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Civil Cases

Citizens United, *McDonald* Hog Spotlight But '09 Term Offers Much Food for Thought

A pair of landmark decisions that redefined the scope of the First and Second Amendments dominated the 2009–2010 term of the U.S. Supreme Court and overshadowed other cases that, while muted, nonetheless raise important issues for both the legal and business communities.

First, in *Citizens United v. Federal Election Commission*, 78 U.S.L.W. 4078 (U.S. 2010), a holdover from the previous term, the court extended the protections of the First Amendment's Free Speech Clause to corporations and struck down long-standing limitations on independent expenditures meant to influence federal elections.

The 5–4 decision saw the court divided along its well-established political fault line, but also produced something of a role reversal, with the wing of the court generally viewed as conservative—led in this instance by Justice Anthony M. Kennedy—taking an expansive view of civil rights, while the justices generally viewed as liberal—in a dissent penned by retiring Justice John Paul Stevens—argued that the result was contrary to the Framers' intent.

THEMES OF THE 2009-2010 TERM

- Speech: Extension of First Amendment rights to corporations; balancing of speech rights against different interests
- Guns: Extension of Second Amendment to the states
- Arbitration: Endorsement of federal presumption in favor of arbitration; parties' consent is foundation for arbitration agreements
- Hi-Tech: Court puts off important decisions regarding new technologies
- Honest Services: DOJ's white collar weapon of choice dulled

McDonald v. Chicago, 78 U.S.L.W. 4844 (U.S. 2010), issued on the last day of opinions, extended the Second Amendment's right to ''keep and bear arms'' to the states and established the right of self-defense—'' 'the *central component*' of the Second Amendment''—as fundamental to American liberty.

Although the decision was seen as unsurprising following the court's decision in *District of Columbia v. Heller*, 76 U.S.L.W. 4631 (U.S. 2008), the court did not provide significant guidance to the lower courts about what types of regulation will pass constitutional muster going forward. Those who spoke with BNA about the case noted that it may take a long time, and a lot of litigation, before people know exactly where the acceptable boundaries for gun control laws lie.

Activism or Minimalism? For some, the sweeping changes embodied in decisions like *Citizens United* and *McDonald* represent the growing trend of ''conservative activism.''

Harvard Law School professor Michael Klarman, whose scholarship focuses on constitutional history and law, told BNA July 2 that ''*Citizens United* is activist on several different levels.''

Along with the fact that the court avoided several narrow rulings in favor of a broader constitutional decision, the court took a view of the First Amendment that would have been unrecognizable to those who drafted it, Klarman said.

''The people who wrote the First Amendment were not thinking about protecting spending in elections and they certainly weren't thinking about protecting corporations.''

McDonald, insofar as it endorsed the court's vision of an individual right to bear arms as expressed in *Heller*, suffers from the same defect, Klarman said.

''It's based on a very controversial interpretation of the original understanding [of the Second Amendment] and I think it contravenes . . . almost a century-worth of conventional understanding of what the Second Amendment meant.''

Conversely, outside of these two constitutional cases, ''a lot of the other big cases . . . ended up being more whimper than shout,'' Paul M. Smith, a partner with Jenner & Block, Washington, D.C., told BNA July 6. ''A number of them don't do very much.''

Smith, the chair of Jenner's appellate and Supreme Court practice, pointed first to *Bilski v. Kappos*, 78 U.S.L.W. 4802 (U.S. 2010), the highly anticipated patent decision, which upheld the patentability of ''business method patents.''

By rejecting the Federal Circuit's ''machine-or-transformation'' test as too narrow, and then failing to define the outer limits of process patentability, the court actually made the law less clear while not affecting the outcome of the case, Smith noted.

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Similarly, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 78 U.S.L.W. 4766 (U.S. 2010), while the court ruled that the double for-cause removal protection afforded to members of the PCAOB was an unconstitutional violation of separation of powers, they ''did it in the most narrow possible way''—by excising the offending language—which left the PCAOB's authority intact and did not affect the functionality of the 2002 Sarbanes-Oxley Act, Smith said.

