

THE JUSTICES HAVE SPLIT 5-3 FOUR (4) TIMES
SINCE OCTOBER 2005

FOURTH AMENDMENT WARRANT REQUIREMENT

In *Georgia v. Randolph*, (March 22, 2006), a 5-3 majority of the Supreme Court held that a physically present co-occupant's stated refusal to permit a warrantless entry and search rendered the search unreasonable and invalid as to that occupant. Justice Souter authored the majority opinion. Justice Stevens filed a concurring opinion as did Justice Breyer. The Chief Justice authored a dissent joined by Justice Scalia. Moreover, Justice Scalia issued his own dissent as did Justice Thomas. In *Randolph*, there were six opinions in all from a Court that only has nine justices. One can only imagine the spirited debate and interplay of ideas, facial expressions and gestures that occurred in oral arguments. Audio recordings are simply inadequate to capture all the nuance that only cameras could capture and convey.

ACTUAL INNOCENCE AND HABEAS CORPUS

In *House v. Bell*, a 5-3 opinion authored by Justice Kennedy (June 12, 2006), the Supreme Court held that because House had made the stringent showing required by the actual innocence exception to judicially-established procedural default rules, he could challenge his conviction even after exhausting his regular appeals. Justice Alito took no part in considering or deciding the House case. It bears noting, however, that if one Justice had been on the other side of this decision it would have resulted in a 4-4 tie and, ultimately, led to affirming the lower court's denial of House's post-conviction habeas petitions due to a procedural default.

MILITARY COMMISSIONS, GENEVA CONVENTIONS AND HABEAS CORPUS

In *Hamdan v. Rumsfeld*, a 5-3 decision in which Chief Justice Roberts did not participate, the Supreme Court held that Hamdan could challenge his detention and the jurisdiction of the President's military commissions to try him despite the 2005 enactment of the Detainee Treatment Act. A thin majority of the justices held that, although the DTA states that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay," the President could not establish a military commission to try Hamdan unless Congress granted him the authority through legislation. This case was of great interest and great importance, and was one of a handful of recent cases in which the Supreme Court released audiotapes or oral arguments almost immediately after they occurred. The prompt release of the audiotapes was good, but it would have been far better to allow the public to watch the parties' advocates and the Justices grapple with the jurisdictional, constitutional and merits-related questions that were addressed in that case. With due respect to Justices Scalia and Ginsberg, watching the advocates respond as the Justices pepper them with questions is something that should be seen and heard.

14TH AMENDMENT DUE PROCESS AND NOTICE CONCERNING TAX LIENS ON HOMES

In another 5-3 case, *Jones v. Flowers*, (April 26, 2006), the Supreme Court considered whether the government must take additional reasonable steps to provide notice before taking the owner's property when notice of a tax sale is mailed to the owner and returned undelivered. The public can readily understand this issue. In an opinion by Chief Justice Roberts, the Court held that where the Arkansas Commissioner of State Lands had mailed Jones a certified letter and it had been returned unclaimed, the Commissioner had to take additional reasonable steps to provide Jones notice. Justices Thomas,

Scalia and Kennedy dissented and Justice Alito took no part in the decision.

Not only lawyers who might listen to the audio tapes and read the full opinions, but all citizens could benefit from knowing how the Court grapples with legal issues related to their rights—in one case something as straightforward as the right to own one's home as it may be affected by unclaimed mail—and in another the right of someone who is in prison to be heard by a court. My legislation creates the opportunity for all interested Americans to watch the Court in action in cases like these.

Regardless of one's views concerning the merits of these decisions, the interplay between the government, on the one hand, and the individual on the other is something many Americans want to understand more fully. So, it is with these watershed decisions in mind that I introduce legislation designed to make the Supreme Court less remote. Millions of Americans recently watched the televised confirmation hearings for our two newest Justices. Americans want information, knowledge, and understanding; in short, they want access.

In a democracy, the workings of the government at all levels should be open to public view. With respect to oral arguments, the more openness and the broader opportunity for public observation—the greater will be the public's understanding and trust. As the Supreme Court observed in *Press-Enterprise Co. v. Superior Court* (1986), "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." It was in this spirit that the House of Representatives opened its deliberations to meaningful public observation by allowing C-SPAN to begin televising debates in the House chamber in 1979. The Senate followed the House's lead in 1986 by voting to allow television coverage of the Senate floor.

JUDICIARY COMMITTEE HEARINGS AND ACTION ON CAMERAS IN THE FEDERAL COURTS

On November 9, 2005, the Judiciary Committee held a hearing to address whether Federal court proceedings should be televised generally and to consider S. 1768, my earlier version of this bill, and S. 829, Senator GRASSLEY's "Sunshine in the Courtroom Act of 2005." During the November 9 hearing, most witnesses spoke favorably of cameras in the courts, particularly at the appellate level. Among the witnesses favorably disposed toward the cameras were Peter Irons, author of *May It Please the Court*, Seth Berlin, a First Amendment expert at a local firm, Brian Lamb, founder of C-SPAN, Henry Schiefel of Court TV Networks, and Barbara Cochran of the Radio-Television News Directors Association and Foundation.

