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Criminal Justice and the 2003-2004 United States Supreme Court Term

Christopher E. Smith

Michael McCall

Madhavi McCall

CRIMINAL JUSTICE AND THE 2003–2004 UNITED STATES SUPREME COURT TERM

CHRISTOPHER E. SMITH,* MICHAEL MCCALL** & MADHAVI MCCALL***

I. INTRODUCTION

In 2004, the nation marked the fiftieth anniversary of the U.S. Supreme Court's historic decision in *Brown v. Board of Education*.[1] In writing about the historical anniversary, Justice Stephen Breyer remarked that, thanks to *Brown*, "[w]e now accept [the] rule of law as part of our heritage" and "understand that our Constitution was meant to create a democracy that worked not just on paper but in practice."[2] In the decades since *Brown*, there has been little doubt that Supreme Court decisions affecting criminal justice demonstrate this lesson of the "rule of law...in practice,"[3] as the rules enunciated by the Court determined such practical and important issues as when suspects are represented by counsel,[4] subjected to searches,[5] and protected against improper interrogations.[6] Supreme Court decisions concerning criminal justice have been especially important for the lives of suspects and the authority of law enforcement officials since "[Chief Justice Earl] Warren's Court revolutionized constitutional law and American society...with a series of rulings on criminal procedure that extended the rights of the accused"[7] in the 1960s.[8] Because of their practical importance for applying the rule of law to the lives—and fates—of human beings, criminal justice issues continue, year after year, to illustrate the challenges faced by the United States in applying the principles of constitutional democracy to significant policy problems that arouse public concern. Criminal justice issues perpetually present judges with difficult problems that require decisions that carefully define and balance concepts concerning rights, authority, and power.[9] In any given year, one can see both the difficulty and practical importance of criminal justice issues as legal rulings related to these issues

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* Professor of Criminal Justice, Michigan State University. A.B., 1980, Harvard University; M.Sc., 1981, University of Bristol (England); J.D., 1984, University of Tennessee; Ph.D., 1988, University of Connecticut.

** Assistant Professor of Sociology, San Diego State University. B.A., 1989, University of Akron; M.A., 1993, University of Akron; Ph.D., 2004, Washington University, St. Louis.

*** Associate Professor of Political Science, San Diego State University. B.A., 1989, Case Western Reserve University; M.A., 1993, University of Akron; Ph.D., 1999, Washington University, St. Louis.

1. 347 U.S. 483 (1954).

2. Stephen G. Breyer, Editorial, *50 Years After* Brown, N.Y. TIMES, May 17, 2004.

3. *Id.*

4. *E.g.*, United States v. Wade, 388 U.S. 218 (1967) (defendant entitled to representation by counsel at post-indictment lineup).

5. *E.g.*, Chimel v. California, 395 U.S. 752 (1969) (searches incident to a lawful arrest limited to the person and nearby locations where weapons or evidence may be hidden).

6. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (limitations on interrogations of represented suspects outside of the presence of counsel).

7. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 100 (2d ed. 1990).

8. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 68 (1998) ("The liberal justices of the sixties had granted certiorari in criminal cases mainly to claims brought by defendants for the purpose of overturning convictions and expanding procedural rights....").

9. CHRISTOPHER E. SMITH, CONSTITUTIONAL RIGHTS: MYTHS AND REALITIES 4–6 (2004).

guide justice-system officials and define protections for suspects, defendants, and citizens in general.[10]

During the U.S. Supreme Court's 2003–2004 Term, the Court heard more criminal justice cases than in recent years. The Court decided thirty-three criminal justice cases[11] from among seventy-three total cases given complete hearings.[12] The Court decided only twenty-two criminal justice cases in 2002–2003,[13] twenty-seven criminal justice cases in 2001–2002,[14] and twenty-five criminal justice cases in 2000–2001.[15] Although the Court decided a higher number of criminal justice cases in the 2003–2004 Term than in the prior three years, the case numbers are consistent with earlier terms in the Rehnquist Court era. Indeed, the Court issued thirty-one criminal justice opinions in the 1999–2000 Term,[16] thirty in 1996–1997,[17] and thirty-five in 1997–1998.[18]

These changing totals may be a result of unpredictable patterns in the nature of issues addressed and decided by the state supreme courts and federal appellate courts.[19] However, noticeable changes in the Court's attentiveness to specific issues might provide evidence that certain justices are succeeding in their efforts to shape the Court's role or agenda.[20] For example, the Court's attention to federalism issues during the Rehnquist era appears to be the result of the philosophical commitments of several justices.[21] It is less clear that there is a similar agenda-setting emphasis on particular criminal justice issues. Overall, despite heightened attention paid by the Court to criminal justice cases in 2003–2004, there is no indication that increased or reduced attention to criminal justice can be attributed to anything other than unpredictable patterns of particular cases brought to the Court each year and

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10. *See id.* at 5 ("The concept of rights in criminal justice, by contrast, actually concerns the legal protections possessed by individuals against improper actions by government officials....The [government official] possesses authority, and that authority is limited by the extent of the individual's rights.").

11. The Court also handed down a criminal justice conservative per curiam ruling in *Mitchell v. Esparza*, 124 S. Ct. 1124 (2004), that we do not cover here.

12. Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004.

13. Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2002–03 United States Supreme Court Term*, CAP. U. L. REV. (forthcoming 2005).

14. Christopher E. Smith & Madhavi McCall, *Criminal Justice and the 2001–02 United States Supreme Court Term*, 2003 MICH. ST. DCL L. REV. 413, 413.

15. Christopher E. Smith & Steven B. Dow, *Criminal Justice and the 2000–01 U.S. Supreme Court Term*, 79 U. DET. MERCY L. REV. 189, 189 (2002).

16. Christopher E. Smith, *Criminal Justice and the 1999–2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1, 1 (2001).

17. Christopher E. Smith, *Criminal Justice and the 1996–97 U.S. Supreme Court Term*, 23 U. DAYTON L. REV. 30, 33 (1997).

18. Christopher E. Smith, *Criminal Justice and the 1997–98 U.S. Supreme Court Term*, 23 S. ILL. U. L.J. 443, 443 (1999).

19. The Supreme Court often agrees to hear cases that concern conflicts between lower courts in the interpretation of the Constitution or federal statutes or lower court decisions that appear to conflict with the Supreme Court's own precedents. STEPHEN WASBY, THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM 197 (3d ed. 1988).

20. For example, Justice Antonin Scalia has long argued that federal courts should reduce their involvement in various kinds of cases, *see* Stuart Taylor, *Scalia Proposes Major Overhaul of U.S. Courts*, N.Y. TIMES, Feb. 16, 1987, and uses concepts such as standing and justiciability to keep the U.S. Supreme Court from considering various issues, *see* RICHARD A. BRISBIN, JR., JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL 328 (1997).

21. Warren Richey, *States' Rights Momentum on Court May Be Waning*, CHRISTIAN SCI. MONITOR, May 19, 2004.

the justices' inclinations to tackle specific issues. As indicated by the foregoing figures, the Court's selection of criminal justice cases has increased and decreased in specific years without manifesting any consistent trends.

Court watchers and analysts believe that the Court has been moving to the right because it has been dominated by conservatives who have "been active in narrowing or overturning many Warren and Burger Court precedents that were favorable to the rights" of individuals in the criminal justice system.[22] As one author notes of the Rehnquist Court voting tendencies, "It's definitely a conservative court in the criminal law area."[23] A majority of contemporary justices have made decisions "extending broad deference to government in death penalty cases, recognizing additional exceptions to the *Miranda* doctrine and Fourth Amendment exclusionary rule, and further expanding the opportunities for police to conduct searches without a valid warrant."[24]

The Supreme Court's orientation toward criminal justice is always a matter of public importance because "Supreme Court decisions...define constitutional rights and provide guidelines for the appropriate exercise of authority by criminal justice officials."[25] Thus, there is good reason to monitor the Court's decision-making trends in criminal justice. In the early years of the twenty-first century, there may be even greater reason to monitor the justices' decisions as the legal system faces an array of percolating issues related to governmental anti-terrorism efforts, such as the prosecution of suspected terrorists[26] and the use of anti-terrorism laws for a variety of purposes in the criminal justice system.[27] Indeed, in the term examined here, the Court issued three important and controversial decisions regarding the war on terrorism and the treatment of individuals, both citizens and non-citizens, suspected of plotting against the United States.[28] The Court's pronouncements on these types of issues will define for years to come the scope of executive authority and the relationship between security and liberty.

This article will explore the Supreme Court's impact on criminal justice during the 2003–2004 Term through an empirical examination of the Court's decision-making processes[29] and a review of the cases.[30] In the final analysis, the Supreme Court's 2003–2004 criminal justice decisions were consistent with previously established patterns in the Rehnquist Court's decision making: most cases favored the interests of the government but a few decisions strengthened protections for individuals drawn into the criminal justice system.

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22. JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 183 (2001).

23. Linda Greenhouse, *Will the Court Move Right? It Already Has*, N.Y. TIMES, June 22, 2003 (quoting John O. McGinnis, professor at Northwestern Univ. School of Law).

24. TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 267 (2000).

25. CHRISTOPHER E. SMITH, CRIMINAL PROCEDURE xvii (2003).

26. *See, e.g.*, *Judge Refuses to Drop Moussaoui Case and Bars Death Penalty*, N.Y. TIMES, Oct. 2, 2003.

27. *See, e.g.*, Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003.

28. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004).

29. *See infra* Part II.

30. *See infra* Part III.

II. EMPIRICAL MEASURES OF THE SUPREME COURT'S DECISION MAKING

In the tables and discussion that follow, the labels "liberal" and "conservative" are used as a convenient shorthand to describe the outcomes supported by individual justices and the Court majority. These labels can be problematic as consistently applicable classifying categories.[31] However, the use of such categories is consistent with prior empirical studies of the Supreme Court and enhances scholars' ability to make systematic comparisons of different Court terms and eras. The definitions for these labels are drawn from the classifications in the Supreme Court Judicial Data Base in which "[l]iberal decisions in the area of civil liberties are pro-person accused or convicted of a crime, pro-civil liberties or civil rights claimant, pro-indigent, pro-[Native American] and anti-government in due process and privacy."[32] By contrast, "conservative" decisions in criminal justice cases favor the government's interests in prosecuting and punishing offenders over recognition or expansion of rights for individuals.[33]

Table 1 summarizes the outcomes of the Supreme Court's 2003–2004 criminal justice decisions according to the Court's vote totals and the direction of the Court's decisions. Unlike past years in which the decisions predominately favored the government,[34] last Term yielded a relatively even number of liberal and conservative decisions (fifteen liberal and eighteen conservative). The table shows a mix of consensus and division in the Court's criminal justice decisions. Nearly one-third of the Court's decisions (ten) were unanimous, while more than half of the decisions (sixteen) showed significant disagreement among the justices, as there were at least three dissenters. The percentage of unanimous decisions in 2003–2004 is similar to the rate of seven unanimous decisions in twenty-two cases during 2002–2003,[35] and a bit higher than the percentage in 2001–2002, where seven of twenty-seven cases yielded unanimous decisions.[36] While the number of unanimous decisions has been relatively constant for the last three terms, there appears to be

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31. Although the term "liberal" is used to describe outcomes in which the Court favors individuals' rights over the interests of government, there are some situations in which justices with so-called conservative values are more likely to favor individuals. For example, cases concerning property rights often produce role reversals among the justices considered "liberal" and those considered "conservative," with the usual liberals supporting the government's authority to regulate property and the usual conservatives supporting individuals' property rights. Such a role reversal occurred, for example, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Despite the problems in applying these terms to all kinds of issues, the liberal label is typically reserved for those justices who support the claims of individuals, and such support can often appear to reflect particular justices' values because of consistencies in their patterns of decision making. For example, Justices William Brennan and Thurgood Marshall earned their "liberal" labels by supporting individuals' claims in civil rights and liberties cases nearly ninety percent of the time during their service in the Rehnquist Court era. *See* THOMAS R. HENSLEY, CHRISTOPHER E. SMITH & JOYCE A. BAUGH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 57, 61 (1997).

32. Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989).

33. HENSLEY, SMITH & BAUGH, *supra* note 31, at 868 ("[A] liberal decision is one which favors the individual claiming a civil rights or liberties violation by the government; conversely, those decisions favoring the government are considered to be conservative.").

34. For instance, in the 2002–2003 term, the Court rendered liberal outcomes in only thirty-six percent of the cases. Smith & McCall, *supra* note 13.

35. *Id.*

36. Smith & McCall, *supra* note 14, at 426–27.

less agreement among these justices over time. Indeed, the percentage of unanimous cases was nearly forty percent in 2000–2001,[37] 1999–2000,[38] and 1998–1999,[39] while nearly fifty percent of decisions were unanimous in the 1995–1996[40] and 1996–1997 terms.[41] This consistent, albeit modest, increase in disagreement concerning criminal justice cases may reflect a trend toward greater division and conflict among the justices.