However, that is not to say that none of the court's decisions had significant real-world effects.

In *New Process Steel LP v. National Labor Relations Board*, 78 U.S.L.W. 4570 (U.S. 2010), the court concluded that the NLRB—which acted for over two years with only two members and three vacancies—did not have the authority to issue decisions under those circumstances.

Carter G. Phillips, the managing partner of the Washington D.C. office of Sidley Austin, who has argued a total of 66 cases before the Supreme Court, told BNA July 6 that the court's decision puts around 710 NLRB decisions in jeopardy, and it will be interesting to see ''how to put that egg together after you've cooked the omelet and as far as I can tell fed it to people.''

Arbitration Cases Raise Practical Issues. Whether one measures the steps the court took this term in feet or miles, some decisions stood out as potentially important for lawyers in their day-to-day practice.

The court paid particular attention to the issue of arbitration this term, a subject that ''comes up for a lot of attorneys'' and has a ''fairly widespread application,'' Smith noted.

The first arbitration case was *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 78 U.S.L.W. 4328 (U.S. 2010). The court held that ''a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.''

In other words, contractual silence cannot justify the imposition of class arbitration, the court said.

Phillips said the decision makes sense because class arbitration is an ''inherently unwieldy'' process.

''I don't think anybody can seriously believe that two parties entering into an arbitration agreement envision the possibility of class-based arbitration as the way to proceed,'' he said. ''Unless you're going to sit down and draw up an arbitration clause that contains the entirety of [Fed. R. Civ. P. 23], including all of the interpretive nuance that comes from the case law,'' it just doesn't make sense to agree to class arbitration.

The other major arbitration case, *Rent-A-Center West Inc. v. Jackson*, 78 U.S.L.W. 4643 (U.S. 2010), tackled the issue of arbitrability and whether a judge or an arbitrator has the authority to determine the enforceability of an arbitration agreement.

In *Rent-A-Center*, the arbitration agreement—signed as a condition of employment—was effectively two separate agreements: the agreement to arbitrate disputes arising out of the plaintiff's employment, and an ''antecedent agreement'' giving an arbitrator authority to resolve any dispute over the enforceability of the contract, the court said.

Because the plaintiff challenged only the enforceability of the agreement as a whole, as opposed to the delegation provision independently, authority over the dispute went to the arbitrator, the court held.

Having identified the case as one of the top cases of the term, David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, Washington, D.C., told BNA July 7 that whether an arbitrator decides issues of arbitrability is an issue that is frequently litigated.

Rent-A-Center will create clarity so that parties will have greater confidence in knowing the precise rules for deciding arbitrability issues, he said.

Arbitration Cases Continue Next Term. On May 24, the court granted review in *AT&T Mobility LLC v. Concepcion*, No. 09-893, 78 U.S.L.W. 3677, a case that picks up where *Stolt-Nielsen* left off.

Rather than contractual silence, the case involves an express waiver of class arbitration, and whether such a provision can be invalidated using state unconscionability laws—in this case, California law.

''I think that's going to be a very big case,'' Jenner's Smith predicted.

He even ventured a guess at the result, speculating that the court will not allow states to eliminate class waivers based on unconscionability arguments.

''I think that's the most likely outcome,'' given the decision in *Stolt-Nielsen*, he said.

Phillips agreed that *AT&T Mobility* will be an important decision, but noted that even if the court allows states to apply their own unconscionability analysis to invalidate class arbitration waivers, it won't necessarily have a nationwide impact.

''All that's going to mean as a practical matter is that the arbitration clauses aren't going to be enforceable in the states that adopt that unconscionability rule,'' he said. ''Which isn't . . . going to be all 50 states,'' he added, because west coast states like California tend to have much stricter unconscionability standards than the rest of the country.

