Review of the U.S. Supreme Court's Term 2017-18

Marin County Bar Association -- Wednesday, June 27, 2018

Professor Rory K. Little[1]
UC Hastings College of the Law
littler@uchastings.edu; @RoryLittle

I. Stats: OT 17 sets yet another "low" for output: Only 59(?) signed majority opinions after full briefing and argument. Lowest Output since the Civil War or earlier. About 6½ opinions per Justice – Judges, compare that to your own dockets.

There were also 8 "summary reversals" (cases reversed just on the certiorari pleadings, without full briefing or argument). Some Justice has to write these. (Six additional cases were dismissed without opinion after cert was granted, 4 before oral argument and 2 after.

The Court has already granted 30 cases for review next Term (and more should be granted tomorrow). This is ahead of last year's pace; I think the Court is a bit chagrined by criticism of its low workload.

II. "Headlines"

1. **The Year of the "Punt"?**
   -- See below.* The key word this Term is "narrow" – a Term of "narrow" decisions.
2. **Extremely polarized (like the rest of the country?).**
   -- Nineteen 5-4 decisions. That's 32%! And Kennedy voted with the four "conservatives" in 17. AMK more consistently conservative than in Terms past.
3. **Justice Kagan quietly leading from the side.**
   -- *Masterpiece Cakeshop* and *Gill v. Whitford* concurrences.
   -- Wrote only one dissent (in *Janus*, issued this morning. Read from the bench).
   -- Obscure examples: *Lucia* (7-2: SEC ALJs violate constitutional "Appointments Clause"); *Ortiz* (7-2: simultaneous service of military judge on two judicial bodies not unconstitutional).
4. **Gorsuch has added a strong presence.**
   -- In majority in all but two 5-4 decisions. Wrote 17 total opinions.
5. **Justices Kennedy (and Thomas) are still there.** Today, anyway.
   -- Stay tuned. My know-nothing prediction? Thomas, not Kennedy, retires.

***/ The year of the "Punt."**

Chief Justice Roberts said when confirmed that the Court should decide on the narrowest grounds available. This Term he appears to be leading the Court in that manner.

-- **"Partisan gerrymandering"**: *Gill v. Whitford*: dismissed because "no standing."
   -- *Benisek v. La.*: decided on preliminary injunction grounds.
   -- *Abbott v. Perez*: decided on racial gerrymandering grounds.

-- **Same-sex customer discrimination:** *Masterpiece Cakeshop*: May a state ban merchant discrimination against same-sex customers? Case remanded due to evidence that lower body may have had "hostility to religion."

---

[1] Credit where credit is due: SCOTUSblog.com and its various sub-blogs. Disclosure: Prof. Little is a regular contributor on Criminal Law issues for SCOTUSblog.

-- **Other Punts**: -- *Hughes v. U.S*: Granted on the question of how to apply the "*Marks* test," which says that the "narrowest" opinion in a divided five-Justice majority should control. Avoided it because Sotomayor switched, so merits can now be resolved. (Kennedy 6.3; Roberts dissent).

-- *Azar v. Garza*: "Office of Refugee Resettlement" won't release an undocumented pregnant minor to have an abortion; cased dismissed as "moot" because abortion happened.

-- *U.S. v. Sanchez-Gomez*: Criminal defendants appearing in court while in custody challenged Marshal's "full restraints" (chains) policy in San Diego; case dismissed as moot because defendants pled guilty and were released.

-- *U.S. v. Microsoft*: Well, it actually was Congress that punted. Must U.S. email provider produce subpoenaed emails when stored overseas? Congress enacted CLOUD ("Clarifying Lawful Overseas Use of Data") Act in March 2018, mooting the case right before argument.

III. "Big" Decisions of the past Term?

This is always somewhat "in the eye of the beholder." As always, the Court decided some extremely important cases, even in the "punts."

