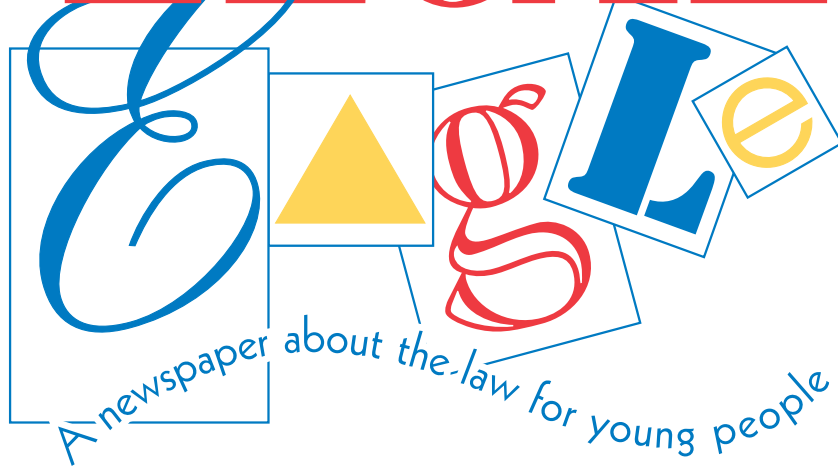


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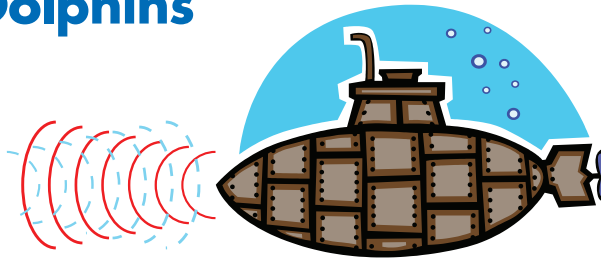
WINTER 2010

National Security Trumps Whales and Dolphins

by Phyllis Raybin Emert

Do humans have a responsibility to protect animals? Or, in this time in our nation's history of heightened security and terror alerts, does national security take precedence?

In November 2008, with the case of *Winter v. Natural Resources Defense Council*, the U.S. Supreme Court decided 5-4 that the issue of military security is more important than whether mid-frequency sonar devices



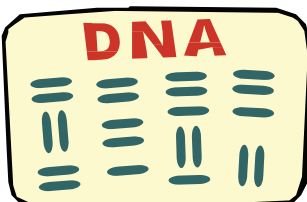
used to detect submarines cause harm to whales, dolphins and other marine mammals. Sonar uses sound waves that reflect back off objects underwater, and can interfere with a marine mammal's own use of sonar.

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Post-Conviction DNA Testing Not a Constitutional Right

by Barbara Sheehan

If you've ever watched an episode of CSI you know that DNA evidence can be used to prove guilt or



innocence. A piece of hair or a drop of blood can be all that is needed to

damn a defendant to life in prison or death row—or set him free.

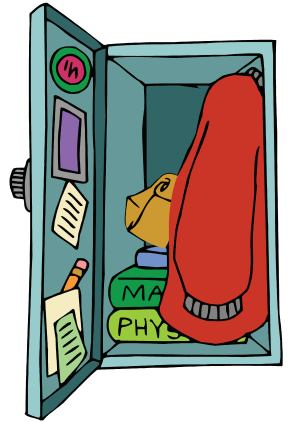
DNA testing, like all science, is constantly evolving with new and more accurate tests being developed. These new tests could potentially benefit inmates trying to prove their innocence. But what if investigators

CONTINUED ON PAGE 5

U.S. Supreme Court Says No to Strip Searches in School

by Cheryl Baisden

When you walk into school in the morning, it's probably reasonable to expect that your iPod would be confiscated if you start listening to it in class, or find your locker being searched if you're rumored to have brought something inappropriate to school. But chances are you wouldn't expect to be called into the nurse's office and strip searched because you're suspected of violating a school policy.



Surprisingly, that's exactly what happened to a 13-year-old Arizona girl in 2003, when school officials suspected she had the equivalent of two Advil in her possession. With an 8-1 decision in June 2009, the U.S. Supreme Court ruled that the honor roll student's Fourth Amendment rights were violated when she was forced to strip down to her underwear and shake out her bra and panties to convince the vice principal and school nurse she was not concealing ibuprofen after a schoolmate claimed the girl had given her pills.