Cases Worthy of Second Reading. Phillips also identified the antitrust decision in *American Needle Inc. v. National Football League*, 78 U.S.L.W. 4413 (U.S. 2010), as an important decision for attorneys to familiarize themselves with, particularly in the context of structuring joint ventures.

In *American Needle*, the court held that an agreement ''that is necessary or useful to a joint venture'' is still a ''contract, combination . . . or conspiracy,'' for purposes of Section 1 of the Sherman Act, if it ''deprives the marketplace of independent centers of decisionmaking.''

During an end of term briefing hosted by the National Chamber Litigation Center, the U.S. Chamber of Commerce's public policy law firm, Phillips encouraged attorneys to consider whether the product created by a joint venture is different from those produced by the individual members. If not, then *American Needle* could present problems for the parties.

In *Morrison v. National Australia Bank Ltd.*, 78 U.S.L.W. 4700 (U.S. 2010), the court limited the reach of Section 10(b) of the 1934 Securities Exchange Act to transactions involving securities listed on U.S. exchanges, or transactions that physically take place in the United States.

Smith said that attorneys need to be aware that the decision was a major departure from ''the law as it has been applied in the Second Circuit for a long time with respect to how you think about the foreign application of the securities laws.''

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Cases Addressed in This Term in Review

- *American Needle Inc. v. National Football League*
- *Bilski v. Kappos*
- *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Martinez*
- *Citizens United v. Federal Election Commission*
- *Free Enterprise Fund v. Public Company Accounting Oversight Board*
- *Holder v. Humanitarian Law Project*
- *Lewis v. Chicago*
- *McDonald v. Chicago*
- *Merck & Co. v. Reynolds*
- *Mohawk Industries Inc. v. Carpenter*
- *Morrison v. National Australia Bank*
- *New Process Steel LP v. National Labor Relations Board*
- *Ontario, Calif. v. Quon*
- *Rent-A-Center West Inc. v. Jackson*
- *Skilling v. United States*
- *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*
- *United States v. Stevens*

Similarly, Phillips said that, because the court emphasized the broad presumption against the extraterritorial application of federal statutes generally, attorneys should assume that the court will not be sympathetic to arguments applying U.S. laws beyond the borders of the United States.

Taking a different direction, Gene C. Schaerr, chair of the appellate and critical motions practice at Winston & Strawn, Washington, D.C., during a July 9 interview highlighted *Mohawk Industries Inc. v. Carpenter*, 78 U.S.L.W. 4019 (U.S. 2009), as potentially important for attorneys.

In *Mohawk*, the court ruled that orders requiring the disclosure of information that is potentially protected by the attorney-client privilege are not immediately appealable.

Schaerr noted that, in his experience, while review of such orders is fairly easy to obtain in state courts, it's not so simple in the federal system. As a practical matter, *Mohawk* just makes it even more difficult to get trial court rulings on privilege issues overturned.

This leaves litigants with a very difficult choice, Schaerr said. One can either produce the documents in question and hope to win on appeal, or refuse to produce them and risk a contempt charge or some other draconian sanction from the court.

Pro-Business Court? Following the final opinions of this term, the debate also continued over whether the court under Chief Justice John G. Roberts Jr. can correctly be labeled as ''pro-business.''

In terms of the shear number of cases heard by the court, the U.S. Chamber of Commerce flagged 35 cases this term that were of interest to the business community, which, at around 34 percent of the total cases, represented a slight increase from the October 2008 term.

Don't Overlook Judicial Administration.

According to Winston & Strawn's Schaerr, one point many lawyers overlook when developing their arguments in a case, is the impact of those positions on ''judicial administration.''

''It's a theme that comes up again and again, and lawyers tend not to think about the implications,'' Schaerr said.

Appellate judges are very aware of the enormous amount of work that trial judges have to do and of the strain that certain types of cases put on the judicial system as a whole, he said.

Morrison provided a great example of this, because the court made it clear that it was concerned about the strain that allowing foreign plaintiffs to sue in U.S. courts would put on the judicial system, Schaerr said.

