Review of the U.S. Supreme Court's Term 2020-21

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"A Court Divided?" or is it "The Trump Court Waiting in the Wings?"

I. Overview.

A. Workload

-- Seems like every year we say the same thing: "lowest number of merits cases in decades." This Term -- 54 cases after full briefing and argument – is THE lowest since the Civil War. (Last Term there were 53, BUT you may recall we had an unprecedented two-month Pandemic shutdown and 10 granted cases were unexpectedly rescheduled for THIS Term. You might have expected that to lead to higher numbers this Term – but no.)

-- There were another 13 cases decided by "summary reversal," which means no full briefing or oral argument but still a written opinion (usually "Per Curiam," that is, no identified Justice author). This number is not that unusual – and does require some "Justice effort." Still, they have the easiest job in the Judiciary ☺ .

-- What is unusual, however, is the large number of additional cases decided by the Court on what is now called "the shadow docket" (so named in these 2015 and 2019 articles). Previously common but little noticed – such as Orders denying a petition for certiorari -- the use of this quiet and rapid "motions practice" skyrocketed under the Trump Administration. (For example, the Solicitor General under Trump filed over two dozen "applications for emergency stays,"– whereas the prior Bush and Obama Administrations filed an average of one such application every two Terms.). Such motions are usually decided on an extremely rapid schedule with no oral argument and only one round of initial briefing. And the Orders are often unsigned and unaccompanied by written opinion (other than, recently, dissents). We can discuss this more if you like. But for now, onward!

B. Personalities

-- Justice Ruth Bader Ginsburg died only 10 months ago – seems like a lifetime ago, doesn't it? Justice Amy Coney Barrett was rushed through confirmation and joined the Court three weeks after the October 2020 Term began (thus she recused in a dozen of the Court's merits cases).

-- There are now three "Trump Justices" on the Court (Kavanaugh, Gorsuch and Barrett).

-- Justice Stephen Breyer is, today, still there (and he is only the 10th oldest Justice to serve). And he wrote (and was assigned by the Chief) a number of significant majority opinions this Term, *e.g.*, *Mahanoy* (the cheerleader case); *California v. Texas* (the ACA case); *Google v. Oracle.*

-- Justice Sam Alito seems almost bitterly unhappy that his more conservative agenda has not completely triumphed (e.g., dissent in *California v. Texas,* discussed below).

-- Meanwhile, Justice Kagan is going to great lengths in unrelated cases to demonstrate adherence to precedent, all in anticipation of future attacks on *Roe v. Wade,* most immediately in *Dobbs* next Term.]

[1] Credit: I draw much raw data from supremecourt.gov and SCOTUSblog.com (where I have been a regular contributor).

C. A Divided, 3-3-3, Court.

This is my strongest impression from this Term: the Justices fall into three relatively clear "camps." The "liberals" are of course Justices Breyer, Sonia Sotomayor, and Elena Kagan. Then three Justices are consistently and vehemently opposed; "conservatives" we could call them. Sam Alito most clearly, with Clarence Thomas and Neil Gorsuch generally but not always joining. And finally, three "moderates," who definitely lean "conservative" but are much more willing to compromise and "go slow" toward the conservatives' broader agenda: Chief Justice John Roberts, and Brett Kavanaugh and Justice Barrett.

This is evidenced by at least two things: a large number (13 I believe) of 6-3 dispositions in which the three liberals and the three "moderates" comprised the majority, in the face of vehement dissents. (*E.g. Van Buren*; *TransUnion* Thomas dissent; each discussed below.) And also, the fact that Justice Kavanaugh was in the majority in divided cases more than any other Justice (95% of the time, a huge percentage), with Roberts and Barret next (84%). **Thus it is Justice Kavanaugh, rather than the Chief Justice, who is perhaps best described as the "swing Justice" today.** (Note that Justice Sotomayor had the lowest percentage (45%) of agreement in divided cases; I think this demonstrates that the Court is "conservative").

