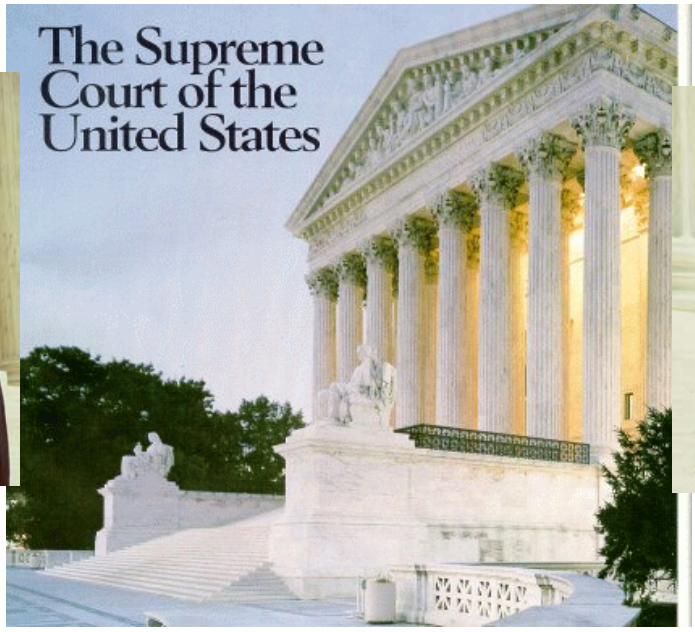
The Defense Never Rests

Volume 3, Special Edition **March, 2001**

Special Supreme Court Edition



Photograph by Franz Jantzen

In light of our recent trip to Washington, D.C., the Office of the Federal Public Defender is dedicating this entire issue to the United States Supreme Court, the briefing process and oral argument.

and now, the rest of the story...

As predicted and reported in previous newsletters, the Supreme Court granted writs in *Zadvydas v. Underdown*. Simply stated, the Ninth Circuit's ruling in *Ma v. Reno* conflicted with the Fifth Circuit's position that a long time resident alien could be indefinitely detained awaiting deportation. There is now increased interest in this law because any resident alien convicted of a felony must now be deported. The two cases were consolidated and our office as well as the Federal Public Defender's office in Seattle began preparation for the February 21st oral argument. Because Respondent Ma and Petitioner Zadvydas were consolidated, the briefing and oral argument schedules were unclear. After countless hours of telephone conferences, video conferences, and arguments which did not resolve who would argue, for how long, and in what order, we filed a motion with the Supreme Court to grant additional time and allow separate arguments. Thankfully, the motion was granted, permitting us to focus on the legal issues. Counsel for Mr. Ma, Jay Stansell, agreed that he would argue first for twenty minutes, followed by counsel for Mr. Zadvydas, our very own Bob Barnard, who would also argue for twenty minutes. The Solicitor General's forty minute argument would follow.

Once the briefing date was received, the wheels were set in motion. With only thirty days, our office learned everything you ever wanted to know about immigration law, but were afraid to ask. With such a daunting task before us, Virginia prevailed upon Washington for a few extra of your tax dollars to enlist the wonderful temporary assistance of Loyola Law Clinic professor Robin Schulberg. Robin is a member of our Criminal Justice Act Panel with a great deal of appellate experience, having previously clerked for Judge Henry Politz for four years. We prepared draft after draft of the brief. Several law firms offered help on the condition that they be allowed to sign the brief and/or argue the case, which offers were graciously declined. We received a considerable amount of help from ACLU lawyers across the country who had expertise in the area of immigration law. Fax machines hummed day and night as we edited and re-edited our brief with a little help from our friends. At the same time, the Solicitor General was preparing its brief in the *Ma* case, to which the Seattle Federal Public Defender's Office had thirty days to respond. After we filed our brief, the Solicitor General was given thirty days within which to respond and after seeking a seven day extension of time, filed its reply brief to *Zadvydas*. (Little did we know additional time was available simply for the asking.) In addition to the word by word drafting of the brief, a Joint Appendix of exhibits also had to be submitted to the court which required COOPERATION with the Solicitor General. Thanks, in large part, to our own research and writing specialist, Gary Clements, our mild-mannered "detail" man, the Joint Appendix was also timely filed. Because we were proceeding *in forma pauperis* and not responsible for the expenses incurred in the printing and binding of the brief and Joint Appendix, we could not directly contact the printer, which made the task even more complicated. We used every minute of our time allotted for preparation of our reply brief, which believe it or not, against all odds, was timely filed on February 5th.

