

JUSTICE SOUTER ON THE ROBERTS' COURT: An Analysis of Souter's Decisions in the 2007-08 Term

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Chief Justice Roberts's goal of greater unanimity and consensus has fallen short this term with just 30 percent of the decided cases resulting in unanimous votes. Overall, this Court has decided the fewest cases since the 1953-54 term, and has experienced consistently decreasing unanimity over the last three years.¹ Chief Justice Roberts's goal to bring the Court together by discouraging the pursuit of individualized jurisprudence and encouraging the Justices to work as a Court,² seems to be slipping away.

In decisions that were not unanimous, Justice Souter dissented in 13 cases this term, and sided with the majority in 28 cases. He authored only 11 opinions: three unanimous decisions of the Court, seven majority opinions, and one dissent. Souter authored only one majority opinion on a controversial topic this term.³

EMPLOYMENT

In *Kentucky Retirement Systems v. Equal Employment Opportunity Commission*,⁴ Justice Souter joined Justices Breyer, Stevens, Roberts and Thomas in the 5-4 majority opinion, ruling in favor of the state. Under Kentucky's retirement program, hazardous-occupation employees who became disabled before they were eligible for retirement were credited with years not actually worked when calculating their pension benefits; however, employees who became disabled after reaching retirement age did not receive the same credit. The Court determined the state's pension program, which lawfully makes age, in part, a condition of pension eligibility, and treats

workers differently in light of their pension status, did not violate the Age Discrimination in Employment Act ("ADEA"). The pension program has a non-age-related purpose and does not discriminate based on age, as age and pension status are analytically different concepts.⁵ Much like the Social Security system, where age is an express factor in the calculation of benefits, the ADEA permits an employer to condition pension eligibility on age.⁶

An employer or a professional insurance company which both funds a plan and evaluates claims against it is not uncommon. However, in *Metropolitan Life Insurance Co. v. Glenn*,⁷ this dual role led to an abuse of discretion by the company in reviewing an employee's claim. MetLife encouraged its employee to apply to the Social Security Administration for disability benefits because she could no longer work, and when she was awarded those benefits, MetLife received an offset from her retroactive Social Security award. MetLife then ignored the agency's finding that she was unable to work, ruling that she was capable of doing sedentary work, and denied her benefits. Justice Souter joined Justices Breyer, Stevens, Ginsburg and Alito in the majority opinion, which determined that where an insurance company plays the dual role of provider and decision-maker with respect to ERISA benefits, the reviewing court must take this conflict of interest into consideration in determining whether an administrator has abused its discretion in denying benefits.

While the burden on an employee is high to prove that an employment decision was motivated by age, Justice Souter, in his majority opinion in *Meacham v. Knolls Atomic Power Laboratory*,⁸ stated that an employer facing a disparate-impact claim and planning to defend on the basis of reasonable factors other than age ("RFOA"), must not only produce evidence raising the defense, but must also persuade the fact finder of its merit.⁹ Souter admitted that this would make it harder and more costly for employers to defend than if they merely bore the burden of production, but reasoned that Congress "set the balance where it is, by both creating the RFOA

exemption and writing it in the orthodox format of an affirmative defense.”¹⁰ In typical Souter fashion, he stated: “We have read it the way Congress wrote it.”¹¹

ELECTIONS

In *Crawford v. Marion County Election Board*,¹² a 6-3 majority upheld Indiana’s election law, which required a citizen voting in person to present a government-issued photo identification. The majority held that the State of Indiana’s interests in preventing voter fraud were sufficient to justify the burden imposed upon voters. Justice Souter authored the dissent, joined by Justices Ginsburg and Breyer, stating: “without a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis, Indiana has adopted one of the most restrictive photo ID requirements in the country.”¹³ Souter concluded that “the Indiana Voter ID law is thus unconstitutional: the State interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old.”¹⁴

In *Davis v. Federal Election Commission*,¹⁵ Justice Souter, along with Justices Ginsburg and Breyer, joined Justice Stevens’s dissent. The 5-4 majority ruled that a provision of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), allowing the opponents of candidates who spend more than \$350,000 of their own money in seeking election to Congress to accept increased contributions from individual contributors, violated the First Amendment. The dissenters would have upheld the so-called “Millionaire’s Amendment” of the BCRA as a reasonable measure to level the playing field for opponents of wealthy candidates.

