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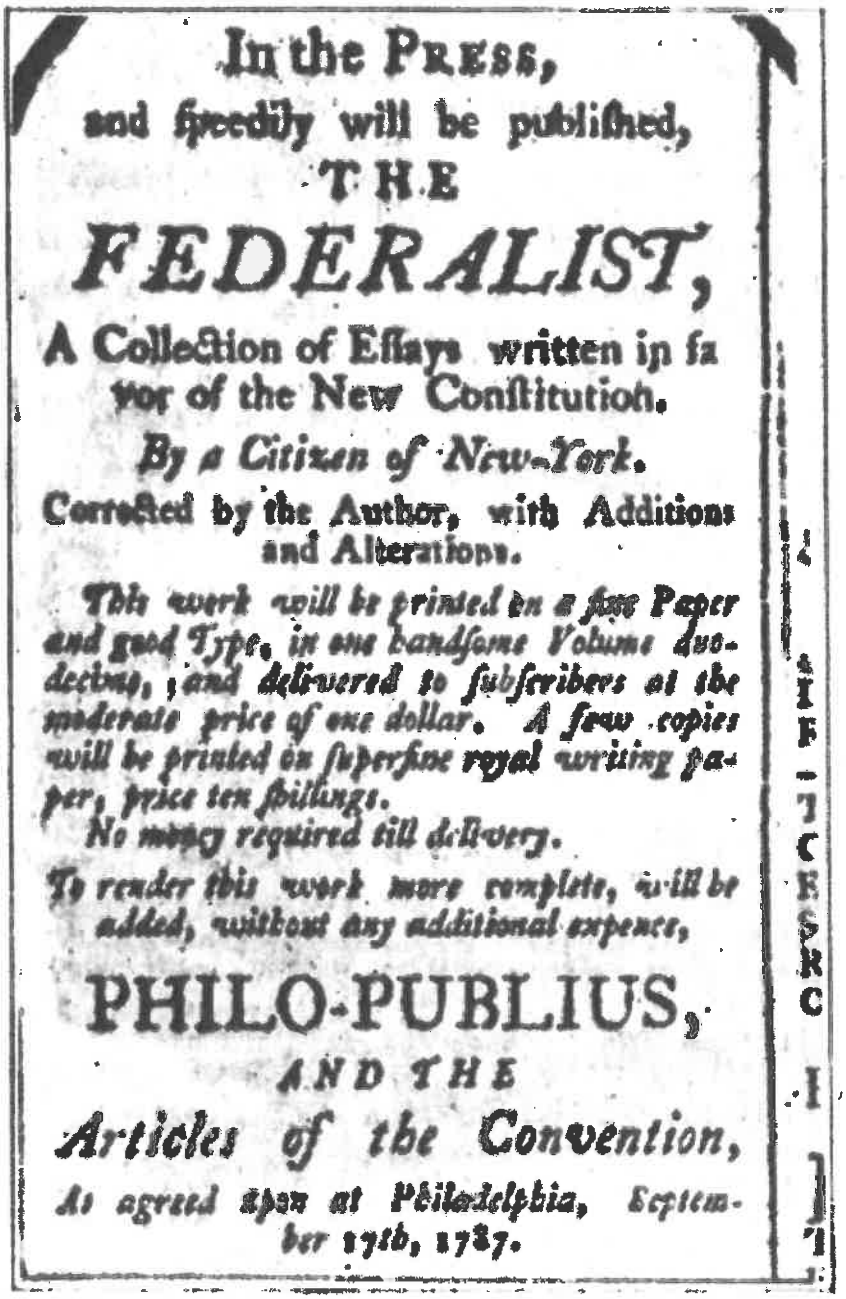

In the PRESS,
and ſpeedily will be publiſhed,
THE
FEDERALIST,
A Collection of Eſſays written in fa vor of the New Conſtitution.
By a Citizen of New-York.
Corrected by the Author, with Additions and Alterations.

This work will be printed on a fine Paper and good Type, in one handſome Volume duodecimo, and delivered to ſubſcribers at the moderate price of one dollar. A few copies will be printed on ſuperfine royal writing paper, price ten ſhillings.

No money required till delivery.

To render this work more complete, will be added, without any additional expence,

PHILO-PUBLIUS,
AND THE
Articles of the Convention,
As agreed upon at Philadelphia, September 17th, 1787.

Source: https://billofrightsinstitute.org

The Federalist Papers : No. 51

The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments
From the New York Packet. Friday, February 8, 1788.

JAMES MADISON

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human

nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the

other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. **Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.**

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by

introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more duly capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

PUBLIUS.

The Federalist Papers : No. 78

The Judiciary Department
From McLEAN'S Edition, New York.

HAMILTON

To the People of the State of New York:

WE PROCEED now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged, as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2d. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts, and their relations to each other.

First. As to the mode of appointing the judges; this is the same with that of appointing the officers of the Union in general, and has been so fully discussed in the two last numbers, that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR; which is conformable to the most approved of the State constitutions and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection, which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every

citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power1; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."2 And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens, that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is, that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable, that between the interfering acts of an EQUAL authority, that which was the last indication of its will should have the preference.

But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies,3 in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already

been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weightier reason for the permanency of the judicial offices, which is deducible from the nature of the qualifications they require. It has been frequently remarked, with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us, that the government can have no great option between fit character; and that a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity. In the present circumstances of this country, and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed, that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good

government. The experience of Great Britain affords an illustrious comment on the excellence of the institution. PUBLIUS

THE CONSTITUTION

[1][Preamble] We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION.

ARTICLE I

Bill Of Rights

[Rights, privileges and franchise secured; power of legislature to dispense with primary elections in certain cases]

Section 1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, except that the legislature may provide that there shall be no primary election held to nominate candidates for public office or to elect persons to party positions for any political party or parties in any unit of representation of the state from which such candidates or persons are nominated or elected whenever there is no contest or contests for such nominations or election as may be prescribed by general law. (Amended by vote of the people November 3, 1959; November 6, 2001.)[2]

[Trial by jury; how waived]

§2. Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

[Freedom of worship; religious liberty]

§3. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state. (Amended by vote of the people November 6, 2001.)

Handout 3: Bill of Rights
Ratified by the states on December 15, 1791

Preamble

Congress of the United States begun and held at the City of New-York, on Wednesday the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

RESOLVED by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Rivera v. Smith, Court of Appeals, New York 1986 – CASE SUMMARY

Edwin Rivera, who is a Muslim and is incarcerated at the Attica Prison, was selected at random for a pat frisk. When a female correction officer approached him to conduct the frisk, Rivera objected and asked for a male officer to perform the search, based upon his religious beliefs, as embodied in the Holy Qu'ran, that all persons should be "modest of their person..." and should not submit to contact towards the opposite sex.