A different view was expressed by Judge Jan DuBois of the Eastern District of Pennsylvania, who testified on behalf of the Judicial Conference. Judge DuBois warned of concerns, particularly at the trial level, where witnesses may appear uncomfortable because of cameras, and thus might seem less credible to jurors. I note, however, that these would not be issues in appellate courts, where there are no witnesses or jurors.

The Judiciary Committee considered and passed both bills on March 30, 2006. The Committee vote to report S. 1768 was 12-6, and the bill was placed on the Senate Legislative Calendar. Unfortunately, due to the press of other business neither bill was allotted time on the Senate Floor.

CONGRESSIONAL AUTHORITY TO LEGISLATE CAMERAS IN THE COURT

In my judgment, Congress, with the concurrence of the President, or overriding his veto, has the authority to require the Su-

preme Court to televise its proceedings. Such a conclusion is not free from doubt and may be tested in the Supreme Court, which will have the final word. As I see it, there is no constitutional prohibition against this legislation.

Article 3 of the Constitution states that the judicial power of the United States shall be vested "in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish." While the Constitution specifically creates the Supreme Court, it left it to Congress to determine how the Court would operate. For example, it was Congress that fixed the number of justices on the Supreme Court at nine. Likewise, it was Congress that decided that any six of these justices are sufficient to constitute a quorum of the Court. It was Congress that decided that the term of the Court shall commence on the first Monday in October of each year, and it was Congress that determined the procedures to be followed whenever the Chief Justice is unable to perform the duties of his office. Congress also controls more substantive aspects of the Supreme Court. Most importantly, it is Congress that in effect determines the appellate jurisdiction of the Supreme Court. Although the Constitution itself sets out the appellate jurisdiction of the Court, it provides that such jurisdiction exists "with such exceptions and under such regulations as the Congress shall make."

The Supreme Court could permit television through its own rule but has decided not to do so. Congress should be circumspect and even hesitant to impose a rule mandating television coverage of oral arguments and should do so only in the face of compelling public policy reasons. The Supreme Court has such a dominant role in key decision-making functions that its proceedings ought to be better known to the public; and, in the absence of a Court rule, public policy would be best served by enacting legislation requiring the televising of Supreme Court proceedings.

My legislation embodies sound policy and will prove valuable to the public. I urge my colleagues to support this bill. Finally, I ask unanimous consent that the text of the bill be printed in the RECORD and I yield the Floor.

Mr. SPECTER. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DORGAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DORGAN. Mr. President, by previous order, I am to be recognized; is that correct?

The PRESIDING OFFICER. That is correct, for 45 minutes.

VA HEALTH CARE

Mr. DORGAN. Mr. President, on Saturday of this past weekend, I was in Minneapolis, MN, for some meetings. In the Minneapolis Star Tribune newspaper, there was on the front page a story that I read with substantial disappointment and concern. I will relate it to my colleagues.

Kevin Giles for the Minneapolis Star Tribune wrote a story:

This Marine's death came after he served in Iraq.

The subhead is:

When Jonathan Schulze came home from Iraq, he tried to live a normal life, but the war kept that from happening.

The story is a lengthy one about a man who served in Iraq, was a marine, very proud of being a marine, a combat marine. His name was Jonathan Schulze. In Iraq, he carried a heavy machine gun as part of his combat experience. He apparently indicated he had watched about 16 of his unit members and close friends die in some very aggressive fighting in Iraq, described the battles. He was twice wounded, earned two Purple Hearts, came back to this country, was discharged, and had very serious post-traumatic stress disorder, severe psychological problems. He couldn't sleep, reliving the combat during his sleep and then having flashbacks when awake.

On December 14, he went to the VA center in Minneapolis, met with a psychiatrist, according to this news account, and was told that he could be admitted for some treatment in March. This was December. On January 12, a couple of weeks ago, he went to the VA hospital in St. Cloud, according to this account. He told the people at the VA hospital in St. Cloud that he was thinking of committing suicide, thinking of killing himself. His parents were with him at that point. They verify that is what he told the VA hospital in St. Cloud. He was thinking of committing suicide, and he wanted to be admitted as a patient. They told him they could not admit him as a patient.

The next day, he called the VA, called them back, and they told him that he was No. 26 on the waiting list. Four days later, he hung himself. This young man who served his country honorably as a U.S. marine reached out for help. According to his parents, who were there at the time, he went to a VA hospital and said: I need help. I want to be admitted, I am having thoughts of suicide, and he was refused. The next day, he was told he is 26th on the list.