-- Perhaps the last point in this overview is that the "liberal three" almost always stick together – a wise strategy when outnumbered. Sometimes silently joining a "conservative" opinion – this Term, often Justice Thomas's -- that is not as "bad" as might otherwise result (e.g., *Caniglia*, and Thomas's *Arthrex* dissent, each discussed below). The other six Justices are more often willing to strike their own paths, although Kavanaugh and Roberts almost always agree with each other, and Justice Barrett has not been there long enough to have any firm identity – but **wait for next Term, when abortion and guns are on the menu!**

D. One last "themes" not heretofore mentioned

In addition to the 3-3-3 Court, many of this Term's decisions may be harbingers of more "conservative" decisions to come. They may be "laying the groundwork" for broader decisions and doctrinal rulings in the future. For example, *Americans for Prosperity*, *Fulton*, and *Brnovich*, all discussed below. And the cert grants in *Corlett* (Second Amendment) and *Dobbs* (abortion/autonomy rights).

E. General "Loose Ends."

-- By the way, the Ninth Circuit went 1-15 this Term – that is, 15 reversals out of 16 cases considered. Although some Circuits with lower numbers were 100% reversed – overall, the Supreme Court reverse far more often than it affirms.

-- Meanwhile, the Supreme Court is like a river, it is always flowing. The Court has already granted review for next Term (OT 21) in 29 cases.

-- Finally, we do not yet know if the Justices will hear in-person oral arguments in October, nor have they said whether they will retain the "live audio stream" or the "seriatim questioning" format. But undoubtedly, "seriatim questioning" changed the character of oral arguments, many think for the better.

III. "Big" Decisions of this Term

This is always somewhat "in the eye of the beholder." As always, the Court's decisions, even in cases that fleeting or non-existent media attention, are extremely important to many.

A. First Amendment cases.

-- *Fulton v. City of Philadelphia*. Roberts, 9-0 in judgment, 3-3-3 on the merits (one of the best examples of the "divided Court"). The City's exclusion of Catholic Social Services as a

certifying agency for foster parents, because CSS will not certify same-sex couples, violates the Free Exercise Clause of the First Amendment. It fails "strict scrutiny" because it permits "exceptions" with no compelling reason to not except CSS. No need to reconsider *Smith* (1990).

Barrett concurring with Kavanaugh and, in part, Breyer (2 pages): "arguments against *Smith* are compelling," but no need to decide what "more nuanced" rules should replace it, in this case.

Alito concurring in judgment with Thomas and Gorsuch (77 pages!): *Smith* should be overruled and today's "wisp of a decision … might as well be written on the dissolving paper sold in magic shops." Gorsuch (with Thomas and Alito): I agree, but shorter and more "respectfully."

-- ***Mahanoy v. B.L.*** **Breyer, 8 (6-2) to 1.** High school violates First Amendment when it disciplined student for critical, vulgar remarks made off-campus on non-school time or activity, that did not threaten substantial disruption or harassment (recall Cohen, 1971). Alito concurring with Gorsuch: I have a different framework. Thomas dissenting: The Court "chooses intuition over history." When First A was incorporated against the States (1867 in the 14th Amendment), "well-settled" rule was that public schools could discipline students for off-campus speech or conduct that "had a proximate tendency to harm the school environment."

-- ***Americans for Prosperity Foundation v. Bonta***. **Roberts, 6 (3-2-1) to 3:** Compelling nonprofit groups to disclose their major donors violates the First Amendment. Applying "exacting scrutiny:" not "narrowly tailored," and "administrative convenience" is a "weak" governmental interest. "The risk of a chilling effect on association is enough" (recall *NAACP v. Alabama (Patterson)*, 1958).

Thomas concurring in part and in judgment: I have three "points of [doctrinal] difference," but I concur in the judgment. Alito concurring in part and in judgment, with Gorsuch: Not sure that "exacting scrutiny" is the right framework, but here the constitutional question is "not even close."