63 N.Y.2d 501, 472 N.E.2d 1015, 483 N.Y.S.2d 187

In the Matter of Edwin Rivera, Respondent,
v.
Harold J. Smith, as Superintendent of Attica Correctional Facility, et al., Appellants.
Court of Appeals of New York
Argued October 16, 1984;
decided November 27, 1984
CITE TITLE AS: Matter of Rivera v Smith

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 27, 1984, which, by a divided court, affirmed a judgment of the Supreme Court (John S. Conable, J.; opn 118 Misc 2d 921), entered in Wyoming County in a proceeding pursuant to CPLR article 78, (1) declaring that performance of a pat frisk by a female officer on a male Muslim inmate, in the circumstances of this case, violated religious rights guaranteed under the Correction Law and the New York Constitution, (2) ordering that such a frisk must be performed by an officer of the same sex in the absence of reasonable grounds to believe that the inmate possesses contraband or some other emergency situation, and (3) ordering that any reference to the reports of October 11 and 12, 1982 be expunged from petitioner's institutional records.

On October 11, 1982, petitioner, Edwin Rivera, who is a Muslim and is incarcerated at the Attica Correctional Facility, and two or three other inmates, were selected at random for a pat frisk. When a female correction officer, respondent M. Ricks, approached him to conduct the frisk, Rivera objected and asked that a male officer perform the search, based on his religious belief, as embodied in the Holy Qu'ran, "that all believers should be modest of their person and they shouldn't submit to contact or lustful * * * desires, towards the opposite sex or even with your own sex". Rivera was advised to speak with a sergeant about his objection. Sergeant Wolf was summoned and, when informed of the situation, told Rivera to submit to the frisk or return to his cell. Rivera was then taken to his cell where he was locked in. He was charged in a misbehavior report filed by Officer Ricks with refusal to obey a direct order, interference with an employee, and violation of search and frisk rules. Rivera appeared before the institution's Adjustment Committee on October 12, 1982 where *502 he admitted refusing to permit the frisk. The committee imposed a penalty of seven days of continuous confinement to his cell and loss of 23 days of specified privileges. By order to show cause dated November 30, 1982, Rivera commenced this CPLR article 78 proceeding against the Superintendent of the Attica Correctional Facility, Correction Officer Ricks and Sergeant Wolf, seeking an order declaring that Directive 4910 of the Department of Correctional Services, which governs frisks of inmates, is unconstitutional and expunging from his record the write-up of his refusal to submit to the frisk. Supreme Court granted the petition. The court found that a pat frisk conducted by a female officer involves sufficient physical contact to violate a male Muslim's religious beliefs which prohibit physical contact between sexes outside of marriage, and which are protected by the free exercise provision of section 3 of article I of the New York State Constitution and by section 610 of the Correction Law. Supreme Court concluded that where searches are carried out as a routine precaution or are conducted at random, male correction officers could be used to pat frisk Muslims. The court also concluded that any interest a female employee may have in her job

assignments would not dictate a contrary result. The Appellate Division affirmed, with two Justices dissenting, holding that the inmate's free exercise right had been violated under State law in the limited circumstances of this case.

The Court of Appeals modified the order of the Appellate Division by eliminating the expunging of petitioner's institutional record and, as so modified, affirmed, holding, in an opinion by Judge Jones, that under the Constitution and statutes of the State of New York, it would have been a violation of the right of a Muslim inmate to free exercise of his religious beliefs, in the limited circumstances of this case, for him to have been subjected to a random pat frisk performed by a correction officer of the opposite sex; that this intrusion on the prisoner's religious beliefs would not have been justified here by the State's interests in maintaining prison security or in providing equal opportunity for women to serve as prison guards; but that it was error, however, for the courts below to have ordered that references *503 to the incident be expunged from the inmate's institutional records.

Matter of Rivera v. Smith, 99 AD2d 672, modified.

HEADNOTES

Prisons and Prisoners

Freedom of Worship

Pat Frisk of Male Muslim Inmate by Female Correction Officer

(1) Under section 3 of article I of the New York Constitution and section 610 of the Correction Law, it would have been a violation of the right of a Muslim inmate to free exercise of his religious beliefs, in the limited circumstances of this case, for him to have been subjected to a random pat frisk performed by a correction officer of the opposite sex; this intrusion on the prisoner's religious beliefs would not have been justified here by the State's interests in maintaining prison security or in providing equal opportunity for women to serve as prison guards. It was not established that legitimate security interests call for the use of female prison guards to perform random pat frisks of male Muslim inmates in violation of the latters' religious beliefs; when petitioner, a male Muslim inmate, was approached by the female correction officer for a random pat frisk there were other male officers in the vicinity who could have performed the search, and the delay required to respond to a Muslim's objection to a pat frisk by an officer of the opposite sex would be minimal. Nor was it shown that the State's interest in providing equal employment opportunity to women justified a pat frisk of petitioner by the female correction officer; any one correction officer does not have the absolute right to pat frisk any single inmate of his or her selection; accommodating the religious beliefs of Muslim inmates in this instance could be attained with only a minimal impact on job assignments.

Prisons and Prisoners

Refusal of Inmate to Carry Out Illegal Order of Correction Officer-- Expunging Institutional Records

(2) It was error to order references to an incident involving a refusal by petitioner, a male Muslim inmate, to submit to a random pat frisk by a female correction officer, expunged from the inmate's institutional records following the court's determination that such pat frisk would have violated petitioner's right under New York law to the free exercise of his religious beliefs. In view of the characteristics of the correctional system and the compelling interests of the State in the preservation of security and order within correctional facilities, the recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy. The risks inescapably attendant on the refusal of an inmate to carry out even an illegal order of a

correction officer are such as to require compliance at the time with the right of retrospective administrative or judicial determination as to the legality of the order.

Appeal

Court of Appeals

Matters Reviewable--Finding of Supreme Court Affirmed by Appellate Division

(3) Inasmuch as the Appellate Division affirmed the Supreme Court findings that petitioner's Muslim beliefs compelled him to avoid contact with members of the opposite sex outside of marriage which view was supported by testimony that the Qu'ran requires Muslims to avoid such physical contact, even when clothed, but that the "sin" of such contact might be forgiven if one's will to prevent it is violated in an emergency, these factual determinations are beyond the scope of the Court of Appeals review; moreover, the Appellate Division having affirmed the Supreme Court finding that a pat frisk by a female correction officer involves physical contact which is violative of the religious creed of a male Muslim inmate, such finding, too, is not reviewable in the Court of Appeals, there being evidence for its support in the record. *504

POINTS OF COUNSEL

Robert Abrams, Attorney-General (*Martin A. Hotvet* and *Peter H. Schiff* of counsel), for appellants.

