

## Elena Kagan, Paul Clement, and Erwin Cherinsky on SCOTUS 2009 Term

5. May 2010 By John Bursch

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The Sixth Circuit Judicial Conference is being held this week in Columbus, Ohio. Participants were treated this morning to a presentation on the 2009 U.S. Supreme Court Term from former Solicitor General Paul Clement and Dean Erwin Chemerinsky in a panel format moderated by current Solicitor General and prospective Supreme Court nominee Elena Kagan. Below the jump are the presenters' thoughts about the Court's direction and its recent decisions.

### General Direction

Chemerinsky - Over a five-year period, there will be four new Supreme Court Justices. This development represents considerable upheaval, given that the Court just finished going through the longest period in its history without any changes in personnel. Notwithstanding the turnover, it is still a Justice Kennedy court. Justice Kennedy has been in the majority of more 5-4 decisions than any other Justice over the last 4 years. Last year, for example, the Court decided 73 cases after full briefing and oral argument. Of those, 23 were decided 5-4, and Justice Kennedy was in the majority in 18 (92%). Justice Kennedy sides with the Court's conservative wing more than twice as often as its liberal wing. Justice Sotomayor's voting patterns to date are very similar to Justice Souter's; in other words, the Court's ideological makeup has not changed materially following that change. It is expected that the same will be true of Justice Stevens' replacement.

Clement - Justice Kennedy's importance will only increase with Justice Stevens' retirement. In any case where Justice Kennedy sides with the liberal wing of the Court, his seniority will mean that he not only casts the decisive vote, but that he will also have assignment authority for the opinion. In certain criminal and sentencing cases (*Aprendi*; *Crawford*), Justice Scalia has fashioned a majority with Justices Stevens and Souter. It will be interesting how that dynamic will be affected now that both Justices have retired. Justice Stevens' wisdom and incisive questioning at oral argument will be sorely missed.

### First Amendment Cases

Chemerinsky - No matter what else the Supreme Court decides this year, *Citizens United* will be the most important decision of the 2009 Term. It involved the McCain-Feingold Act's limit on issue ads by unions and corporations in the 60 days before an election. In a 5-4 decision, the Court held the provision unconstitutional, with Justice Kennedy joining Chief Justice Roberts and Justices Scalia, Thomas, and Alito in the majority. The

decision may have a significant impact on judicial elections. It may also affect current limitations on union and corporate contributions to federal candidates. The case leaves open a question as to whether there are now five votes on the Court to strike *all* campaign finance limitations, other than disclosure requirements. The *Citizens United* result also suggests that *stare decisis* may have less force in the coming years, particularly given the fact that the Court could have decided the case on much narrower grounds.

Clement - There are very few areas where Justice Kennedy feels as strongly about bright line rules as in the First Amendment context. This reality suggests that *Citizens United* does not foretell sweeping 5-4 changes in other cases, even those involving campaign finance. President Obama and his spokespeople have heavily criticized the outcome of *Citizens United*, but the five-Justice majority would say that *Citizens United* is not an activist decision because the plain text of the First Amendment dictated the result, and enforcing the counter-majoritarian First Amendment is exactly why the Court exists.

Chemerisky - *United States v. Stevens* involved a federal law prohibiting possession of pictures depicting animal cruelty. By an 8-1 decision (with Justice Alito dissenting), the Court held that the law violated the First Amendment. While the federal government can punish animal cruelty directly, it cannot punish “speech” depicting such conduct. The Court has already granted cert. for next year involving a California law that prohibits the sale of violent video games to minors. This will be the first time the Court has dealt with video games or with violence and the First Amendment.

Another important case this Term, yet to be decided, is *Humanitarian Law Project v. Holder*. In that case, the Court is considering the constitutionality of a federal statute that bars the knowing provision of service or assistance to terrorist activities. The statute is important in many terrorism prosecutions, and it will be the first time the Court issues a decision involving the First Amendment and the war on terror.

Kagan - *HLP* seemed to be one of those rare cases where every Justice at oral argument, regardless of ideology, seemed to struggle with how to balance the competing arguments and interests.

Clement - *Salazar v. Buono* was a 5-4 case upholding the installation of a war-memorial cross in a national park. After the initial installation was challenged, Congress transferred to the VFW the property on which the cross was located. *Salazar* reinforces the notion that no area of constitutional law has the same capacity to splinter the Court as the Establishment Clause. There were six different opinions but no majority opinion, which is a common pattern in such cases.

Clement - There are two additional, important First Amendment cases to be decided this year. The first is *Christian Legal Society v. Martinez*. The Hastings Law School (a public law school, i.e., a state actor) requires student groups to sign a non-discrimination policy. When applied to the Christian Legal Society, that requirement implicates the group's freedom of association rights. At oral argument, the Court did not give a clear indication of the likely outcome, but it did seem uncomfortable with a government entity telling religious groups they cannot discriminate based on religious beliefs.