The Safford School District has a right to ban the possession of prescription and over-the-counter drugs without advance permission, a policy officials had been actively enforcing since the year before the strip search, after a student nearly died from taking prescription medication brought to school by a friend. In the case of Savana Redding, the problem lies, according to the Court, not in the policy but in the way officials went about enforcing it.

The U.S. Constitution's Fourth Amendment guarantees Americans protection from "unreasonable

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This publication was made possible through funding from the IOLTA Fund of the Bar of New Jersey.

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Lawsuit Challenges Constitutionality of

by Phyllis Raybin Emert

Who has the right to take our country to war? That is the issue at the heart of a lawsuit filed by Dr. Frank Askin, professor of law and director of the Constitution Litigation Clinic at Rutgers Law School—Newark.

In May 2008, Professor Askin filed suit against President George W. Bush [now President Barack Obama] in U.S. District Court charging that the Iraq war was in violation of the U.S. Constitution. Professor Askin represents the **plaintiffs** in the case, who include New Jersey Peace Action, an anti-war group, two mothers of soldiers in Iraq who are members of Military Families Speak Out, and an Army veteran who served in Iraq.

The government or the defendants in the case argued that the plaintiffs lacked standing to bring the lawsuit because they didn't suffer any actual identifiable injuries. Another argument brought forth was that the court should not get involved in hearing the dispute under the **political question doctrine**, which states that foreign affairs are conducted by the executive and legislative branches of government and are not subject to judicial questioning.

After an April 2009 hearing, U.S. District Court Judge Jose L. Linares granted the government's motion to dismiss the case on May 19, 2009. Judge Linares wrote, "The simple fact of the matter is that plaintiffs ask this Court to **adjudicate** an issue that is textually committed to Congress and the president. In the absence of an actual dispute between the political branches, this Court cannot intervene...."

According to a press release issued by Rutgers Law School—Newark, "The complaint was drafted by Rutgers Law School students under Professor Askin's supervision, after a year-long study of the Constitutional Convention of 1787 and the adoption of the Constitution's Article 1, Section 8, lodging the power to declare war in the Congress, rather than the President." The lawsuit does not ask for an end to the war or to bring the troops home. It only "seeks a declaration that can be used as a guide to the legality of such actions in the future."

History of war-making powers

The basic argument of the plaintiffs is that the Founding Fathers never intended for the president to have power equivalent to a king. The plaintiffs' complaint states, "The framers feared a powerful executive with war-making powers." The complaint also cites Thomas Paine's pamphlet *Common Sense* written in January 1776, in which Paine, one of the original Founding Fathers, wrote, "In England a King hath little more to do than make war and give away places, which, in plain terms, is to impoverish the nation..."

At first the founders created the Articles of Confederation, approved in 1781, in which a weak federal government did not have a president or a king. The Constitutional Convention of 1787 debated the creation of a stronger executive, but the delegates were insistent that the executive could not declare war like the King of England. The delegates concluded that "only Congress should have the power to 'make war,'" and

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Iraq War and Presidential Authority

“the issue of war was a public matter to be debated by the nation, with each representative’s vote publicly recorded, not decided in executive chambers.”

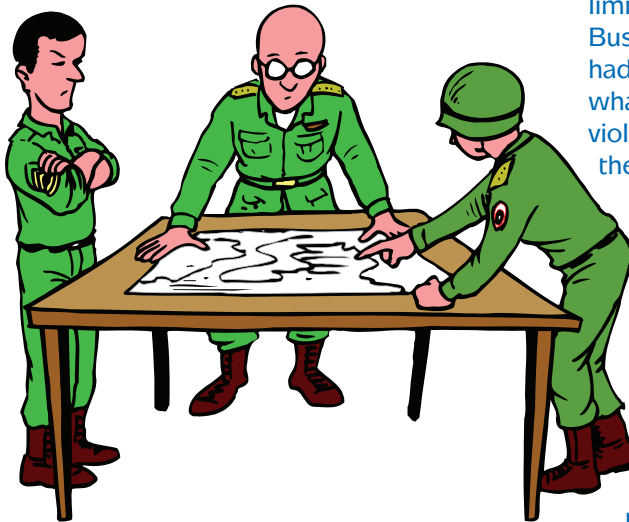
Article 1, Section 8, of the U.S. Constitution states, “The Congress shall have power To declare War... To raise and support Armies... To provide and maintain a Navy; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions...” Article 2, Section 2, of the U.S. Constitution states, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States...”