I. The policy requiring female correction officers to perform pat frisks was not unreasonable as applied to a Muslim inmate in view of the important State interests in providing adequate security and equal opportunity for women to serve as prison guards and the minimal nature of the intrusion into the inmate's free exercise of his religion. (Matter of Brown v McGinnis, 10 NY2d 531; Jones v North Carolina Prisoners' Union, 433 US 119; Pell v Procunier, 417 US 817; Matter of Shahid v Coughlin, 83 AD2d 8, 56 NY2d 987; Bell v Wolfish, 441 US 520; Wolff v McDonnell, 418 US 539; Madyun v Franzen, 704 F2d 954; Sam'i v Mintzes, 554 F Supp 416; Smith v Fairman, 678 F2d 52; Matter of Cunningham v Coughlin, 97 AD2d 930.) II. The disciplinary record should not be expunged. (Matter of Sinclair v New York State Dept. of Correctional Servs., 91 AD2d 742; Matter of Patterson v Smith, 53 NY2d 98; Jones v North Carolina Prisoners' Union, 433 US 119.)

Norman P. Effman and *Leigh E. Anderson* for respondent.

I. The court below correctly held that under the facts of this case, the pat frisk by a female officer of a male Muslim inmate violated religious rights secured under the Correction Law and the New York State Constitution. (Matter of Brown v McGinnis, 10 NY2d 531; Lue v English, 44 NY2d 654; Dothard v Rawlinson, 433 US 321; Forts v Ward, 621 F2d 1210; Matter of Abdullah v Smith, 115 Misc 2d 105, 96 AD2d 742; Matter of Shahid v Coughlin, 83 AD2d 8, 56 NY2d 987; LaReau v MacDougall, 473 F2d 974, 414 US 878; Mawhinney v Henderson, 542 F2d 1; Burgin v Henderson, 536 F2d 501.) II. The court below correctly ruled that the misbehavior report be nullified and expunged from respondent's institutional records. (Sega v State of New York, 60 NY2d 183; Matter of Garfield, 14 NY2d 251.)

OPINION OF THE COURT

Jones, J.

(1,2) Under the Constitution and statutes of the State of New York, it would have been a violation of the right of a Muslim inmate to free exercise of his religious beliefs, in *505 the limited circumstances of this case, for him to have been subjected to a random pat frisk performed by a correction officer of the opposite sex. This intrusion on the prisoner's religious beliefs would not have been justified here by the State's interests in maintaining prison security or in providing equal opportunity for women to serve as prison guards. It was error, however, for

the courts below to have ordered that references to the incident be expunged from the inmate's institutional records.

On October 11, 1982, petitioner, Edwin Rivera, who is a Muslim and is incarcerated at the Attica Correctional Facility, was moving in formation with his company heading for a movie. He and two or three other inmates were selected at random for a pat frisk. When a female correction officer, respondent M. Ricks, approached him to conduct the frisk, Rivera objected and asked that a male officer perform the search. According to Rivera, his objection was based on his religious belief, as embodied in the Holy Qu'ran, "that all believers should be modest of their person and they shouldn't submit to contact or lustful * * * desires, towards the opposite sex or even with your own sex". Rivera was advised to speak with a sergeant about his objection. Sergeant Wolf was summoned and, when informed of the situation, told Rivera to submit to the frisk or return to his cell. Rivera was then taken to his cell where he was locked in. About a half hour later, he was charged in a misbehavior report filed by Officer Ricks with refusal to obey a direct order, interference with an employee, and violation of search and frisk rules.

Rivera appeared before the institution's Adjustment Committee on October 12, 1982 where he admitted refusing to permit the frisk. The committee imposed a penalty of seven days of continuous confinement to his cell and loss of 23 days of specified privileges.

By order to show cause dated November 30, 1982, Rivera commenced this article 78 proceeding against the Superintendent of the Attica Correctional Facility, Correction Officer Ricks and Sergeant Wolf, seeking an order declaring that Directive 4910 of the Department of Correctional Services, which governs frisks of inmates, is unconstitutional *506 and expunging from his record the write-up of his refusal to submit to the frisk.

At a hearing held on February 9, 1983, Professor William L. Gohlman, a professor of Middle Eastern and Islamic History, testified that the Qu'ran forbids a Muslim from revealing his genitals to or having them touched by a member of the opposite sex other than his spouse. According to Gohlman, the Qu'ran is the "direct, literal word of God, is the foundation of all Islamic law and cannot be controverted in any way." Gohlman testified that for a Muslim to have his body touched, even with clothing on, by a member of the opposite sex would be absolutely prohibited, shameful and a very great sin. He further indicated that this prohibition is listed in the Qu'ran among its major tenets and is "put on the same level as prayer, alms giving and the other pillars of Islam, the basis of the Islamic religion."

Gohlman conceded that in an emergency these religious tenets may be waived if absolutely necessary, the principle being that if there is freedom to choose one must heed the prohibition but if one's will is overcome failure to observe the prohibition is not condemned. As to the situation in which a female correction officer attempts a frisk of a male inmate, Gohlman testified that it would depend on the extent to which the prisoner is physically prevented from refusing and that the prisoner should resist to the point at which it would cause him more harm to resist than not to resist.

Abdul Mujahid Shakir, the Imam of the American Muslim Mission at Attica, testified that the Qu'ran forbids intimate physical contact between members of the opposite sex who are not married to each other. It was Shakir's position that in a pat search the woman officer has to touch all areas of the body and would come into contact with the intimate parts, and that this would violate the Qu'ran's admonition to guard one's intimate parts, maintain one's modesty, and refrain from physical contact with the opposite sex which may tend to bring about sexual arousal.

Brenda Valentine, a correction officer at Attica, testified that she had conducted over 30 pat frisks and that in performing them she doesn't touch the genital area though *507 she does put

her hands in the vicinity. The search is conducted by patting the outer clothing over the entire length of the inmate's torso, touching the skin only at the shirt sleeves and collar, and checking the seams and pockets of the prisoner's clothing. She testified that there was always another officer present during these frisks though on perhaps three occasions in which she had performed them no male officer was present. When she had observed random pat frisks being conducted, 12 inmates were selected to be frisked by 12 guards of whom 8 were male officers.