TABLE 1: CASE DISTRIBUTION BY VOTE AND LIBERAL/CONSERVATIVE OUTCOME IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2003–2004 TERM

Vote	Liberal	Conservative	Total
9-0	4	6	10
8-1	2	1	3
7-2	1	3	4
6-3	3	2	5
5-4	5	6	11
Total	15 (45.5%)	18 (54.5%)	33

Another striking aspect of the 2003–2004 Term is the high number of five-to-four criminal justice cases (eleven) handed down by the Court.[42] As one Court observer notes, the 2000–2001 Term was "the first time in modern memory" that the Court handed down more five-to-four decisions than unanimous decisions.[43] In criminal justice cases, the Court handed down more five-to-four cases than unanimous decisions in the 2000–2001 Term,[44] the 2001–2002 Term,[45] and now the 2003–2004 Term. This again points to the possibility that divisions have widened on this Court. Moreover, one of the most interesting aspects of the cases that deeply divided the Court was the representation of liberal outcomes. Half (eight of sixteen) of the five-to-four and six-to-three decisions produced liberal outcomes,[46] which means that one or more of the Court's more conservative members, typically Justice O'Connor or Kennedy, abandoned their usual colleagues to join the moderate liberals. This result may appear surprising if one focuses only on five-to-four decisions in a specific term, such as the 2000–2001 Term, in which conservatives controlled the

37. Smith & Dow, *supra* note 15, at 192.

38. Smith, *supra* note 16, at 4.

39. Christopher E. Smith, *Criminal Justice and the 1998–99 United States Supreme Court Term*, 9 WIDENER J. PUB. L. 23, 27 (1999).

40. Christopher E. Smith, *Criminal Justice and the 1995–96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 4 tbl.1 (1996).

41. Smith, *supra* note 17, at 33.

42. *See infra* note 366.

43. Associated Press, *Election Decision Defined Court's Term*, HOLLAND SENTINEL (July 1, 2001), *available at* http://www.hollandsentinel.com/stories/070101/new_0701010027.shtml (on file with the New Mexico Law Review).

44. Smith & Dow, *supra* note 15, at 193 tbl.1.

45. Smith & McCall, *supra* note 14, at 417 tbl.1.

46. *See infra* text accompanying notes 284–286, 366–368.

outcomes in six of the seven deeply-divided decisions.[47] In reality, however, if one examines the five-to-four and six-to-three decisions in the prior terms, liberal outcomes are consistently evident in split decisions, ranging from lows of three out of eleven in 1996–1997[48] and four out of fourteen in 1999–2000,[49] to highs of seven out of fifteen in 2001–2002[50] and four out of nine in 1998–1999.[51] Still, this past term is the first one in recent memory where the conservative and liberal split in these highly contentious cases was nearly even.

A theory advanced by some observers posits that the diminution of conservative dominance in these issues reflects the increasing influence of Justice John Paul Stevens.[52] In the words of one analyst, "Justice Stevens emerged as a unifying and leading force on the court in part because in an array of important cases the conservative majority did not hold and that left him in control."[53] Justice Stevens can use his power as senior justice to assign authorship of the majority opinion when Chief Justice Rehnquist dissents.[54] He can use this power to cultivate Justices O'Connor and Kennedy by assigning important opinions to them.[55] He can also assign opinions to himself and craft persuasive reasoning that will appeal to Justices O'Connor and Kennedy as a means to defeat conservative outcomes preferred by Chief Justice Rehnquist and Justices Thomas and Scalia.[56]

Like the preceding term, in which fifty-nine percent of the Court's criminal justice decisions concerned constitutional issues,[57] the 2003–2004 Term yielded a high number of cases concerning constitutional issues (seventy-six percent), as was also true during the Court's 1998–1999,[58] 1999–2000,[59] and 2001–2002 terms.[60] The percentage of constitutional cases last Term, however, was much higher than the percentages in the prior term and may reflect the generation of new constitutional issues stemming from the war on terrorism that the Court dealt with last Term. By contrast, in the 2000–2001 Term, only forty-four percent of the criminal justice cases involved constitutional issues.[61] Nonconstitutional issues also comprised the majority of criminal justice decisions in the 1995–1996,[62] 1996–1997,[63] and 1997–1998 terms.[64] The inconsistent pattern of constitutional and nonconstitutional issues decided by the Court each term reinforces the perception that, as with the number of criminal justice cases chosen for decision, the selection of specific issues

47. Smith & Dow, *supra* note 15, at 193.
48. Smith, *supra* note 17, at 33 tbl.1.
49. Smith, *supra* note 16, at 4 tbl.1.
50. Smith & McCall, *supra* note 14, at 417 tbl.1.
51. Smith, *supra* note 39, at 28 tbl.1.
52. *See, e.g.*, Warren Richey, *The Quiet Ascent of Justice Stevens*, CHRISTIAN SCI. MONITOR, July 9, 2004.
53. *Id.* (quoting Thomas Goldstein).
54. *Id.*
55. *Id.*
56. *Id.*
57. Smith & McCall, *supra* note 13.
58. Smith, *supra* note 39, at 29 tbl.2.
59. Smith, *supra* note 16, at 6 tbl.2.
60. Smith & McCall, *supra* note 14, at 419 tbl.2.
61. Smith & Dow, *supra* note 15, at 195 tbl.2.
62. Smith, *supra* note 40, at 5–6 tbl.2.
63. Smith, *supra* note 17, at 34 tbl.2.
64. Smith, *supra* note 18, at 446–47 tbl.2.

is determined by the ebb and flow of issues presented to the justices rather than any planned or strategic agenda.[65]

TABLE 2: ISSUES IN CRIMINAL JUSTICE CASES IN THE SUPREME COURT'S 2003–2004 TERM

Constitutional Issues – 26 (79%)
War on Terrorism, Access to Judicial Proceedings: *Hamdi v. Rumsfeld*;[66] *Rasul v. Bush*;[67] *Rumsfeld v. Padilla*[68]
Search and Seizure: *Groh v. Ramirez*;[69] *Illinois v. Lidster*;[70] *Thornton v. United States*;[71] *United States v. Banks*;[72] *Maryland v. Pringle*;[73] *United States v. Flores-Montano*;[74] *Hiibel v. Sixth Judicial District Court*[75]
Access to Courts: *Tennessee v. Lane*[76]
Right to Counsel: *Iowa v. Tovar*[77]
Double Jeopardy: *United States v. Lara*[78]
Eighth Amendment: *Beard v. Banks*;[79] *Tennard v. Dretke*;[80] *Nelson v. Campbell*[81]
Trial by Jury: *Blakely v. Washington*;[82] *Schriro v. Summerlin*[83]
Right to Confront Witnesses: *Crawford v. Washington*[84]
First Amendment: *Ashcroft v. ACLU*[85]
Self-Incrimination: *United States v. Patane*;[86] *Yarborough v. Alvarado*;[87] *Missouri v. Seibert*;[88] *Fellers v. United States*[89]
Civil Rights: *Pennsylvania State Police v. Suders*[90]
Powers of Congress: *Sabri v. United States*[91]

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65. *See supra* notes 11–21 and accompanying text.
66. 124 S. Ct. 2633 (2004).
67. 124 S. Ct. 2686 (2004).
68. 124 S. Ct. 2711 (2004).
69. 124 S. Ct. 1284 (2004).
70. 124 S. Ct. 885 (2004).
71. 124 S. Ct. 2127 (2004).
72. 540 U.S. 31 (2003).
73. 540 U.S. 366 (2003).
74. 124 S. Ct. 1582 (2004).
75. 124 S. Ct. 2451 (2004). This case also concerns the Fifth Amendment protection against self-incrimination and the right to privacy.
76. 124 S. Ct. 1978 (2004).
77. 124 S. Ct. 1379 (2004).
78. 124 S. Ct. 1628 (2004).
79. 124 S. Ct. 2504 (2004).
80. 124 S. Ct. 2562 (2004).
81. 124 S. Ct. 2117 (2004).
82. 124 S. Ct. 2531 (2004).
83. 124 S. Ct. 2519 (2004).
84. 124 S. Ct. 1354 (2004).
85. 124 S. Ct. 2783 (2004).
86. 124 S. Ct. 2620 (2004).
87. 124 S. Ct. 2140 (2004).
88. 124 S. Ct. 2601 (2004).
89. 124 S. Ct. 1019 (2004).
90. 124 S. Ct. 2342 (2004).
91. 124 S. Ct. 1941 (2004).

Other Issues – 7 (21%)
Habeas Corpus: *Pliler v. Ford*;[92] *Baldwin v. Reese*[93]
Federal Criminal Procedure: *Dretke v. Haley*;[94] *Banks v. Dretke*;[95] *Castro v. United States*;[96] *United States v. Dominguez Benitez*[97]
International Tort: *Sosa v. Alvarez-Machain*[98]

In theory, the Court's attention is drawn to controversial, unsettled, or emerging areas of law when it grants writs of certiorari.[99] Thus, it is not surprising that the Court addressed controversies like the treatment of terrorism suspects,[100] the regulation of sexually explicit material on the internet,[101] sexual harassment,[102] illegal searches,[103] and *Miranda* rights.[104] These issues have garnered significant attention from critics and commentators in recent years.[105] Unlike in 2002–2003,[106] the Court addressed search and seizure issues during the 2003–2004 Term. Indeed, from the 1995–1996 Term through the 1999–2000 Term, Fourth Amendment issues comprised the largest category of constitutional criminal justice issues addressed by the Court and more than twelve percent of the total criminal justice cases.[107] The high number of search and seizure issues addressed last Term suggests that the prior term's lack of cases may merely reflect the vagaries of the mixture of issues submitted to the Court during that specific term.

Table 3 shows the liberal/conservative voting patterns of individual justices in criminal justice cases for the 2003–2004 Term. Justice Thomas was the justice least

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92. 124 S. Ct. 2441 (2004).
93. 124 S. Ct. 1347 (2004).
94. 124 S. Ct. 1847 (2004).
95. 124 S. Ct. 1256 (2004).
96. 124 S. Ct. 786 (2003).
97. 124 S. Ct. 2333 (2004).
98. 124 S. Ct. 2739 (2004).
99. *See* LAWRENCE BAUM, THE SUPREME COURT 112 (6th ed. 1998).

> The Court's Rule 10 does provide general guidance by specifying some of the conditions under which the Court will hear a case. The rule emphasizes the Court's role in ensuring the certainty and consistency of the law. The criteria for accepting a case cited in Rule 10 include the existence of important legal issues that the Court has not yet decided, conflict among courts of appeals on a legal question, conflict between a lower court's decision and the Supreme Court's prior decisions, and departure 'from the accepted and usual course of judicial proceedings' in the courts below.

Id.

100. *See, e.g.*, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).
101. *See, e.g.*, Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).
102. *See, e.g.*, Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).
103. *See, e.g.*, Thornton v. United States, 124 S. Ct. 2127 (2004); United States v. Flores-Montano, 124 S. Ct. 1582 (2004); Groh v. Ramirez, 124 S. Ct. 1284 (2004); Illinois v. Lidster, 124 S. Ct. 885 (2003); Maryland v. Pringle, 124 S. Ct. 795 (2003); United States v. Banks, 124 S. Ct. 521 (2003).
104. *See, e.g.*, United States v. Patane, 124 S. Ct. 2620 (2004); Missouri v. Seibert, 124 S. Ct. 2601 (2004); Yarborough v. Alvarado, 124 S. Ct. 2140 (2004); Fellers v. United States, 124 S. Ct. 1019 (2004).
105. *See* TED GUEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 189–218 (2001).
106. Smith & McCall, *supra* note 13.
107. Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 167 (2003).

likely to support individuals' claims in criminal justice cases during the most recent term (fifteen percent), with Chief Justice Rehnquist (eighteen percent) and Justice Scalia (twenty-one percent) close behind. Justices Stevens and Souter stood out as the most consistent supporters of individual rights in criminal justice cases (seventy-two percent each), followed by Justice Ginsburg (sixty-six percent). Justice Souter's support for individual rights last Term was higher than in past terms. For instance, he supported liberal outcomes in criminal justice cases in only fifty-nine percent of cases in the 2002–2003 Term,[108] sixty-three percent in the 2001–2002 Term,[109] and sixty percent in the 2000–2001 Term.[110] Justices Breyer and Ginsburg were nearly as liberal in the term's criminal justice cases. Justice Ginsburg had been regarded as an outspoken defender of constitutional rights during her pre-judicial career as a lawyer,[111] but on the U.S. Supreme Court, her early voting record earned her the "characterization...as a judicial moderate."[112] Justice Ginsburg's level of support for individuals' claims in criminal justice cases during two earlier terms—45.5 percent (1995–1996)[113] and fifty-three percent (1996–1997)[114]—cast her as a moderate near the middle of the Court. Justice Ginsburg's increased support for individuals during the 1997–1998 (sixty percent),[115] 1998–1999 (sixty-eight percent),[116] 1999–1900 (67.7 percent),[117] 2000–2001 (sixty-four percent),[118] 2001–2002 (sixty-three percent),[119] and 2003–2004 terms (sixty-seven percent) may be attributable either to changes in her attitudes and voting strategies[120] or to a change in the mix of criminal justice cases presented to the Supreme Court.[121] Finally, Justice Breyer reemerged as the Court's "center" on criminal justice cases,[122] supporting the rights of individuals in fifty-seven percent of cases.

