The Phyllis Schlafly Report

VOL. 35, NO. 5 | P.O. BOX 618, ALTON, ILLINOIS 62002 | DECEMBER 2001

Eagle Forum's *Amicus Curiae* Briefs

While the American people typically have the opportunity to correct a bad election result four years later, a bad legal precedent may last forever. Eagle Forum Education & Legal Defense Fund has focused on cases that would set the most important legal precedents and for which the outcome was in doubt.

Eagle Forum filed *amicus curiae* briefs in ten key cases defending conservative principles and supplementing arguments made by the parties in the cases. Six of these ten briefs were filed in U.S. Supreme Court cases. Four were in filed in Courts of Appeals: the Third, Fifth, Ninth, and D.C. Circuits. In most of these cases, the liberal side was predicted to prevail.

Of the six cases before the Supreme Court, the side taken by Eagle Forum won in four, battled to a draw in the fifth, and the sixth is still pending. Three of the Supreme Court victories were 5-4 decisions. Of the four Courts of Appeals cases, the side taken by Eagle Forum battled to a draw in the Ninth, persuaded a judge to file a vigorous dissent in the DC Circuit, persuaded the entire Fifth Circuit to rehear its case *en banc*, and the Third Circuit case is still pending. All Eagle Forum briefs are available on our website at www.eagleforum.org

1. The Violence Against Women Case: *United States v. Morrison*.

This was the feminists' most important case and they were determined to win it. At least 67 liberal or feminist organizations filed *amicus* briefs on their side, but only a couple of *amicus* briefs were filed on the constitutional side. At stake was an attempted takeover of marriage and domestic relations law by the federal government (which would have been one of the results of the defeated Equal Rights Amendment).

This case involved the constitutionality of a section of a 1994 statute, the Violence Against Women's Act (VAWA), that federalizes some gender issues such as rape. VAWA gave plaintiffs (and trial lawyers) the right to sue in federal court for damages from alleged activities that have never constituted *federal* crimes. This case was about trying to recover a money judgment in federal court by alleging a rape that was not promptly reported to the police and was never proved. VAWA included a provision awarding attorneys' fees, creating a bonanza for attorneys seeking to intimidate defendants with allegations of rape.

No one is helped, least of all women, when a victim of a crime turns to a contingency-fee attorney rather than to the local police. Real violence is restrained by law enforcement, not by a civil lawsuit, years later, trying to sift fact from fiction.

Eagle Forum's position: The federal government should not grab new powers over matters that the U.S. Constitution reserves exclusively to state jurisdiction, such as marriage, rape, domestic violence, and other gender-related issues. Only a constitutional amendment can effect such a fundamental transfer of power.

Result: The Supreme Court, by a 5-4 vote on May 15, 2000, declared the VAWA provision to be an unconstitutional extension of federal power.

2. The English Language Case: *Alexander v. Sandoval*.

This was an attempt to balkanize the United States by requiring the State of Alabama to offer official driver's license exams in foreign languages. Special-interests have lobbied for years to undermine English as our national language, and they've been using the power and money of government, the public schools, and the courts to further their goal.

After two lower courts held that Alabama must provide Martha Sandoval with a driver's test in Spanish, President Clinton attempted to elevate the inability to speak English to a protected right under the Civil Rights Act with his Executive Order 13166 issued August 11, 2000, entitled Improving Access to Services for Persons with Limited English Proficiency. This requires federal agencies to provide all services in foreign languages. Janet Reno followed with 15 pages of "guidance" four days before Clinton left office.

Eagle Forum's position: No federal agency or state should be required to do official business in any language other than English. Our government should speak to us

only in the language of the U.S. Constitution, the Declaration of Independence, all our statutes and court decisions. This enormous body of law developed in English, over more than 200 years, cannot be translated into another language without altering the constitutional principles themselves. Many constitutional terms such as "due process of law," "common law," "freedom of speech," "separation of powers," "federalism," "state's rights," "rule of law," and "limited government" do not translate accurately into other languages. Foreign-speaking voters can be easily led to vote for liberal candidates. The English language is the most important tie that binds us together as a nation and makes us *e pluribus unum*.