Directive 4910 of the Department of Correctional Services (dated Jan. 20, 1981) was introduced in evidence at the hearing. On October 11, 1982 section IV(D)(2)(b) of the directive provided that: "A 'Pat Frisk' may be made on inmates to be interviewed by Departmental officials, the Board of Parole, or official visitors; entering the visiting room of a maximum or medium security facility; going to and returning from housing areas and/or outside work details; when the entire or individual area of the facility or living quarters is searched; or when there are reasonable grounds to believe an inmate is in possession of contraband."[1] A provision that a pat frisk "shall be conducted by an officer of the same sex as the inmate being frisked" had been deleted from the directive on June 1, 1981 after the Department promulgated Directive 2230 on May 18, 1981 which was intended to extend equal rights in employment to all employees regardless of sex.[2]

Section II of Directive 2230 provides, in pertinent part, that:

"1. All correction officers will perform the duties that are assigned to them, regardless of sex, provided however, that the following assignments will not be made to officers who are not of the same sex as the inmates:

"a. strip searches

"b. congregate shower facilities *508

"3. Pat frisks of inmates will be performed by officers regardless of sex."

Supreme Court, in a memorandum and judgment dated April 5, 1983, granted the petition. The court found that a pat frisk conducted by a female officer involves sufficient physical contact to violate a male Muslim's religious beliefs which prohibit physical contact between the sexes outside of marriage. According to the court, these religious beliefs are protected by the free exercise provision of section 3 of article I of the New York State Constitution and by section 610 of the Correction Law which recognizes that prison inmates retain their rights to free exercise of religious beliefs. The court noted that these rights are subject to reasonable curtailment if necessary for proper discipline and management of the correctional facility.

After balancing the competing interests involved, Supreme Court concluded that where searches are carried out as a routine precaution or are conducted at random male correction officers could be used to pat frisk Muslims. Inasmuch as Directive 4910 had previously required that pat frisks be performed by an officer of the same sex as the inmate and still so mandates for more intrusive searches, the court found that the only security interest advanced in withdrawing this protection as to pat frisks is the avoidance of delay. This delay, according to the court, would be minimal because Muslim inmates are readily identifiable by the prayer caps which they are permitted to wear.

The court concluded that any interest a female employee may have in her job assignments would not dictate a contrary result. Having male officers available to search Muslim prisoners, the court reasoned, would serve a bona fide purpose of protecting the religious rights of inmates. Further, the requested relief would have only a very slight impact on the assignment of female officers because several officers usually accompany groups of inmates.

Accordingly, the court declared that the performance of a pat frisk of a male Muslim inmate by a female correction officer, in the circumstances of this case, violated religious rights guaranteed

by the Correction Law and the New *509 York Constitution. The court ordered that such a frisk be performed by an officer of the same sex as the Muslim prisoner in the absence of reasonable grounds to believe that the inmate possesses contraband or that there is an emergency situation. Inasmuch as the court concluded that it is not permissible to punish a prisoner for exercising a valid religious right, the court further ordered that any reference to the charges filed on October 11, 1982 or the disposition made the following day by the Adjustment Committee be expunged from petitioner's institutional records.

On appeal by the Superintendent and the correction officers, the Appellate Division affirmed, with two Justices dissenting. The majority distinguished Madyun v Franzen (704 F2d 954 [7th Cir]), which held that a pat frisk of an Islamic male prisoner by a female prison guard did not violate the inmate's rights under the free exercise clause of the Federal Constitution because such searches are justified by the important State interests of providing adequate prison security and equal opportunity for women to serve as prison guards. According to the Appellate Division, in New York section 3 of article I of our State Constitution and section 610 of the Correction Law evince a greater concern for religious freedom of inmates than may be found in other jurisdictions. Consequently, the court held that the inmate's free exercise right had been violated under State law in the limited circumstances of this case.

The dissenters were of the view that there were no special circumstances to except this case from what they perceived to be the general rule that all inmates, even those with religious objections, are subject to frisk searches by correction officers of the opposite sex (citing Madyun v Franzen, 704 F2d 954, supra). According to the dissent, the mere presence of a male correction officer did not render this otherwise lawful search violative of New York law. Nor should the legality of such a search depend on whether the officer has reasonable cause to believe that the inmate possesses contraband or that emergency circumstances justify the frisk. The dissenters would have held that the State has a substantial interest in having its women guards frisk male inmates and that such frisk searches are an *510 integral part of prison security and an important part of a prison guard's duties.

The Superintendent and correction officers have appealed as of right to our court. We now modify the order appealed from.

Our analysis starts with the proposition that with the closing of the prison doors behind him an inmate loses, or must endure substantial limitations on, many rights and privileges he previously enjoyed, a status justified by the character of our penal system (Matter of Brown v McGinnis, 10 NY2d 531, 536; see Price v Johnston, 334 US 266, 285). Nevertheless, a prisoner does not lose all rights during incarceration but rather retains those rights that are not inconsistent with his status as an inmate or with the legitimate penological objectives of the prison institution (see Pell v Procunier, 417 US 817, 822). In the context of religious freedom, it is clear that the prisoner maintains the right to free exercise of religion under the first amendment of the Federal Constitution (LaReau v MacDougall, 473 F2d 974 [2d Cir], cert den 414 US 878; Sweet v South Carolina Dept. of Corrections, 529 F2d 854 [4th Cir]; Childs v Duckworth, 705 F2d 915 [7th Cir]; Teterud v Burns, 522 F2d 357 [8th Cir]; see Cruz v Beto, 405 US 319; Cooper v Pate, 378 US 546), although the Supreme Court of the United States has yet to delineate the breadth of this right.

Under New York law, section 3 of article I of our State Constitution provides that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind". This free exercise right has expressly been extended to those incarcerated in New York correctional facilities by section 610

of the Correction Law.[3] In so *511 providing, the Legislature recognized the positive effect that religion can have in rehabilitating convicts and in shaping their behavior while in prison. These provisions of New York law manifest the importance which our State attaches to the free exercise of religious beliefs, a liberty interest which has been called a "preferred right" (Matter of Brown v McGinnis, 10 NY2d 531, 536, supra).

Notwithstanding the importance of this right, it does not prevent the imposition of reasonable restrictions by prison officials (Matter of Shahid v Coughlin, 83 AD2d 8, 11-12, affd on opn below 56 NY2d 987; Matter of Brown v McGinnis, 10 NY2d 531, 535-536, supra; Correction Law, § 610), but rather such restrictions must be weighed against the institutional needs and objectives being promoted (Matter of Shahid v Coughlin, 83 AD2d, p 11, supra; see Bell v Wolfish, 441 US 520, 546; Wolff v McDonnell, 418 US 539, 556). The nature of a correctional facility, where confinement and order are necessary, is such that inmates cannot be afforded free exercise rights as broad as those enjoyed outside the prison setting.