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108. Smith & McCall, *supra* note 13.
109. Smith & McCall, *supra* note 14, at 423.
110. Smith & Dow, *supra* note 15, at 197.
111. *See* Joyce A. Baugh, Christopher E. Smith, Thomas R. Hensley & Scott Patrick Johnson, *Justice Ruth Bader Ginsburg: A Preliminary Assessment*, 26 U. TOL. L. REV. 1, 4–5 (1994).
112. HENSLEY, SMITH & BAUGH, *supra* note 31, at 81.
113. Smith, *supra* note 40, at 6.
114. Smith, *supra* note 17, at 37.
115. Smith, *supra* note 18, at 450.
116. Smith, *supra* note 39, at 32.
117. Smith, *supra* note 16, at 9.
118. Smith & Dow, *supra* note 15, at 197.
119. Smith & McCall, *supra* note 14, at 423.
120. Justices' decisions about how to vote in Supreme Court cases are largely attributable to their values and attitudes and to the strategic choices they make to persuade colleagues or advance particular doctrines. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).
121. *See* Thomas R. Hensley & Christopher E. Smith, *Membership Change and Voting Change: An Analysis of the Rehnquist Court's 1986–1991 Terms*, 48 POL. RES. Q. 837 (1995).
122. *See* discussion of Justice Breyer's voting record in Smith & McCall, *supra* note 14, at 422.

TABLE 3: INDIVIDUAL JUSTICES' LIBERAL/CONSERVATIVE VOTING PERCENTAGES IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2003–2004 TERM

(Percentages Are Rounded)

Justice	Liberal	Conservative
Thomas	15% (5)	85% (28)
Rehnquist	18% (6)	82% (27)
Scalia	21% (7)	79% (26)
O'Connor	33% (11)	67% (22)
Kennedy	36% (12)	64% (21)
Breyer	58% (19)	42% (14)
Ginsburg	67% (22)	33% (11)
Souter	73% (24)	27% (9)
Stevens	73% (24)	27% (9)

Consistent with the trend in the last four terms,[123] there was differentiation between the Court's two ideological wings. The highest support for individual rights among the Court's five most conservative justices (Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy) came from Justice Kennedy at thirty-six percent. Thus, the difference in support for individual rights between the Court's most liberal conservative (Justice Kennedy) and the Court's most conservative liberal (Justice Breyer) was a pronounced twenty-one percent. In 2001–2002, the division was also notable, with a twenty-four percentage-point difference between the most moderate conservative, Justice O'Connor (thirty percent), and the most moderate liberals, Justices Breyer and Souter (fifty-four percent).[124] In the most recent term, there was comparable differentiation between the four most conservative justices (Chief Justice Rehnquist and Justices Thomas, Scalia, and O'Connor) and the four most liberal justices (Justices Souter, Breyer, Ginsburg, and Stevens).

The philosophical differences between the justices become accentuated when the analytical focus is limited to non-unanimous decisions.[125] As indicated in Table 4, Justice O'Connor may have served a role similar to Justice Kennedy's by providing a vote for individuals' claims in a notable (albeit minority) portion of the Court's non-unanimous decisions.

123. *See* Smith & McCall, *supra* note 13; Smith & McCall, *supra* note 14; Smith & Dow, *supra* note 15; Smith, *supra* note 16.

124. Smith & McCall, *supra* note 14, at 423.

125. On an en banc court, such as the U.S. Supreme Court, individual judicial officers may feel freest to express their disagreements with the majority. When the decision makers split, their disagreements should genuinely reflect the nature and strength of their differences. By contrast, on a three-member appellate panel, a potential dissenter may be deterred by the thought that he or she must dissent alone and carry the entire burden of presenting a dissenting opinion. Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Courts of Appeals*, 74 JUDICATURE 133, 134 (1990).

TABLE 4: INDIVIDUAL JUSTICES' LIBERAL/CONSERVATIVE VOTING PERCENTAGES IN NON-UNANIMOUS U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2003–2004 TERM
(Percentages Are Rounded)

Justice	Liberal	Conservative
Thomas	9% (2)	91% (21)
Rehnquist	13% (3)	87% (20)
Scalia	17% (4)	83% (19)
O'Connor	35% (8)	65% (15)
Kennedy	39% (9)	61% (14)
Breyer	70% (16)	30% (7)
Ginsburg	83% (19)	17% (4)
Souter	91% (21)	9% (2)
Stevens	91% (21)	9% (2)

Table 5 shows an analysis of inter-agreement between individual justices on the Supreme Court. Such inter-agreement tables are used to detect the existence of

TABLE 5: INTER-AGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT CRIMINAL JUSTICE DECISIONS, 2003–2004 TERM
(Percentages Are Rounded)

	Re	Th	Sc	O'C	Ke	Br	So	Gn	St
Re		85	91	85	82	61	46	52	46
Th			88	70	72	46	42	49	42
Sc				76	73	52	49	49	42
O'C					85	76	61	67	61
Ke						67	64	64	64
Br							79	91	79
So								88	94
Gn									88
St									

Court Mean: 69
Sprague Criterion: 83.6
Voting Blocs:
Souter, Stevens, Ginsburg, Breyer: 86
Rehnquist, Scalia, Thomas: 88
Rehnquist, Scalia, O'Connor: 84
Rehnquist, O'Connor, Kennedy: 84

voting blocs on the high court.[126] The one strong four-member voting bloc was comprised of the Court's four liberals (Justices Stevens, Souter, Breyer, and Ginsburg). The blocs made up of conservative justices (Chief Justice Rehnquist and Justices O'Connor and Kennedy, Chief Justice Rehnquist and Justices O'Connor and Scalia, Chief Justice Rehnquist and Justices Scalia and Thomas) also voted together with sufficient regularity to meet the voting bloc criteria, but they did not form the strong four-member voting bloc (Chief Justice Rehnquist and Justices Thomas, Scalia, and Kennedy) that they represented in the prior term.[127] Apparently the mix of issues in the most recent term did not draw all of the Court's most conservative justices together to the same extent as in the recent past. Interestingly, Chief Justice Rehnquist was a member of all three conservative voting blocs.

A focus on non-unanimous decisions generates more pronounced differences between the justices, yet the voting blocs remain the same (see Table 6). The

TABLE 6: INTER-AGREEMENT PERCENTAGES FOR PAIRED JUSTICES IN U.S. SUPREME COURT NON-UNANIMOUS CRIMINAL JUSTICE DECISIONS, 2003–2004 TERM
(Percentages Are Rounded)

	Re	Th	Sc	O'C	Ke	Br	So	Gn	St
Re		78	87	78	74	44	22	30	22
Th			83	57	61	22	17	26	17
Sc				65	61	30	26	26	17
O'C					78	65	44	52	44
Ke						52	48	48	48
Br							70	87	70
So								83	91
Gn									83
St									

Court Mean: 53
Sprague Criterion: 76
Voting Blocs:
Souter, Stevens, Ginsburg, Breyer: 81
Rehnquist, Scalia, Thomas: 83
Rehnquist, Scalia, O'Connor: 77
Rehnquist, O'Connor, Kennedy: 77

justices most likely to disagree with each other were at the endpoints of the liberal and conservative voting spectrums. Justices Stevens and Souter, exhibiting the most liberal voting records, disagreed most frequently with Justice Thomas, the most

126. In empirical studies of the Supreme Court, voting blocs are determined according to the "Sprague Criterion." The Sprague Criterion is calculated by subtracting the average agreement score for the entire Court from 100. The resulting number is divided by two and added to the Court average in order to establish the threshold level for defining a bloc. A bloc exists when the individual agreement scores for a set of justices exceed the threshold established by the Sprague Criterion calculation. JOHN D. SPRAGUE, VOTING PATTERNS OF THE UNITED STATES SUPREME COURT 51–61 (1968).

127. Smith & McCall, *supra* note 13.

conservative justice. In addition, Justice Stevens, who tied with Justice Souter last Term as the most liberal voter and has generally been considered the most liberal voter on this Court over the past several years, agreed with Chief Justice Rehnquist, the second most conservative justice, in a surprisingly high percentage of non-unanimous decisions (twenty-two percent). These apparent anomalies reinforce the impression that the justices react to the specific mix of issues presented to them in a given term rather than reflexively voting in agreement with perceived philosophical allies or in disagreement with perceived ideological opponents.

III. CASE DECISIONS

A. *Unanimous Decisions*

The U.S. Supreme Court handed down ten unanimous criminal justice decisions during the 2003–2004 Term.[128] Of these, the justices rendered liberal decisions in four cases[129] and conservative decisions in six cases.[130] Starting with the liberal outcomes, in *Nelson v. Campbell*,[131] the Court ruled that a condemned offender may file a civil rights action challenging the "cut-down" procedures used to identify and prepare a vein for lethal injection executions.[132] Nelson was an intravenous drug user whose veins were severely compromised due to drug usage.[133] In order to execute him using lethal injection, the warden mandated a vein preparation method—the cut-down procedure—that involved making a two-inch incision in Nelson's arm or leg, a procedure that was performed one hour before the execution, using local anesthesia.[134] Nelson challenged the procedure as a cruel and unusual punishment in violation of his Eighth Amendment rights.[135] The claim rested in part on an affidavit from a board certified anesthesiologist and assistant professor at Columbia University College of Physicians and Surgeons asserting that the cut-down procedure was dangerous and antiquated.[136]

In an opinion written by Justice O'Connor, a unanimous Court remanded the case back to the lower courts for an evidentiary hearing to determine if, in fact, the cut-down procedure violates the Eighth Amendment's Cruel and Unusual Punishment Clause.[137] In so doing, the Court left open the possibility that certain methods of execution, or at least preparations for executions, might be Eighth Amendment violations, independent of a challenge to imprisonment.

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128. *See* Sabri v. United States, 124 S. Ct. 1941 (2004); United States v. Dominguez Benitez, 124 S. Ct. 2333 (2004); Iowa v. Tovar, 124 S. Ct. 1379 (2004); United States v. Banks, 124 S. Ct. 521 (2003); Maryland v. Pringle, 124 S. Ct. 795 (2003); United States v. Flores-Montano, 124 S. Ct. 1582 (2004); Castro v. United States, 124 S. Ct. 786 (2004); Crawford v. Washington, 124 S. Ct. 1354 (2004); Fellers v. United States, 124 S. Ct. 1019 (2004); Nelson v. Campbell, 124 S. Ct. 2117 (2004).

129. *See Castro*, 124 S. Ct. 786; *Crawford*, 124 S. Ct. 1354; *Fellers*, 124 S. Ct. 1019; *Nelson*, 124 S. Ct. 2117.

130. *See Sabri*, 124 S. Ct. 1941; *Dominguez Benitez*, 124 S. Ct. 2333; *Tovar*, 124 S. Ct. 1379; *Banks*, 124 S. Ct. 521; *Pringle*, 124 S. Ct. 795; *Flores-Montano*, 124 S. Ct. 1582.

131. 124 S. Ct. 2117 (2004).

132. *Id.* at 2122.

133. *Id.* at 2121.

134. *Id.*

135. *Id.* at 2120.

136. *Id.* at 2121–22.

137. *Id.* at 2124–26.