I don't know all of the facts about this. I only know the facts I have read in a newspaper. But the story is nearly unbelievable to me. The newspaper description of the flag-draped coffin of this young marine who earned two Purple Hearts fighting for his country in Iraq contains a sad, sad story of a young marine who should have gotten medical help for serious psychological problems that were the result of his wartime experience.

I am going to ask the inspector general to investigate what happened in this case. What happened that a young man who was a marine veteran with two Purple Hearts turns up at a VA center and says: I am thinking of committing suicide, can you help me, can you admit me, and he is told: No, the list is 26 long in front of you? Something dreadfully wrong happened. The result is a young man is dead. What happened here? Does it happen other places?

We know the heavy toll war imposes on these young men and women who wear America's uniform and who answer this country's call. My colleagues and I have all been to Bethesda and Walter Reed, and have visited the veterans who have lost arms and legs, who have had head injuries, especially, because the body armor these days means that the injuries more often sustained are the loss of an arm or a leg or a brain injury due to the improvised explosive devices. We know about the VA health care system. The VA health care system has been excellent in some respects. It has gotten good reviews. But what has happened here? Are there others who show up at a VA center and say: I need help, only to be told no help is available? I hope that is not the case.

But I am going to ask the Inspector General to investigate this case and find out what happened. Is it happening other places? And what can we do to prevent this from happening again? It is the unbelievable cost of war.

ISSUES OF PRIORITY

IRAQ

Mr. DORGAN. This week or next week we will discuss once again the war in Iraq—a war that has now lasted longer than World War II. President Bush has indicated to the Congress and to the American people he has a new strategy. The new strategy he is proposing is to move an additional 20,000 American troops into Iraq. This morning, the more recent polls suggest the President's approval is at 30 percent. Polls also suggest the American people do not support deepening our country's involvement in Iraq. It is quite clear that the Congress does not support it either.

The decision by the President comes on the heels of the Baker-Hamilton commission that had some of the best minds in this country—Republicans and Democrats, old hands and younger people—who took a look at this, who understand foreign policy, understand military policy, and evaluated what are the potential choices, and decided that the deepening of our country's involvement in Iraq would be the wrong choice.

The blue ribbon commission told the President it would be the wrong choice to deepen our involvement in Iraq. Yet, the President decided that is exactly what he is going to do.

It is important, I think, as we discuss it this week and next week, to understand this Congress will always support the men and women whom we have asked to go to battle for our country. I would not support any effort by anyone to withdraw funds for our troops. If our troops are there, they must have everything they need to complete their mission and finish their jobs. But the fact is, in all of these discussions, I regret to say the President and Vice President do not have all that much credibility. Four years ago they presented

to this Congress—much of it in top-secret briefings in this Capitol—intelligence that supposedly buttressed the Administration's request that Congress pass a resolution that would give them the authority to use force against Iraq. It turns out now that much of that intelligence was wrong. Much of it was just fundamentally wrong. Now we know that those who offered the intelligence assessment to Congress knew there were serious doubts about it even as they were offering it to Congress as fact. They are some of the highest officials in our Government. I wish I did not have to say that, but it is the truth.

It was not good intelligence. For example, take the mobile chemical weapons labs that we were told existed for sure. We now understand that was the product of a single source of intelligence, a person named "Curveball," a person who was likely a drunk and a fabricator. On the basis of a single source, whom the Germans, who turned Curveball's information over to our country, thought not to be reliable or likely not to be reliable, we were told by this administration in briefings that this was a case that would justify going to war.

The aluminum tubes. We now understand the aluminum tubes were not for the purpose of reconstituting a nuclear threat. We also understand there are those in the line of—well, I was going to say the chain of command—those at high positions in our Government today who knew there was substantial evidence and disagreement from other parts of our Government who did not believe the aluminum tubes were for the purpose of reconstituting a nuclear effort or nuclear capability in Iraq. Yet, that information was withheld from the Congress, probably and apparently deliberately withheld from the Congress.

Yellowcake from Niger: Again, another case of almost exactly the same thing.

It is the case that the Congress was misled by bad intelligence, and the American people were misled by that same intelligence. That is not me saying that. It is Colonel Wilkerson, who worked 17 years as a top assistant to Colin Powell, the Secretary of State, who made the case at the United Nations. Colonel Wilkerson, who was involved in all that activity, spoke out publicly, and he said it was the "perpetration of a hoax on the American people." That is not me. Those are the words of a top official who was involved, who was there. Yet, no one has had to answer for it, no one.

Hearings. No oversight hearings by the majority party in the last Congress. No one has answered for it.

Now we have a new Iraqi policy, new warnings about more danger in Iraq. But it comes at a time when there is precious little credibility. We now find ourselves in Iraq, longer than we were in the Second World War, in the middle of a civil war. Most of the violence in