Sotomayor dissenting with Breyer and Kagan: "Today's analysis marks [all] reporting and disclosure requirements with a bullseye." Plaintiffs have failed to show any real burden, and you simply cannot compare this to "NAACP members and the Jim Crow South."

B. The Fourth Amendment – three cases all decided in the criminal DEFENDANT's favor!

I know that voting rights (*Brnovich*, discussed below) received all the media attention at the end. But Fourth Amendment cases are always more entertaining AND more relevant to state-side judges and lawyers. (Plus the judges here usually have to leave our lunch early.)

-- ***Torres v. Madrid***. **Roberts, 5-3;** Gorsuch dissenting, Barrett recused: Shooting a person with intent to restrain is a "seizure" even if person does not stop. Gorsuch: No, "taking possession of someone or something" is required (questioning *Hodari D* (1991), written by Scalia).

-- ***Caniglia v. Strom***. **Thomas, 9 (5-2-1-1) to 0.** There is no categorical exception for "community caretaking" to the Fourth Amendment warrant requirement, at least as applied to homes. "Exigent circumstances" remains as a possibility, however. (Shortest opinion of the Term, 4 pages).

Roberts concurring, with Breyer: My 2006 opinion in *Brigham City* said police may enter without a warrant "to assist persons who are seriously injured or threatened with such injury," and nothing said today is contrary to that. Alito concurring: Here are some more examples of what the CJ is affirming. Kavanaugh concurring (my view: "peacemaker"): I "underscore and elaborate" on the CJ's views. "Perfectly constitutional under the exigent circumstances doctrine."

-- ***Lange v. California***. **Kagan, 9 (5-1-1-2) to 0.** (From Sonoma Country; anyone know Mr. Lange?). There is no categorical exception for "hot pursuit of a misdemeanant;" "when the officer has time to get a warrant, he must do so." (Very similar to *Caniglia*, but more "liberally" written.).

Indeed, we "disagree" that we have even stated a categorical exception for fleeing felons (questioning *Santana*, 1976).

-- Kavanaugh concurring ("peacemaker"): "I join the Court's opinion" and also Thomas's concurrence (on the exclusionary rule) and I see "almost no daylight in practice" between the majority and the CJ's concurrence. Thomas concurring in part and in judgment: Majority is correct as to no categorical exception. But I think the exclusionary rule should never apply to evidence seized "in hot pursuit" of a criminal; creates a bad incentive to flee. Roberts concurring in judgment with Alito: Hot pursuit "is itself an exigent circumstance." A case-by-case analysis is "absurd and dangerous."

C. The Federal Computer Fraud and Abuse Statute – and Justice Barrett

-- ***Van Buren v. United States***. **Barrett, 6-3**. Applying this 1986 (as amended) statute to today, the statute is not violated when a person access a databank with authorization, even if the person then obtains information contrary to employer or website terms. A person "exceeds authorized access" under the statute only when they "obtain information located in particular areas of the computer – such as files, folders, or databases – that are off limits to" them. The textual meaning of the word "so" is hotly debated. Moreover "the government's interpretation" would reach "a breathtaking amount of commonplace computer activity."

Thomas dissenting, with Roberts and Alito: "Entitled so to obtain" means that a person is criminally liable when they obtain information from a computer they are "authorized to access" unless they have a "right to obtain" the information. Here, Van Buren's employment terms (as a police sergeant) "expressly forbid" him to use license-plate information for non-law enforcement purposes.

-- **Barret's first majority opinion** (March 4): ***U.S. Fish & Wildlife v. Sierra Club***. **7-2;** Breyer dissenting with Sotomayor. The days of an easy unanimous "first opinion" are apparently bygone. FOIA: the "deliberative process privilege" protects "in house drafts" even if they "proved to be the agency's last word" on the topic. Breyer dissent: I disagree in this context and would remand.