In a second liberal ruling, the Court held, in *Fellers v. United States*,[138] that police violated a petitioner's Sixth Amendment right to counsel by extracting inculpatory statements from him at the jailhouse following *Miranda* warnings, when the police had previously extracted the same statements from the petitioner at his home without providing the *Miranda* warnings.[139] Fellers was arrested for involvement in drug distribution.[140] During his arrest, Fellers made several incriminating statements to police, before officers had advised him of his *Miranda* rights.[141] Upon arriving at the jail, Fellers waived his *Miranda* rights and reiterated his earlier statements.[142] While the court of appeals suppressed Fellers' statements made at his home during the arrest, it allowed the statements made at the jail, concluding that the right to counsel had not been violated because Fellers had knowingly waived such rights.[143] In an opinion by Justice O'Connor, the high Court held that Fellers' Sixth Amendment rights had been violated because the police had deliberately elicited information from him outside the presence of counsel and after he had been indicted.[144]

In another Sixth Amendment, liberal, unanimous decision, this time involving the Confrontation Clause, the Court ruled that prosecutors' use of a witness's recorded statement does not afford defendants the opportunity to confront witnesses as constitutionally guaranteed.[145] In *Crawford v. Washington*,[146] Michael Crawford was charged with attempted murder and assault for stabbing a man, Kenneth Lee, who allegedly tried to rape his wife.[147] Crawford and his wife, Sylvia, went to Lee's apartment to confront him about the attempted rape.[148] Crawford and Lee fought and Lee was stabbed.[149] Crawford and his wife were questioned separately by police and both gave essentially the same account of events leading up to the fight, but their accounts differed considerably when asked if Lee had drawn a weapon before he was stabbed.[150] Crawford asserted that Lee was armed while Sylvia's account differed.[151] At trial, Crawford claimed self-defense.[152]

Because the state could not force Sylvia to testify against her husband without violating marital privilege, the prosecutors instead introduced her recorded statements made to the police.[153] Crawford was convicted and challenged the introduction of his wife's statements as a violation of the Sixth Amendment's Confrontation Clause.[154] Writing for a unanimous Court, Justice Scalia agreed with

138. 124 S. Ct. 1019 (2004).
139. *Id.* at 1021.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1023.
145. Crawford v. Washington, 124 S. Ct. 1354 (2004).
146. 124 S. Ct. 1354 (2004).
147. *Id.* at 1357.
148. *Id.*
149. *Id.*
150. *Id.* at 1357–58.
151. *Id.* at 1357.
152. *Id.*
153. *Id.* at 1358.
154. *Id.* at 1356–57.

Crawford.[155] Relying on historical arguments, the Court noted that the purpose of the Clause was to prevent the use of ex parte examinations and hearsay testimony.[156] Moreover, the Court noted that, for the most part, the principles of the Confrontation Clause have been strictly upheld.[157] Although recent Court decisions allowed recorded statements to be used if the statements could be deemed reliable, the Court found trial courts' determinations of reliability to be unworkable and inconsistent.[158] Thus, the Court determined that cross-examination was the only acceptable way to test the truthfulness of a witness's statements.[159]

In a final unanimous, liberal ruling, *Castro v. United States*,[160] the justices ruled that a court may not recharacterize a prisoner's petition for habeas corpus relief unless the prisoner is informed of the change and warned of the limits recharacterizations may place on subsequent petitions.[161] The petitioner also must be allowed to change or withdraw the petition in light of the court's intentions.[162]

The remaining six unanimous decisions ended in conservative outcomes. Of these, three cases involved Fourth Amendment claims.[163] In *United States v. Flores-Montano*,[164] the Court clarified rules governing the search of vehicles at border stops, stating that not even reasonable suspicion is needed to conduct routine searches, and that removal and search of a gas tank falls under the routine search category.[165] In this case, customs officials in Southern California conducted an initial inspection of Flores-Montano's car as he attempted to enter the United States.[166] Without any reason for suspicion, the officials ordered a secondary inspection of the car.[167] Upon noting at this second inspection that the tank seemed solid, officials ordered the tank dismantled and found thirty-seven kilograms of marijuana inside.[168] After being indicted for importing marijuana, Flores-Montano sought to have the marijuana suppressed, arguing that the Fourth Amendment requires at least reasonable suspicion to remove the gas tank.[169] The Ninth Circuit Court of Appeals agreed, stating that removal of a gas tank was not a routine search for which no suspicion was required.[170] Without reasonable suspicion, the Ninth Circuit held, the search was invalid.[171]

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155. *Id.* at 1374.
156. *Id.* at 1360.
157. *See id.* at 1367–69.
158. *Id.* at 1369–71.
159. *Id.* at 1369.
160. Castro v. United States, 124 S. Ct. 786 (2003).
161. *Id.* at 789.
162. *Id.*
163. United States v. Banks, 124 S. Ct. 521 (2003); Maryland v. Pringle, 124 S. Ct. 795 (2003); United States v. Flores-Montano, 124 S. Ct. 1582 (2004).
164. 124 S. Ct. 1582 (2004).
165. *Id.* at 1584–86.
166. *Id.* at 1584.
167. *Id.*
168. *Id.*
169. *Id.* at 1584, 1586.
170. *Id.* at 1584.
171. *Id.*

Writing for the Supreme Court, Chief Justice Rehnquist reversed the Ninth Circuit's ruling, finding the search to be consistent with the Fourth Amendment.[172] The Court noted that most searches at the border are reasonable simply because they occur at the border.[173] The Court further noted that privacy interests are reduced at the border and that dismantling and reassembling a gas tank is not a significant deprivation of property.[174] Finally, the Court remarked that on the Southern California border alone in 2003, over 300 gas tanks were dismantled and reassembled, and car owners were allowed to enter the United States when narcotics were not found.[175] The Court thus reiterated its stand that suspicionless, routine searches at the border are constitutional.

The Court also dealt with a Fourth Amendment issue in *Maryland v. Pringle*,[176] in which it held that a police officer had probable cause to arrest all individuals in a car after finding drugs and money in the car, even though the officer had no individualized suspicion regarding which one of the car's occupants owned the money and drugs.[177] Joseph Pringle was the backseat passenger in a car that was pulled over for speeding at 3 A.M.[178] When the driver opened the glove compartment to get the car's registration, the officer noticed a wad of money and ordered a full search of the car during which the police found cocaine.[179] The police informed the car's occupants that all of them would be arrested if no one admitted owning the drugs.[180] No one confessed to owning the drugs and all were arrested.[181] At the police station and upon waiving his *Miranda* rights, Pringle admitted to owning the drugs but later contended that the police lacked probable cause to arrest him, making the arrest invalid.[182]

Chief Justice Rehnquist and a unanimous Court found the actions of the law enforcement officers to be consistent with the Fourth Amendment.[183] The opinion noted that the police had probable cause to stop the car and then had probable cause to believe a felony had been or was being committed.[184] Because of the quantities of money and drugs recovered, the Court concluded that it was reasonable to believe that any or all of the car occupants owned, knew of, and/or controlled the drugs.[185] Consequently, the police had probable cause to believe that Pringle had committed a crime, making the arrest constitutional under the Fourth and Fourteenth Amendments.[186]

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172. *Id.* at 1585.
173. *Id.* at 1586.
174. *Id.* at 1586–87.
175. *Id.* at 1587–88.
176. 124 S. Ct. 795 (2003).
177. *Id.* at 802.
178. *Id.* at 798.
179. *Id.*
180. *Id.*
181. *Id.* at 798–99.
182. *Id.* at 799.
183. *Id.* at 802.
184. *Id.* at 800–01.
185. *Id.* at 801.
186. *Id.* at 802.

In *United States v. Banks*,[187] a final Fourth Amendment, conservative, unanimous decision, the Court held that police officers acted constitutionally when they waited only fifteen to twenty seconds after knocking before breaking down the respondent's door to execute a search warrant.[188] Banks was suspected of selling cocaine from his home.[189] Local and federal officers obtained a search warrant for Banks' apartment and went to execute the warrant.[190] Officers knocked loudly on the front door, briefly waited, and then broke down the door.[191] The Ninth Circuit Court of Appeals suppressed the evidence.[192] The U.S. Supreme Court reversed the Ninth Circuit, noting, in an opinion by Justice Souter, that the Fourth Amendment does not specify what formalities officers must use when executing a warrant.[193] The Court concluded that it is reasonable for the police to believe that a suspect, particularly one suspected of drug-related offenses, might not have answered the door in order to dispose of the drugs, and, thus, waiting a short time between knocking and breaking down the door is not a violation of the Fourth Amendment.[194]

The Court also handed down a unanimous conservative decision in *Iowa v. Tovar*,[195] which focused on the Sixth Amendment right to counsel.[196] Tovar was arrested for driving under the influence of alcohol.[197] Tovar told the trial court he wanted to represent himself and, after being informed of the dangers of representing himself, pleaded guilty.[198] Two years later, Tovar pleaded guilty again for his second offense and, in 2000, was arrested a third time.[199] For his third offense, Tovar pleaded not guilty and, represented by counsel, argued that his first conviction was invalid because he was not represented by counsel at that point and was not made adequately aware of the dangers of self-representation.[200] The U.S. Supreme Court, in an opinion written by Justice Ginsburg, found that, since the original trial courts had warned Tovar about such dangers and because he had waived his right to legal representation, the Sixth Amendment had not been violated.[201]

The Court handed down two final unanimous, conservative decisions, both dealing with statutory interpretation.[202] In *Sabri v. United States*,[203] the Court ruled that a bribery statute need not require proof of a connection between federal funds

187. 124 S. Ct. 521 (2003).
188. *Id.*
189. *Id.* at 523.
190. *Id.*
191. *Id.*
192. United States v. Banks, 282 F.3d 699, 705 (9th Cir. 2002).
193. *Banks*, 124 S. Ct. at 524–25.
194. *Id.* at 526–27.
195. 124 S. Ct. 1379 (2004).
196. *Id.* at 1383.
197. *Id.*
198. *Id.* at 1384–85.
199. *Id.* at 1385.
200. *Id.* at 1386.
201. *Id.* at 1390.
202. Sabri v. United States, 124 S. Ct. 1941 (2004); United States v. Dominguez Benitez, 124 S. Ct. 2333 (2004).
203. 124 S. Ct. at 1945–47.

and the alleged bribe.[204] Rather, it is sufficient that the statute specify a threshold amount for the bribe, and that the bribe go beyond the offer of tobacco and liquor.[205] In a second case, *United States v. Dominguez Benitez*,[206] the Court held that, even though a defendant was not informed during his plea colloquy, he could not change his plea if the court did not accept the State's plea recommendations, and he was not permitted to withdraw his plea after the court rejected the plea recommendations.[207] The Supreme Court reasoned that, while the lower court had erred by not informing the defendant at this juncture, he had been informed of this fact earlier in the plea bargaining process.[208] Under these circumstances, the U.S. Supreme Court held that the defendant must show a reasonable probability that he would not have pleaded guilty had the lower court not erred.[209] In *Dominguez Benitez*, such reasonable probability did not exist.[210]

B. Eight-to-One Decisions

The Court issued three eight-to-one criminal justice decisions during the 2003–2004 Term.[211] Of these, one case—*Hamdi v. Rumsfeld*[212]—was one of three rulings during the term addressing the rights of detainees captured during the "war on terrorism" to gain access to the courts.[213] The Court also handed down eight-to-one decisions in a sexual harassment case[214] and a case concerning habeas corpus relief.[215]

The most controversial of the three eight-to-one cases, *Hamdi*, was one of three cases dealing with the entitlement of detainees suspected of plotting terrorist activities to gain access to the U.S. courts for the purpose of challenging their detentions.[216] In an eight-to-one, liberal ruling, in which, surprisingly, Justices Scalia and Stevens joined together to articulate the Court's most liberal position, the Court held that the two-year detention of U.S. citizen Yaser Esam Hamdi was invalid.[217] Nearly all of the Justices agreed with the general direction of the Court's opinion, with only Justice Thomas arguing that the federal government's war powers allow the indefinite detention of U.S. citizens without any opportunity for court proceed-

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204. *Id.*
205. *Id.* at 1946.
206. 124 S. Ct. 2333 (2004).
207. *Id.* at 2338.
208. *See id.* at 2341.
209. *Id.* at 2336.
210. *Id.* at 2341.
211. *See* Baldwin v. Reese, 124 S. Ct. 1347 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Pa. State Police v. Suders, 124 S. Ct. 2342 (2004).
212. 124 S. Ct. 2633 (2004).
213. The other two cases were five-to-four, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), and six-to-three, Rasul v. Bush, 124 S. Ct. 2686 (2004).
214. *Suders*, 124 S. Ct. 2342. This case will not be discussed in detail in this section. Although it impacts criminal justice agencies, it is not directly concerned with the definition of crimes, the rights of suspects and defendants, or the processing of criminal cases.
215. *Baldwin*, 124 S. Ct. 1347.
216. *See, e.g.*, *Hamdi*, 124 S. Ct. 2633; *Rasul*, 124 S. Ct. 2686; *Padilla*, 124 S. Ct. 2711.
217. *Hamdi*, 124 S. Ct. 2633.

ings.[218] Yet, the Court was very divided on the reasoning for why Hamdi's detention was illegal.