In fact, if you look at all the cases this term, ''you'll be hard-pressed to find any'' opinions ''which are likely to increase the work of the federal judiciary,'' he said.

However, this was nowhere near the 53 percent of total cases seen in 2002 under the late Chief Justice William H. Rehnquist.

Thomas C. Goldstein, a partner with Akin Gump Strauss Hauer & Feld, Washington, D.C., and publisher of SCOTUSblog, told BNA July 6 that, particularly in light of the opinions from this term, he felt that the ''pro-business'' label was inappropriate.

''The decisions this term . . . should make people understand that there is balance on the court.''

Referring to a post he authored on SCOTUSblog, Goldstein acknowledged that while *Citizens United* was ''undeniably a pathbreaking case that will enhance the role of corporations in the political process,'' there were many other cases in which the court took a decidedly pro-plaintiff stance or refused to limit claims in areas that have a significant effect on corporations, such as antitrust.

One such case was *Lewis v. Chicago*, 78 U.S.L.W. 4437 (U.S. 2010), which effectively extended the period in which a plaintiff can bring a Title VII discrimination claim against an employer.

This result follows a pattern identified by Robin S. Conrad, executive vice president, NCLC, at the group's end of term briefing. Over the past few terms, Conrad said, the business community has lost more employment discrimination cases than it has won.

Another case that many saw as a defeat for the business community, and a pro-plaintiff ruling, was *Merck & Co. v. Reynolds*, 78 U.S.L.W. 4319 (U.S. 2010). There, the court held that the two-year statute of limitations under Section 10(b) of the 1934 Securities Exchange Act does not begin to run until a reasonably diligent plaintiff would have discovered the facts underlying the violation, including the defendant's intent to manipulate, deceive, or defraud.

Kellogg Huber's Frederick, who represented the plaintiff shareholders in *Merck*, told BNA April 28, ''The court's ruling brings great clarity to the securities fraud statute of limitations analysis, which had become quite confused in recent years.''

Frederick reiterated this view in a later interview with BNA, not only choosing the decision as one of the most significant of the term, but noting that the opinion will be implicated subtly in many future securities cases and may also reinvigorate mortgage-backed securities cases, which had been waning recently.

On the other side of the ledger, as Goldstein noted, *Citizens United* was viewed as coming out very much in favor of business interests, by extending First Amendment protections of political speech to corporations.

At a briefing hosted by the American Constitution Society July 1, Monica Youn, counsel, Brennan Center for Justice, New York, said that the decision represents the majority's ''worldview'' that, in the past, corporations have not been able to exert sufficient influence in American politics.

Although most thought that *Citizens United* was a boon to the business community on its face, many questioned whether or not it will have a practical effect on future elections.

Harvard Law School's Klarman noted that, ''with campaign finance reform there . . . are so many loopholes . . . that I'm not really sure that opening up or closing one avenue for spending money is that effective because there are always other ways you can spend your money.''

Business Issues to Watch. Sidley Austin's Phillips identified two issues of great concern to the business community that have not been addressed by the Roberts court in a meaningful way.

First, Phillips noted that the court's position on punitive damages, post-*State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), remains unclear.

According to Phillips, the court has had at least three separate opportunities to reaffirm *State Farm*'s view that ''in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.''

The court has ducked the issue each time, and the makeup of the court is drastically different now, with only Justices Stephen G. Breyer and Kennedy remaining from the six-justice majority in *State Farm*, but all three dissenters—Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg—still active on the court.

Additionally, Phillips said that he is still waiting for the court to deal with class actions and ''provide additional guidance on the meaning of Rule 23.''

He said that he believes that the recent decision in *Dukes v. Wal-Mart Stores Inc.*, 78 U.S.L.W. 1679 (9th Cir. 2010), in which the en banc Ninth Circuit upheld the certification of a company-wide class of female employees alleging sex discrimination by the retail giant, could be a legitimate candidate for the court to take up this issue.

