

SUPREME COURT REVIEW

Presented by the Attorney General's Office

June 27, 2014

Featured Speaker: Professor Paul Bender

SOME HIGHLIGHTS OF THE OCTOBER 2013 TERM

By the Numbers

Through June 19, the Court had issued opinions on the merits in 62 cases this term, with 11 cases still pending. Of the cases decided thus far, approximately 70 percent have been reversals of the judgment below. The Ninth Circuit was reversed in 10 of 11 cases; the Sixth Circuit was reversed in 8 of 10; the Fifth Circuit and the Federal Circuit were reversed in 5 of 6 cases. On the other end of the spectrum, the Seventh Circuit was affirmed in 3 of 3 cases, and the Second Circuit went 3 for 4. Thirty six of the decisions this term have been unanimous, and that number does not include several per curiam decisions.

Survey Says. . .

Public opinion polling regarding the Supreme Court has produced some interesting results. According to a poll taken in April by the Pew Research Center, 56% have a favorable view of the Supreme Court, while 35% have an unfavorable view. The poll was taken just after the Court's decisions on campaign finance and affirmative action, but before the decision on legislative prayer and the major end-of-term decisions. A similar poll taken last July, following several high-profile rulings at the end of last year's term, found about half (48%) held a favorable view of the Court. But a poll taken in May by Democratic pollster Greenberg Quinlan Rosner Research found that 60% of respondents believed that "the current U.S. Supreme Court justices often let their own personal or political views influence their decisions," compared to only 36% who thought that "the current U.S. Supreme Court justices usually decide their cases based on legal analysis without regard to their personal or political views." And a Gallup Poll taken in early June indicated that only 30% of respondents had a great deal or quite a lot of confidence in the Court, while 26% had very little or no confidence in the Court.

For more information:

<http://www.people-press.org/2014/05/06/supreme-court-favorability-rebounds/>

<http://www.gallup.com/poll/4732/supreme-court.aspx#1>

A Partisan Court?

While a majority of the cases decided through June 19 have been unanimous, those cases mostly involved statutory interpretation, procedure, jurisdiction, and other low visibility issues. The Court remains divided in matters of race, religion, campaign finance, and the scope of federal power. The division was dramatically illustrated in the campaign finance decision (*McCutcheon*) when the five justices appointed by Republican presidents voted for the Republican National Committee, which was a plaintiff in the case, and the four appointed by Democrats dissented. The Court has been divided before, but never has it been so divided along party lines. As one commentator noted, “The perception that partisan politics has infected the Court’s work may do lasting damage to its prestige and authority and to Americans’ faith in the rule of law.” Of course, relatively few cases are decided on a 5-4 vote, and not all of those reflect the partisan divide. Justice Kennedy “crossed party lines” to side with the Democratic-appointed justices in two criminal cases (*Hall* and *Abramski*), and most of the other justices have crossed party lines at least once.

For more information:

http://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html?_r=0

http://www.nytimes.com/2014/05/29/opinion/greenhouse-polar-vision.html?_r=1

Better Call Tech Support

Several cases on the Supreme Court’s docket this term involved technology issues. In particular, the Court decided cases concerning software patents, online video streaming, and cell phone searches. Some commentators worry that the Court doesn’t have a sufficient grasp of modern technology to properly decide the technology cases. The justices’ lack of tech savvy was on display during oral argument on the two cell phone search cases. At one point, Justice Breyer admitted to not knowing what kind of cell phone he owns and explained, “I can never get into it because of the

password.” Chief Justice Roberts surprised many when he questioned a lawyer about her assumption that many people carry more than one cell phone: “What is your authority for the statement that many people have more than one cell phone on their person?” But others think that concerns over the Court’s lack of technical expertise are misplaced. According to one observer, the Court’s real technology problem is that “it thinks carrying two phones means you’re a drug dealer.”

