



Association of American Law Schools

SECTION ON FEDERAL COURTS

SECTION NEWSLETTER

November, 2010

**2011 Annual Meeting
Program**

The Section will meet on Saturday, January 8, 2011 at 8:30 a.m. This year's topic is Official Immunity and the Roberts Court. Panelists include Tom Lee (Fordham), Scott Nelson of Public Citizen, former Alabama Solicitor General Kevin Newsom, now with Bradley, Arant, Boult, Cummings LLP in Birmingham, and Jim Pfander (Northwestern). Program chair Tom Lee (Fordham) will also moderate.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2009 Term, followed by descriptions of cases awaiting review in the October 2010 Term that appear to present Federal Courts issues.

Decided in the October 2009 Term

***Alabama v. North Carolina*, 130 S.Ct. 2295 (2010)**

The Court heard this case under its original jurisdiction. It arose out of a dispute about North Carolina's participation in the Southeast Compact, which set forth a plan for providing regional facilities for the safe disposal of low level radioactive waste. The dispute centered around the question of how the governing commission that the Compact created and the state that were parties to the Compact would share the costs of getting a license for a facility to be located in North Carolina.

Justice Scalia's majority opinion extensively analyzes the precise terms of the Compact in concluding that North Carolina had no obligation to shoulder all remaining costs of getting a license after the Commission declined to allocate any more funds for the license project.

There were five counts in the complaint. The first two asserted damages claims for breach of the Compact. The last three rested on theories of unjust enrichment, promissory estoppel, and money-had-and-received, and therefore did not rest on the Compact.

For Federal Courts purposes, there are two significant aspects to the case. First, the plaintiffs (the Commission and the state parties to the Compact other than North Carolina) argued that the Compact implicitly included an obligation "of good faith and fair dealing." The Court refused to read such an obligation into the Compact. Justice Scalia pointed out that the Compact was itself a federal statute and opined that the federal courts are without power to add terms to a statute. This part of his discussion demonstrated the Court's extreme reluctance to get involved in a multi-state dispute based on an interstate compact approved by the political branches of both the federal and the state governments.

The most interesting part of the case for Federal Courts purposes involved the Eleventh Amendment. North Carolina, the defendant, argued that the Eleventh

Amendment prohibited a federal action against it with the Southeast Compact Commission as a plaintiff. As to the first two counts of the complaint, the Special Master, relying on *Arizona v. California*, 460 U.S. 605 (1983), had ruled that the Eleventh Amendment did not bar the Commission's participation as a plaintiff in the action because it sought only to assert claims and demand relief identical to those sought by the states. On the remaining three counts, the Special Master had deferred his ruling.

The Court endorsed both aspects of the Special Master's ruling. As to the first two counts, it affirmed because of the "entire overlap]" of claims, finding that the Commission's claim for restitution of project advance payments was wholly derivative of the states' claims, the Court rejected North Carolina's argument that the repayment of project advances sought by the Commission did not overlap the states' claims.

With respect to the last three counts, the Court noted that it was conceivable that there was not complete overlap but that, as the Special Master had ruled, it was necessary to have further development of the merits of the dispute in order to reach a conclusion. The Court approved his deferral of that part of the Eleventh Amendment decision.

***Beard v. Kindler*, 130 S.Ct. 612 (2009)**

A state law that permits but does not require a state court to refuse to entertain a habeas claim because the prisoner has escaped can be an adequate and independent state ground enforceable on federal habeas review, notwithstanding the discretionary nature of the determination.

***Granite Rock Co. v. International Brotherhood of Teamsters*, No. 08-1214**

The district court has jurisdiction to decide whether the parties formed a collective bargaining agreement subject to arbitration where the parties dispute formation but do not challenge the arbitration clause aside from asserting its inapplicability before existence of the contract

is established. Taft-Hartley Act § 301(a) does not support recognizing a new cause of action permitting the employer to claim against an international union not a signatory to the contract but alleged to have displaced the local signatory and caused a strike in violation of the agreement.

***Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010)**

The nerve-center test is the appropriate measure for determining a corporation's principal place of business under 28 U.S.C. § 1332(c).

***Holland v. Florida*, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)**

Habeas counsel's late filing of a petition despite petitioner's repeated instructions to him to do so entitles the petitioner to equitable tolling of 28 U.S.C. § 2244(d)(1)(A)'s time limitation. (There is a certain relief in knowing that there are at least *some* things that counsel can do that are so egregious that they do not cut off the client's right to seek relief from his conviction—and his counsel.)

***Hui v. Castaneda*, 130 S.Ct. 1845, 176 L.Ed.2d 703 (2010)**

Section 233(a) of the Federal Torts Claims Act, enacted before *Bivens*, makes the FTCA the exclusive remedy for medical malpractice claims against Public Health Service personnel. That exclusivity bars *Bivens* claims against PHS personnel even for constitutional violations committed while in the scope of their employment.

***Johnson v. United States*, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)**

The Florida Supreme Court held that Johnson's felony conviction for criminal battery under Florida law, which requires at least "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other," did not include use or threatened use of physical force as an element because the offense was charged as a felony only because of Johnson's previous conviction for misdemeanor battery, and misdemeanor battery was not a "forcible felony" within the

meaning of Florida's sentence-enhancement law.

The Supreme Court held that, for purposes of the federal Armed Career Criminal Act, the Florida determination that Johnson's felony battery conviction was not forcible was not binding on the federal courts because the meaning of ACCA's "physical force" is a matter of federal, not state, law. However, the Court also held that the federal courts were bound by Florida's interpretation of its battery statute as requiring any touching, no matter how slight. Because the majority concluded that the sentencing District Court had no basis for concluding that Johnson's battery conviction involved anything more than a slight touch, it found that such a touch did not satisfy the federal term "physical force" as used in ACCA and so set aside Johnson's enhanced sentence.