Result: The 5-4 Supreme Court decision on April 24, 2001 rejected Sandoval's argument and ruled that she did not have a cause of action to demand the driver's test in Spanish. However, the Court based its opinion on a threshold finding that individuals cannot claim "discrimination" and sue over this issue, leaving for a future day the fundamental issue of the preeminence of the English language in the United States. Clinton's Executive Order should be rescinded because it was based on lower-court decisions now overturned. Regrettably, the Bush Justice Department is still enforcing it.

3. The Boy Scout case: *Boy Scouts of America v. Dale*.

Do the Boy Scouts have the freedom to associate by excluding homosexuals? The New Jersey courts said No, calling the Boy Scouts a "public accommodation." This was one of the most important cases of the decade.

Eagle Forum's position: The Boy Scouts of America, like churches, should have full freedom of association to define the criteria for its members. Joining Eagle Forum's brief were Cato Institute, Texas Justice Foundation, Southeastern Legal Foundation, Association of American Physicians and Surgeons, Independent Women's Forum, and Center for Individual Rights.

Result: The Supreme Court on June 28, 2000 ruled 5-4 in favor of freedom of association for the Boy Scouts. The campaign to change or destroy the Boy Scouts continues in other venues, but the Scouts now have the Supreme Court on their side.

4. California Blanket Primary Case: *California Democratic Party et al v. Jones*.

California passed a referendum requiring a wide-open "blanket" primary system, in which all voters could vote in all primaries (*i.e.*, all parties listed on the same *primary* ballot, thus allowing Democrats to vote on the nomination of Republican candidates, and vice versa). This is very different from the "open" primary, used in many states, where voters must declare *which party ballot* they want in the primary and vote only for candidates in that party. The advocates of the "blanket" primary were frank in stating that their purpose was to get more "moderate" candidates nominated and make it harder for true conservatives to be nominated.

Eagle Forum's position: Political parties should have the right to limit voting in their primaries to voters who declare their party affiliation. This promotes elections based on principles rather than personalities.

Result: The Supreme Court invalidated the California "blanket" primary by 7-2 on June 26, 2000. Justice Scalia, writing for the Court, adopted nearly verbatim a key argument in Eagle Forum's brief concerning the importance of Abraham Lincoln's being able to define the Republican Party during its pivotal early years.

5. Family Education Rights and Privacy Case: *Falvo v. Owasso Independent School District*.

The Family Educational Rights and Privacy Act (FERPA) prevents the unauthorized release of student records and ensures parental access to their children's school records. The Supreme Court is now reviewing FERPA for the first time, on appeal from a pro-parent decision by the Tenth Circuit Court of Appeals. The case involves an Oklahoma public school where students were publicly grading each other's papers.

Eagle Forum's position: FERPA is a good law that has been fairly administered since 1974, and its jurisdiction should not be narrowed by the Supreme Court. FERPA protects family rights, and an expansive interpretation is much preferable to a narrow view limiting parental rights, which is sought by the public school system and by the Justice Department. Because of mandatory school attendance laws, families need FERPA to guard against improper behavior by school officials and the exchange of data with non-school agencies.

Result: The Supreme Court will decide this case early next year.

6. State Regulation of Direct Mail Fundraising: *Giani v. American Target Advertising*.

Over the past decade, states have become increasingly burdensome in regulating direct-mail fundraising, the lifeblood of many conservative organizations. These regulations are intrusive and costly to comply with, and are often used by liberals to block conservatives from mailing fundraising letters. At issue in this case was a Utah statute requiring (1) application for a license, (2) financial disclosures to the Utah Division of Consumer Protection, (3) payment of a $250 annual registration fee, and (4) posting a $25,000 bond or letter of credit, all merely to be allowed to request contributions. The Tenth Circuit Court of Appeals struck down the bond requirement but upheld the other regulations.

Eagle Forum's position: Such state regulations interfere with valuable political speech, our First Amendment right.

Result: The Supreme Court declined to hear the case, leaving all the regulations intact except the bond requirement under the Tenth Circuit's decision of January 13, 2000.

7. Nosy Questionnaire Case: *C.N. v. Ridgewood School District.*

A lengthy and highly offensive questionnaire was administered to young students in a public school in Ridgewood, New Jersey. One question asked students whether they had tried to commit suicide, and if so how many times. Many questions implied that illegal drug use is normal behavior. Parents had not given their consent for this social engineering, which lacked any redeeming educational value. Unfortunately, this nosy questionnaire was typical of intrusive surveys commonly given in public schools.