''If they punt [on *Dukes*], then they are basically sending the message that they don't have any intention of doing this anytime soon,'' Phillips said.

Court Struggles With Technology. While observers debated over what issues the court should tackle in the future, the justices themselves struggled with issues of modern technology and effectively put off any major decisions for another day.

In *Bilski*, Kennedy wrote—although not for a majority of the court—that the issue of patentability had become more complicated in what he referred to as the ''Information Age.''

While Kennedy recognized that inventions such as ''software, advanced diagnostic medicine techniques, and [those] based on linear programming, data compression, and the manipulation of digital signals'' demand a fresh approach to patentability, he refused to wade into the debate and effectively left the issue for the lower courts to decide.

Similarly, in *Ontario, Calif. v. Quon*, 78 U.S.L.W. 4591 (U.S. 2010), the court held that a police officer's Fourth Amendment rights were not violated when the

Possible Congressional Action.

Following the court's decision in *Citizens United*, President Obama, during the state of the union address and in front of several of the justices, called for a congressional response to mitigate what he saw as the detrimental effects of the court's action.

So far, this call to action has resulted in the introduction of S.B. 3295, the Democracy Is Strengthened by Casting Light On Spending in Elections Act (DISCLOSE Act), by Senator Charles E. Schumer (D-N.Y.), as well as companion legislation in the House of Representatives.

Representative Chris Van Hollen (D-Md.), sponsor of the companion bill in the house, H.R. 5175, said in an April 29 press release that the focus of the bill is to ''ensure transparency and disclosure in our electoral process.''

Several of the legal experts interviewed by BNA said that they expect that Congress may also take a closer look at the ''honest services'' fraud statute, which was significantly narrowed by the court in *Skilling v. United States*.

Others, such as Akin Gump's Tom Goldstein, felt that Congress is just too busy to bother with any of the decisions from this term except for *Citizens United*.

''Generally, there is such gridlock in Congress that you don't expect to see anything else come out,'' Goldstein said.

Arnold & Porter's Lisa Blatt agreed with that analysis. She told BNA that she believes Congress has too much on its plate to address any more decisions from this term.

However, she did compare the recent surge in congressional activity to the period following the 1994 ''contract with America,'' which she said spawned legislation that drove the court's docket for years.

Legislation coming out now, such as the health care bill, will determine what the court's docket looks like in future terms, Blatt said.

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SUPREME COURT SCORECARD

Top Cases Selected by Supreme Court Analysts

[redacted]

	LISA S. BLATT	ERWIN CHEMERINSKY	DAVID C. FREDERICK	GREGORY G. GARRE	KENNETH S. GELLER	THOMAS C. GOLDSTEIN	ALLYSON N. HO	MICHAEL KLARMAN	CARTER G. PHILLIPS	GENE C. SCHAERR	PAUL M. SMITH
BERGHUIS v. THOMPKINS		●									
BILSKI v. KAPPOS				●	●	●				●	●
CHRISTIAN LEGAL SOCIETY CHAPTER OF THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF THE LAW v. MARTINEZ	●	●				●		●			
CITIZENS UNITED v. FEDERAL ELECTION COMMISSION	●	●	●	●	●		●	●	●		●
FREE ENTERPRISE FUND v. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD	●						●			●	●
GRAHAM v. FLORIDA		●						●			
HOLDER v. HUMANITARIAN LAW PROJECT				●		●		●			
MCDONALD v. CHICAGO	●	●	●	●	●	●	●	●	●	●	●
MERCK & CO. v. REYNOLDS			●								
NEW PROCESS STEEL LP v. NATIONAL LABOR RELATIONS BOARD									●		
ONTARIO, CALIF. v. QUON					●						
RENT -A- CENTER, WEST INC. v. JACKSON			●								
SALAZAR v. BUONO							●				
SKILLING v. UNITED STATES (HONEST SERVICES CASES)	●		●	●		●	●		●	●	●
STOLT-NIELSEN S.A. v. ANIMALFEEDS INT'L CORP.					●				●		
UNITED STATES v. STEVENS										●	