According to the complaint, “The framers deliberately chose to locate the war-initiating power in the most representative branch of government. They recognized that there is always much at stake in war: the lives of the people and the well-being of the nation.” The president was given the power to take emergency action to protect the country in times of sudden attack, but it was only the U.S. Congress that could declare a full-scale war or attack upon another country. Alexander Hamilton, another Founding Father, wrote in *Federalist No. 26*, the U.S. Congress should “declare their sense of the matter by a formal vote in the face of their constituents.”

Declaring war

In American history, there have only been five declarations of war by the U.S. Congress. These declarations include: 1) the War of 1812 against Great Britain on June 18, 1812, when James Madison was president; 2) the Mexican-American War on May 11, 1846, when James Polk was president; 3) the Spanish-American War on April 24, 1898, during William McKinley’s presidency; 4) World War I against Germany on April 6, 1917 and Austria-Hungary on December 7, 1917 during Woodrow Wilson’s presidency;

and 5) World War II against Japan on December 8, 1941, against Germany and Italy on December 11, 1941, and Bulgaria, Hungary, and Romania on



June 5, 1942 when Franklin D. Roosevelt was president.

In a May 2006 *Indiana Law Journal* article, Louis Fisher, a specialist in constitutional law for the Law Library of the Library of Congress wrote, “On many occasions, from 1789 to 1950, presidents used military force abroad without first coming to Congress to seek authority. None of those actions, however, amounted to a major war.” Fisher declared that “Respect for constitutional principles ended in 1950 when President Harry Truman took the country to war against North Korea without ever coming to Congress, either before or after.” Instead, Truman went to the United Nations for approval. In Fisher’s opinion, “Korea was the first unconstitutional presidential war.”

Authorization for the use of military force (AUMF)

The U.S. Congress never officially declared war on Iraq, but it did vote on an authorization for use of military force (AUMF) in 2002. This authorization stated, “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to 1) defend the national security of

the United States against the continuing threat posed by Iraq; and 2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” No deadlines were noted and no limits were set. President George W. Bush assumed the war-making power had been transferred to him, despite, what the plaintiffs considered was a violation of the U.S. Constitution and the intention of the framers.

The plaintiffs’ complaint emphasized that the AUMF was not a declaration of war by the U.S. Congress. Under the U.S. Constitution, Congress cannot delegate its war-making powers to the president. This was an authorization that the complaint stated “denied the people knowledge of how

representatives voted on the war, because their representatives never cast a vote clearly and solely on the issue of going to war.” The AUMF was also very vague, the complaint noted, in that it gave “the president room to assume unlimited discretion to attack Iraq.”

As an example of a declaration, the plaintiffs quoted the 1941 Congressional Declaration of War against Japan after the attack on Pearl Harbor, Hawaii. That declaration stated, “...That the state of war between the United States and the Imperial Government of Japan...is hereby formally declared; and that the President be, and he is hereby authorized, and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination...”

With terrorist forces gaining strength in Afghanistan, and Iran continuing its nuclear weapons program, the plaintiffs are fearful of another undeclared war in these countries without the consent of the U.S. Congress. They want the court to declare

No to Strip Searches CONTINUED FROM PAGE 1

searches” of their homes, possessions and bodies. In order to conduct a legal search officials are expected to obtain a warrant from the court based on a reasonable belief that a crime has been committed. This belief is known as **probable cause**. Defining “unreasonable searches” and “probable cause” is often left up to the courts.

“One thing to remember,” explained attorney Greg Shaffer, whose law practice includes handling civil rights matters, “is that legally schools do have more freedom to search students under the law than is available outside of a school setting. Since schools are required to keep children safe, the courts have given them the right to search student lockers, their possessions and the students themselves without a warrant if officials believe there could be a safety risk,” he said. “The question is, in a case like this, is a strip search the rational way to go. The Court found that under the circumstances, it was not.”

Delivering the **majority opinion** for the Court, Justice David Souter wrote, “What was missing...was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear.” The Court found that schools cannot force students to remove their clothes during a search unless school safety is at risk, and that the Arizona incident violated the young girl’s Fourth Amendment right to not be subjected to unreasonable searches.

The school district believed it was within its rights to conduct a strip search of Redding. Matthew W. Wright, who represented the district, argued that intimate searches should be allowed even for the most common over-the-counter drugs. The dilemma school officials faced, he explained, was deciding between privacy and protection.