**** Hard to decide on the best Order of Other "Big" Decisions this Term ****

D. Constitutional "Standing"

-- ***California v. Texas*** (preserving, again, the Affordable (health)Care Act, ACA). **Breyer, 7 (6-1) to 2.** Plaintiffs have no "standing" to challenge ACA where the penalty for not obtaining insurance is now set at zero and there is no realistic possibility of enforcement. No injury "traceable to" ("caused by") the zero penalty; and declaring the ACA unconstitutional would not "redress" the alleged injuries, which are not "traceable" to the zero penalty (they result from other parts of the ACA legislation).

Thomas concurring: "although the Court has erred twice before [in upholding the ACA], it does not err today." The "standing-through-inseverablity" argument has not previously been argued and so should not be decided today.

Alito dissenting with Gorsuch: "The Court has pulled off an improbable rescue" of the ACA. Especially where States are suing; and the majority ignores *Massachusetts v. EPA* (2007) which suggested that States get some special status for standing. The majority's new "standing" rule is "a flat-out misstatement of the law." It "cannot be right." It is a "new and revolutionary rule the Court has concocted." "Fans of judicial inventiveness will applaud … [b]ut I must respectfully dissent."

-- ***TransUnion v. Ramirez***. **Kavanuagh, 5-4.** Absent a "concrete injury" to individuals, plaintiffs have no "standing" even if Congress has legislatively created a "right" and authorized persons to sue to vindicate that right. **[This last part is quite important and quietly disruptive of many precedents; confirms suggestions in *Spokeo* (2016).]** Here, only 1,853 members of a class of

8,185 persons whose false credit reports were sent to third parties, may have standing to sue for damages. (The Ninth Circuit's contrary certification of a $40 million verdict is reversed and remanded). A "concrete reputational harm" is required, regardless of the expressed legislative intent. "No concrete harm, no standing."

Thomas dissenting, joined by Breyer, Sotomayor, and Kagan: the idea that Congress can legislate "rights" and give holders a right to sue, dates back to the Copyright law enacted by the First Congress (and earlier in common law). The violation of a "private right" created by Congress is constitutionally sufficient. Kagan dissent with Breyer and Sotomayor: Thomas is right; I just "add a few words," and "differ … on just one matter." [Here, and in other cases, in my opinion, **Justice Kagan is working hard to demonstrate adherence to precedent**, all in anticipation of the attack on Roe v. Wade next Term.]

E. Oh okay… Voting Rights. Yes it is a major decision, as much about the future than the two rules at issue in this case. A small amount of what might be said here, follows.

Brnovich (Arizona AG) v. DNC. **Alito, 6 (3+2) to 3.** In 2013, in *Shelby County*, a 5-4 majority of the Court (Ginsburg dissenting) invalidated the "preclearance" formula (and requirement) of Section 5 of the Voting Rights Act of 1965. In *Brnovich*, the Court sets a new standard for evaluating Section 2 cases under the Act, and upholds two State voting restrictions that do not have a "discriminatory purpose" even if there is some disparate impact along racial lines. Section 2 prohibits any voting rule that "results in" abridgment of the right to vote; this decision takes "a fresh look at the statutory language," which says a violation is "established if" voting processes are "not equally open to," or there is "less opportunity," for "classes" of voters. The Court says that it is not imposing "an exhaustive list" of factors, but five seem particularly "important" while others (considered by the court below) are "plainly inapplicable" to what the Court calls "neutral time, place or manner" voting rules. (then 22 pages of explanation and application.)

Gorsuch concurring with Thomas (one paragraph): Whether Section 2 actually provides "an implied cause of action," as we have assumed, remains an open question (to us).

Kagan dissenting with Breyer and Sotomayor (41 pages, echoing and honoring Ginsburg's impassioned dissent in *Shelby County*): "The Court undermines Section 2" and gives it a "cramped reading." The Court "flouts" rules of statutory interpretation "with abandon," and "creates extra-textual exceptions and considerations to sap the strength" of the statute. "Maybe some think that vote suppression is a relic of history … But Congress gets to make that call." "What is tragic is that the Court has (yet again) rewritten – in order to weaken – a statute that stands as a monument to America's greatness, and protects against its basest impulses."