Eagle Forum's position: Children should not be asked to answer psychological, non-academic or incriminating questions unless the school gets prior written parental consent. Eagle Forum is a longtime opponent of nosy, intrusive questionnaires given to schoolchildren. Eagle Forum has always been a big supporter of the federal Protection of Pupil Rights Amendment, passed in 1978, which bars psychological or psychiatric tests or treatment without prior written parental consent, but whose enforcement is adamantly opposed by the public school establishment.

Result: The Third Circuit Court of Appeals heard oral argument on November 9, 2001 and will likely rule by early next year.

8. Disney Mickey Mouse Case: *Eldred v. Reno* (now *Eldred v. Ashcroft*).

In a unique accomplishment of corporate lobbying, both the U.S. House and Senate passed on the same day (10-7-98) the Copyright Term Extension Act, a law worth at least a billion dollars to the Disney Corporation. This law extended existing copyrights for an additional 20 years, amounting to a financial windfall for the Disney Corporation, whose copyrights on Mickey Mouse, Pluto, Goofy, Donald Duck and Winnie the Pooh would soon expire, as well as to the holders of copyrights on the Happy Birthday song (owned by AOL Time-Warner), and other works. Under the new "Disney" law, copyrights now run for 70 years plus the life of the author, and 95 years for corporations. (By comparison, the life of patents today is only 20 years from the date of application.)

The U.S. Constitution grants Congress the power to protect copyrights (and patents) only "for limited times," after which the work goes into the public domain. The Constitution states that the purpose of this clause is "to promote the progress of science and useful arts." (The framers of our Constitution set the "limited times" of copyrights at 14 years plus one 14-year renewal.)

Eagle Forum's position: Copyright protection should be granted only "for limited times," as our Constitution requires, and the Disney law unconstitutionally makes the "times" virtually unlimited. More importantly, retroactive extensions of copyright for artwork created long ago are unconstitutional because they do not encourage "the progress of science and useful arts." Misuse of copyright to stop free speech is also unconstitutional.

Result: The D.C. Circuit Court of Appeals ruled against us 2-1, but Eagle Forum's *amicus* brief had a big impact. The dissent agreed with us completely, while the other two judges ducked our arguments by saying that the main party had not raised them. The case is now pending for review by the Supreme Court.

9. The Building Codes Case: *Veeck v. SBCCI.*

All laws, court judgments, and other government documents have traditionally been in the public domain (*i.e.*, not copyrighted) because the public owns the law and has an obvious need to have unrestricted access to the laws and regulations that bind us. In recent years, there has been a trend toward the government making deals with private organizations to adopt their codes as binding regulations, which the organizations then sell under their own copyright. In this case, Veeck put the local building code on his website and then faced a copyright-violation lawsuit by the organization that claims to own the code.

Eagle Forum's position: Private organizations should not have ownership over mandatory government rules and regulations, and then be in a position to charge fees for their use.

Result: The Fifth Circuit upheld by 2-1 the building code association's claim to own the regulation, but the strong dissent was convinced by the argument that citizens should have unrestricted access to laws and regulations. Eagle Forum filed a brief in support of reconsideration *en banc* by all the Fifth Circuit judges, and they then agreed to rehear the case. Eagle Forum subsequently filed another brief before all the judges. Remarkably, ten states and territories have now filed a brief supporting Eagle Forum's side.

10. The Napster Case: *Napster v. A.M. Records*.

Napster was an internet search engine that was initially shut down by a federal judge based on allegations by recording companies that some were improperly using Napster to download copyrighted music.

Eagle Forum's position: Eagle Forum opposes giving middlemen or gatekeepers, or federal judges, the power to censor the distribution of information on the internet. The internet provides valuable competition to news media and other forms of information distribution, and is a positive force that has reduced the liberal stranglehold on the media. The impeachment of Bill Clinton was at least partially the result of Drudge using the internet to bypass the censoring middlemen (the media establishment).

Result: The Ninth Circuit agreed that the federal judge should not have summarily shut down the entire Napster service (Feb. 12, 2001). However, Napster continued to encounter legal difficulties that crippled its service.

The Awesome Power of Legal Precedent

Some of the most far-reaching social and economic decisions of our times have been established by legal precedent rather than by our elected representatives. These include criminal procedures, prayer and the Ten Commandments in public schools, internal security, pornography, forced busing, racial preferences and quotas, term limits, abortion, and welfare payments.