“My thought process is I would rather have the kid embarrassed by a strip search, if we can’t find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry,” Wright said during oral arguments before the Court.

Justice Clarence Thomas, the Court’s lone dissenter in the case, sided with the school district. In his **dissenting opinion**, Justice Thomas wrote, “Redding would not have been the first person to conceal pills in her undergarments. Nor will she be the last after today’s decision, which announces the safest place to secrete contraband in school.” Justice Thomas added, “Preservation of order, discipline and safety in public schools is simply not the domain of the Constitution.”

New Jersey case sets standard for school searches


Safford County school officials based their decision to strip search Redding on a 1985 New Jersey case where the U.S. Supreme Court ruled that schools only needed what it called “reasonable suspicions,” rather than “probable cause,” to search a student. But that case involved a high school girl, and school officials only searched her purse, believing she was smoking cigarettes in the bathroom. The search revealed not only cigarettes, but also marijuana, money and a list of people who owed her money for drugs. Under the circumstances, the Court found the search was justified, said Shaffer. “Instead of needing to be sure what they were looking for, and confident they would find it, schools just needed to be pretty sure they would find something that broke the rules. That’s a very different approach to searches.”

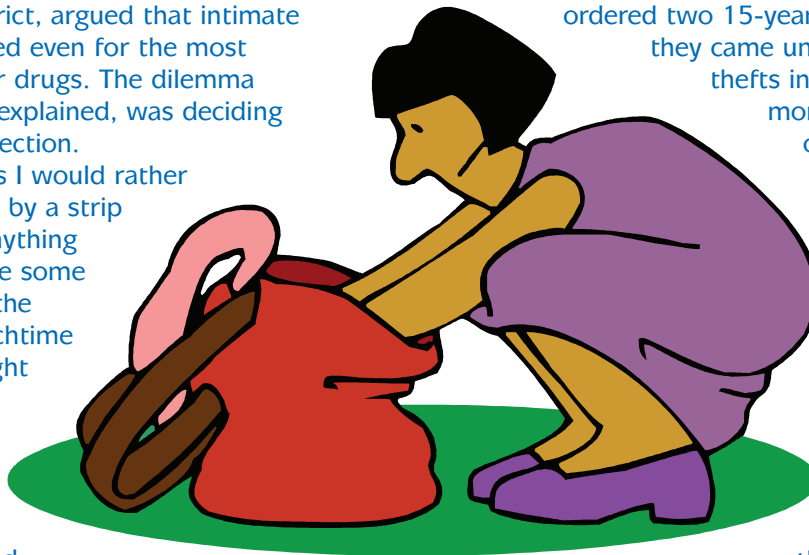
Both sides argued that the 1985 case caused confusion in the Arizona case, since it did not clearly define when certain types of searches are permitted. Unfortunately, noted Shaffer, the Redding case doesn’t make the guidelines much clearer.

“What we know is that you can’t conduct a strip search of a young girl to look for ibuprofen,” he said. “Other than that, it’s still not clear what a school can and can’t do.”

Another, more recent New Jersey case might have helped define the fine line between acceptable and non-acceptable searches if the two sides hadn’t settled the dispute through mediation in February 2009. The Franklin Township School District, in Hunterdon County, ordered two 15-year-old girls strip searched when they came under suspicion for a series of thefts involving small amounts of money from teachers. No evidence of a crime was found during the search, and the school district decided to pay each girl \$75,000 to settle the case.

Fight not over

In addition to the constitutional issue, the Court was also asked to determine whether the assistant principal who ordered the strip search and the school nurse and female administrative assistant who conducted it could be held **liable** for damages against Redding. The Court ruled that the standards for school searches at the time were unclear in the lower courts, so the school officials should not be held personally liable. Redding’s lawsuit against the school district, however, will go forward. So, for Savana Redding, the fight is not over. 



refuse to hand over crime scene evidence needed to perform the DNA tests? Do people who have already been convicted of crimes have a constitutional right to access this DNA evidence?

In a close 5-4 decision handed down in June 2009, the U.S. Supreme Court said no. That left William Osborne, an Alaska prisoner who petitioned the courts for access to the DNA evidence used to convict him, out of luck.

According to The Innocence Project, an organization dedicated to freeing the wrongly convicted through DNA testing, 240 people nationwide have been **exonerated** through post-conviction DNA testing. Of those people, 17 were sentenced to death row.