To Err is Human

In *EPA v. EME Homer City*, the Court upheld an environmental regulation designed to combat interstate air pollution. Justice Scalia issued a dissenting opinion that is notable for a couple of reasons. First, he complained about the “uncontrolled growth of the administrative state,” calling the challenged rule a “textbook example of ... government by the bureaucracy” instead of “by the people.” But what really raised eyebrows was a mistake in Scalia’s dissent. Scalia argued, “This is not the first time EPA has sought to convert the Clean Air Act in to a mandate for cost-effective regulation.” To support this assertion, he cited to a 2001 case called *Whitman v. American Trucking*. The only problem is that the EPA’s position in *Whitman* was exactly the opposite, and it was industry groups that wanted cost considerations factored into the regulations. The legal blogosphere erupted over this “epic blunder,” which one commentator noted was “doubly embarrassing because Scalia wrote the opinion [in *Whitman*], so he surely should remember which side won!” Shortly thereafter, the Supreme Court quietly revised Scalia’s dissent to correct the error.

Time for Change?

Although the Supreme Court is viewed more favorably than other branches of the federal government, some would like to see changes at the Court. One idea that won’t go away is to install cameras so that the Court’s proceedings can be televised. And as the Court has grown more partisan, some scholars have proposed term limits for Supreme Court justices. Political scientist Norman Ornstein and constitutional scholar Erwin Chemerinsky have both suggested replacing lifetime appointments with 18-year terms, meaning a new seat would open up every two years, and every president would get

an equal number of appointments. Such a change seems unlikely, but another change could happen. Several commentators have publicly suggested that Justice Ruth Bader Ginsburg should retire when this year's term ends. At 81, Ginsburg is the oldest justice and is reportedly somewhat frail physically, but that isn't why some have encouraged her retirement. The calls for her to retire now come from people who like her as a justice but are concerned the political dysfunction in Washington may make it impossible for President Obama to win obtain confirmation of a replacement after this year. Justice Ginsburg has given no indication that she's ready to hang up her robes.

For more on term limits:

<http://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/>

New Books About the Supreme Court

Laurence Tribe and Joshua Matz, *Uncertain Justice: The Roberts Court and the Constitution* (2014)

http://www.amazon.com/Uncertain-Justice-Roberts-Court-Constitution/dp/0805099093/ref=sr_1_1?s=books&ie=UTF8&qid=1403300941&sr=1-1&keywords=laurence+tribe+the+roberts+court

Bruce Allen Murphy, *Scalia: A Court of One* (2014)

http://www.amazon.com/Scalia-Court-Bruce-Allen-Murphy/dp/0743296494/ref=sr_1_1?s=books&ie=UTF8&qid=1403301153&sr=1-1&keywords=scalia+a+court+of+one

Erwin Chemerinsky, *The Case Against the Supreme Court* (to be released September 25, 2014)

http://www.amazon.com/Case-Against-Supreme-Court/dp/0670026425/ref=sr_1_8?s=books&ie=UTF8&qid=1403465131&sr=1-8&keywords=erwin+chemerinsky

CRIMINAL LAW AND PROCEDURE

Cell Phone Searches: The Fourth Amendment's prohibition of unreasonable searches and seizures means that police generally need a warrant to conduct a search, though there are exceptions. Police can conduct a warrantless search incident to an arrest to protect their safety, or to prevent the destruction of evidence. May police search a person's cell phone in the course of an arrest? The Court addressed this issue in two cases. In *Riley v. California*, police stopped a suspect for having expired tags, and a subsequent search of the suspect's smartphone revealed photos and videos linking the man to more serious crimes. In *U.S. v. Wurie*, police arrested a suspect for dealing drugs, and a search of the call log on his flip phone led police to his home where more drugs were found.

Capital Punishment – A decade ago, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of persons with intellectual disability. An inmate on death row in Florida asked a state court to vacate his sentence, presenting evidence that included an IQ test score of 71. The state court denied his request because a Florida statute required that he show an IQ score of 70 or below before being permitted to present additional evidence of intellectual disability. May states use a fixed IQ score as the measure of incapacity to be put someone to death? No, the Court said in *Hall v. Florida*. 5-4 decision.

