

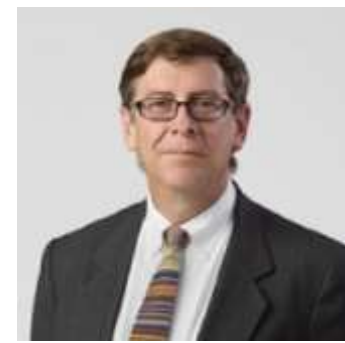
“Pandemic Term – the Supreme Court Finds its ‘Middle’ ” or “2020 -- An Unprecedented Term”

Presentation for the Marin County Bar Association

(remote via Zoom on July 23, 2020)



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It was an Unprecedented Term

- Two months of oral arguments cancelled – not since the Civil War.
- Arguments in May: not for decades.
- “Remote” oral arguments (by phone!) 🖱️
- “Real-time” live-streamed audio
(not video) of the arguments.

Argument audio: https://www.supremecourt.gov/oral_arguments/argument_audio/2019



So here is the Court today

(not an official portrait)

Remote oral arguments with “real time” live audio



What are some of the top decisions? (you may have others)

It's a "big" Term, but historically small: 61 cases, only 53 signed opinions

- ***Trump v. Vance; & v. Mazars***: Presidential subpoena cases.
- ***Bostock***: federal employment discrim applies to gay and transgender.
- ***Chiafalo, & Baca***: States sanction "faithless Electors;" car crash avoided (9-0!) for Nov. 3rd.
- ***Homeland Security v. Regents***: DACA preserved (for now; election effect?)
- ***Ramos*** – States must apply jury unanimity for criminal convictions; Weird split; and a *stare decisis* "stalking horse" for coming abortion cases.
- ***County of Maui*** – Clean Water Act can apply to groundwater discharges.
- ***Georgia v. Public Resource Org*** – No copyright for legal annotations. "No one can own the law."
- ***McGirt***: 5-4 win for native American tribes; 40% of Oklahoma.

Other "big" areas: Immigration. Religion. IP. Appointments Clause (*Seila*).

Court and Justice “headlines” (just my opinions)

- 1. Chief Justice Roberts firmly in charge**, preserving the Third Branch.
 - Keeping “big” opinions for himself. *Vance & Mazars; DACA; Seila Law*
 - A fifth vote for the “middle.” Ruling against the Executive Branch when it matters. (In addition to the obvious, join in *Bostock*; sep. op. in *Russo*)
 - A non-partisan and non-confrontational style, “for the ages.”
- 2. Court forced into the 21st century**: live-stream audio arguments.
- 3. Kavanaugh and Gorsuch** continue to differentiate.
 - Both Trump Justices” voted against Trump on subpoenas.
 - Kavanaugh: more moderate, conciliatory. *Bostock; DACA; Russo; Ramos; Maui.*
 - Gorsuch: more libertarian (and arrogant), “Western.” *Ramos; Bostock; McGirt.*
- 4. Where are the “libs”? The women?**
- 5. The future?** (“The future lies ahead of us” – who said it? ([Pogo](#))).

If we have time, a few more “big decisions” from the past Term:

- ***Hernandez v. Mesa***: no Bivens for cross-border shooting.
- ***Kelly v. US***: mail/wire fraud inapplicable to “Bridgegate” in New Jersey.
- ***Kansas v. Glover***: 4th Amendment brain teaser (as always).
- ***U.S. v. Sinengeng***: slapdown of Ninth Circuit; by RBG!; highly unusual.
- **Religion** -- ***Our Lady of Guadalupe*** (“ministerial exception” to federal employment discrim); ***Little Sisters of the Poor*** (fed. Authority to exempt entities with “moral objections” from ACA contraceptive rule); ***Espinoza*** (denial of school funds to religious schools violates “free exercise”).
 - **1st Amendment** -- ***Barr v. Amer. Assoc. Political Consultants***: Exception for govt debt collection in “no robo calls” statute violates 1st A, but it is severable.
 - **Trademark, copyright, IP** -- ***PTO v. Booking.com***: A “dot-com” name is not “generic” (non-trademarkable) if it does not have a generic meaning in the minds of consumers; ***Romag Fasteners*** (wilfulness not req’d for trademark damages); ***Thryv*** (*inter partes* review of patents, cool name anyway).
 - **Environmental** – ***Atlantic Coast Pipeline*** (Feds may issue permit for pipeline under the Appalachian Trail); ***Atlantic Richfield v. Christian*** (EPA approval required for remedial actions);