IMMIGRATION

What *about* that red tape? In *Dada v. Mukasey, Attorney General*,¹⁶ Souter joined the majority in a 5-4 decision, which held that Congress did not intend an alien’s statutory right to reopen a case to be limited by the voluntary departure process.¹⁷ After an alien’s case has been heard and a decision has been rendered, he or she is afforded only one petition to reopen and have the decision reconsidered; however, there is a time limit on the voluntary departure.¹⁸ Should aliens depart, they effectively withdraw their petition to reopen. On the other hand, if they stay in the country to resolve the petition to reopen,¹⁹ they are in violation of voluntary departure, which leads to statutory fines as well as loss of the benefits associated with voluntary departure such as the facilitation of readmission to the country. In this case, the appellant’s petition to reopen was denied because he had overstayed his voluntary departure period. The majority, including Justice Souter, ruled that because of the extensive benefits incorporated into the voluntary departure programs²⁰ and the purpose of the petition to reopen proceeding,²¹ this outcome could not have been what Congress intended.

CRIMINAL

Must the trial court inform the parties before departing from the applicable sentencing range based on a ground not previously



identified? Justice Souter joined Justice Breyer’s dissent in *Irizarry v. United States*.²² Under a prior decision of the Court,²³ the trial court was required to give notice to the parties because at that time the sentencing guidelines were mandatory. According to the *Irizarry* majority, because the sentencing guidelines are now advisory, the concern over depriving a defendant of his or her due process rights by failing to give notice of a possible upward departure from the sentencing guidelines is no longer valid.²⁴ The dissent, which Souter joined, argued that to fail to provide notice of grounds for a variance from the guidelines would render meaningless the defendant’s right to comment on matters relating to an appropriate sentence.²⁵

Justice Souter sided with the majority in both *Gall v. United States*²⁶ and *Kimbrough v. United States*,²⁷ where the Court gave greater deference to sentencing courts. In *Kimbrough*, Justice Souter joined the majority in ruling that, because sentencing guidelines were effectively advisory and no longer mandatory, a deviation from the guidelines dealing with violations for trafficking in crack versus powder cocaine was permissible. Similarly, in *Gall*, Souter wrote a concurring opinion, advocating a system where juries determine, based on a finding of fact and within mandatory sentencing guidelines, what the ceiling of each sentence would be.

Souter joined the majority in *Kennedy v. Louisiana*,²⁸ a 5-4 decision, ruling that to sentence a person to death for the rape of a child was a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment, where the rape did not, and was not intended to, result in the death of the child. The defendant was sentenced to death in Louisiana under a law that imposed the death penalty on any person who raped a child less than twelve (12) years of age. The Court considered the history of the death penalty for non-homicidal crimes as well as legislative enactments and state practice with respect to executions,²⁹ and reasoned that while the rape of a child may be devastating in its harm, “in terms of moral depravity and the injury to the person and to the public, they cannot compare to murder in their severity and irrevocability.”³⁰

In *United States v. Williams*,³¹ the majority ruled that a law making it illegal to offer child pornography, regardless of whether the depictions are of real children or are computer-generated images, was not overbroad under the First Amendment. In his dissent, Justice Souter was concerned with the effect the Court’s decision

would have on overzealous prosecution for pornographic material that did not, in fact, depict real children, and, therefore, had no underlying criminal act.

In *United States v. Santos*,³² Justice Souter joined the majority in this decision regarding the proper valuation of defendant's profits in a money-laundering scheme. 18 U.S.C. §1956(a)(1) prohibits the use of the "proceeds" of criminal activities for certain purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity.³³ The Court narrowly interpreted the word "proceeds" in 18 U.S.C. §1956(a)(1) to mean "profits," rather than "receipts," thus decreasing the length of the defendant's potential sentence.

ACCESS TO COURTS/LIMITATION OF ACTIONS

In three important cases, Justice Souter joined the decision which supported claimants' rights to pursue their causes of action.