1. *Trump v. Hawaii* (Roberts) – **third-try "travel ban" Executive Order upheld.**

-- "Following a worldwide multi-agency review," "the President lawfully exercised [his] broad [statutory] discretion to suspend the entry of aliens" from specified countries.

-- Plaintiffs with "an interest in being united with [their] relatives" have standing.

-- "The issue before us is not whether to denounce the [President's anti-Muslim] statements."

-- Final page of majority: *Korematsu* was "gravely wrong" and "'has no place in law under the Constitution'" (quoting Justice Jackson's *Korematsu* dissent).

-- Kennedy concurrence a "warning shot" to Trump? (and non-retirement signal?).

-- Preliminary injunction vacated; remanded for "further proceedings"? (like ***NIFLA*** below)

2. *Masterpiece Cakeshop* (Kennedy) – **Merchant refusal to sell to same-sex customers.**

-- "Our society has come to the recognition that gay persons ... cannot be treated as social outcasts or as inferior in dignity and worth."

-- "**it is a general rule** that [religious and philosophical] objections **do not allow business owners and others in the economy and in society to deny protected persons equal access** to goods and services." (for at least six Justices).

3. *Carpenter v. U.S.* (Roberts) – **Obtaining seven days of "cell-site location information" (CSLI) is a Fourth Amendment "search" subject to warrant requirement.**

-- The "unique nature" of CSLI invokes "great privacy concerns" protected by the 4th A, even though "shared" with third-party cell-provider companies.

-- "We do not express a view on matters not before us." (But there sure are a lot of questions!)

-- **Three other Fourth Amendment decisions:** *Byrd* (rental car driver has rights even if not on rental agreement); *Collins* (police cannot trespass on "curtilage" to examine vehicle without a warrant); *Wesby* (fact-specific probable cause and qualified immunity).

4. *NIFLA v. Becerra* (Thomas) – **California statute requiring posted notices in "pregnancy crisis centers" violates First Amendment.**

-- Throws into question prior First Amendment doctrine. Think of all the "required to post notices" contexts we are familiar with.

-- "We do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." Really?

-- Odd four-Justice "viewpoint discrimination" concurrence; "nice" Breyer dissent for four.

-- **Three other "big" First Amendment decisions:** *Mansky* (ban on polling place "political apparel" vague and overbroad); *Lozman* (arrest in retaliation for speech can be challenged even if there was also probable cause); Janus, below (#6).

5. Three (at least) "big" business law decisions:

-- *South Dakota v. Wayfair* (Kennedy, 5-4, Ginsburg 5th vote; Roberts dissents with 3 "libs").

-- States can collect **sales taxes from out-of-state merchants** even if they have no physical presence in the State (i.e., internet sales companies). *Quill* (1992) overruled.

-- *Murphy v. NCAA* (Alito, 7 ½ - 2 ½): **Sports gambling.** Congress cannot constitutionally order State legislatures not to authorize sports gambling.

-- *Oil States Energy* and *SAS Institute*: "*Inter partes*" review of patents by PTO, without jury trial, is okay. But PTO must decide all of the claims a petitioner challenges.

6. Two "big" labor law decisions:

-- *Janus v. AFSCME* (Alito, 5-4): First Amendment prohibits public-sector unions from collecting any dues from represented non-members. *Abood* (1977) overruled.

-- *Epic Systems Corp. v. Lewis* (Gorsuch, 5-4): Federal Arbitration Act requires that even claims that the Fair Labor Standards Act has been violated, must be arbitrated it employment contract requires arbitration.

7. As usual, about a third (21) of the decisions were criminal/habeas. In addition to the 4th Amendment cases (#3, above), here are a few others:

-- *McCoy v. Louisiana* (Ginsburg, 6-3): Ineffective assistance for defense counsel to concede defendant's guilt to the jury over defendant's "intransigent objection."