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Lisa S. Blatt, Arnold & Porter LLP, Washington, D.C.
Erwin Chemerinsky, Dean, School of Law, University of California, Irvine
David C. Frederick, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., Washington, D.C.
Gregory G. Garre, Latham & Watkins LLP, Washington, D.C.
Kenneth S. Geller, Mayer Brown LLP, Washington, D.C.
Thomas C. Goldstein, Akin Gump Strauss Hauer & Feld LLP, Washington, D.C.
Allyson N. Ho, Morgan, Lewis & Bockius LLP, Houston, Texas
Michael Klarman, Kirkland & Ellis Professor of Law, Harvard Law School, Cambridge, Mass.
Carter G. Phillips, Sidley Austin LLP, Washington, D.C.
Gene C. Schaerr, Winston & Strawn LLP, Washington, D.C.
Paul M. Smith, Jenner & Block LLP, Washington, D.C.

city reviewed sexually charged text messages he exchanged with several women on a department issued pager.

However, even at a time when a new president, inheriting two wars and a floundering economy, expresses grave concerns over whether he can keep his Blackberry, the court made its ruling based on ''settled'' Fourth Amendment principles, rather than take a closer look at the intersection between modern technology and constitutional privacy concerns.

Citing the fast-paced nature of technological change, particularly in reference to communications devices, Kennedy again chose the path of least resistance when he said that ''it is preferable to dispose of this case on narrower grounds,'' rather than ''risk[ing] error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.''

Kenneth S. Geller, managing partner of Mayer Brown, and a former deputy solicitor general, told BNA July 8 that *Quon* was just the ''opening wedge,'' in what could turn out to be a significant line of cases for the court.

''There are some cutting-edge issues that the court is going to have to grapple with for years to come,'' Geller said. The ''issue of Fourth Amendment protections in the area of electronic privacy are going to become bigger and bigger,'' he added.

Gregory G. Garre, former U.S. Solicitor General and current global chair of the Supreme Court and appellate practice group at Latham & Watkins, Washington, D.C., saw the decisions not as a sign that the court was apprehensive about dealing with technological issues, but rather a recognition by the justices of the practical implications associated with their pronouncements in an emerging area of law.

What the court says regarding new technologies—especially in the area of communications, such as texting, email, etc.—''will have a dramatic economic effect,'' Garre told BNA July 9. Thus, the court is ''inclined to move slowly.''

Honest Services Fraud and *Skilling*. While the court looked to the future regarding new technologies, it also revisited familiar ground when it analyzed the scope of 18 U.S.C. § 1346—the ''honest services fraud'' statute—in a trio of cases, lead by *Skilling v. United States*, 78 U.S.L.W. 4735 (U.S. 2010).

In *Skilling*, the court held that the statute's broad language prohibiting scams meant to ''deprive another of the intangible right of honest services''—in this case, as that language applied to Jeffrey Skilling, the former CEO of the failed Enron Corp.—must be limited to bribery and kickback schemes to escape being invalidated as unconstitutionally vague.

The court had already dealt with this issue once before in *McNally v. United States*, 583 U.S. 350 (1987), when it overturned the decision of some lower courts to begin applying traditional mail and wire fraud statutes to schemes that went beyond receiving bribes and kickbacks.

In response to *McNally*, Congress enacted the current version of Section 1346, and the Department of Justice ran with it—using the malleable language of the statute as a primary weapon in its white collar enforcement strategy.

Lisa S. Blatt, head of the appellate and Supreme Court practice at Arnold & Porter, Washington, D.C., and a former assistant solicitor general, said that during her time with the Department of Justice she saw Section 1346 ''completely used, overused, and abused.''