(3) Supreme Court found that Rivera's Muslim beliefs compelled him to avoid contact with members of the opposite sex outside of marriage. This view was supported by the testimony of Dr. Gohlman that the Qu'ran requires Muslims to avoid such physical contact, even when clothed, but that the "sin" of such contact might be forgiven if one's will to prevent it is violated in an emergency. Further *512 support for Rivera's religious belief was provided by the testimony of Shakir. Nor did respondent ever challenge the sincerity or *bona fides* of petitioner's religious convictions (cf. Matter of Holy Spirit Assn. v Tax Comm., 55 NY2d 512, 526). Inasmuch as the Appellate Division affirmed Supreme Court's findings, these factual determinations are beyond the scope of our review. Supreme Court further found that, based on Officer Valentine's description of the manner in which pat frisks are performed, a pat frisk by a female correction officer involves physical contact which is violative of the religious creed of a male Muslim inmate.[4] This finding, too, having been affirmed at the Appellate Division, is not reviewable in our court, there being evidence for its support in the record.

The question thus becomes whether the impingement on Rivera's religious convictions caused by a routine pat frisk conducted by a woman officer is outweighed by a legitimate institutional need or objective of the correctional facility. The Superintendent and the correction officers assert two interests which, they contend, justify application to Muslim inmates of their policy that pat frisks be performed by all officers without regard to the officer's sex. They support this policy on the grounds that it is necessary to maintain prison security and that it provides equal opportunity for women to serve as correction officers.

With respect to the first asserted interest, it cannot be questioned that prison administrators have a substantial interest in maintaining security in their facilities. The extraordinary difficulties of managing prisons, in which the daily activities of a large number of inmates who have been confined due to their criminal, and often violent, conduct must be supervised, are such that the maintenance of order and discipline is a critical objective. Prison officials are charged with the responsibility, among other things, to secure their institutions against escape, to prevent the transfer or possession of contraband, and to protect the safety of inmates and prison employees. To carry out these *513 formidable tasks in the volatile setting of our correctional institutions requires that prison officials be vested with broad discretion in their formulation of security-related policies.

(1) In the limited circumstances of the present case, however, it has not been shown that legitimate security objectives are advanced by having female correction officers randomly pat frisk Muslim male inmates. When petitioner was approached by Officer Ricks there were other

male officers in the vicinity who could have performed the search. Further, Officer Valentine testified that during random frisks she had observed that 12 inmates were searched by 12 guards, of whom 8 were male officers. Supreme Court found that, based on the Department of Correctional Services' previous prohibition on pat frisks by officers of the opposite sex and its continued policy that more restrictive searches be performed by officers of the same sex as the inmates searched, the only security interest advanced in not providing such protection for pat frisks is the avoidance of the delay required to respond to a Muslim's objection. The court concluded that such delay would be minimal inasmuch as Muslim inmates can easily be identified by the prayer caps which they are allowed to wear and thus officers can readily determine which inmates should be frisked by male guards. Accordingly, it has not been established that security interests call for the use of female prison guards to perform random pat frisks of male Muslim inmates in violation of the latters' religious beliefs.

The argument that the policy of having officers perform pat frisks regardless of sex is justified by the State's interest in affording women opportunity to serve as correction officers, important as that objective is, does not compel a different result on the facts of this particular case. The Governor has promulgated Executive Order No. 6 which establishes that it is the policy of the State "that equal opportunity be assured in the State's personnel system and affirmative action provided in its administration". The order requires each State agency or department to "develop a revised written affirmative action program, where necessary, including the development of specific *514 goals and timetables for the prompt achievement of full and equal employment opportunity for minorities, women, disabled persons and Vietnam era veterans." To implement this policy, the Commissioner of the Department of Correctional Services issued his own policy statement which condemns the lack of equal opportunity for all and "acknowledges and accepts [the Department's] obligation to eliminate those forms of discrimination that exist within" the Department. According to the Superintendent and the correction officers, the Department's amendment of Directive 4910, which had prohibited female prison guards from frisking male inmates, and its issuance of Directive 2230, which provides that pat frisks are to be performed by all officers regardless of their sex, are in furtherance of this policy.

The Department's policy of providing equal opportunity in employment unquestionably promotes a salutary objective. We need not now decide, however, whether the State's interest in this regard can outweigh an inmate's right to free exercise of religion (compare Forts v Ward, 621 F2d 1210 [2d Cir]; Madyun v Franzen, 704 F2d 954 [7th Cir], supra; Smith v Fairman, 678 F2d 52 [7th Cir]; and Sterling v Cupp, 290 Ore 611). Nor need we consider whether limiting random pat frisks of Muslim inmates to officers of the same sex as the inmate searched to protect Muslim religious beliefs would be justified as a bona fide occupational prescription (see Dothard v Rawlinson, 433 US 321). In the present instance, two or three other inmates were selected for routine searches along with petitioner. Officer Ricks could have been assigned to frisk a non-Muslim prisoner while a male officer frisked petitioner. Any one correction officer does not have the absolute right to pat frisk any single inmate of his or her selection. Accommodating the religious beliefs of Muslim inmates in this instance could be attained with only a minimal impact on job assignments because, as Officer Valentine testified, routine frisks had been conducted on groups of 12 prisoners by 12 officers, 8 of whom were male. There is no proof in the record in this case that denial to Officer Ricks of the opportunity to conduct a pat frisk of Rivera frustrated the objectives of the equal opportunity policy. Thus, it has not *515 been shown that the State's interest in providing equal employment opportunity to women justified a pat frisk of Rivera by Officer Ricks.

Accordingly, we hold that, in the setting in which this frisk was to be made, for Officer Ricks to have conducted a routine pat frisk of Rivera would have violated his right to the free exercise of his religious beliefs guaranteed by section 3 of article I of the New York Constitution and section 610 of the Correction Law.

(2) We turn now to consideration of the appropriate remedy to be fashioned in this case. As well as declaring that a pat frisk by Officer Ricks would have violated Rivera's right under New York law to the free exercise of his religious beliefs and ordering that in similar circumstances such a search be performed by a guard of the same sex absent a reason to believe the inmate possesses contraband or other emergency circumstances, Supreme Court ordered that any reference to the charges and their disposition be expunged from Rivera's records. This latter relief was inappropriate.

In view of the characteristics of the correctional system and the compelling interests of the State in the preservation of security and order within correctional facilities, the recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy. There must, in most instances (including this case), be compliance with the orders of the correction personnel, or acceptance of the penalties properly applicable to noncompliance. The risks inescapably attendant on the refusal of an inmate to carry out even an illegal order of a correction officer are such as to require compliance at the time with the right of retrospective administrative or judicial determination as to the legality of the order.