Three consolidated moot courts were held for *Ma* and *Zadvydas*. We enlisted the help of Loyola Law School immigration professors Isabel Medina and Luz Molina. The head of the appellate division from our Dallas Federal Public Defender's Office, Tim Crooks, whom you all know from previous CLE programs, participated in video conferenced moots of both Jay Stansell and Bob Barnard. We found the videotaping of the moot courts very helpful and with each moot, the quality of the representation improved noticeably.

One week prior to the scheduled argument, Bob Barnard and Virginia Schlueter left for the Capitol. During that week, they participated in a moot at Georgetown Law School. There, several immigration and constitutional law professors who had authored the law reviews cited in our briefs questioned counsel consistent with the reported philosophies of the Supreme Court Justices. Through the effort of the Federal Defender

Training Group, spearheaded by Fran Pratt, the law firm of Sidley and Austin made their offices and staff available to us for the entire week and actually set up a moot conducted by their own lawyers who had previously clerked for Supreme Court Justices. Through this joint effort, we anticipated most of the questions asked by the Justices and thus, we were better able to address their concerns.

After hearing a few oral arguments, finally, the morning of Wednesday, February 21, 2001 arrived. We were required to appear personally in the marshals office several hours before the argument, along with family members and friends who had been given assigned seating. It was exciting to learn that our case had generated such interest that there was a long line waiting to be admitted to the argument. The Clerk of the United States Supreme Court, William Suter (no relation to Justice Souter), a Tulane graduate, cordially greeted his Louisiana colleagues formally attired (including top hat and tails), and led us into the packed courtroom to take our seats. He congratulated us and advised that in the last year, seven thousand writs had been filed, of which, less than one percent were granted. On behalf of the Court he presented us with the traditional, ceremonial hand-crafted white quills awarded all counsel who appear before the United States Supreme Court. For the next hour and twenty minutes, the Court exhibited a great amount of interest with very animated questioning. It appeared as if the attorney arguing the case was merely the conduit through which justices spoke with each other and argued certain crucial points.

Justice Scalia was the most vocal member of the court supporting the government. Four Justices seemed receptive to our argument: Souter, Breyer, Ginsburg, and Stevens. Justice O'Connor seemed particularly distressed that there was no judicial review and on that basis alone, we hope that she will be the swing vote necessary to rule that the INS may not indefinitely detain a resident alien after a final deportation order when the deportation itself is not reasonably foreseeable. The lack of repatriation agreements with countries like Cambodia, Laos, Cuba and Vietnam makes deportation unlikely. All information available indicates that there are approximately 3,500 similarly situated long term resident aliens who may be directly impacted by this Supreme Court ruling.

Two days following the Wednesday argument, the Justices privately voted. The senior Justice in the majority may write the opinion or assign it to one of the other Justices in the majority. We expect a decision in May, prior to the June recess. During that time, the Justices work together to craft a decision which, if possible, presents one opinion. The goal is to avoid a plurality decision consisting of several concurring opinions.

In sum, while a Supreme Court writ grant was a great deal of work, it was also terribly exciting. We are happy to have had an opportunity to be involved in the resolution of such an important issue. We hope the Court's ruling will prohibit the INS from compelling deportees to serve life sentences without judicial review while awaiting deportation. It was through the teamwork of everyone in our rather small office that hopefully we were able to help Mr. Zadvydas, a man without a country.

We have taken the time to reduce our experience to writing in the hope that the information included might assist any panel lawyer who gets invited to appear before the United States Supreme Court. We are particularly hopeful that our experience may benefit Herb Larson, your CJA representative and a former Assistant Federal Public Defender, who is to appear before the United States Supreme Court on April 16, 2001, to argue *Tyler v. Cain*, 218 F.3d 711 (5th Cir. 2000). *Tyler* addresses the retroactive application of the improper reasonable doubt instruction of *Cage v. Louisiana*, 498 U.S. 39 (1990). In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), John Wilson Reed, another of our fine panel lawyers, convinced the Court that a *Cage* error was a structural defect and could never be harmless error.

The transcript of the oral argument is available at http://supct.law.cornell.edu/supct
Copies of the briefs are available at http://supreme.lp.findlaw.com/supreme_court/briefs

DID YOU KNOW?