In the first case, a class action was brought pursuant to § 10(b) of the Securities and Exchange Act of 1934, against a corporation that provided cable television services and against the corporation's vendors and customers.³⁴ It was alleged that they entered into sham transactions, which improperly inflated the corporation's operating revenues. In a 5-3 decision, Justice Kennedy for the majority held that the § 10(b) right of action did not extend to the corporation's vendors and customers with whom the corporation allegedly acted in concert. Justice Stevens filed a dissenting opinion, joined by Justices Souter and Ginsburg, which concluded: "I respectfully dissent from the Court's continuing campaign to render the private cause of action under § 10(b) toothless."³⁵

In *Ali v. Federal Bureau of Prisons*,³⁶ an inmate sued the Federal Bureau of Prisons, its director and a warden, asserting claims under the Federal Tort Claims Act in connection with the alleged mishandling of his personal property. Section 2680(c) of the Act provides that the waiver of the federal government's sovereign immunity does not apply to claims arising from the detention of property by "any officer of customs or excise or any other law enforcement officer." The majority opinion, written by Justice Thomas, concluded that "any other law enforcement officer" was to be construed broadly, thereby affirming the dismissal of the inmate's claim. Justice Kennedy wrote the dissent, joined by Justices Stevens, Souter and Breyer. The dissent interpreted "or any other law enforcement officer" narrowly, as limited to the specific type of officers described in the statute, and thus would have allowed the claim to proceed.

Finally, Justice Souter joined a 5-4 majority opinion, written by Justice Breyer, which allowed the assignee of a claim under the Communications Act of 1934 to pursue the claim in federal court, even though the assignee had promised to remit the proceeds of the litigation to the assignor.³⁷ The dissenting Justices (Roberts, Scalia, Thomas and Alito) would have denied standing to bring the claim in federal court, however the majority reasoned that courts "both before and after the founding—have always permitted the party with legal title alone to bring suit; and that there is a strong tradition specifically of suits by assignees for collection."³⁸

THE REACH OF HABEAS CORPUS

In one of the term's most closely watched cases, Justice Souter joined Justice Kennedy's 5-4 majority opinion holding that individuals captured while fighting against the United States in Afghanistan and being detained at the United States Naval Station at Guantanamo Bay, Cuba, have the constitutional privilege of habeas corpus to challenge their detention.³⁹ Justice Souter authored a concurring opinion, joined by Justices Ginsburg and Breyer, which emphasized the "historical reach of the writ of habeas corpus" and the length of time (six years) that some of the prisoners had been locked up at Guantanamo Bay.⁴⁰

Justice Souter also filed a concurring opinion, again joined by Justices Ginsburg and Breyer, in a unanimous decision holding that federal courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens held overseas by American forces.⁴¹ Justice Roberts's unanimous decision held that on the merits of the particular claim, habeas corpus provided no relief to prevent the citizens from being transferred by the United States Army to the Iraqi government for criminal prosecution. Justice Souter's concurring opinion cautioned that where "probability of torture is well documented," there would be grounds to prevent the transfer to another government for prosecution.⁴²

GUN CONTROL

In a decision many observers believe will open the door to massive litigation regarding gun control laws across the United States,⁴³ a 5-4 majority found the District of Columbia's gun control law to be unconstitutional. Justice Souter joined both Justice Stevens and Justice Breyer who wrote separate dissenting opinions. Justice Stevens felt that, although the Second Amendment protects an individual right, there is nothing to define the scope of that right and the ruling of the Court "limits the power of Congress to regulate civilian use of weapons."⁴⁴ Justice Breyer disagreed that the provision at issue, which prohibited the possession of handguns in the home, violated the Second Amendment. He agreed with Justice Stevens that the Second Amendment protects militia-related rather than self-defense-related interests, but added that even taking that into consideration, the District of Columbia law does not violate the Second Amendment since "the protection it provides is not absolute."⁴⁵

CONCLUSION

The two biggest headline-making cases of the 2007-08 term demonstrate that Justice Kennedy is probably now the key vote on the Court in close, controversial decisions.⁴⁶ While Justice Souter continues to side most frequently with the more liberal members of the Court (Stevens, Breyer and Ginsburg), he has not been reluctant to side with the conservative members in closely decided cases.⁴⁷ Thus if Justice Roberts's goals of increasing unanimity and decreasing acrimony within the Court are to be reached, Justice Souter is likely to play a major role.