As was noted in a similar context in Matter of Shahid v Coughlin (83 AD2d 8, 12, affd on opn below 56 NY2d 987, supra): "Inmates who object to a particular prison rule should obey the rule until such time as established procedures can effectuate a change. Any holding to the contrary would simply encourage inmates to break rules as a means *516 of addressing their grievances and invite chaos." The threat to prison security would be manifest were we to allow inmates to decide for themselves which orders to obey and which to ignore as violative of their rights and to act accordingly. In principle the legal situation is not unlike that in which an individual against whom an injunction has been granted must comply with the terms of the injunction or be liable for contempt for failure to do so, notwithstanding that the injunctive order is illegal. His remedy lies in judicial challenge to the injunction, not in personal refusal to obey its command. (United States v Mine Workers, 330 US 258, 293; City School Dist. v Schenectady Federation of Teachers, 49 AD2d 395, 397, mot for lv to app den 38 NY2d 820; cf. Matter of Balter v Regan, 63 NY2d 630, 631, cert den 469 US --, 53 USLW 3324.) Consequently, we cannot sanction petitioner's refusal to submit to the frisk by expunging the incident from his files.[3]

Accordingly, the order of the Appellate Division appealed from should be modified, without costs, to eliminate the expunging of petitioner's institutional record and, as so modified, affirmed.

Kaye, J.

(Concurring).

I write separately to emphasize my own understanding that the declaratory relief is narrowly confined to the particular facts of this case, based on the record made below. This court, as well as both lower courts, have noted that the declaration is made "in the limited circumstances of this case." Since this appeal involves a collision of important interests, shared by the State -- that of inmates in the free exercise of their religious beliefs, that of correction officers in equal employment opportunity, and that of prison administrators, who must be accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" (*517 Bell

v Wolfish, 441 US 520, 547-548) -- it seems desirable to underscore certain of those circumstances.

When petitioner and two or three other inmates were selected to be frisked by a female officer, a male officer was present. Petitioner asked the male officer to frisk him, on the ground that his religious beliefs forbade touching by a female, but the male officer declined. A pat frisk of the particular manner described, done by a female, would have involved physical contact violative of a major tenet of petitioner's religious creed; that affirmed finding, which is supported by the record, is binding on this court. Conversely, respondent adduced no proof whatever that the interests of either effective prison management or equal employment opportunity would have been in the slightest impaired or threatened if the male officer who was right there had performed the pat frisk on this petitioner. Given the record, I must agree that in the circumstances the intrusion on this petitioner's religious beliefs was not justified. Proof that requiring a male officer to pat frisk a male Muslim inmate affects equal employment opportunity or prison administration would present an entirely different situation (see Matter of Shahid v Coughlin, 83 AD2d 8, affd on opn below 56 NY2d 987).

Chief Judge Cooke and Judges Jasen, Wachtler, Meyer and Simons concur with Judge Jones; Judge Kaye concurs in result in a separate opinion.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. *518

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OPINION

Why Obama Voted Against Roberts

'He has used his formidable skills on behalf of the strong in opposition to the weak.'

Updated June 2, 2009 12:01 a.m. ET

The following is from then-Sen. Barack Obama's floor statement explaining why he would vote against confirming Supreme Court Chief Justice John Roberts (September 2005):

. . . [T]he decision with respect to Judge Roberts' nomination has not been an easy one for me to make. As some of you know, I have not only argued cases before appellate courts but for 10 years was a member of the University of Chicago Law School faculty and taught courses in constitutional law. Part of the culture of the University of Chicago Law School faculty is to maintain a sense of collegiality between those people who hold different views. What engenders respect is not the particular outcome that a legal scholar arrives at but, rather, the intellectual rigor and honesty with which he or she arrives at a decision.

Given that background, I am sorely tempted to vote for Judge Roberts based on my study of his resume, his conduct during the hearings, and a conversation I had with him yesterday afternoon. There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land. Moreover, he seems to have the comportment and the temperament that makes for a good judge. He is humble, he is personally decent, and he appears to be respectful of different points of view.

It is absolutely clear to me that Judge Roberts truly loves the law. He couldn't have achieved his excellent record as an advocate before the Supreme Court without that passion for the law, and it became apparent to me in our conversation that he does, in fact, deeply respect the basic precepts that go into deciding 95% of the cases that come before the federal court -- adherence to precedence, a certain modesty in reading statutes and constitutional text, a respect for procedural regularity, and an impartiality in presiding over the

adversarial system. All of these characteristics make me want to vote for Judge Roberts.

The problem I face -- a problem that has been voiced by some of my other colleagues, both those who are voting for Mr. Roberts and those who are voting against Mr. Roberts -- is that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95% of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95% of the cases -- what matters on the Supreme Court is those 5% of cases that are truly difficult.

In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy.

In those 5% of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision. In those circumstances, your decisions about whether affirmative action is an appropriate response to the history of discrimination in this country, or whether a general right of privacy encompasses a more specific right of women to control their reproductive decisions, or whether the Commerce Clause empowers Congress to speak on those issues of broad national concern that may be only tangentially related to what is easily defined as interstate commerce, whether a person who is disabled has the right to be accommodated so they can work alongside those who are nondisabled -- in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.

I talked to Judge Roberts about this. Judge Roberts confessed that, unlike maybe professional politicians, it is not easy for him to talk about his values and his deeper feelings. That is not how he is trained. He did say he doesn't like bullies and has always viewed the law as a way of evening out the playing field between the strong and the weak.

I was impressed with that statement because I view the law in much the same way. The problem I had is that when I examined Judge Roberts' record and history of public service, it is my personal estimation that he has far more often used his formidable skills on behalf of the strong in opposition to the weak. In his work in the White House and the Solicitor General's Office, he seemed to have consistently sided with those who were dismissive of efforts to eradicate the remnants of racial discrimination in our political process. In these same positions, he seemed dismissive of the concerns that it is harder to make it in this world and in this economy when you are a woman rather than a man.

I want to take Judge Roberts at his word that he doesn't like bullies and he sees the law and the court as a means of evening the playing field between the strong and the weak. But given the gravity of the position to which he will undoubtedly ascend and the gravity of the decisions in which he will undoubtedly participate during his tenure on the court, I ultimately have to give more weight to his deeds and the overarching political philosophy that he appears to have shared with those in power than to the assuring words that he provided me in our meeting.

The bottom line is this: I will be voting against John Roberts' nomination. . . .

Connecting Reading and Writing and Speaking about Citizenship to National and State Educational Standards

All the activities, from engaging in classroom debates to the document based activities connect to the following Common Core State Standards. Educators should use their expertise and judgment adapting the curricular materials to meet the needs of their classrooms, schools, and districts. As there is significant overlap between the New York State Standards and the Common Core Standards, the Common Core State Standards, (CCSS) that serve as the basis of the curricular materials are included below.

Common Core State Standards 9-12

CCSS.ELA-LITERACY.RH.9-10.1
Cite specific textual evidence to support analysis of primary and secondary sources, attending to such features as the date and origin of the information.