Consent to Search – Police officers saw a suspect run into an apartment building and heard screams coming from one of the apartments. They knocked on the door, which was opened by a battered and bleeding woman (Rojas). When the officers asked her to step aside so they could conduct a protective sweep, Fernandez appeared at the door and objected. Suspecting that he'd assaulted Rojas, police arrested Fernandez and, after he was identified as the perpetrator in the earlier robbery, took him to the police station. Officers returned to the apartment, obtained Rojas' consent to search the place, and found several items linking Fernandez to the robbery. Did the search violate the Fourth Amendment, given that Fernandez had earlier refused consent to search the apartment? No, the Court said in *Fernandez v. California*, by a 6-3 vote.

For more: <http://www.scotusblog.com/2014/02/five-thoughts-on-fernandez-v-california/>

Privilege Against Self-Incrimination/Habeas Relief – Does the privilege against self-incrimination apply at the penalty phase of a criminal trial? Robert Woodall brutally raped, slashed with a box cutter, and drowned a 16-year-old high school student. He pleaded guilty to capital murder, capital kidnaping, and first-degree rape. During the penalty phase of his capital murder trial, he asked the court to instruct the jury not to draw any adverse inference from his failure to testify. The trial court denied his request, Woodall was sentenced to death, and the state supreme court affirmed the conviction, finding that the Fifth Amendment’s requirement of a no-adverse-inference instruction to protect a non-testifying defendant at the guilt phase is not required at the penalty phase. Because that decision was “not objectively unreasonable,” Woodall was not entitled to habeas relief. *White v. Woodall*. 6-3 decision.

Gun Laws – Can a person buy a gun for someone else by claiming to be the actual purchaser? Nope, the Court said in *Abramski v. U.S.* The case involved a retired police officer who accepted \$400 from his uncle and went to a gun store to buy a Glock 19 handgun for the uncle. To purchase the gun, he had to fill out a federal form that asked him to confirm that he was “the actual transferee/buyer of the firearm.” The form specifically said that a person is not an “actual buyer if you are acquiring the gun on behalf of another person.” The retired officer signed the form even though he was purchasing the gun for his uncle. By a 5-4 vote, the Court allowed prosecution under a federal law that requires gun buyers to disclose if they are making the purchase for someone else.

For more on this case:

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/06/the_supreme_court_doesn_t_want_to_touch_the_second_a_mendment_this_term_here.html

Child Pornography/Restitution - A federal statute requires individuals convicted of certain federal offenses, including possession of child pornography, to pay “the full amount of the victim’s losses,” but how should courts determine the amount? Doyle Paroline pled guilty to possessing images of child pornography, which included two images of a victim referred to as “Amy.” Amy had been sexually abused as a young girl in order to produce child pornography, and when she was a teenager she learned that images of her abuse were being trafficked on the Internet. When Paroline was convicted for possessing two of those images, she sought \$3.5 million in restitution. There was no question that Amy had been harmed severely by the knowledge that images of her sexual abuse were shared on the Internet; the question was whether Paroline caused the harm. Amy stipulated that she didn’t know who he was and that none of her losses flowed from any specific knowledge about him or his conduct. He was one of many anonymous possessors of her images. In *Paroline v. U.S.*, a 5-4 majority of the Court held that restitution is proper only to the extent a defendant’s offense proximately caused the victim’s losses, and that defendants should only be liable for their own conduct, not the conduct of others. The majority did not set a specific formula to determining restitution when there are multiple offenders, but it identified relevant factors and said that trial courts should weigh them in determining an amount that comports with a defendant’s relative role in causing the victim’s general losses.

Traffic Stops/Anonymous Tips – An anonymous caller telephoned 911 to say that a driver had run her off the road. The caller described the truck and reported its license number. May police conduct a traffic stop based on an anonymous tip? In *Navarette v. California*, a 5-4 majority of the Court said yes, although the answer in a particular case depends on the totality of circumstances.

FIRST AMENDMENT/DEMOCRACY

Campaign Spending – Since 1974, federal law has imposed a ceiling on contributions to candidates for federal office, parties, and political committees. Do these “aggregate limits” violate the First Amendment? Yes, said the Court in *McCutcheon v. FEC*. 5-4 vote.

For more on this case:

<http://www.bostonreview.net/us/william-hogeland-what-does-mccutcheon-decision-say-about-democracy>

Abortion Clinic Buffer Zones – Can Massachusetts enforce a 35-foot quiet zone near the doors of abortion clinics, or does that violate the First Amendment rights of “sidewalk counselors” who hope to persuade patients not to end their pregnancies? The case is *McCullen v. Coakley*.