F. Antitrust law and "Amateur" College Athletes.

NCAA v. Alston. **Gorsuch, 9 (8+1) to 0.** District Court (Claudia Wilken, DJ) and CA9 injunction invalidating NCAA limits on "education-related benefits" to athletes. (Other limits left in polace because the plaintiff-athletes did not challenge them in USSCt.) The NCAA is "a joint venture with monopoly power" and thus subject to "rule of reason" analysis, not just a "quick look." It does not get any special antitrust immunity; and it cannot avoid scrutiny by relabeling its restraint ("ametuerism") as a unique "product feature." Substantially less restrictive (less anti-competitive) rules are possible. Further clarification can be sought from the district court.

Kavanaugh concurring (playing, perhaps unconsciously, into his "sports guy" image): "An overdue course correction." There are serious questions whether the NCAA's remaining compensation rules can pass [antitrust] muster." Fun analogy: "Labels cannot disguise reality. … Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.'" "price-fixing of labor" is simply not allowed. (Kavanaugh goes out of his way to note "the student athletes who generate the revenue, many of whom are African-American and from lower-income backgrounds," and cite the amicus "Brief for African-American Antitrust Lawyers."

G. The Constitutional [and Doctrinally Arcane] Appointment and Removal Powers of the President.

-- and Intellectual Property: ***United States v. Arthrex***. **Roberts, 5-4 (and complicated mess).** The statutory appointment provision, governing 200-plus Administrative Law Judges (ALJs) within the Patent Trial and Appeal Board, (PTAB) which hears cases of *inter partes* review, is constitutionally invalid, because their decisions are effectively unreviewable and yet they cannot be removed "at will." But if they are "principal officers" they must be removable at will; or if they are "inferior officers" then they must be "supervised" by a principal officer; unreviewable decision power is incompatible with that. Although we do not announce an "exclusive" analysis; our decision applies only to officers with "adjudication" function.

As to **remedy** [only a four-Justice plurality here: **Roberts**, joined by Alito, Kavanaugh and Barrett], we do not declare the ALJs or their decision to be unlawful; instead, we strike that part of the statute that says the Director of the PTO cannot review ALJ decisions. "Partical, rather than facial, invalidation" is "our normal rule."

Gorsuch concurs but dissents as to remedy. He said in *Oil States* (2018) that he thinks *inter partes* review of patents is unconstitutional.

Breyer joined by Sotomayor and Kagan) concurs in judgment as to remedy, but dissents on the merits: "the Court's basic constitutional determinations" are wrong.

Thomas dissenting, joined by Breyer, Sotomayor and Kagan in large part: The Court should not treat these ALJs, "*two* officers below the President" – as "principal" officers; and it ought not invalidate Congress's decision as to how to appoint and protect "inferior" officers. There is no Constitutional requirement of "reviewability by a principal officer." Here the President appoints the Secretary of Commerce; the Secretary then appoints to PTO "Director," and the Director then appoints the ALJs. The Court's "nebulous" approach confuses past doctrine today, and does not carefully evaluate "the text, history, and structure of the Constitution."

-- and the Federal Housing Finance Agency (FHFA): ***Collins v. Yellen***. **Alito, 9 to 0, or 7 to 2, or 5 to 2+1+1 (another mess of split votes)**. Putting aside much arcane law to get to the constitutional holding, the for-cause removal restriction on the President's removal power over the Director of the FHFA is unconstitutional. This is a "straightforward application" of *Seila Law* (2020). (as if anything in this area today could be called "straightforward"). Whether that unconstitutional provision infected the merits of the decisions at issue here, is left for remand.