OPINIONS AUTHORED BY SOUTER

1. *Boulware, Michael H. v. United States*, 3 Mar 2008.
2. *Watson, Michael A. v. United States*, 10 Dec 2007.
3. *Rothgery, Walter A. v. Gillespie County, Tx*, 23 Jun 2008.
4. *Hall Street Assoc. v. Mattel, Inc.*, 25 Mar 2008.
5. *Meacham, Clifford B., et al. v. Knolls Atomic Power Lab., et al.*, 19 Jun 2008.
6. *Dept. of Revenue of Ky, et al. v. Davis, George W., Et Ux.*, 19 May 2008.
7. *Exxon Shipping Company, et al. v. Baker, Grant, et al.*, 25 Jun 2008.
8. *United States v. Williams, Michael*, 19 May 2008. (Dissent)
9. *United States v. Rodriguez, Gino G.*, 19 May 2008. (Dissent)
10. *Crawford, William, et al. v. Marion Cty. Election Bd., et al.*, 28 Apr 2008. (Dissent)
11. *Giles, Dwayne v. California*, 25 Jun 2008. (Concurrence)

SOUTER IN DISSENT

1. *Ali, Abdus-shahid M. S. v. Fed. Bureau of Prisons, et al.*, 22 Jan 2008. (5-4)
2. *Baze, Ralph, et al. v. Rees, Comm'r, Ky Doc, et al.*, 16 Apr 2008. (7-2)
3. *Begay, Larry v. United States*, 16 Apr 2008. (6-3)
4. *Crawford, William, et al. v. Marion Cty. Election Bd., et al.*, 28 Apr 2008. (6-3)
5. *District of Columbia, et al. v. Heller, Dick A.*, 26 Jun 2008. (5-4)
6. *Engquist, Anup v. Or Dept. of Agric., et al.*, 9 Jun 2008. (6-3)
7. *Irizarry, Richard v. United States*, 12 Jun 2008. (5-4)
8. *Medellin, Jose E. v. Texas*, 25 Mar 2008. (6-3)
9. *Morgan Stanley Capital Group v. Public Utility Dist. 1, et al.*, 26 Jun 2008. (5-2)
10. *Riley, Gov of Al v. Kennedy, Yvonne, et al.*, 27 May 2008. (7-2)
11. *Stoneridge Investment v. Scientific-Atlanta, Inc., et al.*, 15 Jan 2008. (5-4)
12. *United States v. Williams, Michael*, 19 May 2008. (7-2)
13. *United States v. Rodriguez, Gino G.*, 19 May 2008. (6-3)

