

NEWSLETTER

Volume XVII, Number 1

November, 2006

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CHAIR=S COLUMN

by

**Professor Janice C. Griffith
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At our annual breakfast meeting last January we decided that a program devoted to exploring the issues raised by Hurricane Katrina would be both enlightening and exciting. Hurricane Katrina highlighted the importance of coordinated decision making at all levels of government in the wake of a disaster. It also demonstrated how our federalism form of government has systematically undervalued the role of planning to prevent or mitigate such disasters. Because all disasters affect local populations they provide a laboratory for studying a number of local government law issues.

Professor Clayton Gillette outlined some key issues raised by Hurricane Katrina in his Chair's column last year: political participation, the distribution of wealth and power in our society, public choice theory, the optimal allocation of government authority, class and racial divisions, the breakdown of municipal services, the complexities of urban planning, and the uncertain assignment of responsibilities among local, state, and federal authorities. We are now well into the rebuilding process following such a mega disaster. Katrina presents a once in a lifetime opportunity to rebuild better and smarter than has occurred in the past. What new ideas can the experts offer for rebuilding Gulf coast communities? Should public planning or the private market dictate the choices available? What planning approaches will achieve greater environmental justice? How can coastal protection be maximized? How do we plan for more sustainable environmental living? Should local governments use the power of eminent domain to rebuild devastated areas? These are just a few of the questions.

I am happy to report that our Section on State and Local Government Law has partnered with the Property Section and the Real Estate Transactions Section to sponsor an ambitious half-day program at this year's AALS meeting. Together we will sponsor "The Katrina Workshop: Redeveloping a Region After a Mega Disaster." The Workshop takes place on Wednesday, January 3, 2007, from 2:00 p.m. to 5:00 p.m. and will feature three separate panels.

The first panel, featuring James Smith, Frank Alexander, Peter Blanck, and Michael Morris, will focus on housing issues. The topics to be covered include federal, state, and local government responses (including those of HUD and FEMA) to immediate and short-term housing needs, the merits of using tax foreclosures and land banking to transform blighted areas into usable properties, and the housing needs of disabled persons in the wake of a disaster.

The second panel, featuring Daniel Mandelker, Wendell Pritchett, and Rachelle Alterman (Israel Institute of Technology in Haifa) will focus on the role of planning and the

scope of planning processes for rebuilding after Hurricane Katrina, the varied land use questions associated with shrinkage of an urban area's geographic footprint, the use of eminent domain as a rebuilding tool, and various land assembly approaches taken by other countries, including Israel, Germany, and Japan, to cope with disasters.

The third panel, featuring Paul Boudreaux, Rachel Van Cleave, and Carol Brown, will focus on issues related to the re-composition of a community as it redevelops following a disaster, including the effects of gentrification, the role of the new urbanism as a planning tool, and the importance of community and individual identity in the rebuilding process.

Two of the above presenters were selected from a call for papers. Papers related to Workshop topics will be published as chapters in a book to be published by Ashgate Publishing for its book series on Law, Property, and Society. The book most likely will be titled "Regional Redevelopment After a Mega Disaster: Insights from Hurricane Katrina." If you are interested in contributing a chapter to this volume, please contact Professor Robin Paul Malloy, E.I. White Chair and Distinguished Professor of Law, Director of Center on Property, Citizenship, and Social Entrepreneurism, College of Law, Syracuse University. See <http://www.law.syr.edu/pcse>.

I urge each of you to attend our afternoon Katrina Workshop on January 3rd. If you do not want to wait until January to plunge into Katrina related issues, you might look at the recently published book by Daniel Farber and Jim Chen titled "Disasters and the Law: Katrina and Beyond." The book's index alone demonstrates just how many different areas of the law come into play in coping with a disaster.

I also hope that you will attend our annual breakfast on Thursday, January 4, 2007, at 7:00 a.m. The breakfast always presents a nice opportunity to visit with old friends and to make new friends.

Finally, don't forget that our annual meeting will take place immediately at the end of the Katrina Workshop. If you have any interest in participating in section governance, please contact me as soon as possible.

I look forward to seeing you soon!