Hamdi was picked up on the Afghanistan battlefield for allegedly fighting with the Taliban against the United States.[219] The federal government classified Hamdi as an "enemy combatant" and held him in a naval brig in Charleston, South Carolina.[220] Hamdi's father filed for a writ of habeas corpus arguing that his son's Fifth Amendment right to due process had been violated because Hamdi had been held without access to legal counsel and without being given a notice of the charges against him.[221] Moreover, the petition asserted that Hamdi's arrest was not legally authorized and that, because Hamdi was an American citizen held on U.S. soil, he was entitled to the rights and protections of the U.S. Constitution.[222]

Justice O'Connor, announcing the judgment of the Court and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, found that the detention of U.S. citizens—and Hamdi specifically—was legally authorized when Congress voted to allow the President the ability to use military force in Afghanistan.[223] As such, U.S. citizens classified as "enemy combatants" generally can be detained during a time of war.[224] However, these four justices also concluded that U.S. citizens facing the possibility of indefinite detention, as was the case here because of the nebulous nature of the war on terrorism, are entitled to a meaningful opportunity to challenge the legal basis for their detention in a judicial proceeding.[225] Justices Souter and Ginsburg agreed with the plurality opinion that Hamdi deserved his day in court but argued more generally that his detention was not legally sanctioned because Congress did not explicitly authorize the detention of U.S. citizens.[226]

Justices Scalia and Stevens, in a dissenting opinion written by Justice Scalia, argued that the government must either give Hamdi a trial complete with constitutional safeguards or release him outright.[227] Congress may detain Hamdi if it chooses to suspend the writ of habeas corpus, Justice Scalia said, but, absent such a move, the state may not simply detain him.[228] As Justice Scalia stated,

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers

218. *Id.*
219. *Hamdi*, 124 S. Ct. at 2637.
220. *Id.*
221. *Id.* at 2636.
222. *Id.*
223. *Id.* at 2640–41.
224. *Id.* at 2640.
225. *Id.* at 2648.
226. *Id.* at 2653–56.
227. *Id.* at 2660–74.
228. *Id.* at 2671.

> thought proper...there would soon be an end of all other rights and immunities."[229]

Justice Scalia continued,

> The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow...procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trials....
>
> To be sure, certain types of permissible *non* criminal detention—that is, those not dependent upon the contention that the citizen had committed a criminal act —did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions—[such as] civil commitment of the mentally ill....It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.[230]

Finally, in a dissenting opinion, Justice Thomas found no fault with the detention, the possibility of indefinite detention, or the lack of any due process procedures.[231] In short, Justice Thomas asserted that the President is vested with plenary powers related to national security, including the power to designate enemy combatants and order their detention, and that the judiciary lacks the expertise and capacity to second-guess such executive decisions.[232] While the remaining justices failed to agree on the exact scope and nature of the due process procedures the government must afford Hamdi, a clear majority was unwilling to accept this type of executive action without any judicial oversight.[233]

The Court's other eight-to-one criminal justice decision, *Baldwin v. Reese*,[234] clarified the use of federal habeas corpus relief by state prisoners.[235] Writing for the majority, Justice Breyer found that a state prisoner does not present a fair federal habeas corpus claim if the court has to read beyond the petition to alert the federal courts to the federal claim.[236] Justice Stevens was the lone dissenter to this conservative decision.[237]

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229. *Id.* at 2662 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (1765); citing *id.* at 132–33).

230. 124 S. Ct. at 2662 (Scalia, J., dissenting) (citations omitted).

231. *Id.* at 2674–85.

232. *Id.* at 2674.

233. Interestingly, following the Supreme Court's decision in *Hamdi*, Hamdi was released and sent home to Saudi Arabia without facing any criminal charges or further detention in his home country. Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. TIMES, Oct. 16, 2004. Hamdi merely agreed to renounce his U.S. citizenship and promised to limit his future travel. *Id.* A spokesman for the U.S. military said, "Hamdi was no longer considered a threat to the United States and did not possess any further intelligence value." *Id.*

234. 124 S. Ct. 1347 (2004).

235. *Id.*

236. *Id.*

237. *Id.* at 1352.

C. *Seven-to-Two Decisions*

There were four seven-to-two criminal justice decisions in the term and only one of those ended in a liberal outcome.[238] Starting with the lone liberal decision, the Court issued unusually harsh statements regarding the Fifth Circuit Court of Appeals' decision in a habeas corpus-based death penalty case. The case, *Banks v. Dretke*,[239] was one of two high profile, death penalty cases in Texas in which the Fifth Circuit failed, according to the U.S. Supreme Court, to follow the high court's precedents by refusing habeas relief.[240] In this case, Delma Banks was convicted of capital murder in 1980.[241] During the original trial, the State failed to advise Banks that the testimony of two of its witnesses could be easily challenged if not discredited.[242] One witness was a paid police informant while the other had been extensively coached.[243] In addition, the prosecutor knowingly allowed its paid informant to give false testimony and represented to the jury that the testimony was not only truthful, but also of the "utmost significance."[244] The prosecutor also allowed the second witness to tell the jury that his testimony was completely unrehearsed.[245] The State's deception was eventually discovered in a federal habeas corpus proceeding.[246] Although the district court granted Banks relief, the Fifth Circuit Court of Appeals reversed, stating that Banks had documented too late the prosecutorial misconduct and, thus, federal relief was not available.[247]

In a strongly worded opinion by Justice Ginsburg, a seven-member majority ruled for Banks, allowing him for the first time in twenty years to challenge his original murder conviction.[248] As the Court noted, "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."[249] Chastising the court of appeals, the Court wrote, "The Fifth Circuit stated its position on this point somewhat obliquely, but appears to have viewed Rule 15(b) as inapplicable in habeas proceedings...."[250] The majority, however, stated that "[w]e have twice

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238. Pliler v. Ford, 124 S. Ct. 2441 (2004); United States v. Lara, 124 S. Ct. 1628 (2004); Thornton v. United States, 124 S. Ct. 2127 (2004); Banks v. Dretke, 540 U.S. 668 (2004).

239. 540 U.S. 668 (2004).

240. The second case is *Tennard v. Dretke*, 124 S. Ct. 2562 (2004). *See* Greenhouse, *supra* note 12.

241. *Banks*, 124 S. Ct. at 1181–82.

242. *Id.* at 1264–65.

243. *Id.* at 1264.

244. *Id.* at 1267.

245. *Id.* at 1263.

246. *Id.*

247. *Id.*

248. *See id.* at 1271.

249. *Id.* at 1263.

250. *Id.* at 1279. Federal Rule of Civil Procedure 15(b) states:

> Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in

before referenced Rule 15(b)'s application in federal habeas proceedings."[251] Justice Thomas, joined by Justice Scalia, issued a dissenting opinion asserting that there was not a reasonable probability that the jury would have altered its finding even had the State disclosed the exculpatory evidence.[252]

In *Thornton v. United States*,[253] the Court decided whether police officers can search a car incident to a valid arrest if the officer first makes contact with the car's occupant after the occupant has left the vehicle.[254] In *Thornton*, which extended the Court's ruling in *New York v. Belton*,[255] Officer Nichols became suspicious of Marcus Thornton's driving.[256] Upon running Thornton's license plates, Nichols discovered that the plate numbers did not correspond with the car Thornton was driving.[257] Before Nichols could stop Thornton, Thornton parked and exited the car.[258] Nichols proceeded to question Thornton, conducted a pat down, discovered narcotics, and arrested him.[259] Nichols, asserting that he was concerned for his safety, then searched the car, uncovering a handgun.[260] Thornton sought to have the gun suppressed as a product of an unconstitutional search under the Fourth Amendment.[261]

In an opinion authored by Chief Justice Rehnquist, the majority ruled against Thornton and expanded principles articulated in *Belton*.[262] In *Belton*, the Court had ruled that, if a police officer has made a valid arrest of a car occupant, the officer is constitutionally allowed to search the passenger compartment of the vehicle.[263] The Court extended that ruling in *Thornton* by asserting that police officers can search a vehicle without a warrant even if the driver has left the car.[264] The Court ruled that Thornton's arrest caused legitimate concern for the officer's safety as well as concern for destruction of evidence inside the vehicle.[265] Justice Stevens, joined by Justice Souter, dissented and stated that the majority had expanded the doctrine articulated in *Belton* too far and that such a search is unconstitutional under the Fourth Amendment.[266]

The third seven-to-two Supreme Court ruling dealt with the issue of double jeopardy. In *United States v. Lara*,[267] Billy Jo Lara, a Native American from a

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maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

251. *Banks*, 124 S. Ct. at 1279.
252. *Id.* at 1281.
253. 124 S. Ct. 2127 (2004).
254. *Id.* at 2129.
255. 453 U.S. 454 (1981).
256. 124 S. Ct. at 2129.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 2132.
263. 453 U.S. at 462–63.
264. 124 S. Ct. 2127.
265. *Id.* at 2129.
266. *Id.* at 2139–40.
267. 124 S. Ct. 1628 (2004). As noted previously, *see supra* note 31, some cases are difficult to classify as "liberal" or "conservative." The *Lara* case fits the criteria as "liberal" because it is "pro-[Native American]," *see supra* note 32 and accompanying text, in that it enhances the sovereignty of Native American tribes. However, the

Chippewa tribe, ignored an order by the Spirit Lake Sioux Tribe and attempted to enter the Sioux Tribe reservation.[268] Federal officers stopped Lara, and Lara assaulted one of the officers.[269] Lara was then prosecuted by the Spirit LakeTribe in tribal court for "violence to a policeman" and, upon being found guilty, served ninety days in jail.[270] After Lara served his time, he was arrested by federal officials for assaulting a federal officer.[271] Because both crimes were based on essentially the same key facts, Lara argued that the second prosecution by the federal government violated the Double Jeopardy Clause of the Fifth Amendment.[272] The federal government argued that, because the Spirit Lake Sioux Tribe is a sovereign entity, the second prosecution did not violate the Double Jeopardy Clause.[273]

Writing for the majority, Justice Breyer agreed with the government's perspective.[274] Because each prosecution was undertaken by a separate sovereign, the Court found that the Fifth Amendment was not violated.[275] Indeed, the Court held that the double jeopardy protection did not apply because the prosecutions were brought by dual sovereigns and thus were constitutionally permissible.[276] Justices Stevens, Kennedy, and Thomas filed concurring opinions, while Justice Souter, joined by Justice Scalia, dissented.[277] Justices Souter and Scalia argued that, because Lara was not a member of the Spirit Lake Sioux Tribe, the tribe lacked the authority to prosecute him.[278]

In *Pliler v. Ford*,[279] the final seven-to-two case, the Court ruled that courts may dismiss mixed habeas corpus petitions without warning petitioners that the petitions will be dismissed.[280] The majority opinion was written by Justice Thomas.[281] Justice Ginsburg wrote a dissenting opinion that was joined by Justice Breyer.[282] Justice Breyer also dissented separately.[283]

D. Six-to-Three Decisions

Of the five criminal justice cases[284] decided six-to-three in the 2003–2004 Term, three ended in liberal outcomes[285] and two can be classified as conservative

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case is classified as "conservative" because the essential core of the liberal/conservative classification scheme places greater emphasis on the issue of whether an individual's claim of right was supported or whether the court sided with the government. *See supra* note 33.

268. 124 S. Ct. at 1631.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 1631–32.
274. *Id.* at 1639.
275. *Id.*
276. *Id.* at 1634.
277. *Id.* at 1639, 1641, 1648.
278. *Id.* at 1649.
279. 124 S. Ct. 2441 (2004).
280. *Id.* at 2444.
281. *Id.*
282. *Id.* at 2448–49.
283. *Id.* at 2449.
284. Dretke v. Haley, 124 S. Ct. 1847 (2004); Illinois v. Lidster, 540 U.S. 419 (2004); Tennard v. Dretke, 124 S. Ct. 2562 (2004); Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004).
285. *Tennard*, 124 S. Ct. 2562; *Sosa*, 124 S. Ct. 2739; *Rasul*, 124 S. Ct. 2686.

rulings.[286] The three liberal decisions, in particular, are all very controversial. *Rasul v. Bush*[287] is one of three "war on terrorism" cases decided in the term.[288] *Tennard v. Dretke*[289] is the second of two cases in which the Court overruled a Texas due process decision[290] and criticized the Fifth Circuit Court of Appeals.[291] *Sosa v. Alvarez-Machain*[292] in part opened the federal courts to lawsuits from individuals claiming human rights abuse outside this nation's borders.[293] The conservative decisions concerned a habeas petition[294] and the Fourth Amendment.[295]

The Court continued to be confronted with the task of balancing individual rights with executive powers during the war on terrorism in *Rasul v. Bush*.[296] The petitioners—two Australians and twelve Kuwaiti citizens[297]—were apprehended and subsequently detained at the U.S. naval base at Guantanamo Bay, Cuba.[298] Detained since early 2002, the petitioners, through relatives, filed actions in the D.C. District Court challenging the government's right to detain them.[299] The case concerned claims of being denied counsel, being refused access to the courts, and not being informed of the charges against them.[300] The petitioners contended that these actions violated the U.S. Constitution, international law, and international treaties.[301] The Supreme Court considered a narrow question with potentially broad implications, namely whether the U.S. courts have jurisdiction to hear challenges to the legality of the detention of foreign nationals captured abroad[302] during hostilities and later held in military custody at the Guantanamo Bay U.S. Naval Base located in yet another sovereign nation, Cuba.[303] The court of appeals affirmed a district court

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286. *Haley*, 124 S. Ct. 1847; *Lidster*, 540 U.S. 419.