About the case

William Osborne was convicted of a brutal crime in 1993. He filed a federal lawsuit claiming that he had a **due process right** to access the evidence used against him to conduct a DNA test—at his own expense—that would definitively prove his guilt or innocence. The U.S. Court of Appeals for the Ninth Circuit ruled in Osborne's favor, but the U.S. Supreme Court **reversed** that decision.

A DNA test performed after the crime was committed showed that Osborne was among the approximately 15 percent of African Americans with a DNA match. Osborne's attorney at the time declined to pursue a more refined DNA test that could more accurately prove Osborne's guilt or innocence, reportedly out of concern that it might prove Osborne's guilt.

In considering this case, it is important to note that it concerned a crime that was committed in Alaska, which, along with Massachusetts and Oklahoma, has no law granting prisoners the right to post-conviction DNA testing. According to The Innocence Project, 47 states have passed legislation granting DNA testing in some cases. For example, some states allow testing in death row cases, but it is denied to those sentenced to life in prison. In addition, some states will not grant post-conviction DNA testing to a prisoner who pleaded guilty. The Court's ruling in the Osborne case does not mean that prisoners cannot access DNA evidence; rather it keeps the Constitution and the U.S. Supreme Court out of it.

In a press statement Peter Neufeld, co-director of The Innocence Project, who argued Osborne's case before the U.S. Supreme Court, acknowledged that a small percentage of the 240 exonerated individuals sought their DNA testing through federal court, however, for some, he said, it is their last resort.

"Most people who need DNA testing to prove their innocence will not be affected by today's ruling, but the small number of people who are impacted may suffer greatly," Neufeld said. "As a result of this decision, more innocent people will languish in prison and some may die

in prison because they were prevented from proving their innocence."

Why the justices said no

In delivering the **majority opinion** of the U.S. Supreme Court denying Osborne's request, Chief Justice John Roberts recognized that DNA testing has "the potential to significantly improve both the criminal justice system and police investigative processes."

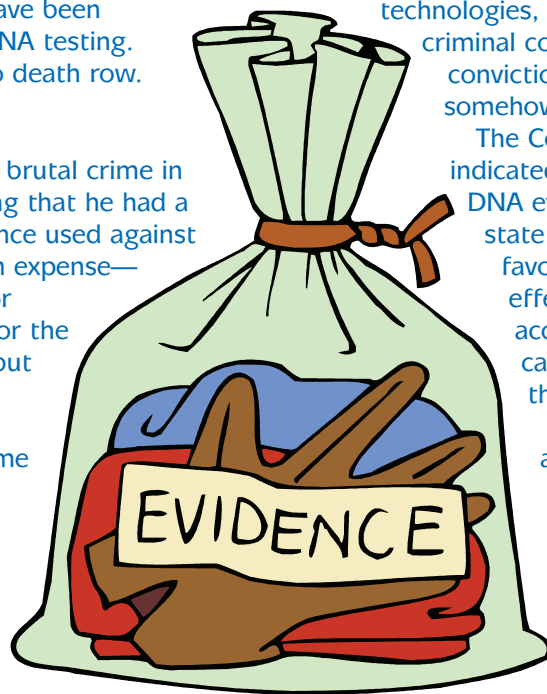
But, the Court held, "The availability of new DNA testing technologies, however, cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence is somehow in doubt."

The Court ruled against Osborne and indicated that decisions about how to handle DNA evidence are best left to legislatures and state courts. Had the court instead ruled favorably for Osborne, it would have in effect set a broad precedent allowing for access to DNA testing in post-conviction cases, thereby taking power away from the states to decide.

"To suddenly constitutionalize this area," Chief Justice Roberts wrote, "would short-circuit what looks to be a prompt and considered legislative response."

Justice John Paul Stevens, who delivered the Court's **dissenting opinion**, wrote, "There is no reason to deny access to evidence and there are many reasons to

provide it, not least of which is a fundamental concern in ensuring that justice has been done."



What are New Jersey's laws?

According to New Jersey law, prisoners currently serving jail time are eligible to apply for post-conviction DNA testing with the trial court where they were convicted.

New Jersey also has an established law to financially compensate individuals who are wrongfully convicted. Specifically, the law states that if a convicted person "did not by his own conduct cause or bring about his conviction," he or she is eligible (within two years from release of pardon) for twice the amount of their income in the year prior to their incarceration or \$20,000 per year of incarceration, whichever is greater.

So have any convictions ever been overturned in New Jersey? According to The Innocence Project, five of the 240 nationwide exonerations involved a New Jersey convict.