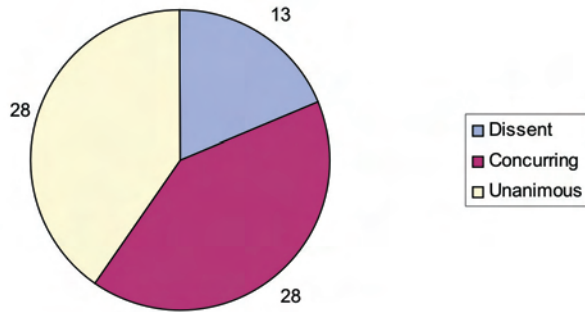
SOUTER IN MAJORITY

1. *Boumediene, Lakhdar, et al. v. Bush, President of U.S., et al.*, 12 Jun 2008. (5-4)
2. *Cbocs West, Inc. v. Humphries, Hedrick G.*, 27 May 2008. (7-2)
3. *Chamber of Commerce, et al. v. Brown, Att'y Gen. of Ca., et al.*, 19 Jun 2008. (7-2)
4. *Dada, Samson T. v. Keisler, Acting Att'y Gen.*, 16 Jun 2008. (5-4)
5. *Danforth, Stephen v. Minnesota*, 20 Feb 2008. (7-2)
6. *Dept. of Revenue of Ky, et al. v. Davis, George W., Et Ux.*, 19 May 2008. (7-2)
7. *Federal Express Corp. v. Holowecki, Paul, et al.*, 27 Feb 2008. (7-2)
8. *Fl Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 16 Jun 2008. (7-2)
9. *Gall, Brian M. v. United States*, 10 Dec 2007. (7-2)
10. *Giles, Dwayne v. California*, 25 Jun 2008. (6-3)
11. *Gomez-perez, Myrna v. Potter, Postmaster Gen.*, 27 May 2008. (6-3)
12. *Gonzalez, Homero v. United States*, 12 May 2008. (8-1)
13. *Greenlaw, Michael v. United States*, 23 Jun 2008. (6-3)
14. *Hall Street Assoc. v. Mattel, Inc.*, 25 Mar 2008. (6-3)
15. *Indiana v. Edwards, Ahmad*, 19 Jun 2008. (7-2)
16. *John R. Sand & Gravel Co. v. United States*, 8 Jan 2008. (7-3)
17. *Kennedy, Patrick v. Louisiana*, 25 Jun 2008. (5-4)
18. *Kentucky Retirement Sys., et al. v. EEOC*, 19 Jun 2008. (5-4)
19. *Kimbrough, Derrick v. United States*, 10 Dec 2007. (7-3)
20. *Metlife, et al. v. Glenn, Wanda*, 19 Jun 2008. (5-4)
21. *Preston, Arnold M. v. Ferrer, Alex E.*, 20 Feb 2008. (8-1)
22. *Riegel, Charles R., Et Ux. v. Medtronic, Inc.*, 20 Feb 2008. (8-1)
23. *Rothgery, Walter A. v. Gillespie County, Tx*, 23 Jun 2008. (8-1)
24. *Snyder, Allen v. Louisiana*, 19 Mar 2008. (7-3)
25. *Sprint Communications, et al. v. Pac Services, Inc., et al.*, 23 Jun 2008. (5-4)
26. *United States v. Santos, Efrain, et al.*, 2 Jun 2008. (5-4)
27. *United States v. Ressam, Ahmed*, 19 May 2008. (8-1)
28. *Washington State Grange v. Wa Republican Party, et al.*, 18 Mar 2008. (7-3)

UNANIMOUS AND PER CURIAM DECISIONS

1. *Allison Engine Co., Inc., et al. v. United States, Ex Rel. Sande*, 9 Jun 2008.
2. *Arave, Warden v. Hoffman, Maxwell*, 7 Jan 2008.
3. *Bd. of Ed. of the City of NY v. Tom F.*, 10 Oct 2007.
4. *Boulware, Michael H. v. United States*, 3 Mar 2008.
5. *Bridge, John, et al. v. Phoenix Bond & Indemnity, et al.*, 9 Jun 2008.
6. *Burgess, Keith L. v. United States*, 16 Apr 2008.
7. *CSX Transportation, Inc. v. Ga State Bd. of Equalization*, 4 Dec 2007. *Cuellar, Humberto F. R. v. United States*, 2 Jun 2008.
8. *Davis, Jack v. Federal Election Commission*, 26 Jun 2008.
9. *Exxon Shipping Company, et al. v. Baker, Grant, et al.*, 25 Jun 2008.
10. *Knight, Michael J. v. Cir*, 16 Jan 2008.
11. *Larue, James v. Dewolff, Boberg & Assoc., Inc.*, 20 Feb 2008.
12. *Logan, James D. v. United States*, 4 Dec 2007.
13. *Meacham, Clifford B., et al. v. Knolls Atomic Power Lab., et al.*, 19 Jun 2008.
14. *Meadwestvaco Corp. v. Il Dept. of Revenue, et al.*, 15 Apr 2008.
15. *Munaf, Mohammad, et al. v. Geren, Sec. of Army*, 12 Jun 2008.
16. *NY Bd. of Elections, et al. v. Torres, Margarita L., et al.*, 16 Jan 2008.
17. *Phillipines, et al. v. Pimentel, Mariano J., et al.*, 12 Jun 2008.
18. *Plains Commerce Bank v. Long Family Land & Cattle*, 25 Jun 2008.
19. *Quanta Computer, Inc., et al. v. LG Electronics, Inc.*, 9 Jun 2008.
20. *Richlin Security Service Co. v. Chertoff, Sec. of Homeland Sec.*, 2 Jun 2008.
21. *Rowe, Att'y Gen. of Me v. No Motor Transp. Assn., et al.*, 20 Feb 2008.
22. *Sprint/United Management Co. v. Mendelsohn, Ellen*, 26 Feb 2008.
23. *Taylor, Brent v. Sturgell, Act. Adm'r, FAA, et al.*, 12 Jun 2008.
24. *United States v. Clintwood Elkhorn Mining, et al.*, 15 Apr 2008.
25. *Virginia v. Moore, David L.*, 23 Apr 2008.
26. *Warner-Lambert Co., et al. v. Kent, Kimberly, et al.*, 3 Mar 2008.
27. *Watson, Michael A. v. United States*, 10 Dec 2007.
28. *Wright v. Van Patten*, 7 Jan 2008.