-- *Currier v. Virginia* (4½ to 4½; Kennedy's 5th vote limit's Gorsuch's plurality): Defendant who agrees to separate trials on severed counts, cannot later object to second trial on double jeopardy "issue preclusion" grounds.

-- *Marinello v. U.S.* (Breyer, 7-2): Obstruction of tax administration requires that defendant was aware of a specific tax-related proceeding or could reasonably foresee it.

IV. Significant (it looks from here) cert grants for next Term (OT '18):

(Note: The Supreme Court does not grant "easy" cases, even if they sound boring).

A. First, a nerdy Criminal Law Professor's "Dream Term" (do YOU remember 1L criminal Law?)

1. Federal definition of "burglary": *U.S. v. Sims & U.S. v. Stitt*: Does the Armed Career Criminal Act (ACCA)'s definition of "generic burglary" extend to a state law burglary of "nonpermanent or mobile structures adapted or used for overnight habitation"? (triggering 15-year mandatory minimum imprisonment).

2. Federal definition of "robbery": *Stokeling v. U.S.* – Is a robbery requiring only "slight force" under state law sufficient to meet the ACCA's definition of "violent felony"?

3. Eighth Amendment: Is the 8th Amendment's prohibition of "excessive fines" applicable against the States via the Fourteenth Amendment "incorporation" doctrine?

4. **Eighth Amendment:** *Madison v. Alabama* – May the state execute a person with mental disabilities caused by physical problems including multiple strokes, such that he is unable to remember his offense.

5. **Eighth Amendment:** *Bucklew v. Precythe* – How should "method of execution" challenges be proved and reviewed? Mr. Bucklew (in Missouri) has a blood-filled tumor condition that he says could make lethal injection gruesome; he proposes gas chamber execution instead.

B. "Other stuff" (smile).

7. **Antitrust Damages:** *Apple v. Pepper* – Can purchaser sue the seller for treble damages where the seller allegedly overcharged a third-party, who then passed that on to the buyer? Involves Apple allegedly setting super-charge for I-Phone app creators to sell via the Apple "App store." I don't pretend to understand it; but when asked, the SG urged the Court to grant cert.

8. **Non-delegation doctrine:** *Gundy v. U.S.* – Does the federal Sex Offender Registration Act violate the Constitutional "non-delegation doctrine" by giving the Attorney General authority to issue regulations that would apply registration requirements to pre-Act offenders? A total "sleeper" surprise. The Court had denied review of this claim many times prior; Gundy enlisted Jeff Fisher of Stanford after cert was granted.

9. **Environmental law:** *Weyerhaeuser Co. v. U.S. Fish and Wildlife Service* **("the frog case").** Can the FWS designate 150 acres in Louisiana as "critical habitat" when the frog allegedly does not live there and hasn't been seen there for 50 years? And can the FSW decision to not exclude the land from its designation, despite alleged significant economic impact, be judicially reviewed?

10. **Service on a Foreign State**: *Republic of Sudan v. Harrison* – Does service by mail on the foreign State's U.S. mission violate the Vienna Convention doctrine of "mission inviolability"?

11. -- And **another international immunities case**: *Jam v. Int'l Finance Corp.* – do "international organizations have the same immunities as foreign governments?

12. **Federal Arbitration Act:** *New Prime v. Oliveira* – Does exemption for "contracts of employment" apply to independent contractor agreements; and is that an issue reserved for arbitration?

13. **Another FAA case,** *Lamps Plus v. Varela*: state law interpretation that allowed class-actions.

14. And **another**, *Henry Schein v. Archer and White Sales*: may a court decline to enforce an agreement if it finds the claim of arbitrability to be "wholly groundless."

15. **Age Discrimination Employment Act:** Mt. Lemmon Fire District v. Guido – Does the Act's 20-employee minimum for private employers apply to political subdivisions of a state? CA9 said no.

16. **Class Action "cy pres" awards**: *Frank v. Gaos*: Are they allowed?

-- END --