the inmate to determine if the inmate appeared unconscious. In Kentucky's only other lethal injection case, the warden could only clearly see the inmate from the waist down.

Petitioners argument was not that lethal injection itself violates the 8th Amendment's prohibition on cruel and unusual punishment. They in fact conceded that when performed properly, the inmate's death is humane. Rather, the petitioners argued that there was a "significant risk" of the first drug being administered improperly, which would result in extreme conscious

pain and suffering. As petitioners pointed out, *23 states have banned the use of a paralyzing agent, like that used in executions, for use in animals because of its high risk of pain.* As Justice Stevens pointed out in his concurrence, "[i]t is unseemly-to say the least-that Kentucky may well kill petitioners using a drug it would not permit to be used on their pets." Petitioners also cited a controversial study published in the British medical journal, *the Lancet*, in which blood was drawn from 49 executed inmates, tested, and the results concluded that "most of the executed inmates had concentrations [of sodium thiopental] that would not be expected to produce a surgical plane of anaesthesia, and 21 (43%) had concentrations consistent with consciousness."

The Court ultimately held that to violate the 8th Amendment, an "execution method must present a 'substantial' or 'objectively intolerable' risk of serious harm." The Court found that petitioners had not met their burden. First, the opinion (written by Justice Roberts, joined by Justices Kennedy and Alito) stated that this procedure is not "intolerable" because the 36 states that have capital punishment, and the federal government, use lethal injection as their preferred method. Acknowledging that petitioners' arguments turn on the administration of the first drug in the three drug cocktail, the Court stated that petitioners have not shown that "the risk of an inadequate dose of the first drug is substantial", and cited the fact that Kentucky requires the person who inserts the IV to have one year of medical training, and, as mentioned before, a warden is present.

Justice Ginsberg wrote a completely logical dissent, pointing out that Kentucky has chosen not to adopt procedures used in many other states which establish that an inmate is indeed unconscious prior to administering the second and

third drugs. Ginsberg proposed remanding to Kentucky with instructions to consider whether the lack of safeguards testing consciousness is cruel and unusual. She pointed out how easy it would be to brush the inmate's eyelashes, call out his name, pinch his arm, or expose him to potent smells to test conscious reaction, as is done in many other states. In fact, the inmate is already attached to an EKG machine, so why not check his blood pressure, which would confirm the drug's presence in the inmate's body at an effective dose to cause unconsciousness. "Use of a blood pressure cuff and EKG, the record shows, is the standard of care in surgery requiring anesthesia."

What does this law mean for the future? Opponents of the death penalty will keep fighting! Justice Stevens wrote in his concurring opinion that the "question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record." He also predicted that this case will "generate debate ...about the justification for the death penalty itself." He pointed out that the second drug, the paralytic agent, serves no therapeutic purpose and the make-up of the three drug cocktail was determined by Department of Correction officials without medical training or expert advice. He also stated, "[n]otably, the Oklahoma medical examiner who devised the protocol has disavowed the use of pancuronium bromide." Stevens also stated that in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court found three purposes for the death penalty: "incapacitation, deterrence, and retribution...." He went on to write, "In the past three decades, however, each of these rationales has been called into question." He included a quote from Justice White, concurring in *Furman v. Georgia*, 408 U.S.

Continued on page 8

Kennedy v. Louisiana

by Anthony Naro

In one of the more controversial cases the Court faced this past term, *Kennedy v. Louisiana* posited the question of whether imposition of the death penalty for rape of a child under the age of 12 violated the Eighth Amendment. The divided 5-4 Court held that Louisiana statute that permitted the death penalty in cases of rape of a child under 12 was unconstitutional, voiding similar statutes in five other states.

Justice Kennedy's opinion began with a recitation of the factual background, using similar heart wrenching and gruesome detail as he used in his *Carhart* decision upholding a ban on partial-birth abortions. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). And just as in *Carhart*, Kennedy's moral position, which followed his factual and procedural background, signaled the Court's ruling: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint."