Perhaps the most noted New Jersey case involved a man named Byron Halsey, who was convicted in 1988 of the brutal murders of two children in Plainfield. According to The Innocence Project, Halsey "has a sixth-grade education and severe learning disabilities"

and was living with the children and their mother in a rooming house at the time of the crime. He reportedly was helping to support the family and raising the children as his own.

One evening, a friend of Halsey's named Cliff Hall took him across town while the children were home alone. A couple of hours later, Halsey walked home to find the children missing. Later, the children were found dead in the basement. After many hours of interrogation, Halsey allegedly confessed to the crime. After spending 19 years in prison, however, a DNA test proved Halsey's innocence and showed that in fact his friend, Hall, committed the murders. In July 2007, prosecutors announced that they were dropping all charges against Halsey, and he was officially exonerated.

Where do things go wrong?

How do wrongful convictions occur and why would someone confess to a crime they didn't commit? Jon Iannaccone, a lawyer with the Passaic County Public Defender's Office, said imperfections in the process—particularly false confessions and bad eyewitnesses—happen more often than one might think. Where confessions are concerned, Iannaccone said that people often feel pressured. They are in a room with a police officer, and they sometimes confess as a way of getting out. Some people, he said, have described it as an "out-of-body experience."

Since 2005, New Jersey has required that all confessions be videotaped, Iannaccone said. This, he noted, has marked an improvement in the process. As for eyewitnesses,

The Innocence Project maintains, "the most common element in all wrongful convictions later overturned by DNA evidence has been eyewitness

misidentification." According to a study published in *Law and Human Behavior*, the *Journal of the American Psychology-Law Society*, 77 percent of wrongful convictions involved mistaken eyewitness accounts.

While there is no way to guarantee accuracy with eyewitness accounts, the New Jersey Attorney General's Office has implemented statewide guidelines to help improve the process. For example, in an effort to avoid biasing the process, the guidelines recommend that photo and live line-ups be conducted by someone other than the primary investigator assigned to the case. There are also guidelines about how to instruct witnesses, how to compose line-ups, and how to document the procedure, among other things.

Why wouldn't DNA be used?

In discussing the use of DNA in court, Iannaccone said that if a

DNA test will help a defendant's case, it is typically done before trial.

Just as defense attorneys want to protect the rights of their clients,

prosecutors don't want an innocent person to be convicted, Iannaccone said.

DNA tests are not always conducted, however, even when

DNA evidence may be available. Paul DeGroot, senior assistant prosecutor in the Passaic County Prosecutor's Office, pointed out that in some cases, the evidence against a defendant may simply be so compelling that a DNA test is not needed. Still, he agreed with Iannaccone that DNA is "powerful" evidence and can play an important role in today's criminal cases. DeGroot said that in New Jersey, any person who is found guilty or pleads guilty to a **felony** has their DNA plugged into the database. DNA is usually taken from a swab that extracts saliva from the person's mouth.

That record remains on file and can be used with reliable accuracy to pin a person to a crime. In fact, while

discussing the use of DNA for this article, DeGroot said his office had just received what they referred to as a "CODIS hit." In other words, the DNA database linked a specific individual to a burglary and theft. In that case, the intruder apparently took a drink from an apple juice container while breaking into a house. In doing so, he left saliva on the container, which subsequently linked him to the crime.

Questions linger


In the case of the apple juice intruder, DNA left little doubt about who committed the crime. A newly released study, however, has brought the reliability of DNA evidence into question. Scientists at a Tel Aviv-based company fabricated DNA evidence and published the results of their study online in *Forensic Science International* in August 2009. The

company aims to sell to forensic laboratories a test it developed to determine if a DNA sample is false.

While the ramifications of this study remain unclear, John M. Butler, a fellow of the National Institute of Standards and Technology and

leader of its Human

Identity DNA Measurements Group, told *The New York Times* that while he was "impressed at how well they [the scientists] were able to fabricate the fake DNA profiles" he didn't think "your average criminal would be able to do something like that."

Only time will tell what this discovery and future DNA technology will mean for convicted individuals who may be serving unfair prison time and still waiting for justice. 



Whales and Dolphins

CONTINUED FROM PAGE 1

Chief Justice John Roberts, writing for the majority, stated that limiting sonar training exercises by the U.S. Navy “jeopardizes the safety of the fleet,” and may result in “the potential that a North Korean diesel electric submarine will get within range of Pearl Harbor undetected.” According to Justice Ruth Bader Ginsburg in her **dissenting opinion**, sonar is linked to “changes in the central nervous system” and “hemorrhaging around the brain and ears of mammals.” These injuries, she wrote, “cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy’s training exercises.”