The details of the four additional, separate, opinions is omitted here, other than to note that Justice Kagan writes a separate "concurring in the judgment" opinion, joined by Breyer and Sotomayor, to say only that she concurs solely due to *stare decisis*; the majority's view "rests on faulty theoretical premises." She "disagreed vehemently" with *Seila Law* last Term; but cites Robert's opinion in the abortion case of *June Medical* (also 2020) to remind [the Justices?] that "the 'doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike'—even when that means adhering to a wrong decision." Sotomayor and Breyer also flatly dissent on the merits of the ruling. Thomas writes separately, as does Gorsuch.

H. IP Law

In addition to *Arthrex*, above:

-- ***Google v. Oracale***. **Breyer, 6-2 (Barrett not participating).** We tend to forget this case because it happened SO long ago (☺): April 5. I don't pretend expertise here; and full disclosure, my wife's law firm, Keker Van Nest & Peters, represented Google (although she and I almost never discuss our respective work). But here's the basic holding: **Copying certain basic but copyrighted code (only 0.4% of the entire JAVA program), needed to write "new and transformative" software, can be (and was here) "fair use" under the Copyright Act.** (Whether the basic code should have been permitted a copyright in the first place, is left undecided.)

Thomas dissenting with Alito: I would rule that Oracle's code was copyrightable, and that this was hardly "fair use" of an extremely valuable and protected intellectual product.

-- ***Minerva Surgical v. Hologic***. **Kagan, 5-4 (3+1) – (Note: Barrett's first dissenting opinion? Firm but respectful):** "Assignor estoppel" is a valid common-law defense to patent infringement. But it applies only when the assignor's claim of invalidity contradicts explicit or implicit representations made in" the assignment." So it does not work here.

Barrett dissent with Thomas and Gorsuch: The text of the Patent Act of 1952 does not adopt "assignor estoppel" and it is a confused and not "well-settled" doctrine. So we ought not endorse it here.

Alito dissent: we should overrule a case, Westinghouse (1924) that both the majority and the dissent "go to great lengths to avoid" overruling.

I. Other Criminal cases.

This is my personal bread and butter; and there were 19 cases involving or related to criminal law (broadly defined) this Term. That is about one-third of the total docket, about average for criminal-law-and-related cases.

For my thoughts at greater length, see this podcast I did for the ABA Criminal Justice Section, "Review of the Supreme Court's Term, Criminal Cases." I will be reprising that effort as a panel at the ABA's Annual Meeting, Criminal Justice Section, on Tuesday August 10, 1pm Eastern/10am Pacific (must join the CJS to attend).

1. Two Habeas cases addressing "retroactivity." Both the "traditional" 6-3 "conservative to liberal" split. Very disappointing results for habeas fans.

-- ***Jones v. Mississippi***. **Kavanaugh, 6 (5+1) to 3**: Juvenile LWOP ("life without parole") sentences. The Court held (in ***Miller***, 2012) that juvenile LWOP sentences are unconstitutional (Eighth Amendment) if they are mandatory -- a sentencing judge must have discretion not to impose LWOP; juvenile LWOP sentences should be "rare," only for the "incorrigible." Then in 2016 the Court ruled that ***Montgomery*** is "retroactive" (meaning it can be applied even to cases that are "final" after appeals are exhausted. But, says Justice Kavanaugh today or the Court, that does not mean a judge must make a finding of incorrigibility on the record, or even that an old case should require an evidentiary hearing to see if the judge would not impose LWOP. "Incorrigibility" is not an "eligibility" requirement for LWOP, it is merely one factor a judge should consider. Jones' judge said below that they knew they had discretion; no more is required.

Thomas concurring in the judgement: The Court is wrong, that is not what the Court said in *Miller*, it said a judge must find the juvenile to be "incorrigible" before imposing LWOP. But we should just overrule *Miller*, I think juvenile LWOP is fine, so I concur in the judgment here.

Sotomayor dissenting with Breyer and Kagan: Justice Thomas is right, that is not what the Court in *Miller* said at all. But we disagree with Thomas as to remedy: Jones should get a new hearing here with an explicit finding oof incorrigibility required.