The Court emphasized that at the time of the opinion only five

other states had laws similar to that of Louisiana and the absence of such laws in the remaining 44 states was not due to a misinterpretation of the Court's past ruling which held that the death penalty was unconstitutional in cases of adult rape, *Coker v. Georgia*, 433 U.S. 584 (1977). Rather, the absence of any such laws or significant trend in enacting statutes providing for the death penalty in cases of child rape was the product of a national consensus on the issue, Justice Kennedy found. Further evidence supporting this finding was the fact that the last person to be sentenced to death for rape of a child was in 1964¹.

Taking the victim's interests into consideration, the Court noted that because the sentencing portion of the case centers on the child victim, that child is forced to relive and repeat the atrocities befallen upon him or her. Further, because the child is needed by the government to advocate for the death penalty of the attacker, that child is essentially forced to make a moral decision as to whether or not capital punishment is appropriate.

Even more compelling, the

Court opined that while capital punishment may deter sexual predators from committing such acts, it may also provide an incentive to commit murder. If the rapist is already going to face the death penalty for the sexual assault, what sense would it be to not kill the victim? Killing the victim would not subject the rapist to any more severe a penalty and may prevent the reporting of the crime itself as well as capture and prosecution. Restricting the imposition of capital punishment to cases in which there is a death provides an incentive to the perpetrator, the Court found, not to murder the victim.

The Court also addressed the issue of an increased potential for wrongful convictions as in cases of child rape, finding that there is a special risk of unreliable testimony from the child witness.

In sum, perhaps because of the sensitivity of the issues and the expected and inflammatory response to the decision, Justice Kennedy took care to produce a decision that, upon careful review, is well-reasoned, logical, and strongly supported by precedent and policy.

Heller

Continued from page 6

Nothing in *Heller* overturns all firearms restrictions and, as with any groundbreaking Supreme Court ruling, it will take many cases for the ultimate boundary between what restrictions are constitutional or not to be established. What *Heller* made clear, however, is that the 2nd Amendment protects not the military, but the rights of individuals, which is (ironically considering the breakdown of the votes) a traditional goal of liberals. In this respect, *Heller* might end up being a case in which both sides of the political spectrum will find some good.

Craig Yankes is a member of the NLG and practices mostly bankruptcy law in MA and NH.

Baze v. Rees

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238 (1972), that the "needless extinction of life with only marginal contributions to any discernible social or public purposes ... would be patently excessive...". Stevens also foreshadowed what the next step is: "The time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits it produces has surely arrived."

(For some interesting reading on the death penalty death row, check out minutesbeforesex.com, a blog written by a death row inmate in Texas.)

Laura Arling is an associate at Adkins, Kelston & Zavez and serves on the NLG Board.

¹ The Court also noted that no federal laws provided for capital punishment in the case of child rape. However, after the opinion was issued, it was discovered that the Uniform Code of Military Justice provides for such a penalty. The state of Louisiana, with support from the Bush Administration, has petitioned the Court to reopen the case for a new hearing, arguing that the Court's decision "rests on an erroneous and materially incomplete assessment of the 'national consensus' concerning capital punishment for child rape. That error undermines the foundation for the Court's decision." The petition is unlikely successful, since the "foundation" of Justice Kennedy's opinion is much broader than petitioners would admit.

Tony Naro is a staff attorney for the New Hampshire Public Defender and an alumni of Suffolk Law School.

Medellin v. Texas: Using the U.S. Federal System to Evade International Treaty Requirements

by Jessie Hahn

In *Medellin v. Texas*, the Supreme Court allowed the State of Texas to defy an order from the International Court of Justice and execute a Mexican national on death row in Texas. The 6-to-3 decision, with only Ginsberg, Breyer and Souter in dissent was, ironically, a rebuke both to the Bush administration and to international law, with the procedurally complicated case turning on issues of consular notification, domestic enforcement of international treaty obligations, and the scope of executive power.

The U.S. and Mexico are both parties to the Vienna Convention on Consular Relations (VCCR), which expressly provides in Article 36 that foreign nationals have the right, upon arrest, to contact their consulate and to have consular officials notified of their detention. Under the VCCR's Optional Protocol, to which the US was a party at the time of Medellin's arrest, the International Court of Justice (ICJ) had compulsory jurisdiction to settle any disputes arising out of the interpretation or application of the VCCR. The US subsequently withdrew from this Optional Protocol.