JUSTICE SOUTER'S PARTICIPATION IN DECISIONS FOR THE 2007-2008 TERM



ENDNOTES

- Greenhouse, Linda, *On Court That Defied Labeling, Kennedy Made the Boldest Mark*, *New York Times*, June 29, 2008.
- Mauro, Tony *Abortion, Race Cases will Challenge Roberts's Goal of Consensus*, *Legal Times*, September 29, 2006.
- Exxon Shipping Company, et al. v. Baker et al.*, 128 S. Ct. 2605 (2008) (maximum punitive damages under maritime law limited to amount of compensatory damages).
- 128 S. Ct. 2361 (2008).
- Decisions are made because of pension status, not age, even where pension status itself is based upon age. *Id.* at 6.
- Id.*
- 128 S. Ct. 2343 (2008).
- 128 S. Ct. 2395 (2008).
- "A provision in the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. §621 *et seq.*, creates an exemption for employer actions "otherwise prohibited" by the ADEA but "based on reasonable factors other than age" (RFOA). §623(f)(1)." *Id.* at 2398.
- Id.* at 2406.
- Id.* at 2404.
- 128 S. Ct. 1610 (2008).
- Id.* at 1642.
- Id.* at 1643.
- 128 S. Ct. 2759 (2008).
- 128 S. Ct. 2307 (2008).
- Aliens are encouraged to apply for voluntary departure, which benefits the government by expediting the departure process and avoiding deportation expenses, and benefits the alien by facilitating readmission. *Id.* at 2311.
- Sixty (60) days.
- Petitions to reopen can take as long as three (3) years to resolve.
- "Between 1927 and 2005, over 42 million aliens were granted voluntary departure; almost 13 million of those departures occurred between 1996 and 2005 alone." *Id.* at 2312.
- To ensure a proper and lawful disposition. *Id.* at 2318.
- 128 S. Ct. 2198 (2008).
- Burns v. United States*, 501 U.S. 129 (1991).
- Irizarry, supra* at 2202.
- Id.* at 2205.
- 128 S. Ct. 586 (2007).
- 128 S. Ct. 558 (2007).
- 128 S. Ct. 2641 (2008).
- Id.* at 2653.
- Id.* at 2654.
- 128 S. Ct. 1830 (2008).
- 128 S. Ct. 2020 (2008).
- 18 U.S.C. §1956(a)(1)(A)(i) and §1956(h).
- Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., et al.*, 128 S. Ct. 761 (2008).
- Id.* at 779.
- 128 S. Ct. 831 (2008).
- Sprint Communications Co., L.P. et al. v. APCC Services, Inc. et al.* 128 S. Ct. 2531 (2008).
- Id.* at 2541.
- Boumediene et al. v. Bush, President of the United States, et al.* 128 S. Ct. 2229 (2008).
- Id.* at 2278.
- Munaf et al. v. Geren, Secretary of the Army, et al.* 128 S. Ct. 2207 (2008).
- Id.* at 2227.
- District of Columbia v. Heller*. 128 S. Ct. 2783 (2008).
- Id.* at 2823.
- Id.* at 2847.
- See *Kennedy v. Louisiana, supra* (Kennedy with 5-4 liberal majority holding that death penalty in child rape case is cruel and unusual punishment); and *District of Columbia v. Heller, supra* (Kennedy with 5-4 conservative majority finding gun control law unconstitutional).
- E.g., in *Kentucky Retirement Systems, supra*, Souter joined with Justices Breyer and Stevens but also with Justices Roberts and Thomas.