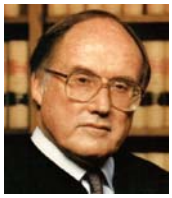
We attended a few oral arguments the day before ours to observe the court in action. It was interesting to learn that three of the current Supreme Court Justices clerked for former Supreme Court Justices. Chief Justice Rehnquist clerked for Robert Jackson during his 1951 and 1952 terms. Justice Stevens clerked for Wiley Rutledge in 1947. Justice Breyer was a law clerk for Arthur Goldberg during his 1964 term. Because the Fifth Circuit opinion in *Zadvydas* overruled 100 years of jurisprudence, their prior clerkships had historical significance.

We also learned that each Term of the Supreme Court begins on the first Monday of October. The Term lasts until late June or early July. The Term is divided into sittings and recesses which alternate in two-week intervals. The justices hear cases during sittings, and they study briefs and draft opinions during the recess periods. The Court allows countless tours to enter for three minute intervals because of its strong belief that many people should be able to view the Court in session and actually hear the oral arguments which form the basis of the Court's deliberations.

Contrary to the mistaken belief that the Chief Justice is selected on the basis of seniority, we learned that the Chief Justice is appointed by the President with the approval of the Senate. The President may nominate whomever he chooses. Chief Justice Rehnquist's appointment was one of the rare instances in which a sitting Associate Justice was nominated for Chief Justice. The last time that occurred was in 1941.

LADIES & GENTLEMEN, THE SUPREMES...

We thought it might be helpful to provide you with a little bit of background information on the Supreme Court Justices. The following biographical information was obtained from the Cornell Law School website http://supct.law.cornell.edu/supct.



CHIEF JUSTICE WILLIAM HUBBS REHNQUIST

William Hubbs Rehnquist was born on October 1, 1924 in Milwaukee, Wisconsin. He served in the United States Army from 1943 to 1946. He studied at Stanford and Harvard Universities. Chief Judge Rehnquist was nominated Associate Justice of the Supreme Court by President Nixon in 1971. After serving as Associate Justice for 15 years, Rehnquist was nominated Chief Justice by President Reagan, and was sworn in 1986. He succeeded Warren E. Burger as Chief Justice. The Chief Justice is appointed by the president and need not have the longest tenure, or any tenure, on the Court. Chief Justice Rehnquist was viewed as the staunch conservative on the Burger Court, until the addition of Antonin Scalia to the Court. He is still counted on for his conservatism today, although his views have moderated slightly.

STEPHEN BREYER

Seated in October of l994, Justice Stephen Breyer is the 108th person to serve on the United States Supreme Court. Described as "brilliant, friendly and nice," Breyer graduated from Stanford in l959 with a degree in philosophy. He later earned his law degree at Harvard Law School. Since 1967, Justice Breyer has served as either a full-time professor or part-time lecturer at Harvard. His primary interest is administrative law, having an "active interest in

economic regulation affecting industry, in antitrust law, and in securities law." Before being nominated to the Supreme Court, Justice Breyer served as a judge on the United States Court of Appeals for the First Circuit in Boston.

Justice Breyer may be generally considered conservative, but his judicial philosophy is more complicated than the label suggests. He has acquired this evaluation mainly because of his stance on antitrust law and environmental regulations. One commentator considers him anti-consumer and pro big business, based on his record as a Circuit Court of Appeals judge where he ruled in favor of corporate defendants in all 19 antitrust cases which came before him. Furthermore, he holds a strong belief in the ability of parties to contract freely and is "inclined to hold reasonably sophisticated parties to the terms of the bargain expressed in the contract."

RUTH BADER GINSBURG

Born in Brooklyn, New York in 1933, Ruth Bader Ginsburg was studious and succeeded in academics. She received her undergraduate degree from Cornell University, graduating Phi Beta Kappa in 1954. She attended Harvard Law School, but transferred to Columbia Law School when her husband began work with a New York Law firm. Designated a Kent Scholar, Justice Ginsburg graduated from Columbia Law School in 1959, tied for first in her class.

After her clerkship with a New York Judge, she joined the faculty at Rutgers School of Law, where she remained for nine years. In 1972, she returned to Columbia Law School as a member of the faculty.

In 1972, Justice Ginsburg co-founded the Women's Rights Project of the American Civil Liberties Union. She directed her attack to laws which differed in their treatment of men and women. Championing the rights of women, she argued six cases before the Supreme Court between 1973 and 1976. Winning five of the six cases, she pleaded for the application of equal protection to gender issues. Above all, Justice Ginsburg urged the end of discrimination along gender lines. Of all the present Supreme Court Justices, Justice Ginsburg appeared as an advocate before the Supreme Court the most times.

In 1980, she was appointed to the Court of Appeals for the District of Columbia Circuit. She held this position until 1993, when she was nominated by President Clinton to serve on the Supreme Court. Upon her confirmation, she became only the second female justice appointed to the Court.