287. 124 S. Ct. 2686 (2004).

288. The others are *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

289. 124 S. Ct. 2562 (2004).

290. The other is *Banks v. Dretke*, 540 U.S. 668 (2004).

291. *Tennard*, 124 S. Ct. at 2569.

292. 124 S. Ct. 2739 (2004). This is a six-to-three decision as to Part IV of the majority opinion, which reserved the right for some foreign plaintiffs to sue U.S. citizens under U.S. law.

293. Greenhouse, *supra* note 12.

294. Dretke v. Haley, 124 S. Ct. 1847 (2004).

295. Illinois v. Lidster, 540 U.S. 419 (2004).

296. 124 S. Ct. 2686 (2004).

297. Two British citizens—including the primary petitioner, Shafiq Rasul—were among the petitioners when the Supreme Court granted certiorari. *Id.* at 2690 n.1. Both were later released from custody and dropped from the case, resulting in fourteen remaining petitioners. *Id.* at 2691.

298. *Id.*

299. *Id.* at 2690–91.

300. *Id.*

301. The two Australian citizens sought release, access to counsel, and other relief through separate habeas corpus petitions. *Id.* at 2691. In their complaint, Fawzi Khalid Abdullah Fahad Al Odah and eleven other detainees from Kuwait sought access to the courts or an impartial tribunal so as to be informed of the specific charges against them and other relief. *Id.*

302. Applications filed on behalf of detainees maintained that the villagers, after being promised financial rewards, captured the Kuwaiti citizens in Afghanistan and Pakistan. *Id.* at 2691 n.4. The villagers turned over the Kuwaiti citizens to U.S. custody. *Id.* A somewhat similar pattern is claimed regarding one of the Australians who was transferred to U.S. custody after allegedly being captured by local groups opposing the Taliban. *Id.* It is asserted that the remaining Australian was shifted from arresting Pakistani authorities to Egyptian and then U.S. authorities. *Id.*

303. *Id.* at 2692–93.

decision to dismiss the petitions for want of jurisdiction.[304] The Supreme Court held, contrary to the position of the Bush administration, that U.S. courts do have jurisdiction to review such matters, but the Supreme Court left unresolved many issues regarding the extent of legal protections enjoyed by the detainees and how these protections would be afforded.[305]

The rationale for the rulings in the lower courts drew heavily from the Supreme Court's decision in *Johnson v. Eisentrager*,[306] a case arising from military actions in World War II and concerning a habeas corpus claim by civilians working for the German military who were held in American custody abroad.[307] The petitioners in *Eisentrager* were German citizens captured by U.S. forces in China, tried and convicted of war crimes by an American military commission in Nanking, and then incarcerated in occupied Germany.[308] Noting the perceived similarities between the claims by the detainees and those of the German prisoners in *Eisentrager*, the court of appeals in *Al Odah* ruled that U.S. district courts lack jurisdiction to entertain such claims, stating that the Guantanamo detainees "are in all relevant respects in the same position as the prisoners in *Eisentrager*."[309] "They cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them."[310]

However, the Supreme Court's majority opinion, delivered by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and Breyer, rejected the applicability of *Eisentrager* as a controlling precedent in the current case.[311] This majority, along with Justice Kennedy, who filed an opinion concurring in the judgment, found critical differences between the relevant conditions in *Eisentrager* and those in *Rasul*.[312] Among these dissimilarities, the Court stressed that the Guantanamo detainees are not nationals of countries at war with the United States and that the petitioners deny that they have participated in acts of aggression against the United States.[313] Moreover, and again distinguished from the German petitioners in *Eisentrager*, those detained at Guantanamo had not been charged formally with, let alone convicted of, a crime and had never been given access to any tribunal in which the validity of claims against them might be challenged.[314] Importantly, these petitioners had been imprisoned for over two years in a place—an American naval base—where the United States exercises plenary and exclusive jurisdiction (but not ultimate sovereignty) through a century-old agreement between the United States and Cuba.[315]

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304. *Id.* at 2691–92.
305. *Id.* at 2694.
306. 339 U.S. 763 (1950). The lower court decisions are *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 1494 (2004), and *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.N.Y. 2002).
307. *See Eisentrager*, 339 U.S. at 765–66.
308. *Id.*
309. *Id.*
310. *Al Odah*, 321 F.3d at 1145.
311. *Rasul*, 124 S. Ct. at 2695.
312. *Id.* at 2693–94, 2700.
313. *Id.* at 2693.
314. *Compare id. with Eisentrager*, 339 U.S. at 765–66.
315. The Court refers to the following agreements: Lease of Lands for Coaling and Naval Stations, Feb. 23,

Not only were the petitioners in the two cases differently situated according to the Court, but the conditions critical in *Eisentrager* "were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus."[316] The majority further reasoned that, because the habeas corpus statute (section 2241)[317] would provide for federal court jurisdiction over the claims of an American citizen held at Guantanamo, the statute does not distinguish between Americans and aliens held in foreign custody, and, because the writ of habeas corpus acts upon the custodian (for example, the Department of Defense) and not the prisoner,[318] the jurisdiction of a district court to hear such a claim is not strictly limited to only those claims from petitioners detained inside the territorial jurisdiction of the court.[319] Thus, the Court concluded that section "2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base."[320]

In his concurring opinion, Justice Kennedy agreed that U.S. courts have jurisdiction to consider challenges to the legality of the detentions in this case involving the Guantanamo Base.[321] However, Justice Kennedy did not believe that the statutory predicate to *Eisentrager*'s ruling in general has been as weakened as much as other members of the majority had concluded; that is, Justice Kennedy argued for the general preservation of the *Eisentrager* precedent but viewed the current case as sufficiently distinguishable.[322] Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissenting opinion in which Justice Scalia argued strongly that the habeas corpus statute does not apply to aliens detained abroad by the U.S. military.[323]

Despite the Court's apparently strong statement on the reach of the judiciary and certain limitations on executive authority, many provocative issues remain unresolved. The Court, for instance, did not explain what specific protections and proceedings might be required regarding the Guantanamo detainees, and, furthermore, it is unclear what aspects of the decision, if any, might apply in situations in which foreign suspects are detained in parts of the world where the United States does not have such a long-standing lease agreement or where it does not exercise the extent of jurisdictional control that it does in Guantanamo.[324]

In *Tennard v. Dretke*,[325] the Supreme Court ruled that the Fifth Circuit had failed to follow the Court's precedents when it refused to issue a certificate of appealability to Robert Tennard, even though his lawyers had argued that Tennard's

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1903, U.S.-Cuba, art. III, T.S. No. 418 and the supplements; Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U.S.-Cuba, arts. I–II, T.S. No. 426; and Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1683.

316. 124 S. Ct. at 2693 (citing *Eisentrager*, 339 U.S. at 777).

317. 28 U.S.C. § 2241 (2000).

318. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494–95 (1973) (citing Wales v. Whitney, 114 U.S. 564, 574 (1885)).

319. *Rasul*, 124 S. Ct. at 2688.

320. *Id.* at 2698.

321. *Id.* at 2699.

322. *Id.* at 2700–01.

323. *Id.* at 2701–10.

324. *Id.* at 2702–03.

325. 124 S. Ct. 2562 (2004).

low IQ prohibited his execution.[326] In a scathing indictment of a decision by the court of appeals to deny habeas relief, Justice O'Connor's majority opinion stated, "Despite paying lipservice to the principles guiding issuance of a COA [Certificate of Appealability], the Fifth Circuit's analysis proceeded along a distinctly different track."[327] The Court went on to state that the Fifth Circuit's analysis had "no foundation in the decisions" of the high court.[328] The Court asked whether Tennard's limited capacities would have persuaded a reasonable jury to find his IQ to be a mitigating factor when deciding whether or not to apply the death penalty.[329] Indeed, the majority found that the case's facts had demonstrated that a jury might have decided differently, and consequently reversed the Fifth Circuit's ruling.[330] Chief Justice Rehquist and Justices Scalia and Thomas all wrote dissenting opinions.[331] Chief Justice Rehnquist maintained that a reasonable jury would not have placed sufficient weight on Tennard's limited mental abilities to require reversal,[332] while Justices Scalia and Thomas disagreed fundamentally with the precedent on which the majority relied.[333]

Several cases in the 2003–2004 Term presented unique questions to the Court regarding the jurisdiction of American courts to resolve disputes that did not take place on American soil. In one such case, *Sosa v. Alvarez-Machain*,[334] the Court interpreted the meaning of the two-centuries-old Alien Tort Statute.[335] This statute allows foreigners who are victims of abuse abroad to use U.S. courts to sue for human rights violations.[336] In this case, an agent of the Drug Enforcement Administration (DEA) was captured, tortured, and murdered in Mexico in 1985.[337] DEA agents believed that Humberto Alvarez-Machain was involved in the murder.[338] These agents eventually hired Jose Sosa and other Mexican nationals to abduct Alvarez-Machain and to bring him to the United States where he was arrested by federal agents.[339] Ultimately, Alvarez-Machain was acquitted on all charges and filed a civil action against Sosa, other Mexican citizens, DEA operatives, and the United States.[340] Alvarez-Machain sued the United States under the Federal Tort Claims Act and Sosa under the Alien Tort Statute.[341] A divided Court held that Alvarez-Machain was not entitled to recover under either claim.[342]

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326. *Id.* at 2570.
327. *Id.* at 2569 (citations omitted).
328. *Id.* at 2570.
329. *Id.* at 2569–70.
330. *Id.* at 2573.
331. *Id.* at 2573, 2575, 2576.
332. *Id.*
333. *See id.* at 2575–76.
334. 124 S. Ct. 2739 (2004).
335. 28 U.S.C. § 1350 (2000) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").
336. *Id.*
337. *Sosa*, 124 S. Ct. at 2746.
338. *Id.*
339. *Id.*
340. *Id.* at 2746–47.
341. *Id.* at 2747.
342. *Id.*

Although the Court's ruling barred Alvarez-Machain from obtaining monetary damages, the Court left open the possibility that other foreigners who claim to be the victims of human rights violations could sue in U.S. courts even if the offenses took place abroad. Given the chance that Americans, both civilian contractors and government personnel, in Iraq, Afghanistan, and at the Guantanamo Bay Naval Base might have committed relevant violations against prisoners confined as a result of military actions in Iraq, Afghanistan, and the more general "war on terrorism," the ruling in *Sosa* allows for the provocative possibility that such individuals might sue their alleged abusers in U.S. courts. Justices Scalia and Thomas and Chief Justice Rehnquist dissented from Part IV of Justice Souter's majority opinion.[343]

Turning to the six-to-three conservative decisions, the Court handed down an important Fourth Amendment ruling in *Illinois v. Lidster*[344] dealing with the constitutionality of information stops.[345] The case began in Illinois in 1997 when an unknown motorist killed a bicyclist.[346] A week later, in an attempt to gain information about the accident, the police set up an informational checkpoint.[347] At checkpoints that were erected at the same location and time of day as the original accident, vehicle occupants were stopped for approximately ten to fifteen seconds each and questioned by police.[348] Robert Lidster approached a checkpoint, swerved, and nearly hit an officer.[349] Lidster eventually failed a sobriety test and was arrested.[350] After his conviction for driving under the influence, Lidster challenged his conviction, arguing that the information used to arrest him was gathered at a checkpoint that violated the Fourth Amendment.[351]

Writing for the majority, Justice Breyer first stated that this case was not governed by the Court's decision in *Indianapolis v. Edmond*,[352] in which the Court held that general crime control checkpoints without individualized suspicion are unconstitutional.[353] Rather, the Court asserted that these checkpoints were not intended to catch criminals but rather to gather information about a crime that in all probability was committed by a person other than the driver stopped.[354] As such, *Edmond* was not controlling.[355] The Court then asked if the information checkpoints used here were reasonable and found that they did not violate the Fourth Amendment.[356] Justices Stevens, Ginsburg, and Souter dissented in part, arguing that the roadblock may not have been reasonable and should be investigated further by the lower courts.[357]

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343. *Id.* at 2769.
344. 124 S. Ct. 885 (2004).
345. *Id.* at 888.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. 531 U.S. 32 (2000).
353. *Id.* at 48.
354. *Lidster*, 124 S. Ct. at 889.
355. *Id.* at 888.
356. *Id.* at 891.
357. *Id.* at 891–92.