SUMMARY OF UNITED STATES SUPREME COURT CASES
IN STATE AND LOCAL GOVERNMENT LAW:
THE 2005-2006 TERM

by
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During the 2005-2006 Term the United States Supreme Court addressed several issues in state and local government law, including:

1. **DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006).**

No Taxpayer Standing to Challenge Tax Incentives

In an opinion written by Chief Justice Roberts joined by Justices Stevens, Scalia, Kennedy, Souter, Thomas, Breyer and Alito, the Court held that city and state taxpayers lack Article III standing to challenge local property tax abatements and state franchise tax credits granted to an automobile manufacturer to induce it to remain in the city. The taxpayers' argument that their taxes were increased as a result of the tax benefits conferred on the manufacturer were rejected as insufficient to confer Article III standing.

The Court also rejected the taxpayers' suggestion that it create an exception to the general prohibition on taxpayer standing for Commerce Clause challenges to state tax decisions, similar to the Commerce Clause exception for Establishment Clause claims in Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942 (1968). The Court emphasized that a state's taxing and spending powers for religious purposes was not the same as the use of such powers for providing incentives to business.

2. **Jones v. Flowers, 126 S. Ct. 1708 (2006).**

Federal Due Process Imposes Additional Obligations on Governments to Provide Notice "Reasonably Calculated to Give Actual Notice" Before Tax Foreclosure

In an opinion written by Chief Justice Roberts joined by Justices Stevens, Souter, Ginsburg and Breyer, the Court held that when the mailed notice of a tax sale is returned

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unclaimed, the foreclosing governmental entity must take additional steps to assure that the owner is provided with "notice reasonably calculated to give actual notice" as required by the federal Due Process Clause. The Court emphasized that where posted notice on the realty also is not provided, simply publishing notice in a newspaper a few weeks before the foreclosure sale does not provide notice required by the federal Due Process Clause.

3. **Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).**

Government Employee May Be Disciplined Based on Employee's Work Product

In an opinion written by Justice Kennedy, joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, the Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties.

Thus, the Court held, a memo written by a deputy district attorney pursuant to his official duties is not "speech" for First Amendment purposes, and the attorney could be subjected to discipline by his employer based on the memo. The Court emphasized that the attorney was indeed a "citizen" under the First Amendment, and that the fact the memo was only distributed internally in the district attorney's office, and that it concerned the subject matter of the attorney's employment, were not determinative. The controlling factor was that the memo was made pursuant to his duties as a deputy district attorney.

4. **Brigham City v. Stuart, 126 S. Ct. 1943 (2006).**

Warrantless Entry to Stop Fight Unanimously Upheld

In an opinion written by Chief Justice Roberts for a unanimous court, the Court held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. The case involved a melee in the early morning hours when four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, the officers heard shouting from inside, observed two juveniles drinking beer in the backyard, and saw through a screen door and windows an altercation taking place in the kitchen of the home. The tumult was so heated that when the officers entered, at first, nobody noticed.

The Court rejected the argument that the subjective motivation of the officers should be considered. It distinguished searches conducted without individualized suspicion, such as checkpoints to combat drunk driving or drug trafficking, where consideration of programmatic purpose is sometimes appropriate.

The Court also rejected the argument that the defendants' conduct was not serious enough to justify the warrantless entry. The Court distinguished Welsh v. Wisconsin, 466 U.S. 740, 104 S. Ct. 2091, 80 L.Ed.2d 732 (1984), where a warrantless entry into a suspect's home was made by officers to arrest the suspect for driving while intoxicated. In

contrast, the circumstances here involved ongoing violence within the home.

5. **U.S. v. Grubbs, 126 S. Ct. 1494 (2006).**

Anticipatory Search Warrants Upheld

In an opinion written by Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas and Breyer, the Court upheld "anticipatory search warrants," which are based on an affidavit showing probable cause that at some future time certain evidence of crime will be located at a specified place. By definition, the "triggering condition" which establishes probable cause has not yet been satisfied when the warrant is issued.

The Court held that anticipatory warrants are no different in principle from ordinary warrants, and require a magistrate to determine (1) that it is now probable that (2) contraband, evidence of a crime, or a fugitive will be on the described premises (3) when the warrant is executed. For an anticipatory warrant to comply with the Fourth Amendment, two prerequisites of probability must be satisfied: (a) that if the triggering condition occurs, there is a fair probability that contraband or evidence of crime will be found in a particular place and (b) that there is probable cause to believe that the triggering condition will occur.