''I can't think of a case that has more of an impact on the government than [Skilling],'' Blatt told BNA July 9. ''Every criminal prosecution of a white collar case,'' relies on this statute, she said. It's the ''bread and butter of federal criminal prosecutions.''

Winston & Strawn's Schaerr echoed the importance of honest services fraud to the government.

Honest services fraud had become the ''weapon of choice'' for going after white collar criminals in both the business world and state and local governments, Schaerr told BNA.

The language had become so amorphous that just about anything a prosecutor didn't like became an indictable offense, Schaerr said.

By way of example, Schaerr noted his involvement in the defense of former Illinois Governor George Ryan, who was convicted in 2006 on charges stemming from alleged political corruption.

The indictment against Ryan was ''almost entirely an honest services indictment,'' Schaerr said. ''Aside from a couple of tax violations the government couldn't find anything specific that he had done that violated any law''; it just ''looked unseemly,'' he said. ''So the vast majority of the indictment was . . . premised on honest services fraud.''

While Schaerr was a clerk at the court when the opinion in *McNally* came down, Sidley Austin's Phillips actually argued the case before the court, and he was happy to see the court rein in honest services fraud claims once again.

Now, ''it will be interesting to see if Congress this time around does what it did in 1987 when *McNally* was decided, to see if they are going to change the law in order to try and give prosecutors more discretion, more authority,'' Phillips said.

Laws Subject to First Amendment Scrutiny. While the court tried to salvage as much of the ''honest services fraud'' statute as it could, it was all or nothing for the statutes in two important freedom of speech cases.

In *United States v. Stevens*, 78 U.S.L.W. 4267 (U.S. 2010), the court focused on a federal law aimed curbing the creation and proliferation of ''crush videos,'' depicting animal cruelty through the killing of small animals. The court determined that the law was overbroad and therefore a violation of the First Amendment. The court also refused to create a new category of ''unprotected speech'' for such material.

Schaerr, who filed an amicus brief in support of the respondent's challenge to the federal law, said that the court's decision in *Stevens* shows that it is willing to take a fairly absolutist view of the First Amendment.

By rebuffing the government's argument that it should exclude animal cruelty from speech protected by the First Amendment, the court made it clear that—except for pornography—it is not interested in creating exceptions to the Free Speech Clause, Schaerr said.

However, in *Holder v. Humanitarian Law Project*, 78 U.S.L.W. 4625 (U.S. 2010), the court deferred to Congress, as well as the executive branch, when it upheld a federal statute prohibiting the provision of ''material

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support or resources'' to any group designated as a foreign terrorist organization by the secretary of state.

The 6–3 decision, which was joined by the five generally conservative members of the court—plus Stevens—put a lot of stock in the findings submitted by both Congress and the executive branch that all support for FTO's is ''fungible,'' and may support the more nefarious activities of such organizations despite the donor's intent.

Thus, even seemingly benign activities, such as training groups in humanitarian and international law and providing instruction on how to petition organizations such as the United Nations for relief, run afoul of the statute, the court said.

Latham & Watkin's Garre said that the court's holding was significant because the material support statute has become an ''important part'' of the government's efforts to combat terrorism.

On the other hand, Harvard's Klarman said that he found the decision ''extraordinary.''

''Even during the McCarthy era when the court was pretty deferential to national security concerns, I don't remember the court ever saying that you could punish pure speech that was addressed toward a nonviolent objective simply because it was coordinated with a group that the secretary of state deemed a terrorist organization,'' he said. ''I'm amazed by that.''

Antidiscrimination v. First Amendment. Then, on the final day of opinions, the court decided another First Amendment case, *Christian Legal Society Chapter of University of California, Hastings College of the Law v. Martinez*, 78 U.S.L.W. 4821 (U.S. 2010). It held that the law school's ''all-comers'' policy—requiring student organizations to admit any and all applicants in order to be fully recognized and obtain special benefits from the school—was not a violation of the First Amendment.