[The irony here, of course, is that Justice Kavanaugh clerked for Justice Kennedy; and moreover, Kennedy is still alive and could be asked what he meant in Miller. But Kennedy has, like most former Justices on most issues, remained silent so far.]

-- ***Edwards v. Vannoy***. **Kavanaugh (again, three weeks after *Jones*), 6 (4+2) to 3.** The ***Ramos*** (2020) decision, that the Sixth Amendment requires that all criminal jury verdicts be unanimous, is not "retroactive." [Why different from *Miller*, discussed in *Jones* above? Kavanaugh does not even mention his recent *Jones* decision. But Kagan does, in dissent: Juvenile LWOP was held to be a "substantive": rule, whereas jury unanimity is a "procedural" rule, so precedent requires they be analyzed differently – perhaps demonstrating the craziness of the entire retroactivity doctrine.]. Moreover, we now announce that there is no "watershed rule" exception to the

retroactivity analysis for procedural rules, even though we said years ago in Teague v. Lane that there is such an exception. We have never actually found a rule to fit that exception, other than *Gideon* (right to counsel in criminal cases) back in 1963. We now reject the idea that any further cases could ever fit into it. [Note: this seems necessary because, as Justice Kagan's dissent persuasively demonstrates, if ever a rule should fit that exception, it would be the constitutional rule that all criminal jury verdicts must be unanimous. The Court needs to reject the exception, because otherwise this case would have to fit it.]

J. Immigration cases.

There were at least seven, and some were very important. But no time to cover them now, especially since it is such a specialized area and one in which I have only surfacy understanding.

K. Miscellaneous others.

There is more, but as my friend Akhil Amar has written, "I am a lover of mercy," *see* n.53 in this law review Essay.

L. Death penalty cases

These all happened on the "shadow docket" (see above), in motions for stays of execution. Justice Sotomayor consistently dissented; and the Biden Administration and Attorney General Merrick Garland has announced a "moratorium" on federal executions, after an unprecedented resumption and number of executions in the last months of the Trump Administration (sigh).

-- Meanwhile, There is a federal death penalty case on the docket for next Term, set for oral argument on October 13: United States v. Tsarnaev (the "Boston Marathon Bomber" case). Whether the Solicitor General will go forward with that case and argument has not yet been announced.

IV. Before we run out of time, "big" cases already on NEXT year's docket:

There are 29 cases already granted for review. The two "biggest" ones are:

-- ***Dobbs*** v. Jackson Women's Health Organization. Constitutional abortion/autonomy rights. The Petition for certiorari was set for **14** "Conferences" at the Court, before being granted. Three questions were presented; the Court's Order granting says "limited to Question 1," which is:

"Whether all pre-viability prohibitions on elective abortions are unconstitutional?"

-- Whether the Justices will actually restrict their analysis to this question is … debatable.

-- Quoting from Mississippi's Petition, the 2018 Mississippi law "allows abortions after 15 weeks gestational age only in medical emergencies or for severe fetal abnormality."

-- ***Corlett*** (N.Y. State Rifle & Pistol Assn v.): Second Amendment and gun control laws. The Court's Order granting certiorari says "Petition GRANTED limited to the following question: **Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment?"**

The individual petitioners here were denied a permit to conceal-carry their guns outside the home, because (New York state said), they "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because they **did not demonstrate a special need for self-defense that distinguished him from the general public."**

-- Note that in both cases, the Justices carefully edited the "Questions Presented."

-- Also, in neither case is the United States a party, nor has any Solicitor General indicated whether the United States will seek to participate (it looks unlikely at this point). Notably, **there is still no Senate-confirmed Solicitor General, or even a nominee.** However, Elizabeth Prelogar, who has been "Acting" SG since January 29, 2021, is viewed as doing an excellent job. Prelogar clerked for, among others, D.C. Circuit Chief judge Merrick Garland, who is currently the Attorney General of the United States. Prelogar (Barchas) was also "Miss Idaho" in 2004.

-- END --