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The Supreme Court Returns From Its Summer Recess With A New Justice And A Docket Already Filled With Important Cases Involving Free Speech, Immigration, The Establishment Clause, And The State Secrets Privilege

The Supreme Court will have a new look when it returns next week for the October 2010 Term. For the first time in 35 years, Justice John Paul Stevens will not be there. And, for the first time in history, the Court will include three women. The Court today is very different than it was five years ago. From 1994-2005, the Court's membership was unchanged – the longest period that any nine Justices have ever sat together. Since 2005, there are four new members of the Court.

Despite this change in personnel, the ideological balance on the Court has remained the same, which still leaves Justice Kennedy in the middle as the critical swing vote on a host of key issues. Justice Kennedy nonetheless occupies a different position on the Court now that Justice Stevens has retired. In cases where Justice Kennedy is in the majority, and Chief Justice Roberts and Justice Scalia are in dissent, Justice Kennedy will have the power to decide who writes the majority opinion, a power that previously belonged to Justice Stevens by virtue of seniority. Whether and to what extent that alters the internal dynamics of the Court remains to be seen, but it may increase the probability that Justice Kennedy writes even more of the Court's high profile decisions.

Inevitably, a great deal of attention will be focused this Term on Justice Kagan, who joins the Court without ever previously serving as a judge. It typically takes several Terms, at least, before one can speak with any confidence about the voting patterns of a new Justice. Early predictions are treacherous and quick assessments are often wrong. That is especially true for Justice Kagan. She arrives on the Court without having revealed very much about her judicial philosophy, either in her writings or in her confirmation hearings. And she has already announced that she will recuse herself from slightly less than half of the cases that the Court has so far accepted for review. Justice Marshall, who was the last member of the Court to be nominated while serving as Solicitor General had roughly the same percentage of recusals during his first Term on the Court.

Justice Kagan's recusals represent a wild card in this Term's deliberations. On a closely divided Court, removing one vote enhances the chances of a 4-4 tie, which affirms the decision below but does nothing to clarify the law. Less obviously, the prospect of Justice Kagan's recusal in cases that she worked on while Solicitor General will almost certainly affect the Court's decisions about what cases to take, although in ways that may not be immediately apparent. The upcoming Term, like every Term, has a roster of

significant cases on the docket and more will be added as the year proceeds. But unlike most Terms, this Term may end with more uncertainty about where the Court stands on a number of important questions depending on the impact of Justice Kagan's recusals.

The ACLU currently has two cases that will be heard this fall. In *Chamber of Commerce v. Whiting* (09-115), which is scheduled for argument on December 8, the issue is whether federal immigration law preempts, and thus nullifies, Arizona's effort to impose its own severe sanctions on employers who hire immigrants that, in Arizona's view, are not authorized to work in the United States. (The case is described more fully in the accompanying statement by Omar Jadwat.)

The issue in *Arizona Christian School Tuition Organization v. Winn* (09-987) and *Garriott v. Winn* (09-991), which have been consolidated for argument on November 3, is whether Arizona can utilize a system of tax credits to subsidize religious education with taxpayer funds. (The case is described more fully in the accompanying statement of Daniel Mach.)

The ACLU is opposing certiorari in a third case, *Ashcroft v. al-Kidd* (10-98). But, if certiorari is granted, the Court will have to decide whether John Ashcroft, the former Attorney General, is immune from damages in a lawsuit alleging that he used the material witness statute as a form of preventive detention following 9/11. (The case is described more fully in the accompanying statement of Lee Gelernt.)

Free speech cases figured prominently on the Court's docket last Term, and they do this Term as well. On October 6, the Court will hear argument in *Snyder v. Phelps* (09-751), which arises from a protest organized by members of the Westboro Baptist Church at the funeral of a dead soldier to promote their belief that God is punishing America for its tolerance of homosexuality. The question before the Court is whether a speaker can be held liable for the intentional infliction of emotional distress based on a jury finding that the speech at issue was outrageous or offensive. The ACLU has submitted an *amicus* brief supporting the Fourth Circuit's holding that the legal standards applied by the jury in this case violated the First Amendment.

