Hope Without Borders

By Simona Agnolucci

The United States has long provided a safe haven, through its asylum laws, to refugees who have been persecuted in their native countries. Despite the protections of federal immigration law and the international treaties it implements, the fate of one class of asylum seekers — women who have survived severe domestic violence at the hands of their male partners or spouses — remains uncertain. Immigration courts have decided such cases inconsistently, and have denied protection to deserving refugees, returning these women to the hands of their persecutors and to countries whose officials turn a blind eye to their suffering. Our new administration should provide courts and litigators alike with much-needed guidance in this area by adopting regulations that uphold the protectionist policies of our asylum laws.

The law should not be so arbitrary. It should instead protect those women whose governments cannot, or will not, do so.

I recently litigated the asylum case of a Central American woman who fled her country after she and her children suffered years of relentless physical and sexual abuse at the hands of her husband. My client told a compelling and highly credible story. Over the course of her marriage, her husband viciously raped, beat and sodomized her, including while she was pregnant. He threatened her with weapons and attempted to kill her, and later began to treat their children with equal brutality. He refused to allow my client to legally divorce him and continued to enter her home to abuse her after they informally separated, at times breaking into her bedroom to rape her after she had gone to sleep. My client attempted numerous times to seek protection from the police, courts and prosecutors, complaining that her husband was abusing not only her but also her young children. The authorities did nothing.

My client had the good fortune of winning her asylum case, but many women in her situation are not so lucky. Because the law in the area of domestic violence-based asylum cases is in flux, immigration judges retain enormous discretion in deciding the future of immigrants who have survived domestic abuse.

The law should not be so arbitrary. It should instead protect those women whose governments cannot, or will not, do so.

Under federal statute, an individual may obtain asylum in the United States if she demonstrates that she has been persecuted because of her race, religion, nationality, political opinion or membership in "a particular social group." The persecution need not be at the hands of government officials so long as the government is unable or unwilling to protect the refugee. For years, immigration attorneys have argued that women who flee domestic violence were persecuted on account of their political opinion or membership in a particular social group. Immigration judges have granted some domestic violence cases and denied others, but have not received definitive guidance from the Board of Immigration Appeals, the highest administrative tribunal for asylum cases, or from the Department of Justice.

The board has spoken on the issue only once, when, in 1999, it denied the asylum application of Rodi Alvarado Peña. Alvarado fled Guatemala after enduring 10 years of sadistic violence at the hands of her husband. She had complained on numerous occasions to the Guatemalan police, who declined to investigate what they told her was a domestic matter. The board found Alvarado credible and concluded that her husband would continue to abuse her if she returned to Guatemala. Nonetheless, it denied her asylum, reasoning that she did not meet the statutory criteria for eligibility.

In 2001, then-Attorney General Janet Reno vacated the board's decision pending the issuance of Department of Justice regulations regarding gender-based asylum claims. The Bush administration never finalized the proposed regulations, and in September 2008 Attorney General Michael Mukasey ordered the board to reconsider Alvarado's case. The case then was remanded to the immigration court, where it is now pending. The result of this back-and-forth is that after nearly a decade, Alvarado's fate is yet undecided. More broadly, attorneys and immigration judges throughout the country involved in domestic-violence-based asylum claims remain unguided. The new administration should end this confusion, and the resulting prejudice to meritorious asylum claims, by passing regulations that recognize at least two situations in which women fleeing domestic violence deserve protection.

First, women who were abused because they oppose male domination and subordination of women qualify for asylum because they have been persecuted on account of a political opinion. American and foreign scholars of violence against women have long agreed that a man's domestic abuse of his female partner is a tool used to perpetuate his socio-cultural superiority over women. Women often protest this treatment by seeking divorces, attempting to leave their partners, or objecting to the dehumanizing treatment they suffer. All of these forms of protest are expressions of a political opinion — namely, that women have the civil right not to be physically and sexually mistreated by their partners. Accordingly, a perpetrator of violence who is motivated, at least in part, by his partner's verbal and/or behavioral statements of opposition has engaged in the type of persecution that entitles its victims to asylum.

Second, some women trapped in a cycle of domestic violence qualify for asylum because they belong to a particular social group — namely, a group consisting of married or partnered women whose spouses or partners do not permit them to leave the relationship. The woman's relationship status vis-à-vis her abuser, and the abuser's belief that she cannot choose to escape his treatment, provide the basis for asylum. In such cases, the fact that the perpetrator does not abuse other women who belong to the same particular social group as his victim-i.e., other women who also live with abusive partners — is not dispositive.