She has been hailed by some as a centrist and by others as a moderate liberal. Typically, she is considered to be a jurist who treads the path of the middle. Although she is noted for her role in advancing women's rights, she has often been criticized for her reservations on *Roe v. Wade,* 410 US. 113 (1973).

During her tenure on the Court, she has been known for emphasizing the importance of cooperation among the justices on the bench. Arguing for the merits of a more unified Court, Justice Ginsburg has advocated the need for judicial consensus in opinion writing.

ANTHONY M. KENNEDY

Justice Anthony M. Kennedy is an important and sometimes unpredictable vote on the Supreme Court. President Reagan appointed him to the Court in 1988. Justice Kennedy took a low profile at the beginning of his Supreme Court career (he refused to give interviews during the 1987 Term). However, Justice Kennedy quickly established himself as a solid, if not loud, conservative voice on the Court. In split-decision cases, Justice Kennedy voted with Antonin Scalia a lofty 85% of the time during the 1987 Term and 90% of the time during the 1988 Term. Early in his career, Justice Kennedy authored two Fourth Amendment drug testing cases which demonstrated his ideological similarity with President Reagan. In *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989) and *Skinner v. Railway Labor Executives' Association*, 109 S.Ct. 1402 (1989), Justice Kennedy writing for the majority found that the Fourth Amendment does not require a warrant, probable cause, or a reasonable suspicion test. Most importantly, Justice Kennedy

demonstrated a notable move toward moderation in the early 1990s, a move that has had serious consequences for key Supreme Court issues like abortion and the Establishment Clause.

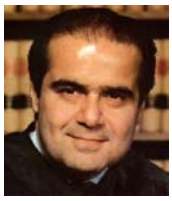
Justice Kennedy's move toward moderation, or at least his tendency to avoid going against precedent, was established in the opinion of *Planned Parenthood v. Caset*, 112 S.Ct. 2791 (1992) which he co-authored with O'Connor and Souter. *Planned Parenthood* is significant for what it did *not* do; it did not overrule *Roe v. Wade,* and thus served as a reaffirmation of the right to choose during a period when it was thought that the Reagan/Bush appointees might muster enough votes to overrule *Roe.* Justice Kennedy was also the deciding fifth vote and opinion writer for *Lee v. Weisman*, 112 S.Ct.2649 (1992), in which the Court preserved the separation of church and state in a case involving prayer at a school graduation. Some have speculated that Justice Kennedy's moderation in the above two opinions is consistent with his desire to avoid over turning precedent.

SANDRA DAY O'CONNOR

Sandra Day O'Connor was born in 1930, educated at Stanford, and was the first woman appointed to the Supreme Court. She was appointed by President Reagan in 1981. A former Republican majority leader in the Arizona State Senate, Justice O'Connor is a conservative member of the Supreme Court; however, Justice O'Connor has also had the role of a "critical 'swing' vote." She held the deciding vote for such controversial decisions as a constitutional right to abortion, state affirmative action, mental capacity standards for the death penalty, and school prayer.

Justice O'Connor's reputation on the Court indicates that she is not interested in "bright line" decisions but in establishing "intermediate principles." Justice O'Connor believes in deference to the states. Her other positions include support of the death penalty, limiting employment discrimination suits, and limiting affirmative action. Justice O'Connor believes that the Equal Protection clause "is fundamentally hostile to race-based government action, even when such action is designed to aid minorities."

Although she is considered part of the "centrist core" on the Supreme Court, Justice O'Connor has been noted for her dissent in *Garcia v. San Antonio Metropolitan Transit Authority*. O'Connor wrote that the federal government should respect "legitimate" state interests and the states should not have a federally-imposed "agenda."



ANTONIN SCALIA

Antonin Scalia was born March 11, 1936 in Trenton, N.J. He studied at Georgetown University, University of Fribourg (Switzerland) and Harvard Law School. In 1967, he joined academic life as a professor at the University of Virginia. From 1971 to 1977, Justice Scalia served in various government offices as general counsel. He later taught at Georgetown, Chicago, and Stanford before being appointed by President Reagan to the U.S. Court of Appeals for the District of Columbia Circuit in 1982. Four years later, Scalia became the first Italian American to be appointed as a Justice of the Supreme Court.

Justice Scalia is considered the leading conservative voice on the Supreme Court today, but political considerations are secondary to his methodology in his decision making. The plain language of Constitutional and statutory text is of paramount importance to his decisions. Although he subscribes to originalism (original Constitutional wording), he recognizes its limitations, noting that it is often a technique better suited to historians than judges. Conservatives have been pleased with the outcomes of many of Justice Scalia's decisions, but he has not always marched in lockstep with Conservative thought.