Jose Medellin was a Mexican national who was arrested in June 1993 for his role in a gang rape and murder of two teenage girls in Houston, Texas. Even though Medellin told his arresting officers that he was a Mexican national, they did not notify the Mexican consulate or advise Medellin of his Art. 36 rights. Medellin confessed to the crime while in custody, and at his trial in 1994 he was convicted and sentenced to death. In 1997 the Texas Court of Criminal Appeals (TCCA) affirmed his con-

viction. The Mexican Consulate first learned of his case in April 1997.

In 1998, Medellin raised the violation of Art. 36 for the first time in his state habeas corpus petition. The lower court denied the Art. 36 claim as procedurally barred because Medellin failed to raise the issue at trial or on appeal. The court further stated that *even if* the Mexican Consulate had been notified of Medellin's pending charges, it would not have made a difference in the outcome of his trial because he had representation. This decision was upheld in 2001 by the TCCA. In 2003, the federal district court denied relief to Medellin's *federal* habeas petition for the same reasons. In May 2004 the Fifth Circuit Court of Appeals affirmed this decision and held that the VCCR did not confer private rights on individuals but rather on the Mexican government—that Art. 36 did not give Medellin the ability to walk into court and assert those rights as part of his defense.

In 2003, the Mexican government initiated proceedings at the ICJ against the US alleging violations of Art. 36 in the cases of 52 Mexican nationals sentenced to death by the US, including Medellin. The 2004 ICJ ruling in this case, known as *Avena*, held that the US failed to meet its obligations under Art. 36 and was required to give "additional review and reconsideration" to the convictions and sentences of these Mexican nationals notwithstanding the procedural bar under Texas state law. The Supreme Court granted certiorari in Medellin's case in 2005 to decide whether the US had to give effect to the ICJ's holding in *Avena*, especially considering the interests of uniform treaty interpretation and judicial comity. Mexico abolished capital

punishment in 2005.

Prior to the oral argument before the Supreme Court, President Bush issued a Presidential Memorandum to the Attorney General in which he ordered Texas to give effect to the *Avena* decision based on the principle of judicial comity. The Bush Administration also submitted an amicus brief to the Supreme Court in the *Medellin* case arguing that while the VCCR does *not* provide judicially enforceable private rights, the President (not the courts) should determine whether the US would comply with an ICJ decision. In this instance, Bush decided the US had a duty to comply in the interest of judicial comity.

The year before, the Supreme Court heard another case, *Sanchez Llamas*, in which the Court agreed with the Fifth Circuit holding that the VCCR creates no privately conferrable rights on the individual. While this decision was not favorable for Medellin, he sought to distinguish his case by arguing that the prior case did not have—as he did—a Presidential Memorandum specifically ordering the enforcement of an ICJ decision in which he was a named petitioner and which was decided in his favor. The Solicitor General urged the Court to overturn the decision by the TCCA and protect the federal government's constitutional power to enter into enforceable treaties without interference from state courts: "a state court should not have the final word on whether the US as a nation abides by its treaty obligations."

The Supreme Court ruled that Bush lacked the authority to compel state courts to comply with the ICJ judgment. The Court further found that the VCCR was not self-executing and could not be binding

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Boumediene v. Bush

by David Kelston

In *Boumediene v. Bush* – a decision heralded by civil libertarians – the Court rebuked both the Bush administration and an all-too-pliant Congress to vindicate federal habeas corpus rights. In the Authorization for Use of Military Force, Congress empowered the President “to use all necessary and appropriate force against those” he determined “planned, authorized, committed, or aided” the 9/11 attacks. Congress later passed the Detainee Treatment Act of 2005 and the Military Commission Act of 2006 (MCA), both in response to federal court decisions and both serving essentially to strip the federal courts of the ability to review the detention of aliens declared to be “enemy combatants.”

In *Boumediene*, the D.C. Court of Appeals concluded that Congress had taken from it, and all federal courts, jurisdiction to consider petitioners’ habeas rights, and thus that it could not reach the issue whether the Defense Department’s tribunals used to determine “enemy combatant” status provided adequate procedures. The Court, with Justice Kennedy writing for a majority including Justices Stevens, Souter, Ginsberg and Breyer, determined that, in particular, parts of MCA were unconstitutional and that petitioners, aliens designated as enemy combatants held for years at Guantanamo without actual charges against them, had habeas rights not barred either because they had been designated enemy combatants or were being held outside the U.S.