Schwarzenegger v. Entertainment Merchants Ass'n (EMA) (08-1448), which will be argued on November 2, is in many ways a sequel to last year's decision in *United States v. Stevens*, where Chief Justice Roberts forcefully wrote that the First Amendment does not permit the government to balance the social value of speech against its social costs in deciding whether or not to prohibit it. In *Stevens*, the federal government had criminalized depictions of animal cruelty. In *EMA*, California has banned the sale of "violent video games" to minors. Agreeing with the Ninth Circuit, the ACLU *amicus* brief argues that the California statute is unconstitutional.

The Court has also agreed to hear several access-to-court cases arising in a variety of different contexts. For example, in *Connick v. Thompson* (09-571), scheduled for argument on October 6, the question is whether someone who spent 14 years on death row before his murder conviction was overturned because the prosecutor failed to turn

over exculpatory evidence can recover damages from the prosecutor's office on the theory that it failed to train its staff regarding their constitutional obligations. In *Sossamon v. Texas* (08-1438), which is scheduled for argument on November 2, the issue is whether states can be sued for damages under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) for violating the constitutional rights of prisoners. And, in *Thompson v. North American Stainless, LP* (09-291), which is scheduled for argument on December 7, the question is whether the anti-retaliation provisions of Title VII protect an employee who alleges that he was dismissed because his fiancée filed a sex discrimination claim against the employer with the EEOC. The ACLU has filed *amicus* briefs in all three cases supporting the right to sue.

In addition, on September 27, the Supreme Court announced that it will be revisiting the state secrets privilege for the first time since 1953 in two consolidated cases, *General Dynamics Corp. v. United States* (09-1298) and *Boeing Co. v. United States* (09-1302). In both cases, the government terminated a substantial military contract based on a claim of default, but then asserted the state secrets privilege to prevent the contractors from defending themselves against the government's default charge. If these were criminal prosecutions, the government would be required to share the information in some form or dismiss the indictment. The contractors are claiming that the same due process rules apply here as well. While the due process issues are undeniably important, since 9/11 the government has far more frequently invoked the state secrets privilege to dismiss claims of misconduct against the government or those acting on its behalf. The Ninth Circuit, sitting en banc, recently granted the government's motion to dismiss in a case arising out of the government's extraordinary rendition program. The plaintiffs in *Mohamed v. Jeppesen Dataplan, Inc.*, represented by the ACLU, have announced their intention to file a petition for certiorari with the Supreme Court. Jeppesen, interestingly, is a Boeing subsidiary.

NASA v. Nelson (09-530), to be argued on October 5, presents the Court with an opportunity to provide further guidance on the meaning and scope of the right to informational privacy – an issue of increasing importance as new technology permits the development of ever-expanding databases. The ACLU *amicus* brief urges the Court to reaffirm the constitutional right to informational privacy and to hold that NASA violated that right when it required Caltech employees working at the Jet Propulsion Laboratory in "low-risk" and "non-sensitive" jobs to disclose information about medical treatment and psychological counseling they may have received in connection with illegal drug use.

The consequences of America's commitment to over-incarceration will be on display when the Court reviews a federal injunction directing California to reduce the size of its prison population in *Schwarzenegger v. Plata* (09-1233), which is scheduled for argument on November 30. Not only does the U.S. incarcerate more people than any other nation in the world, there is increasing evidence that we are incarcerating – and, indeed, sentencing to death – individuals who are actually innocent and have been wrongfully convicted. DNA has been crucial to many of these exonerations. The issue in *Skinner v. Switzer* (09-9000), to be argued on October 13, is whether a Texas death row inmate can bring a federal due process claim against the state for denying him post-

conviction access to biological evidence that he alleges he is entitled to obtain under state law for DNA testing.

Finally, while the conservative credentials of the Roberts Court have been well-established by now, this Term may tell us something more about its particular brand of conservatism. The prevailing wisdom has been that the Roberts Court is more concerned about corporate rights and less concerned about states' rights than the Rehnquist Court that preceded it. At the end of the Term, we may have a better sense of whether that distinction is either valid or meaningful as the Court grapples with a quartet of preemption cases. In addition to *Chamber of Commerce v. Whiting*, the cases are *Bruesewitz v. Wyeth* (09-152), *Williamson v. Mazda Motor of America, Inc.* (08-1314), and *AT&T Mobility v. Concepcion* (09-893).

The ACLU's Supreme Court briefs can be found on the ACLU web site at http://www.aclu.org/scotus/index.html.