Legislative Prayer – The town of Greece, N.Y., begins its town board meetings with a prayer. This practice started in 1999, and from 1999 to 2007 all of the ministers invited to give the prayer were Christian. After some citizens complained, the town invited or allowed a Jewish layperson, the chairman of a Baha’i temple, and a Wiccan priestess to deliver prayers. In *Town of Greece v. Galloway*, the Court held that the town’s prayer practice does not violate the Establishment Clause. 5-4 decision.

For more on this case:

<http://blogs.wsj.com/law/2014/05/09/justice-clarence-thomas-and-the-church-of-virginia/>

<http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-court-meyerson-20140510,0,7743650.story>

Public Sector Unions – In Illinois, some home health care workers are state employees. A majority of them voted to join a union, making the union the exclusive bargaining representative for the group—union members as well as non-members. Non-members aren’t required to join the union, but they are required under state law to pay the union “agency fees” or “fair share fees” to cover the

costs of collective bargaining and contract administration. Does this requirement violate the First Amendment rights of those who oppose the union? The case is *Harris v. Quinn*.

Standing/Ripeness – An anti-abortion outfit wanted to put up a billboard accusing a Democratic congressman of voting for “taxpayer funded abortion” when he supported Obamacare. The candidate complained to the state election commission that the ads violated Ohio’s truth-in-politics law. The candidate lost the election and dropped his complaint. The anti-abortion group nevertheless filed suit to challenge the law, contending that it violated their First Amendment rights. Did the group have standing, considering that the law wasn’t enforced? Yes, said a unanimous Court, because it had alleged a “credible threat of enforcement.” *Susan B. Anthony List v. Driehaus*.

FEDERALISM/FEDERAL POWER

Contraception/Religious Freedom of Corporations – Do corporations have religious beliefs? Under the Affordable Care Act, health insurance companies are required to cover the costs of birth control. This “contraception mandate” is challenged by two for-profit corporations run by religious owners who contend they should be allowed to deny their employees contraception coverage because providing it would violate their religious beliefs. Are religious business owners entitled to an exemption from laws of general applicability?

Presidential Power/Recess Appointments – Presidential appointments generally require the “advice and consent” of the Senate, except that the President may appoint judges and top administration officials for limited terms without Senate approval when Congress is not in session. Presidents have used their recess appointment power more often in recent years as obstruction to presidential nominees has become common practice. Senate Republicans have blocked all of President Obama’s appointments to the National Labor Relations Board (NLRB). In 2012, the President invoked his recess appointment power to appoint three new members to the NLRB. But Congress was not technically in recess. Most lawmakers had left, but Republicans were holding brief pro forma sessions to block Obama’s appointments. Can the President exercise his recess appointment power when Congress is not technically in recess but is conducting no business? The case is *NLRB v. Noel Canning*.

Scope of Federal Power – After Carol Anne Bond discovered that her husband had an affair with another woman, she spread two toxic chemicals—some arsenic that she took from her employer, and potassium dichromate that she got from Amazon.com—on the other woman’s car, mailbox, and door knob. Bond succeeded only in causing the other woman to suffer a minor chemical burn on her thumb, which she treated by rinsing with water. This sounds like the plot of a soap opera, but it also forms the basis of a dispute that raised questions concerning the reach of federal power in general and the treaty-making power in particular. Bond was prosecuted

under a provision of the Chemical Weapons Convention Implementation Act of 1998 that criminalizes the possession or use of “chemical weapons.” Does the statute apply to Bond’s conduct? Is the statute constitutionally valid, considering it was enacted pursuant to the Treaty Power? In *Bond v. U.S.*, all nine justices agreed that Bond couldn’t be prosecuted under the federal law, but for different reasons. Six justices concluded that the federal statute wasn’t intended to cover “purely local crimes,” while the other three justices were prepared to declare the statute unconstitutional.