Activist liberal judges have sometimes admitted that they are, in fact, rewriting the Constitution. Justice William Douglas, late in his 36-year Supreme Court career, admitted that the due process clause is the "wild-card to be put to such use as the judges choose."

Justice William J. Brennan in a 1982 speech revealed the mindset of the liberal activist judges who have convinced themselves that they are divinely ordained to rule over lesser Americans. He argued for "the evolution of constitutional doctrine" and for law itself "to rethink its role." In previous eras, he said, "the function of law was to formalize and preserve (accumulated) wisdom," but "over the past 40 years Law has come alive as a living process responsive to changing human needs." He bragged that "evolution of constitutional law has been, in fact, a moving consensus," and that "our constitutional guarantees and the Bill of Rights are tissue paper bastions if they fail to transcend the printed page."

It is so important for citizens who believe in our Constitution and the Rule of Law to present the courts with *amicus curiae* briefs advocating conservative positions *before* the courts make their decisions.

Landmark Case on Second Amendment

If the hijackers had used guns for their crimes on 9/11, we would surely now be caught up in a frenzy of demands that this "lesson" calls for tough gun-control legislation. But they didn't use any firearms, just easily purchased box-cutters.

The real lesson of 9/11 is that, if any pilot or off-duty policeman had had a gun on board, he could have averted supreme tragedy by doing what our powerful FBI, CIA, and Armed Services could not do. The American people understand this. That's why the 9/11 events have led to a big increase in gun purchases and the taking of courses at shooting ranges. The Founding Fathers understood this, too, and that's why they gave us the Second Amendment.

Against the stunning reality of 9/11, the federal Court of Appeals for the Fifth Circuit issued a landmark decision on October 16 in *United States v. Emerson*, affirming the constitutional right of individuals to own a gun. Individuals, not government, are the ultimate protectors of a free society.

At issue in the *Emerson* case was whether the Second Amendment defines an individual right, or a collective right available only to government groups such as the National Guard.

The Second Amendment reads: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." The anti-gun lobby and some lower court decisions have touted the notion that the Second Amendment is limited to firearms carried in actual military situations rather than by civilians in peaceful self-defense.

The *Emerson* decision thoroughly rejects that theory. The Court ruled: "The plain meaning of the right of the people to keep arms is that it is an individual, rather than a collective, right and is not limited to keeping arms while engaged in active military service or as a member of a select militia such as the National Guard."

The court concludes: "It appears clear that `the people,' as used in the Constitution, including the Second Amendment, refers to individual Americans." This is consistent with the use of the term "the people" in all the other amendments in the Bill of Rights. As the Tenth Amendment shows, the Founders understood the difference between "the states" and "the people."

The gun control debate is really about whether we control government and defend freedom, or government controls us. Should our defense against hijacking terrorism be limited to government fighter planes shooting down hijacked planes, killing everyone on board?

The *Emerson* decision disposed of arguments that only formal state militias have a constitutional right to keep and bear arms. As the Supreme Court explained over 60 years ago in *United States v. Miller*, the framers of the Constitution used the term "militia" to mean "all males physically capable of acting in concert for the common defense."

It still does mean that. Current federal law (10 U.S. Code 311) states: "The militia of the United States consists of all able-bodied males at least 17 years of age. . . . The classes of the militia are (1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia."

The men on board the hijacked airplanes were part of the unorganized militia. A disarmed public cannot protect a free society against terrorists' assaults. Strict gun control creates vulnerable targets for the enemies of a free society. The Fifth Circuit's upholding of the constitutional right of individuals to keep and bear arms is a welcome development in our continued defense of freedom.

The Phyllis Schlafly Report
PO Box 618, Alton, Illinois 62002
ISSN0556-0152
Published monthly by the Eagle Trust Fund, PO Box 618, Alton, Illinois 62002. Periodicals Postage Paid at Alton, Illinois. Postmaster: Address Corrections should be sent to the Phyllis Schlafly Report, PO Box 618, Alton, Illinois 62002. Phone: (618) 462-5415.
Subscription Price: $20 per year. Extra copies available: 50¢ each; 3 copies $1; 30 copies $5; 100 copies $10.
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