Scalia's influence on the court is significant both because his opinions are bold and frequent. His direct influence will continue for many years to come since he came to the Court at the young age of fifty. Indirectly, his influence may be greater. As the political/jurisprudential texture of the Court changes complexion, time will tell if Scalia's vision will radically reshape American law.

DAVID SOUTER

Justice David Souter was sworn into the United States Supreme Court as an Associate Justice in 1990. He is originally from New Hampshire, where he held a variety of roles such as Attorney General, Associate Justice of the New Hampshire Superior Court, and Associate Justice of the New Hampshire Supreme Court. Educated at Harvard for both his undergraduate and law degrees, Justice Souter was also a Rhodes Scholar at Oxford University.

President Bush nominated Justice Souter because he believed that Justice Souter would use his position to interpret the constitution, as opposed to forming public policy. Bush admired Justice Souter's approach of judicial restraint and a close following of the text of the Constitution Bush also thought Justice Souter would make a strong addition to the politically conservative component of the bench.

However, much to the conservatives' surprise, Justice Souter has been more of a centrist than expected. In past opinions, he has defended the rights of mentally retarded people, convicts awaiting the death penalty, and victims of employment discrimination.

Although Justice Souter is still finding his place in judicial history, he has written several important opinions. These include *Rosenberger v. University of Virginia* (a dissent on freedom of speech and student run presses), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Campbell v. AcuffRose Music* (the famous 2 Live Crew case), and *Lee v. Weissman* (regarding the separation of church and state).

JOHN PAUL STEVENS

John Paul Stevens was born in 1920 in Chicago, Illinois. He attended college at the University of Chicago and law school at Northwestern University. After law school he clerked for a Supreme Court Justice, the Honorable Wiley Rutledge. Some say that Stevens' style resembles that of Justice Rutledge, who was not afraid to be the sole voice for an unpopular point of view.

The words "maverick," "wild card" and "loner" would not readily spring to the minds of most watching the 76 year old Supreme Court Justice play bridge in a suit and bow tie. Yet these are the words used by many to describe John Paul Stevens as a Supreme Court Justice. When he was appointed by President Ford in 1975 he was considered a moderate Republican. However, over time the court's makeup changed around him, and he was left among the liberal leaning justices. But to catalog him with any ideological wing would be a gross oversimplification. While some might put him on the left side of the spectrum because of his strong concern for individual rights, he has not aligned himself with any particular justice or voting bloc on the court, as evidenced by his numerous concurrences and dissents.

Although one might not be able to predict which justices he will side with on any given issue, there are some reliable characteristics to Justice Stevens' Supreme Court jurisprudence. He favors judicial restraint in that he examine issues based on the specific facts at hand and defers to lower courts and state legislatures when appropriate. He avoids brightline tests and prefers standards which allow decisions to be tailored to the facts of each case. His experience as a litigator and as a circuit court judge is evident in his close adherence to the trial court record. His concurrences reflect his voice because he carefully deliberates over the facts of each case and writes his own opinions. Another prominent theme in Justice Stevens' judicial philosophy is his insistence that the powerless be accorded constitutional protection. He is a strong voice for the protection of individual dignity.

CLARENCE THOMAS

Clarence Thomas, the second African American to serve on the bench, was appointed by President Bush in 1991. He graduated from Yale Law

School in 1974 and has worked as an Assistant Attorney General in Missouri, a Legislative Assistant in Washington, D.C., an Assistant Secretary for Civil Rights at the United States Department of Education and Chairman of the Equal Employment Opportunity Commission, and a Circuit Judge for the District of Colombia. The equal protection clause according to Thomas requires the government to treat all as equal and any policy deviating from this as a violation of the Constitution.

THE FUTURE OF THE COURT

Chief Justice Rehnquist and Justice O'Connor are rumored to be considering retirement at the end of the 2000 term. Justice O'Connor was rumored to have been planning her retirement months ago, and Chief Justice Rehnquist is rumored to have a chair waiting for him at the University of Arizona law school. The two could be more willing now than in previous years because, with a conservative President in the White House, they can be fairly certain that their replacements will reflect their conservative ideology.

With a contentious confirmation battle most likely awaiting any Bush appointee, the White House may nominate someone who will have conservative views but will also add to the diversity of the Court in order to appease (and perhaps conflict) some of the Democrats in the Senate.