The five-justice majority upheld the policy as both reasonable and viewpoint neutral, despite the Christian Legal Society's claim that being forced to admit non-Christians and those who engage in ''unrepentant homosexual conduct'' violated their constitutional right to free speech and association.

Erwin Chemerinsky, founding dean of the University of California, Irvine School of Law, and noted constitutional scholar, applauded the decision.

''As the dean of a law school at a public university, it's a terrific decision,'' Chemerinsky said. All student groups should be open to all students, he added.

From a less personal point of view, Chemerinsky acknowledged that the case presented strong issues and arguments on both sides—pitting antidiscrimination policy against the freedom of association.

As it stands now, it seems that ''so long as a college or university has a consistent antidiscrimination policy, an all-comers policy, it can enforce that,'' Chemerinsky explained. Going forward, litigation on this topic will involve as-applied challenges alleging that institutions have not enforced their all-comers policy in an even-handed manner, he said.

Dissenting, Justice Samuel A. Alito Jr. said that the majority's opinion was offensive to free speech precedent protecting unpopular opinions, and rested on the notion that there is ''no freedom for expression that offends prevailing standards of political correctness in our country's institutions of higher learning.''

Klarman found Alito's dissent rather baffling when compared to the majority's opinion in *Humanitarian Law Project*, which Alito joined.

''I . . . find it mind-boggling that Justice Alito thinks that the First Amendment protects the ability of a Christian organization to exclude gays, but it doesn't protect somebody's pure speech advocating a perfectly legal objective because it is deemed to be in conjunction with . . . a terrorist organization,'' Klarman said. To say that the *Christian Legal Society* majority is weakening First Amendment jurisprudence in light of the *Humanitarian Law Project* decision, is a bit like Chicken Little claiming that the sky is falling, he added.

''It's all about balance,'' Chemerinsky explained when asked about this comparison. While Alito seems to give more weight to freedom of speech than antidiscrimination concerns, issues of national security seem to trump First Amendment issues, he said.

''Yes, facts matter,'' Arnold & Porter's Blatt exclaimed.

In these two cases, Alito saw the plaintiffs very differently. ''One was a group of people who wanted to help

Justice Stevens Retires.

In recent months, those who knew Justice Stevens, both professionally and personally, discussed his departure from the court with a healthy mix of admiration and sentimentality, proving that the third-longest serving justice of all time will be missed by those with ties to the court.

Speaking at the NCLC briefing, Sidley Austin's Phillips called Stevens' retirement a ''big change'' and praised the justice as the best hypothetical questioner on the court, who asked his often pointed and insightful questions with congeniality—even ''with a knife in your back.''

Amanda C. Leiter, a professor at Catholic University's law school, Washington, D.C., and a former Stevens clerk, told the audience at a National Law Journal July 7 panel discussion that the foundation of Stevens' judicial philosophy rested on both deference to the elected branches of government, but also the willingness to question whether their actions were legitimate exercises of political power.

As for the possibility that Elena Kagan will be confirmed by the Senate to fill the seat left by Stevens, most seem to feel that while she remains a mystery in terms of her substantive views, she will inevitably succeed as a Supreme Court justice.

''She's not an easy person to read,'' Jenner's Smith told BNA. I can imagine scenarios under which she becomes more progressive or less.'' However, Smith did predict that she would ''be a very strong justice.''

Kellogg's Frederick said that Kagan will make a ''wonderful addition'' to the court. She ''has a personality that is effervescent,'' and ''will bring great spirit to the court,'' he added.

terrorists and one was a group that believed in worship,'' Blatt said. ''I don't find that hard to understand at all.''

And it's not just Alito. The facts are important to all of the justices, Blatt said. In that sense, *Christian Legal Society* revealed something very important about how the Supreme Court works and makes decisions, Blatt pointed out.

''They're going to go through the law, to analyze it, but at the end of the day didn't they kind of come out how you would come out at your dinner table without going through the law,'' she said. ''Facts definitely matter.''

BY TOM P. TAYLOR

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