The other important pending case is *Doe v. Washington*, which is a right to privacy case. At issue is whether signatures on a referendum petition can be disclosed to the public through the state public records act. It is an unusual privacy right, since it involves public participation in a government activity.

Kagans - In the oral argument for *Doe*, Justice Scalia was particularly eloquent about the need for "civic courage."

Chemerinsky - What is most significant about *Salazar* is what did not happen. Conventional wisdom is that there are now five votes on the Court that the government violates the Establishment Clause only if it actually establishes a religion, coerces on the basis of religion, or discriminates among religious sects. Yet, the Court did not adopt such a broad holding.

### **Eighth Amendment Cases**

Chemerinsky - *Sullivan v. Florida* and *Graham v. Florida* both involve minors sentenced to life in prison without parole. The question is whether it is cruel and unusual punishment to impose on juveniles life imprisonment without parole. At oral argument, Justice Roberts advocated that age should be a factor that a jury could consider, but that there should be no bright line rule.

### **Civil Rights Cases**

Clement - *Perdue v. Kenny A.* The question presented was the availability of an enhancement above the lodestar amount in awarding attorney fees under 28 U.S.C. § 1988. The Court held, 9-0, that such an enhancement is possible, but only in "rare" or "exceptional" circumstances involving superior performance, superior results, or unusual delay. This was a significant result because there are a number of bases on which to reduce such attorney fees; the availability of enhancements levels the playing field and encourages settlements at the lodestar amount.

### Structure of Government Cases

Clement - There are three important cases that have yet to be decided. The first is *McDonald v. Chicago*, involving whether the Second Amendment should be applied against the states, i.e., the “incorporation” debate that divided the Court in the 1950s. The challenge is to a City of Chicago ban on handguns that is very similar to the one the Court struck down in the *Heller* case, involving the District of Columbia. In fact, the lawsuit was filed the same day the Court issued *Heller*. At oral argument, the Court seemed sympathetic to the Due Process theory of incorporation.

Chemerinsky - What is going to be the proper standard of review for such cases? Much of the *McDonald* oral argument focused on this questions.

Clement - *U.S. v. Comstock* tests Congress’s power under the Necessary and Proper Clause to authorize indefinite civil commitment of “sexually dangerous” persons.

Chemerinsky - *Comstock* has the possibility of being the “sleeper” case of the Term. It is the first Supreme Court case during the Chief Justice Roberts era that implicates federalism, Congressional power, and related principles from the Rehnquist Court.

Clement - *Enterprise Fund v. Public Company Accounting Oversight Board* challenges the structure of the Public Accounting Act under Sarabanes-Oxley, specifically, whether the Board’s members should be appointed by the President rather than the SEC.

Chemerinsky - Some conservatives, including members of the Court, have long argued there should be a unitary executive. If such a philosophy is adopted in the *Enterprise Fund*, it could have a dramatic impact in many areas.

### Criminal Cases

Chemerinsky - Section 1346 makes it a crime to deprive an individual of the intangible right of private services. In *Weyhrauch v. United States*, a member of the Alaska legislature applied for private jobs, then voted for a bill that would have benefitted one of his prospective employers. When prosecuted, the legislator argued that the law is vague and therefore unconstitutional.

*Black v. United States* involves the question whether the “honest services” clause of 18 U.S.C. § 1346 applies in cases where the jury did not find that the defendants reasonably contemplated identifiable economic harm.

Finally, *Skilling v. United States* is an Enron case. Does the honest services statute require proof that the individual enjoyed a private gain? Must he show breach of a fiduciary duty? Is the statute unconstitutionally vague?

#### **Fourth Amendment Cases**

Chemerinsky - Only one major case this Term involving the Fourth Amendment, and it does not even arise in a criminal context. In *City of Ontario v. Kwan.*, the respondent is a police officer who was issued a text pager that he used to send explicit messages to his wife and mistress. The question presented is whether he has a reasonable expectation to privacy in these messages.

#### **Business Cases**

Clement - In the first couple of years of the Roberts Court, the perception was that this is a very pro-business Court, particularly in the preemption and securities areas. Paul considered this to be a simplistic view, painting with too broad a brush. There does appear to be, however, two real trends. In the antitrust area, the Roberts Court had eight cases before this Term, and the plaintiff lost in every case. Moreover, the opinions have been unanimous or near unanimous. This Term, in *American Needle Inc. v. NFL*, the Court has been asked whether the NFL is a single entity for purposes of the antitrust laws. Based on the oral argument, it appears that this will be the first case in the Roberts era where the Court rules in favor of the antitrust plaintiff.

There other trend is that the Court has been cutting back on patent protection and has not been terribly deferential to the Federal Circuit. Before this Term, the Roberts Court had seven patent cases. In 61 possible votes (two recusals), the votes to reverse were 59-2. It appears likely that in *Bilski v. Kappos*, the Court will affirm the Federal Circuit in cutting back on business method patents.

Chemerinsky - It is interesting how many more business cases the Court has been hearing recently, perhaps partially attributable to Chief Justice Roberts, who had a significant business practice before first being confirmed as a D.C. Circuit judge