In this case, the triggering condition was the delivery of a videotape containing child pornography to the defendant's residence. In addition, the affidavit established probable cause to believe that triggering condition would be satisfied.

6. **Hudson v. Michigan, 2006 WL 1640577 (2006).**

Violation of "Knock-and-Announce" Rule Does Not Trigger Exclusionary Rule

In an opinion written by Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, and in part by Justice Kennedy, the Court held that the federal exclusionary rule does not apply to violation of the "knock-and-announce" rule when police enter a home pursuant to a valid search warrant.

Police obtained a warrant to search Hudson's home for drugs and firearms. When they arrived to execute the warrant, they announced their presence, but waited only about three to five seconds before turning the knob of the unlocked front door and entering the home. They found cocaine rocks in Hudson's pocket, large quantities of other drugs, and a loaded gun between the cushion and armrest of the chair in which Hudson was sitting. The State conceded that the police had violated the "knock-and-announce" rule, but contended that the exclusionary rule was not triggered by such violation. The United States Supreme Court agreed.

The Court noted that the "knock-and-announce" rule does not protect the interest in preventing the government from seeing or taking evidence described in a warrant. Accordingly, the exclusionary rule does not apply to violation of the "knock-and-announce" rule.

In contrast, the Court emphasized, the interests that are protected by the "knock-

and-announce" include: (1) protecting residents from being surprised by unannounced entry by police, and possibly provoking self-defense by residents that may lead to injury; (2) protecting property by providing residents with information and time to open door rather than having it kicked in; and (3) protecting personal privacy and dignity which might be infringed if police barge in before residents have the opportunity to throw on a robe.

Such interests can be protected by better police training, and also by the prospect of civil liability on the part of police and their employers.

7. Rapanos v. U.S., 2006 WL 1667087 (2006).

New Standard(s) for Defining "Navigable Waters" Under the Clean Water Act

This decision involves two cases in which the Army Corps of Engineers claimed jurisdiction to issue permits for the discharge of dredged or fill material into "navigable waters" under the Clean Water Act. 33 U.S.C. § 1251 *et seq.* Rapanos v. U.S. involved four Michigan wetlands near ditches or man-made drains that eventually emptied into traditional navigable waters. Carabell v. U.S. Army Corps of Engineers involved a wetland that was separated from a drainage ditch by an impermeable berm.

The judgment of the Court was announced by Justice Scalia in an opinion joined by Chief Justice Roberts and Justices Thomas and Alito. As a threshold matter, Justice Scalia's opinion first concluded that

"the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.' See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."

Having defined "the waters of the United States," in the Clean Water Act, Justice Scalia's opinion then defined the necessary connection between waters and wetlands sufficient to bring wetlands under the Clean Water Act as well. First, Justice Scalia reiterated that the standard for such connection is a "significant nexus," discussed in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001). Second, Justice Scalia concluded that the meaning of "significant nexus" is that

"*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' ... lack the necessary connection to covered waters that [can be] described as a 'significant nexus.'"

Thus, Justice Scalia concluded, determining whether the Rapanos and Carabell wetlands are covered by the Clean Water Act

"requires two findings: First, that the adjacent channel contains a 'wate[r] of the

United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

The fifth, swing vote, was added by Justice Kennedy in a separate concurring opinion. He also reiterated the "significant nexus" requirement, but gave it a different meaning. For Justice Kennedy,

"[W]etlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"

The Court remanded both cases for further proceedings.

8. Woodford v. Ngo, 2006 WL 1698937 (2006).

**Prisoners Must Properly Exhaust Administrative Remedies
in Order to Bring Suits Under 42 U.S.C. Section 1983**

In an opinion written by Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Kennedy and Thomas, the Court held that prisoners must properly exhaust any available administrative remedies before challenging prison conditions in federal court.

The case involved the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321-71, as amended, 42 U.S.C. Section 1997e, et seq. The Court construed Section 1997e(a) of the PLRA, which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

The Court concluded that a prisoner whose grievance was rejected as untimely because it was not filed within 15 working days as required by California prisoner grievance provisions could not bring a suit in federal court challenging administrative segregation punishment imposed on him by prison officials.

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