For more information on this case:

<http://www.newrepublic.com/article/118059/bond-v-us-supreme-court-resists-radical-takeover-foreign-policy>

Greenhouse Gases – The Court heard two major challenges to the Environmental Protection Agency’s regulatory authority. In *EPA v. EME Homer City Generation*, the Court by a 6-2 vote upheld a complex rule designed to regulate pollution that drifts across state lines. In *Utility Regulatory Group v. EPA*, the Court addressed whether the agency’s authority regulate greenhouse gases extended to stationary sources such as power plants. By a 7-2 vote, the Court sustained regulation of most of the sources the EPA sought to regulate, but a 5-4 majority found that the agency had overstepped its authority in part.

Environmental Law/Preemption – The federal environment statute CERCLA, commonly known as the Superfund law, preempts state statutes of *limitations* on bringing state law environmental tort cases. Does it likewise preempt state statutes of *repose*? In *CTS Corp. v. Waldburger*, the Court said no. 7-2 vote.

OTHER NOTABLE CASES

Affirmative Action – In 2006, Michigan voters approved a constitutional amendment banning the use of racial preferences in state university admissions. In *Schuette v. Coalition to Defend Affirmative Action*, six members concluded that Michigan’s amendment does not violate the Equal Protection Clause, although they were unable to agree on a single rationale. Five justices wrote opinions, and the variety of views expressed in them reveals differences in how the justices view race. “it was as if the Justices in the majority and those in dissent were writing about different countries,” according to one commentator. In her dissenting opinion, Justice Sotomayor pointed to a quote from Chief Justice Roberts—“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race”—and then wrote, “It is a sentiment out of touch with reality, one that is required by our Constitution, and one that has properly been rejected as not sufficient to resolve cases of this nature.”

Intellectual Property – Patent claims over the way ideas are incorporated into computers, cell phones, and other devices have become a challenge for technology companies. Does the Patent Act Authorize patents on software—specifically, on computer-implemented inventions? In *Alice Corp. v. CLS Bank*, the Court ruled unanimously that software developers can’t get a patent simply for taking an abstract idea and implementing it on a computer.

For more information on this case:

<http://www.vox.com/2014/6/20/5824426/the-supreme-court-doesnt-understand-software-and-thats-a-problem>

http://www.slate.com/articles/technology/future_tense/2014/06/alice_v_cls_bank_supreme_court_gets_software_patent_ruling_right.html

TV on the Internet – A start-up tech firm records the broadcasts of local stations and then streams the broadcasts to subscribers over the Internet, charging much less than cable companies. Is the tech

firm violating copyright law? The case is *American Broadcasting Companies v. Aereo*, and many observers think the Court's ruling could shape the future of not only television but cloud computing.

Qualified Immunity – Under the doctrine of qualified immunity, government officials are immune from suit if their conduct is objectively reasonable in light of clearly established law. The Court relied on qualified immunity to reject civil rights claims in four cases this term, including *Wood v. Moss*, where two Secret Service agents were granted immunity for ordering that protesters be kept further away from President Bush than supporters; and *Lane v. Franks*, where a college president was held to be entitled to qualified immunity because he could have reasonably believed it was okay to fire an employee who testified about corruption at the college.

Paul Bender

Professor of Law Dean Emeritus

Paul Bender teaches courses on U.S. and Arizona constitutional law. He has written extensively about constitutional law, intellectual property and Indian law, and is coauthor of the two-volume casebook/treatise, *Political and Civil Rights in the United States*. Professor Bender has argued more than 20 cases before the U.S. Supreme Court, and actively participates in constitutional litigation in federal and state courts.

Professor Bender served as Dean of the College of Law from 1984-1989, during which time he was instrumental in starting its Indian Legal Program. Prior to joining the College faculty, he was law clerk to 2nd U.S. Circuit Court of Appeals Judge Learned Hand and to U.S. Supreme Court Justice Felix Frankfurter, and spent 24 years as a faculty member at the University of Pennsylvania Law School. Professor Bender served as Principal Deputy Solicitor General of the United States from 1993-1997, with responsibility for Supreme Court and federal appellate litigation in the areas of civil rights, race and sex discrimination, freedom of speech and religion, and tort claims against the federal government.

Professor Bender has served as a member of the Hopi Tribe's Court of Appeals, and is currently Chief Justice of the Fort McDowell Nation Supreme Court, and the San Carlos Apache Court of Appeals.