The Court began its analysis by determining that the MCA did deny jurisdiction to the federal courts to review the petitioners’

detentions, such that “if the statute is valid, petitioners’ cases must be dismissed,” and that, in fact, it was clearly Congress’ intention to deprive the federal courts of jurisdiction. Thus, the Court reviewed the statute in light of the purpose and reach of the habeas writ, which itself predated the Bill of Rights:

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.

The Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme.

After a rather byzantine historical analysis of the framers’ intentions as to the geographical reach of the writ (e.g., is Guantanamo today more analogous to Scotland or to India in 1779), the Court concluded that the writ protects persons detained at Guantanamo because our government maintains control over Guantanamo such that allowing the government to “contract away” constitutional rights as it might choose would fundamentally undermine the separation of powers and allow the executive and not the judiciary to determine the law.

Having determined that petitioners were entitled to habeas protection and that MCA sec. 7 was unconstitutional, the Court then found that the tribunal protections actually given petitioners by Congress and the administration fell short of what was constitutionally required, since, *inter alia*, the detainees’ “opportunity to question witnesses is likely to be more theoretical than real” (e.g., classified evidence is withheld from the

accused and hearsay is admitted) and a host of other habeas protections are missing (e.g., ability to supplement the factual record, challenge fact findings made by the initial tribunal determining enemy combatant status, and the like).

While the conservative minority (with opinions by the Chief Justice and Justice Scalia) was expectedly heated (“the Majority’s overreaching is particularly egregious,” wrote the chief Justice, while the always temperate Justice Scalia found the Court “[t]oday warps our Constitution”), the *Boumediene* majority announced what should have been an uncontroversial rule of law: the executive will not be able to hold in detention in Guantanamo indefinitely, during an indefinite “war,” foreign citizens, but rather these citizens will have access to the federal courts to challenge the legality of their detention. What is extraordinary, then, is not the opinion, but that our government (absent the courts) would purport (openly and proudly) to suspend fundamental constitutional protections and argue that the courts are closed entirely to those imprisoned. In these too-often dark times, we can occasionally be proud of our courts, and our lawyers, prominently including in this case Boston attorneys from Wilmer/Hale, who represented petitioners.

David Kelston is a partner with Adkins Kelston & Zavez in Boston and serves on the Chapter Board.

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Medellin v. Texas

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on the states unless Congress enacts legislation enforcing it as federal law, which had not occurred.

Specifically, the Court read the Optional Protocol as not mentioning how or whether states must comply with ICJ judgments and found the obligation to comply actually derived from Art. 94 of the UN Charter, which says only that states will “undertake to comply” with ICJ opinions and leaves referral to the UN Security Council as the *sole remedy* for noncompliance with ICJ opinions (not domestic rights of action). This decision, therefore, heightens the requirements for international treaties to be found “self-executing.” Prior law had been that explicit language to the effect that the treaty was self-executing was not required and the

Optional Protocol was self-executing. This creates a presumption against automatic enforceability of not only the VCCR but also potentially the UN Charter, while significantly weakening the VCCR until implementing legislation is passed.

The Court also found that ICJ decisions are only binding between countries, not between countries and their citizens/individuals. Moreover, the President’s executive order that Texas courts give effect to the *Avena* judgment does not independently require state courts to provide “review and reconsideration” of the claims of the named plaintiffs in *Avena*. Because the treaties at issue were non-self-executing, the President was not acting with “implicit congressional approval” in ordering the implementation of the *Avena* decision.

This March 2008 decision

effectively ended federal habeas claims for Medellin and the other petitioners named in *Avena*. Following complicated further appeals by Mexico and the beginning of Congressional action in this country, on July 16 the ICJ ordered the US to “take all measures necessary” to prevent the executions of Medellin and four other Mexican nationals sentenced to death in Texas while the ICJ resolved Mexico’s request for interpretation of the *Avena* judgment. The state of Texas disregarded the ICJ’s order and executed Jose Medellin by lethal injection around 10pm on August 5, 2008.

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