As the Department of Justice explained in its past proposed regulations, in a society in which a group of people holds another group of people in slavery, a persecutor may beat his own slave but not his neighbor's. This fact does not alter his motive for persecuting his own slave.

Critics of these theories of asylum eligibility have expressed concern that granting asylum to survivors of domestic violence will open our country's doors to countless women who claim that they were abused by their partners. Not so. The criteria for asylum are strict: applicants must as an initial matter demonstrate that the harm they suffered rises to the level of persecution, and that it was inflicted for the specific reasons outlined above. They must show that their government was unable or unwilling to protect them. In most cases, they also must prove that they cannot safely relocate in another area of their country.

Perhaps most importantly, they must make their way to our shores — a feat that is difficult for most people of limited financial means, and even more so for women who are kept in a state of fear and subordination by their violent partners, and who often must leave behind their families in order to seek refuge abroad. As the Department of Justice acknowledged in its brief in the case of Alvarado, a change in asylum law will affect only a limited number of survivors of domestic violence. In such cases, we cannot deny the protection of our immigration laws to deserving refugees.

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High Court Is Set to Tackle Profound Federalism Issues

By Erwin Chemerinsky

The docket for the current Supreme Court term is now almost complete and it is likely to be a memorable term with enormously important rulings. Three cases, all to be argued in the months ahead and decided by the end of June, are particularly important.

On Friday, Jan. 9, the court granted review in a blockbuster case about race and federalism. In *Northwest Austin Municipal Utility District v. Mukasey*, cert. granted, 2008 WL 4153806 (Jan. 9, 2009), the Supreme Court will decide whether it was constitutional for Congress to extend the Voting Rights Act for the next 25 years.

The provision that is the focus of this case is Section Five of the Voting Rights Act, which requires that jurisdictions with a history of racial discrimination in voting to obtain preclearance from the attorney general. The provision was adopted in 1965 and has been re-extended four times, most recently in 2006. This is the second 25-year extension.

Conservatives have long contended that this provision is an unconstitutional intrusion into state and local governments. William Rehnquist, in a dissenting opinion, wrote that Section Five "requires state and local governments to cede far more of their powers to the federal government than the Civil War amendments ever envisioned." *City of Rome v. United States*, 445 U.S. 156 (1980). Its supporters contend that it is a crucial remedial provision that is essential to prevent harm to minority voters in the electoral process.

The case involves a sewer district that serves 3,500 people, but it raises profound constitutional questions. This will be the first major federalism case decided by the Roberts Court. I have no doubt that when constitutional historians look back at the Rehnquist Court, they will say that the most important changes in constitutional law were in the area of federalism. The Rehnquist Court limited Congress's powers under the commerce clause and under Section Five of the 14th Amendment, revived the 10th Amendment as a limit on federal power and greatly expanded the scope of state sovereign immunity.

Northwest Austin Municipal Utility District v. Mukasey forces the Roberts Court to consider the scope of Congress's powers under section five of the 14th Amendment and Section Two of the 15th Amendment. What is Congress's authority to act to remedy the history of race discrimination in voting? In its petition for review, the Northwest Austin Municipal Utility District expressly argued that the election of an African-American president is powerful evidence that times have changed with regard to race and voting. The court's ruling thus will be about a very important statute, but also about larger issues concerning the scope of federal power to deal with race discrimination.

A second crucial case on the docket is *Al-Marri v. Pucciarelli*, cert. granted, 2008 WL 4326485 (Dec. 5, 2008). The issue is whether the United States government may detain a lawful resident alien, who was apprehended in the United States, as an enemy combatant. Ali Al-Marri, a longtime lawful resident alien in the United States, was a student at Bradley University in Peoria, Ill., when he was apprehended by the federal government in 2002. Since then, he has been held as an enemy combatant. He never has been charged with any crime. He never has been tried or convicted. The Bush administration has claimed throughout the litigation that it has unreviewable authority to detain Al-Marri indefinitely as an enemy combatant.