Case background

In 2004, the National Resources Defense Council (NRDC) wrote a letter to the Secretary of the U.S. Navy Donald C. Winter requesting a “dialogue” to sit down and discuss how the use of sonar harmed mammals. When the Navy failed to respond, the NRDC and other conservation groups filed a federal lawsuit in October 2005 in California. The groups joining the NRDC in the action included the International Fund for Animal Welfare, League of Coastal Protection, Cetacean Society International and the Ocean Futures Society.

In the lawsuit, NRDC claimed the U.S. Navy violated the National Environmental Policy Act (NEPA) because it did not prepare an Environmental Impact Statement (EIS) before its sonar training exercises off the California coast. According to NEPA regulations, an EIS “should include discussions of the purpose of and need for the action, alternatives, the affected environment, the environmental consequences of the proposed action” and so forth. In addition, the NRDC claimed the Navy failed to obtain permits for the animals that would be affected, and did not consult with the Fish and Wildlife Commission to determine what possible effects these sonar exercises could have on endangered species.

In a press statement, Fred Regan, President of the International Fund for Animal Welfare, said, “The U.S. Navy could use a number of proven methods to avoid harming whales when testing mid-frequency sonar. Protecting whales and preserving national security are not mutually exclusive.” NRDC suggested “simple precautions” to protect marine mammals, such as avoiding well-populated habitats and migration routes, breeding and feeding areas, training in areas not occupied by many mammals, or even “increasing the volume of active sonar gradually to give nearby marine mammals a chance to flee.”

The federal district court issued a preliminary injunction requiring the Navy to stop training exercises if mammals were detected in the area within 2,200 yards of ships, lower sonar when water temperatures reached

certain levels, and imposed other restrictions, “including a 12-mile no sonar zone along the California coast and enhanced monitoring requirements.” The Bush

administration granted the Navy a waiver and additional time to comply with NEPA requirements. The Navy appealed the lower court **injunction** to the Ninth Circuit Court of Appeals, which supported the lower court decision, but eventually stayed, or suspended, the injunction, allowing the Navy to appeal to the U.S. Supreme Court.

Arguments and decision

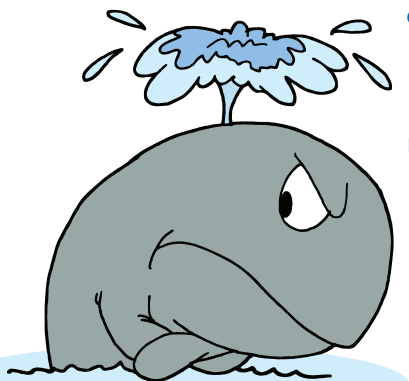
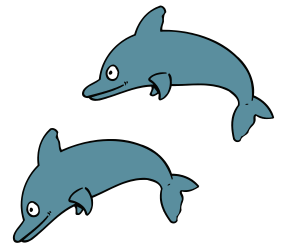
Oral arguments presented before the U.S. Supreme Court focused on harm to marine mammals versus national security preparedness. Richard B. Kendall, NRDC lawyer likened sonar noise from the Navy “as loud as 2,000 jet engines, causing marine mammals to suffer lasting physical trauma, strandings [on beaches] and changes in breeding and migration patterns.” Gregory Garre, the United States solicitor general who represented the Navy stated that harm to the animals posed by sonar waves was minor and only temporary.

The Court **reversed** the Ninth Circuit decision and **vacated** [set aside] the injunction. A majority of the justices believed that the NRDC had not proven extreme harm to mammals despite the fact that the Navy’s own data showed “564 physical injuries and 170,000 behavioral disturbances of marine mammals.” Chief Justice Roberts wrote, “the lower courts failed properly to defer to senior Navy officers’ specific, predictive judgments.” He referred to a comment made in 1907 by President Theodore Roosevelt that a prepared Navy must “practice at sea, under all the conditions which would have to be met if war existed.” Chief Justice Roberts declared that any harm to animals is “outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors... In this case...the proper determination of where the public interest lies does not strike us as a close question.”