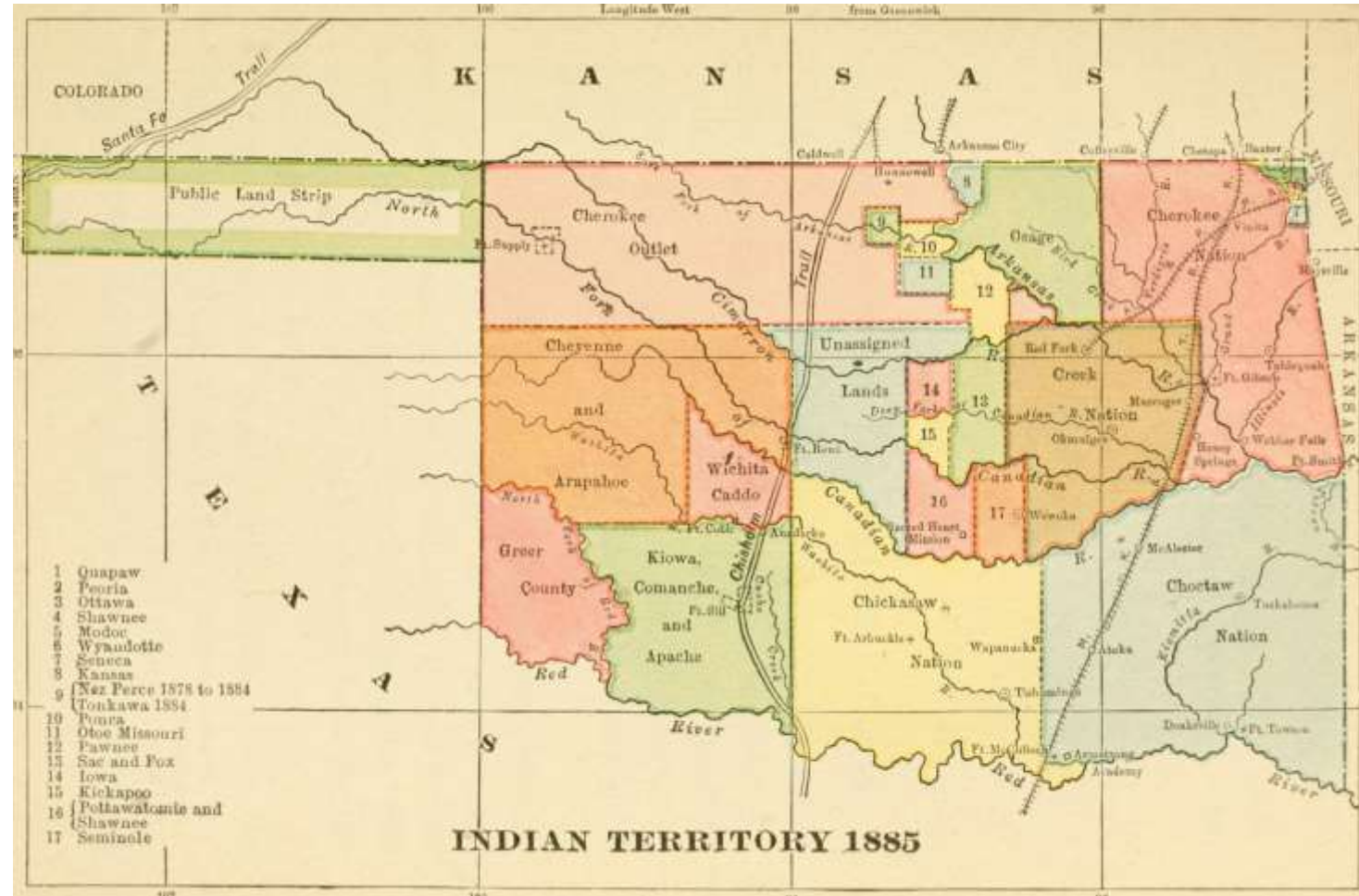
Big cases granted for argument next Term (OT '20)

37 cases already granted (12 “kicked” from last Term). A sample:

- ***California v. Texas***: Is the entire Affordable Care Act unconstitutional?
- ***Google v. Oracle***: Is computer code copyrightable, and if so can copying computer code be okay as “fair use”?
- ***Van Buren v. U.S.***: Is it a crime for someone authorized to access a computer, to access information for an improper purpose?
- ***DOJ v. House Judiciary Comm.***: May the redacted grand jury parts of the Mueller Report be released as part of a “judicial proceeding”?
- ***Fulton v. Philadelphia***: Religion: should *Smith* be overruled?
(also Religion: *Tanzin v. Tanvir*).
- ***U.S. v. Briggs & Collins***: Ct. App. Armed Forces; statute of limits for rape
(and is military death penalty for rape unconstitutional?).

McGirt v. Oklahoma (arg. May 11) – Huge “sleeper” case

- “Five Tribes” forced to relocate in 1830s (“Trail of Tears”). Treaties of 1832, 1866, and others. Federal promises
- “Indian country” in present-day Oklahoma: over 19 million acres (43%).
- Oklahoma statehood in 1907.
- Narrow question: who has Criminal jurisdiction.
- But consequences likely much broader.



(credit: Scotusblog.com)

*U.S. Patent & Trademark Office v. **Booking.com***

(arg. May 4, next Monday)

The first case in history to be “livestream audioed.” And the only case set for that historic Monday.

-- If there are going to be tech or other difficulties, they will be exposed in this first case. Perhaps that is why it was chosen to go first? (Similarly, *US A.I.D.*, set alone for May 5.)

QP: Does adding “.com” to an otherwise non-registerable “generic” term -- like “booking” -- make it registerable under federal trademark law?

-- Court-watchers note that this will be the first-ever “all-female arguers” case for the Court: Lisa Blatt for Booking.com; Erica Ross for SG.

Thank you for attending. Stay healthy!