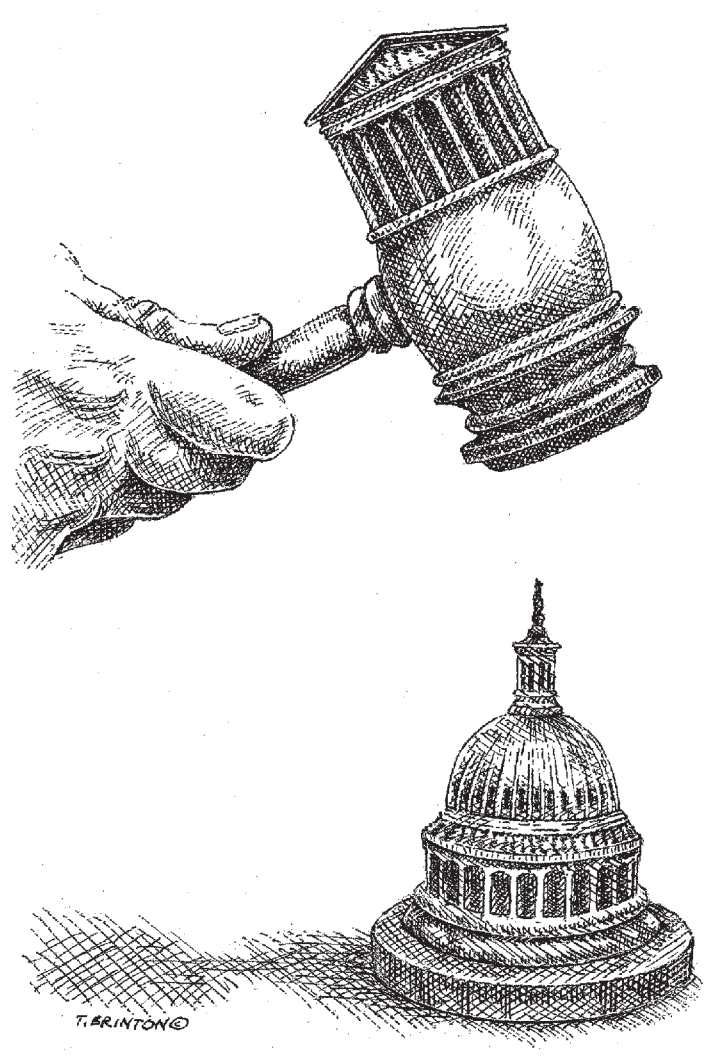
The case is of profound importance: May the United States government detain without trial a person apprehended in the United States for crimes allegedly planned in this country? This was the issue presented by the detention of Jose Padilla, but the question was not resolved when the United States government chose to try Padilla for crimes. Padilla was an American citizen apprehended at Chicago's O'Hare Airport and held for four and a half years as an enemy combatant. Only when the Supreme Court was posed to decide whether his detention was lawful did the United States government choose to indict and prosecute him.

No issue in the war on terrorism is more important than whether the government can detain individuals in the United States without having to comply with the Constitution's requirements for indictment, trial by jury and proof beyond a reasonable doubt before imprisonment. The Supreme Court is likely to focus on whether there is even statutory authority for such detentions, especially whether the Authorization for the Use of Military Force can be read as authorizing the detention.

There is a real chance that the case could become moot and not decided by the Supreme Court. The Obama administration, which takes office today, could decide to end Al-Marri's status as an unlawful combatant by charging him with a crime. One of the most important initial decisions facing Eric Holder and Elena Kagan when they take over as attorney general and solicitor general will be what to do with Al-Marri and the matter pending before the Supreme Court. It will be a strong indication of whether President Obama will dramatically depart from the Bush administration's expansive claims of executive power in the war on terrorism.

A final case of potentially huge significance is *Caperton v. A.T. Massey Coal Co.*, cert. granted, 129 S.Ct. 593 (2008). The issue is whether due process is violated when a judge participates in a case after having received substantial campaign contributions from one of the litigants.

West Virginia Supreme Court Justice Brent D. Benjamin wrote the opinion for his court, in a 3-2 decision, reversing a $50 million jury verdict against A.T. Massey Coal Co. The chairman of that company, Don L. Blankenship, spent $3 million to get Benjamin elected, which was more than 60 percent of the total spent for Benjamin's seat on the West Virginia Supreme Court. Benjamin refused to recuse himself, cast the deciding vote, and wrote the opinion in favor of Blankenship's company.



John Grisham's novel "The Appeal" tells the fictionalized story of a company spending a large amount of money to get a candidate elected to the highest state court to overturn a specific case.

The underlying question presented by the book is whether due process, which requires an impartial decision-maker, is violated when this occurs.

Across the country, judicial elections are becoming ever more expensive. The money inevitably comes from lawyers and litigants with matters before the courts. At what point is due process violated by the judge adjudicating a matter when a donor is a lawyer or party? That is the issue before the court in *Caperton v. A.T. Massey Coal Co.*

There, of course, are numerous other important cases before the Supreme Court this term concerning matters ranging from fleeting expletives on television and radio to whether prosecutors must present live witnesses when introducing lab reports into evidence.

Altogether, and especially in light of these three cases, it likely will be a term of great importance and lasting significance in many different areas of law.

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