A final six-to-three conservative ruling pertains to habeas corpus petitions.[358] Generally, the federal courts do not entertain habeas corpus petitions based on procedural defaults without a showing of prejudice.[359] The exception to this rule is when the petitioner can show that a constitutional error resulted in the conviction of someone making a claim of actual innocence in a capital case.[360] The Court, in *Dretke v. Haley*,[361] had the opportunity to expand this exception to non-capital cases.[362] However, the majority declined to do so in an opinion written by Justice O'Connor, though the Supreme Court did remand the case for further consideration.[363] Justice Stevens, joined by Justices Kennedy and Souter, dissented, arguing forcefully that Haley should be granted habeas corpus relief and released immediately.[364] As Justice Stevens noted, "The miscarriage of justice is manifest....[T]he Court's ruling today needlessly postpones final adjudication of respondent's claim and perversely prolongs the very injustice that the cause and prejudice standard was designed to prevent."[365]

E. Five-to-Four Decisions

There were eleven[366] five-to-four criminal justice decisions handed down by the Court in the 2003–2004 Term (five liberal[367] and six conservative[368]) covering a wide variety of issues, including questions regarding the First,[369] Fourth,[370] Fifth,[371] Sixth,[372] and Eighth amendments,[373] and the rights of detainees in the context of the

358. Dretke v. Haley, 124 S. Ct. 1847 (2004).

359. *Id.* at 1849 ("Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default.").

360. *Id.* ("We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty. *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).").

361. 124 S. Ct. 1847 (2004).

362. *Id.* at 1849.

363. *Id.*

364. *See id.* at 1854–55.

365. *Id.* at 1855.

366. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); United States v. Patane, 124 S. Ct. 2620 (2004); Yarborough v. Alvarado, 124 S. Ct. 2140 (2004); Hiibel v. Sixth Judicial Dist. Ct., 124 S. Ct. 2451 (2004); Beard v. Banks, 124 S. Ct. 2504 (2004); Schriro v. Summerlin, 124 S. Ct. 2519 (2004); Tennessee v. Lane, 124 S. Ct. 1978 (2004); Blakely v. Washington, 124 S. Ct. 2531 (2004); Groh v. Ramirez, 124 S. Ct. 1284 (2004); Missouri v. Seibert, 124 S. Ct. 2601 (2004); Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).

367. *Lane*, 124 S. Ct. 1978; *Blakely*, 124 S. Ct. 2531; *Groh*, 124 S. Ct. 1284; *Seibert*, 124 S. Ct. 2601; Ashcroft v. ACLU, 124 S. Ct. 2783.

368. *Padilla*, 124 S. Ct. 2711; *Patane*, 124 S. Ct. 2620; *Alvarado*, 124 S. Ct. 2140; *Hiibel*, 124 S. Ct. 2451; *Banks*, 124 S. Ct. 2504; *Summerlin*, 124 S. Ct. 2519. *Lane*, 124 S. Ct. 1978, will not be discussed in detail in the following section. Although it can affect institutions in the justice system, the issue under the Americans with Disabilities Act did not concern the definition of crimes, constitutional rights for suspects and defendants, or the processing of criminal cases. *See id.*

369. Ashcroft v. ACLU, 124 S. Ct. 2783.

370. *Groh*, 124 S. Ct. 1284; *Hiibel*, 124 S. Ct. 2451.

371. *Patane*, 124 S. Ct. 2620; *Alvarado*, 124 S. Ct. 2140; *Seibert*, 124 S. Ct. 2601.

372. *Blakely*, 124 S. Ct. 2531.

373. *Banks*, 124 S. Ct. 2504; *Summerlin*, 124 S. Ct. 2519.

war on terrorism.[374] Interestingly, one important analyst calls this the "Year Rehnquist May Have Lost His Court."[375] Indeed, in five-to-four criminal justice cases, Chief Justice Rehnquist was in the Court's majority in the six cases that ended in conservative outcomes and dissented in all five cases with a liberal outcome. The moderate conservatives appear to have moved the Court to the center in certain cases, while Chief Justice Rehnquist's position over the years does not appear to have changed.

In *Ashcroft v. ACLU*,[376] the Supreme Court ruled that the Child Online Protection Act (COPA) was most likely a violation of the First Amendment.[377] Congress enacted COPA to protect minors from exposure to sexually explicit material on the Internet.[378] The district court and appeals court prohibited enforcement of COPA and the Supreme Court, in an opinion authored by Justice Kennedy, upheld the injunction.[379] Justice Kennedy, writing for Justices Stevens, Souter, Thomas, and Ginsburg, noted that the Court has consistently held that content-based prohibitions on speech are presumed invalid and the burden of proof to show their constitutionality is on the government.[380] The majority found that the government had not met that burden.[381] Further, the Court noted that there were many alternatives to censorship, including filtering, that are less restrictive and may even be more effective than COPA.[382] Justice Stevens' concurring opinion, joined by Justice Ginsburg, took a more expansive perspective by asserting that criminal prosecution was an inappropriate way to deal with offensive material.[383] Justices Scalia and Breyer filed dissenting opinions.[384] Justice Breyer's opinion was joined by Chief Justice Rehnquist and Justice O'Connor.[385]

Justice Kennedy played a key role in two five-to-four *Miranda* cases, with one case ending in a liberal outcome[386] and the other ending in a conservative outcome.[387] In *Missouri v. Seibert*,[388] Justice Kennedy was the swing vote whose opinion concurring in the judgment helped the liberals reject a police tactic of double questioning suspects, once without *Miranda* and then a second time with *Miranda*.[389] The purpose of the method is to induce suspects to confess before they are informed of their rights, and then to convince the suspects to repeat the confession after the *Miranda* warnings are given.[390] While the first statements are inadmissible, the question in *Seibert* was the admissibility of the second, post-

374. *Padilla*, 124 S. Ct. 2711.
375. Greenhouse, *supra* note 12.
376. 124 S. Ct. 2783 (2004).
377. *Id.* at 2788–89.
378. *Id.* at 2789.
379. *Id.* at 2788.
380. *Id.* at 2791.
381. *Id.* at 2791–92.
382. *Id.* at 2792.
383. *Id.* at 2796–97.
384. *Id.* at 2797.
385. *Id.*
386. Missouri v. Seibert, 124 S. Ct. 2601 (2004).
387. Yarborough v. Alvarado, 124 S. Ct. 2140 (2004); *see also* Greenhouse, *supra* note 12.
388. 124 S. Ct. 2601 (2004).
389. *Id.* at 2605.
390. Greenhouse, *supra* note 12.

Miranda statements.[391] Justice Kennedy and the Court's four liberals found the practice to be unconstitutional and both sets of statements to be inadmissible.[392]

In *Seibert*, the defendant's son, afflicted with cerebral palsy, died in his sleep.[393] Seibert feared being accused of neglect[394] and devised a plan to burn her mobile home to conceal the circumstances surrounding her son's death.[395] Her plan also included leaving a mentally ill teenager who had been living with the family in the burning mobile home so that it would appear that her son had not been left alone.[396] Seibert's other sons set the fire, and the mentally ill teenager died as had been planned.[397] Seibert was later questioned at the police station for about forty to fifty minutes without the benefit of having been read her *Miranda* rights.[398] After she eventually made incriminating statements, she was given a twenty-minute break and then Mirandized, after which she again made incriminating statements.[399] The trial judge suppressed the pre-*Miranda* statements but stated that the way in which the post-*Miranda* statements were obtained did not violate the Fifth or Fourteenth Amendment.[400]

Writing for the plurality, Justice Souter found that the second set of statements was obtained in violation of the Fifth Amendment.[401] Justice Souter pointed out that the practice of extracting information pre- and post-*Miranda* is not confined to the *Seibert* case but rather is a two-stage interrogation process promoted by a national police training organization (the Police Law Institute) and by other police departments.[402] Given this organized effort to extract incriminating statements, the Court concluded that the process could only be motivated by a desire to render the *Miranda* warnings ineffective.[403] The plurality stated that the admissibility of information obtained by the two-step process should depend on "whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object."[404] This test would apply to both intentional and unintentional interrogations.[405] Justice Kennedy, in a concurring opinion, felt that such a test should be used only when the two-step process is used in a calculated manner to undermine *Miranda*.[406] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented.[407]

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391. *Seibert*, 124 S. Ct. at 2605.
392. *Id.* at 2605, 2514.
393. *Id.* at 2605.
394. The son apparently had bedsores and allegedly Seibert feared that she would be charged with neglect if her son's body were discovered in such a condition. *Id.* at 2605.
395. *Id.*
396. *Id.* at 2606.
397. *Id.*
398. *Id.*
399. *Id.* at 2606–07.
400. *See id.* at 2606.
401. *Id.* at 2607.
402. *Id.* at 2609.
403. *Id.*
404. *Id.* at 2612.
405. *Id.*
406. *Id.* at 2616.
407. *Id.*

In *Groh v. Ramirez*,[408] the Court addressed the validity of a warrant that failed to adequately specify the things to be seized.[409] While the application for the warrant contained a detailed list of items sought, that information was not included in the actual warrant.[410] Officers enforced the warrant at the home of Mr. and Mrs. Ramirez, found no illegal material, and left a copy of the warrant, but not a copy of the application, with one of the home's occupants.[411] The officers were then sued by the Ramirezes, leaving the high court to determine both if the warrant was valid and if the officers could be sued.[412]

Writing for the majority of Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer, Justice Stevens found that the warrant was plainly invalid and that, although the warrant was issued based on a properly constructed application, neither the warrant nor the subsequent search was saved by the application.[413] The Court then turned to the question of whether the officers were entitled to qualified immunity.[414] The majority opinion noted that immunity does not attach if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[415] Here, the Court found that, given that the warrant requirements are listed explicitly in the Constitution, any reasonable officer should have been aware that the warrant was invalid and, thus, the officers were not entitled to immunity.[416] Justice Kennedy, joined by Chief Justice Rehnquist, dissented, arguing that, although the Fourth Amendment was violated, the officers nevertheless should receive immunity.[417] In a separate dissenting opinion, Justice Thomas, joined by Justice Scalia and in part by Chief Justice Rehnquist, went further than Justice Kennedy, stating that the search itself was in fact reasonable.[418]

In a case with far-reaching implications, *Blakely v. Washington*,[419] the Justices in a five-to-four liberal decision cast doubt on the current use of sentencing guidelines.[420] Ralph Blakely, a Washington rancher, abducted his wife at knifepoint, placed her in a wooden box, and drove to Montana with her.[421] He also made their thirteen-year-old child drive the family car behind them.[422] Blakely's actions appear to have been triggered by his wife's filing for divorce.[423] Blakely was caught, his wife and child suffered minor physical injuries, and Blakely was charged with first-

408. 124 S. Ct. 1284 (2004).
409. *Id.* at 1287.
410. *See id.* at 1288.
411. *Id.*
412. *See id.*
413. *Id.* at 1289–90.
414. *Id.* at 1293.
415. *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).
416. *Id.*
417. *Id.* at 1295.
418. *Id.* at 1299–1303.
419. 124 S. Ct. 2531 (2004).
420. *See id.*
421. Associated Press, *High Court Ruling Casts Doubts on Sentencing Guidelines* (June 25, 2004), *available at* http://www.cnn.com/2004/LAW/06/25/scotus.sentences.ap/index.html (on file with the New Mexico Law Review).
422. *Id.*
423. *See id.*

degree kidnapping.[424] Blakely agreed to a plea of second-degree kidnapping, admitting the factual elements necessary for the second-degree charge, but not admitting to facts that would have supported a higher charge.[425] At sentencing, and based on Washington's sentencing guidelines, the prosecutors recommended a sentence of forty-nine to fifty-three months.[426] The judge, however, concluded that Blakely acted with "deliberate cruelty," rejected the prosecutors' recommendations, and imposed a sentence of ninety months.[427] The ninety-month sentence was thirty-seven months greater than the statutory maximum, but the judge justified it based on his determination of Blakely's deliberate cruelty toward his wife.[428] Blakely appealed, arguing that his federal constitutional right to have a jury determine all the facts essential to his sentence, as mandated by the Sixth and Fourteenth amendments, had been violated.[429]

Justice Scalia, writing for an unusual majority of Justices Stevens, Thomas, Souter, and Ginsburg, found that the state violated the high court's ruling in *Apprendi v. New Jersey*,[430] in which the Court stated that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[431] Here, the judge could not have justified the increased sentence without using facts that were not stipulated to in the plea agreement, and, thus, without a jury's ruling, the judge's actions violated the Sixth Amendment.[432] Indeed, in a characteristically blunt manner, Justice Scalia noted,

> Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation [to a jury].[433]

Justice O'Connor, joined by Justice Breyer in full and Justice Kennedy and Chief Justice Rehnquist in part, dissented.[434] Justices Kennedy and Breyer also wrote separate dissenting opinions.[435] Of these three dissents, Justice O'Connor's expressed the greatest concern for the decision's implication for sentencing guidelines. Justice O'Connor noted that complications of the ruling would "either trim or eliminate altogether...sentencing guidelines schemes and, with them, 20 years of sentencing reform."[436] True to Justice O'Connor's prediction, the case

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424. *Blakely*, 124 S. Ct. 2531.
425. *Id.* at 2534–35.
426. *Id.* at 2535.
427. *Id.*
428. *Id.* at 2535–36.
429. *See id.* at 2536.
430. 530 U.S. 466 (2000).
431. *Id.* at 490, *quoted in Blakely*, 124 S. Ct. at 2536.
432. *Blakely*, 124 S. Ct. at 2538.
433. *Id.* at 2543.
434. *Id.*
435. *Id.* at 2550–51.
436. *Id.* at 2543.