John F. Spinello Jr., an environmental law attorney believes the Court “reached the legally correct conclusion” in *Winter*. “It is clear from Chief Justice Robert’s opinion the Ninth Circuit failed to properly consider the facts and weigh and balance the competing interests as required by the applicable law,” Spinello said. “The Ninth Circuit appeared to reach an illegitimate conclusion based, not on the law, but on the policy outcome it believed to be preferable.”

Spinello feels it is the responsibility of the government to take the lead on environmental issues and global warming. “Government intervention,” said Spinello, “is essential to prevent illness and disease, the destruction of wildlife, and changes in climate.”

The U.S. Navy completed its sonar training exercises off the coast of California and did turn in the EIS statement required by NEPA in January 2009. The NRDC plans to continue the fight against sonar training by the Navy.



Iraq War CONTINUED FROM PAGE 3

President Bush and President Obama's actions in prosecuting the war in Iraq as unconstitutional.

Injury to plaintiffs

The complaint noted that injury had been caused to the New Jersey Peace Action because of the absence of a declaration of war, forcing the non-profit organization to "redirect its financial resources and staff to opposition to the war... by being deprived of the opportunity to vote for or against their elected representatives based on how their representatives voted on the issue of going to war...[and] by being compelled to pay tax dollars for an unconstitutional war that they oppose."

Both mothers of soldiers in Iraq, the complaint claimed, have experienced "emotional, physical and psychological injury arising from... [their] concerns for the safety of [their] sons," and the Iraqi veteran was directly exposed to "hostile sniper fire and mortar rounds" and "endure[d] the many emotional, psychological and physical effects arising from the ordeal of combat, the continuing affects of which still plague him." He also "suffered injury by being compelled to obey orders that were unlawful because they were premised on the president's unconstitutional initiation of the War in Iraq without a Congressional Declaration of War."

The decision

Despite the fact that the plaintiffs' claim they suffered various injuries, the Court ruled that "Disagreement with government action or policy...does not constitute an injury in the constitutional sense." In addition, "Even if the Court were to grant plaintiffs the full relief they seek—a declaration that the order to invade Iraq was unconstitutional—none of the injuries would be **redressed**." Judge Linares noted that the plaintiffs filed this action over five years after the war started and have no claim for monetary damages. Linares wrote, "Plaintiffs' allegations as to the need for such a declaratory judgment are based in large part on the potential for future 'wars' with the countries of Pakistan or Iran. These theoretical wars are neither immediate nor real, and plaintiffs...lack standing to bring this action."

In dismissing the case, Judge Linares cited the political question doctrine first formulated by Chief Justice John Marshall in the 1803 case of *Marbury v. Madison*. This doctrine allows a court to decide whether a matter is appropriate for review. The political question doctrine permits a federal court to refuse to decide an issue "...because it properly belongs to the decision-making authority of elected officials." The legislative and executive branches share the war powers and work out their disputes separately from the judicial branch. According to Judge Linares, "In the absence of any alleged dispute between them [the Congress and the President], this court must stand down...The very act of second-guessing Congress's decision not to declare war is outside of the judiciary's sphere of competence."

Judge Linares declared that it is not the role of the judiciary to enter into foreign policy. He wrote, "The fact that the United States is engaged in military action absent a declaration of war does not automatically invite the judiciary's analysis as to whether that action is constitutionally sanctioned... the issues raised are barred by the political question doctrine, and thus the suit must be dismissed."

The case is now before the Third Circuit Court of Appeals. "This is all about the original intent of the framers as they were drafting the Constitution in 1787," Professor Askin said. "The U.S. Supreme Court has never definitively interpreted Article I, Section 8 of the...Constitution...We would like to get this issue concerning the original intent of the founders of our nation before the U.S. Supreme Court." 🔪



adjudicate — to resolve a dispute through legal action.

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

due process rights — constitutional rights of procedures with regard to government actions prior to deprivation of a person's right to life, liberty or property.

exonerate — to acquit or free from blame.

felony — a serious criminal offense usually defined by statute, with more serious punishments in terms of jail time or fines or both than lesser offenses.

injunction — an order of the court that compels someone to do something or stops someone from doing something.

liable — to be held responsible for damages.

majority opinion — a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues.

plaintiff — person or persons bringing a civil lawsuit against another person or entity.

political question doctrine — a question that courts will refuse to decide because determination would infringe on legislative or executive powers.

probable cause — a reasonable belief in certain facts that justify governmental action.

redress — satisfaction, in the form of compensation or punishment, for an injury or wrong doing.

reverse — to void or change a decision by a lower court.

vacate — to annul or cancel; to render an act null and void.