CCSS.ELA-LITERACY.RH.9-10.2
Determine the central ideas or information of a primary or secondary source; provide an accurate summary of how key events or ideas develop over the course of the text.

CCSS.ELA-LITERACY.RH.9-10.3
Analyze in detail a series of events described in a text; determine whether earlier events caused later ones or simply preceded them.

Craft and Structure:

CCSS.ELA-LITERACY.RH.9-10.4
Determine the meaning of words and phrases as they are used in a text, including vocabulary describing political, social, or economic aspects of history/social science.

CCSS.ELA-LITERACY.RH.9-10.5

Analyze how a text uses structure to emphasize key points or advance an explanation or analysis.

CCSS.ELA-LITERACY.RH.9-10.6
Compare the point of view of two or more authors for how they treat the same or similar topics, including which details they include and emphasize in their respective accounts.

Integration of Knowledge and Ideas:

CCSS.ELA-LITERACY.RH.9-10.7
Integrate quantitative or technical analysis (e.g., charts, research data) with qualitative analysis in print or digital text.

CCSS.ELA-LITERACY.RH.9-10.8
Assess the extent to which the reasoning and evidence in a text support the author's claims.

CCSS.ELA-LITERACY.RH.9-10.9
Compare and contrast treatments of the same topic in several primary and secondary sources.

Comprehension and Collaboration:

CCSS.ELA-LITERACY.SL.9-10.1
Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 9-10 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

CCSS.ELA-LITERACY.SL.9-10.1.A
Come to discussions prepared, having read and researched material under study; explicitly draw on that preparation by referring to evidence from texts and other research on the topic or issue to stimulate a thoughtful, well-reasoned exchange of ideas.

CCSS.ELA-LITERACY.SL.9-10.1.B
Work with peers to set rules for collegial discussions and decision-making (e.g., informal consensus, taking votes on key issues, presentation of alternate views), clear goals and deadlines, and individual roles as needed.

CCSS.ELA-LITERACY.SL.9-10.1.C
Propel conversations by posing and responding to questions that relate the current discussion to broader themes or larger ideas; actively incorporate others into the discussion; and clarify, verify, or challenge ideas and conclusions.

CCSS.ELA-LITERACY.SL.9-10.1.D
Respond thoughtfully to diverse perspectives, summarize points of agreement and disagreement,

and, when warranted, qualify or justify their own views and understanding and make new connections in light of the evidence and reasoning presented.

CCSS.ELA-LITERACY.SL.9-10.2
Integrate multiple sources of information presented in diverse media or formats (e.g., visually, quantitatively, orally) evaluating the credibility and accuracy of each source.

CCSS.ELA-LITERACY.SL.9-10.3
Evaluate a speaker's point of view, reasoning, and use of evidence and rhetoric, identifying any fallacious reasoning or exaggerated or distorted evidence.

Presentation of Knowledge and Ideas:

CCSS.ELA-LITERACY.SL.9-10.4
Present information, findings, and supporting evidence clearly, concisely, and logically such that listeners can follow the line of reasoning and the organization, development, substance, and style are appropriate to purpose, audience, and task.

CCSS.ELA-LITERACY.SL.9-10.5
Make strategic use of digital media (e.g., textual, graphical, audio, visual, and interactive elements) in presentations to enhance understanding of findings, reasoning, and evidence and to add interest.

CCSS.ELA-LITERACY.SL.9-10.6
Adapt speech to a variety of contexts and tasks, demonstrating command of formal English when indicated or appropriate. (See grades 9-10 Language standards 1 and 3 here for specific expectations.

Standards 11-12

CCSS.ELA-LITERACY.RH.11-12.4
Determine the meaning of words and phrases as they are used in a text, including analyzing how an author uses and refines the meaning of a key term over the course of a text (e.g., how Madison defines *faction* in *Federalist* No. 10).

CCSS.ELA-LITERACY.RH.11-12.5
Analyze in detail how a complex primary source is structured, including how key sentences, paragraphs, and larger portions of the text contribute to the whole.

CCSS.ELA-LITERACY.RH.11-12.6

Evaluate authors' differing points of view on the same historical event or issue by assessing the authors' claims, reasoning, and evidence.

Integration of Knowledge and Ideas:

CCSS.ELA-LITERACY.RH.11-12.7
Integrate and evaluate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, as well as in words) in order to address a question or solve a problem.

CCSS.ELA-LITERACY.RH.11-12.8
Evaluate an author's premises, claims, and evidence by corroborating or challenging them with other information.

CCSS.ELA-LITERACY.RH.11-12.9
Integrate information from diverse sources, both primary and secondary, into a coherent understanding of an idea or event, noting discrepancies among sources.

Range of Reading and Level of Text Complexity:

CCSS.ELA-LITERACY.RH.11-12.10
By the end of grade 12, read and comprehend history/social studies texts in the grades 11-CCR text complexity band independently and proficiently.

Comprehension and Collaboration:

CCSS.ELA-LITERACY.SL.11-12.1
Initiate and participate effectively in a range of collaborative discussions (one-on-one, in groups, and teacher-led) with diverse partners on grades 11-12 topics, texts, and issues, building on others' ideas and expressing their own clearly and persuasively.

CCSS.ELA-LITERACY.SL.11-12.1.A
Come to discussions prepared, having read and researched material under study; explicitly draw on that preparation by referring to evidence from texts and other research on the topic or issue to stimulate a thoughtful, well-reasoned exchange of ideas.

CCSS.ELA-LITERACY.SL.11-12.1.B
Work with peers to promote civil, democratic discussions and decision-making, set clear goals and deadlines, and establish individual roles as needed.

CCSS.ELA-LITERACY.SL.11-12.1.C
Propel conversations by posing and responding to questions that probe reasoning and evidence; ensure a hearing for a full range of positions on a topic or issue; clarify, verify, or challenge ideas and conclusions; and promote divergent and creative perspectives.

CCSS.ELA-LITERACY.SL.11-12.1.D
Respond thoughtfully to diverse perspectives; synthesize comments, claims, and evidence made on all sides of an issue; resolve contradictions when possible; and determine what additional information or research is required to deepen the investigation or complete the task.

CCSS.ELA-LITERACY.SL.11-12.2
Integrate multiple sources of information presented in diverse formats and media (e.g., visually, quantitatively, orally) in order to make informed decisions and solve problems, evaluating the credibility and accuracy of each source and noting any discrepancies among the data.

CCSS.ELA-LITERACY.SL.11-12.3
Evaluate a speaker's point of view, reasoning, and use of evidence and rhetoric, assessing the stance, premises, links among ideas, word choice, points of emphasis, and tone used.

Presentation of Knowledge and Ideas:

CCSS.ELA-LITERACY.SL.11-12.4
Present information, findings, and supporting evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternative or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks.