immediately "left criminal sentencing in turmoil around the country"[437] as there was great uncertainty about what factors judges could rely upon in imposing sentences under federal guidelines.[438]

Schriro v. Summerlin,[439] a five-to-four conservative opinion, clarified the reach of the Supreme Court's 2002 ruling in *Ring v. Arizona*.[440] In *Ring*, the Court decided that juries, not judges, must determine the presence of aggravating factors that would allow imposition of the death penalty in a capital case.[441] The question in *Summerlin* was whether or not *Ring* "applies retroactively to cases already final on direct review."[442] Writing for the majority of Chief Justice Rehnquist and Justices Thomas, Kennedy, and O'Connor, Justice Scalia found that *Ring* does not apply retroactively.[443] The Court concluded that, when a person has had a full trial and lost the subsequent appeals, "it does not follow that...he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart."[444] Justice Breyer, joined by Justices Ginsburg, Stevens, and Souter, dissented and called *Ring* a "watershed" decision that federal courts must apply when considering constitutional challenges to final death sentences.[445]

The Court decided against retroactive application of another death penalty-related decision in *Beard v. Banks*.[446] In *Mills v. Maryland*,[447] the Court concluded that capital sentencing schemes that require juries to ignore mitigating factors if all the jury members do not unanimously agree on the validity of those mitigating factors are unconstitutional.[448] The question in *Banks* was whether individuals sentenced to death under invalid sentencing schemes before the Court's decision in *Mills* was handed down should be provided relief under the *Mills* standard.[449] The majority of Chief Justice Rehnquist and Justices Thomas, Scalia, O'Connor, and Kennedy, in an opinion written by Justice Thomas, decided against the retroactive application of *Mills*.[450] Justices Stevens, Ginsburg, Breyer, and Souter again dissented.[451]

Extending the logic of *Terry v. Ohio*,[452] the majority ruled in *Hiibel v. Sixth Judicial District Court*[453] that people could be arrested for refusing to reveal their identities to police during roadside questioning.[454] Larry Hiibel was arrested and

437. Greenhouse, *supra* note 12.
438. *See* Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004.
439. Schriro v. Summerlin, 124 S. Ct. 2519 (2004).
440. 536 U.S. 584 (2002), *cited in Summerlin*, 124 S. Ct. at 2521.
441. *Id.*
442. *Summerlin*, 124 S. Ct. at 2521.
443. *Id.* at 2526.
444. *Id.*
445. *Id.*
446. 124 S. Ct. 2504 (2004).
447. 486 U.S. 367 (1988).
448. *Id.* at 375, 384.
449. *Banks*, 124 S. Ct. at 2508.
450. *Id.* at 2504.
451. *Id.* at 2515–18.
452. 392 U.S. 1 (1968).
453. 124 S. Ct. 2451 (2004).
454. *Id.* at 2461.

convicted for refusing to identify himself during a *Terry* stop.[455] The police had approached Hiibel and asked for information about a fight that had recently taken place.[456] Hiibel appeared intoxicated and so the officer asked for identification.[457] Hiibel refused and was arrested.[458] Although the Court recognized in *Terry* that when police have a reasonable suspicion that a person may be involved in a crime they are allowed to stop the person briefly to investigate further, the Court had not ruled on whether a person could be lawfully prosecuted for refusing to answer questions about his or her identity.[459]

Justice Kennedy's majority opinion upheld Hiibel's conviction by noting that under ordinary circumstances a police officer is allowed to ask for identification without violating the Fourth Amendment.[460] The Court also found no Fifth Amendment violation because merely disclosing one's name does not necessarily present any reasonable degree of incrimination.[461] The majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas.[462] In dissent, Justice Stevens stated that the Fifth Amendment right to remain silent does not allow the police to force disclosure of one's identity.[463] Moreover, Justice Stevens stated that a person under suspicion of a crime should receive the same constitutional protections as one being investigated based on probable cause.[464] Also in dissent, Justice Breyer, joined by Justices Souter and Ginsburg, found that forced identification violated the Fourth Amendment.[465] The case is considered a major defeat for privacy advocates.[466]

Another case concerning *Miranda* rights in the 2003–2004 Term was *Yarborough v. Alvarado*.[467] The police wanted to speak to Michael Alvarado, who was seventeen years old at the time of the crime, regarding a recent carjacking and murder and left word with his parents requesting a meeting.[468] Alvarado's parents brought him to the station and waited in the police station lobby for two hours as Alvarado was questioned by police without the benefit of *Miranda* warnings.[469] Alvarado eventually admitted his participation in the crime and was arrested.[470]

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455. *Id.* at 2455–56.
456. *Id.* at 2455.
457. *Id.*
458. *Id.*
459. *See id.* at 2457.
460. *Id.* at 2458.
461. *Id.* at 2460.
462. *Id.* at 2454.
463. *Id.* at 2464 (Breyer, J., dissenting).
464. *Id.* at 2462 (Breyer, J., dissenting).
465. *Id.* at 2464–66 (Breyer, J., dissenting).
466. Bill Mears, *Keeping Name Private Can Be Crime, Court Rules* (June 29, 2004), *at* www.cnn.com/2004/LAW/06/21/scotus.police.id/index.html.
467. Yarborough v. Alvarado, 124 S. Ct. 2140 (2004). As noted earlier, this is also the second case dealing with *Miranda* rights in which Justice Kennedy was the swing vote. *See supra* notes 386–389 and accompanying text.
468. *Alvarado*, 124 S. Ct. at 2145.
469. *Id.*
470. *Id.* at 2146.

Alvarado filed for habeas corpus relief, arguing that his Fifth Amendment rights had been violated.[471]

Writing for the majority, Justice Kennedy ruled against Alvarado.[472] The Court first noted that Alvarado was not in custody and thus was free to leave.[473] Because he was free to leave, a *Miranda* warning was unnecessary and his rights were not violated.[474] Moreover, the Court noted that the state court's failure to consider Alvarado's age did not warrant overturning his conviction.[475] Justice O'Connor's concurring opinion left open the possibility that there might be situations in which a person's age is a relevant factor in determining the constitutionality of police actions.[476] Chief Justice Rehnquist and Justices O'Connor, Thomas, and Scalia joined Justice Kennedy's majority opinion.[477] Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented, asserting that Alvarado's Fifth Amendment rights were clearly violated because he was in custody and had not been Mirandized.[478] Moreover, Justice Breyer argued that Alvarado's youth made it more likely that he would have thought he was in custody and felt compelled to cooperate with police, thus further mandating the use of *Miranda* warnings by police.[479]

A final case in the 2003–2004 Term dealing with *Miranda* rights concerns the ability of police to use physical evidence gathered as a result of voluntary statements made without the benefit of *Miranda*. In *United States v. Patane*,[480] the Court found that physical evidence resulting from voluntary, but unwarned, statements is not "fruit of the poisonous tree" and thus is constitutionally admissible.[481] The opinion was written by Justice Thomas and joined by Chief Justice Rehnquist and Justice Scalia.[482] Justices Kennedy and O'Connor concurred in the judgment that the evidence could be used.[483] Justice Souter dissented, arguing that the majority opinion created an incentive for police to withhold *Miranda* warnings because the physical evidence would nevertheless be admissible.[484] Justice Souter's dissent was joined by Justices Ginsburg and Stevens.[485] Justice Breyer also dissented separately.[486]

The third terrorism case in the term, *Rumsfeld v. Padilla*,[487] ended with a five-to-four decision in which the justices "punted" the case back down to the lower courts on a jurisdictional issue.[488] Padilla, an American citizen, was arrested at O'Hare

471. *Id.*
472. *Id.* at 2144.
473. *Id.* at 2149–50.
474. *See id.* at 2150.
475. *Id.* at 2152.
476. *Id.*
477. *Id.* at 2143.
478. *Id.* (Breyer, J., dissenting).
479. *Id.* at 2154–56.
480. United States v. Patane, 124 S. Ct. 2620 (2004).
481. *Id.* at 2623.
482. *Id.* at 2624.
483. *Id.* at 2630.
484. *Id.* at 2632 (Souter, J., dissenting).
485. *Id.* at 2631.
486. *Id.* at 2632.
487. 124 S. Ct. 2711 (2004).
488. *Id.* at 2714, 2715.

Airport in Chicago because the government suspected that Padilla intended to engage in terrorist activities in the United States.[489] One month after his arrest, Padilla was labeled an "enemy combatant" and transferred to military custody in South Carolina without his lawyer being informed.[490] Two days after the transfer, Padilla's lawyer filed a petition for a writ of habeas corpus in the New York federal courts.[491]

The Court avoided the habeas issue in the case by not rendering a decision on the question of whether Padilla's military detention was constitutional.[492] That is, the Court failed to address the constitutionality of the Executive's authority to detain indefinitely, in military custody, an American citizen captured on American soil and presumably protected by the U.S. Constitution.[493] Instead, the five-member majority of Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas concluded that Padilla's case was filed in the wrong jurisdiction and, therefore, the case had to be refiled in the district court with jurisdiction over the location where Padilla was being held after the transfer.[494]

It is possible that the justices remanded the case without decision because otherwise a majority of the Justices, based on their votes in *Hamdi*,[495] might have felt compelled to release Padilla outright. *Hamdi* was the eight-to-one decision in which only Justice Thomas argued that the President has broad authority of the type required to keep an American citizen in indefinite detention.[496] Thus, it appears that the Justices felt unwilling to release Padilla in light of the government's frightening but unsubstantiated claims about his planned terrorist acts[497] but also were unable to endorse the government's practices of lengthy incommunicado detentions of Americans.

Justice Stevens, writing for Justices Ginsburg, Souter, and Breyer, dissented, arguing that the Court should address the merits of the case.[498] Justice Stevens concluded with a passionate argument about the importance to the concept of liberty and freedom of court access for all detainees:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

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489. *Id.* at 2715.
490. *Id.* at 2716.
491. *Id.* at 2716–17.
492. *Id.* at 2715.
493. *See id.*
494. *Id.* at 2724–25.
495. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).
496. *See supra* text accompanying notes 216–233.
497. The federal government claimed that Padilla planned to create a "dirty bomb" by detonating uranium wrapped in explosives in order to release deadly radioactive particles into the air. Associated Press, *Bomb Would Have Been Dud, Scientists Say*, N.Y. TIMES, June 10, 2004. However, scientists say that a bomb made from uranium would, in fact, not pose a significant hazard because uranium has extremely low radioactivity. *Id.*
498. *Hamdi*, 124 S. Ct. at 2729 (Stevens, J., dissenting).

> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.... [I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[499]

IV. CONCLUSION

The Court's 2003–2004 Term will most likely be remembered for its decisions regarding detainee rights and the extent to which the President can block constitutional rights and access to the courts during times of perceived national emergency. The Court's obvious discomfort with the concept of indefinite detention and unchecked executive power may shape the scope of the legal battles dealing with the "war on terrorism" in future terms.

The term is also memorable for the relatively high number of liberal rulings concerning criminal justice. Almost half of all criminal justice cases last Term ended in liberal rulings, and a full fifty percent of the most hotly contested cases, the five-to-four and six-to-three cases, ended in liberal rulings. Commentators suggest that the Court's center, Justices O'Connor and Kennedy, may have moved farther away from the far right positions favored by Chief Justice Rehnquist and Justices Scalia and Thomas.[500] The move of Justices O'Connor and Kennedy has led to speculation that the 2003–2004 Term marks a decline of the Chief Justice's tight control over the Court and his power on the Court.[501] Given the dynamic such a change might signal for public policy and legal decisions, it will be interesting to see if the question of whether the shift by Justices O'Connor and Kennedy is driven by the particular nature of the cases in the term or a long-term change in judicial philosophies is answered in the terms to come. If Justice O'Connor, in particular, had any thoughts of retiring, her growing power as one of two members of the Court's center, and a member who often casts a deciding vote in five-to-four cases, may persuade her to pursue a longer Court tenure.

Finally, the Court's focus on certain types of issues was clear last Term. The Court handed down a higher percentage of criminal justice decisions dealing with constitutional issues, as opposed to statutory interpretation, than in past years. In so doing, the Justices clarified important questions regarding the double-questioning of suspects and *Miranda* rights, the ability of individuals to withhold their names during *Terry* stops, and the retroactive application of death penalty rulings. Although the terrorism cases certainly took center stage, the Court's other thirty criminal justice cases, as well as the interesting potential shift of the Court to the center on criminal justice issues, make the 2003–2004 Term of significant interest to judicial scholars and other court watchers.

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499. *Id.* at 2735 (Stevens, J., dissenting).
500. Richey, *supra* note 52.
501. Greenhouse, *supra* note 12.