CCSS.ELA-LITERACY.SL.11-12.5
Make strategic use of digital media (e.g., textual, graphical, audio, visual, and interactive elements) in presentations to enhance understanding of findings, reasoning, and evidence and to add interest.

CCSS.ELA-LITERACY.SL.11-12.6
Adapt speech to a variety of contexts and tasks, demonstrating a command of formal English when indicated or appropriate. (See grades 11-12 Language standards 1 and 3 here for specific expectations.)

Rights and the Courts: Classroom Debates about Freedom of Religion.

Introduction:

Many cases have been decided by the New York State Courts that address the tension between liberty and security. Article 1 includes the protection of key individual rights, the freedom of speech and the freedom of religion. Section 3, specifically notes that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state." Yet, as life in a multicultural and diverse democracy shows, religious freedom has limits. The state's respect for an individual's rights can conflict with government interests in security.

Rivera v. Smith (Court of Appeals, New York) (1984) is one such case that brings into focus this conflict at the heart of diverse democracies: The competing interests in preserving a person's freedom to practice their religion and the state's interest in safety. *Rivera v. Smith* concerns the rights of a prison inmate to refuse a "pat down" by a female guard, as prohibited by his Muslim religion. Prisoners are subject to searches and these searches can require guards to physically search for contraband that could harm other inmates or jeopardize the security of prisons and jails. This case raises important public policy issues, ranging from the extent of prisoner's rights and respect for religious beliefs, to the interests of the state in securing prisons and jails, and many other issues. There are clear pros and cons to each side. Using *Rivera v. Smith* to ground this discussion of liberty and security, our class will be debating this resolution:

Resolved: When in conflict, the exercise of religious freedom ought to be valued above the security interests of the government.

Our class will be using the format, explained in the handout **Setting up a Classroom Debate.** Before we start dividing up into sides and judges, we need to prepare because debates are won by research and preparation.

First Steps in Topic Analysis:

1. Break Down, ask questions, and define the key terms in the resolution.

Exercise of religious freedom

What does it mean to exercise and practice religious beliefs? Are there or should there be limits on how a person practices her or his religion? Who is the state to say how a people can practice their religion? Why is or is not religion an important part of a person's identity?

Ought to be valued above

Of course, when individual freedoms are not in conflict with the safety of society, they should be respected. However, for this debate, we must make a choice. Which is preferable in a democracy, respect for person's deeply held values or security in public spaces?

Security interests of the government

While *Riviera v. Smith* looks at the rights of a inmate in conflict with the policies of the New York Corrections (Prison and Jails) system, the topic is much broader. When in conflict, should individual rights take precedence over potential risks to security?

2. Building the Pros and Cons

1. Identify 3 supporting arguments for the affirmative side and the negative side.
2. Research and find evidence that support your arguments.
3. Integrate your evidence and your arguments and prepare your speeches.

Evidence: The Foundation of Argument

Affirmative (Pro) Central Position: Individual rights are more important than concerns for security and public safety.	Negative (Con) Central Position: Concerns for security and public safety are more important than individual rights.
Claim: The statement you are trying to prove true.	Claim: The statement you are trying to prove true.
Warrant: The reasons why (evidence) your claim is true.	Warrant: The reasons why (evidence) your claim is true.
Impact: The Significance of your claim, if true.	Impact: The Significance of your claim, if true.

New York State Common Core Learning Standards for English Language Arts and Literacy in History/Social Studies, Science, and Technical Subjects

College and Career Readiness Anchor Standards for Reading

Key Ideas and Details

1. Read closely to determine what the text says explicitly and to make logical inferences from it, and cite specific textual evidence when writing or speaking to support conclusions drawn from the text.
2. Determine central ideas or themes of a text, analyze their development, and summarize the key supporting details and ideas.
3. Analyze how and why individuals, events, or ideas develop and interact over the course of a text.

Craft and Structure

4. Interpret words and phrases as they are used in a text, including determining technical, connotative, and figurative meanings, and analyze how specific word choices shape meaning or tone.
5. Analyze the structure of texts, including how specific sentences, paragraphs, and larger portions of the text (e.g., a section, chapter, scene, or stanza) relate to each other and the whole.
6. Assess how point of view or purpose shapes the content and style of a text.

Integration of Knowledge and Ideas

7. Integrate and evaluate content presented in diverse formats and media, including visually and quantitatively, as well as in words.
8. Delineate and evaluate the argument and specific claims in a text, including the validity of the reasoning and the relevance and sufficiency of the evidence.
9. Analyze how two or more texts address similar themes or topics to build knowledge or to compare the approaches the authors take.

Range of Reading and Level of Text Complexity

10. Read and comprehend complex literary and informational texts independently and proficiently.

College and Career Readiness Anchor Standards for Writing

Text Types and Purposes

1. Write arguments to support claims in an analysis of substantive topics or texts, using valid reasoning and relevant and sufficient evidence.
2. Write informative/explanatory texts to examine and convey complex ideas and information clearly and accurately through the effective selection, organization, and analysis of content.
3. Write narratives to develop real or imagined experiences or events, using effective technique, well-chosen details, and well-structured event sequences.

Production and Distribution of Writing

4. Produce clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience.
5. Develop and strengthen writing as needed by planning, revising, editing, rewriting, or trying a new approach.
6. Use technology, including the Internet, to produce and publish writing and to interact and collaborate with others.

Research to Build and Present Knowledge

7. Conduct short as well as more sustained research projects based on focused questions, demonstrating understanding of the subject under investigation.
8. Gather relevant information from multiple print and digital sources, assess the credibility and accuracy of each source, and integrate the information while avoiding plagiarism.
9. Draw evidence from literary or informational texts to support analysis, reflection, and research.

Range of Writing

10. Write routinely over extended time frames (time for research, reflection, and revision) and shorter time frames (a single sitting or a day or two) for a range of tasks, purposes, and audiences.

College and Career Readiness Anchor Standards for Speaking and Listening

Comprehension and Collaboration

1. Prepare for and participate effectively in a range of conversations and collaborations with diverse partners, building on others' ideas and expressing their own clearly and persuasively.
2. Integrate and evaluate information presented in diverse media and formats, including visually, quantitatively, and orally.
3. Evaluate a speaker's point of view, reasoning, and use of evidence and rhetoric.

Presentation of Knowledge and Ideas

4. Present information, findings, and supporting evidence such that listeners can follow the line of reasoning, and the organization, development, and style are appropriate to task, purpose, and audience,
5. Make strategic use of digital media and visual displays of data to express information and enhance understandings of presentations.
6. Adapt speech to a variety of contexts and communicative tasks, demonstrating command of formal English when indicated or appropriate.