***Kiyemba v. Obama*, 130 S.Ct. 1235 (2010)**

This case originally presented the question of whether federal habeas jurisdiction, in light of *Boumediene*, nonetheless not entitle the federal court to order the release of aliens held indefinitely by the executive when release into the United States is the only possible remedy, given that only the political branches have constitutional authority to determine the admissibility of aliens. Subsequent to the grant of certiorari, however, each of the detainees received at least one offer of resettlement in another country, and all but five accepted. The Court noted that this change in facts might affect the ultimate issue and, because the lower courts had not ruled in light of the new facts, vacated the judgment and remanded for further proceedings.

***Kucana v. Holder*, 130 S.Ct. 827 (2010)**

The jurisdiction-stripping provision of 8 U.S.C. § 1252(a)(2)(B)(ii) does not prevent the federal courts from reviewing a Board of Immigration Appeals discretionary refusal to reopen an asylum case in light of changed facts. The United States reversed its position in this case at the

certiorari stage, refusing to defend the Seventh Circuit's decision to the contrary. The Court appointed an *amicus* to defend that decision. That didn't seem to help.

***Magwood v. Patterson*, 130 S. Ct. 2788 (2010)**

A state prisoner resentenced pursuant to federal habeas relief may challenge the new sentence on grounds on which he could have challenged his now-vacated first sentence. The second sentence is a new judgment, and a habeas challenge to it is not a "second or successive" petition under 28 U.S.C. § 2244(b). The Court split 5-4, with Justice Kennedy writing a dissent joined by the Chief Justice and Justices Ginsburg and Alito. Justice Thomas wrote the majority opinion, joined by Justice Scalia in full and by Justices Breyer, Sotomayor and Stevens except as to Part IV-B.

***Mohawk Industries Inc. v. Carpenter*, 130 S.Ct. 599 (2009)**

The collateral-order doctrine does not permit an interlocutory appeal of a district court order finding a waiver of attorney-client privilege and compelling production of otherwise privileged materials.

***Reed Elsevier Inc. v. Muchnick*, 130 S.Ct. 1237, 176 L.Ed.2d 17 (2010)**

Title 17 U.S.C. § 411(a) does not restrict federal subject matter jurisdiction over copyright actions when it states that "no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." The Second Circuit had vacated an approved settlement of a class action where the class included some authors who had complied with § 411(a) and some who had not.

The Supreme Court held that the district court had jurisdiction both to certify the class and to approve the settlement, ruling that the registration requirement, though a prerequisite to stating a claim, was not directed at the courts' subject matter jurisdiction. Although Muchnick and some other class members objected to

the settlement, no party was willing to defend the Second Circuit's decision. The Court appointed an *amicus* to do so.

***Shady Grove Orthopedic Associates PA v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010)**

The fact that state law precludes plaintiffs from maintaining a state-created claim as a class action does not also prevent federal courts hearing such a claim as a class action under Rule 23, and Rule 23, thus construed, does not violate the Rules Enabling Act.

That was the holding, but it hardly expresses the disarray in which the Court now finds itself on how to handle Rules-Enabling-Act challenges. Justice Scalia wrote the lead opinion, in which five Justices agreed that there was unavoidable conflict between the state and federal rules and that the federal rule should prevail. However, Justice Stevens did not concur in Justice Scalia's subsequent REA analysis, writing separately, and Justice Sotomayor did not join that part of the analysis but also did not explain why she did not join. Justice Ginsburg wrote a lengthy dissent for the remaining four Members.

Justice Scalia approached the question by looking only at whether Federal Rule 23 was procedural or whether it attempted to affect substantive rights. He relied on *Sibbach* and *Murphree* and concluded that Rule 23 is no more than a method for adjudicating claims and thus procedural.

Justice Stevens's REA analysis began with the state rule. He concluded that the state rule that Rule 23 trumped was procedural and that Rule 23 therefore did not violate REA.

Justice Ginsburg took a much more deferential approach to the state's interest. She looked beyond her colleagues' characterizations of the state and federal rules and argued that the majority's position allowed the federal courts to create a substantive result—a multimillion class action judgment—that the state had clearly forbidden. She regarded the state

rule as substantive, intentionally limiting the amount of damages available in the action, and therefore not in conflict with Rule 23, which contains no damage limitation. She relied heavily on her majority opinion in *Gasperini*, which had found a part of the state rule to be a substantive limitation on recovery.

There is thus a serious split on the Court about how even to approach cases in which there is an REA issue. Justice Stevens and Justice Ginsburg's group of dissenters wanted to look closely at the state rule involved, making five Justices who preferred that approach. Justice Stevens is now gone, of course, and Justice Kagan's position is unknown. Meanwhile, Justice Scalia had only two supporters, the Chief Justice and Justice Thomas, for looking only at the characteristics of the federal rule. Justice Sotomayor's decision not to join the REA analysis of Justice Scalia's opinion without indicating why leaves her position as unknown as Justice Kagan's. Perhaps the only thing clear after *Shady Grove* is that the Court will have to revisit the question of how to approach REA challenges because, as Justice Scalia pointed out with respect to the Court's fractured decision in *Pennsylvania v. Union Gas*, the decision is inherently unstable.

Granted Certiorari

***Astra USA Inc. v. Santa Clara County*, No. 09-1273**

The federal government enters into statutorily required contracts with drug companies that contain discount provisions for some federally funded medical clinics. The statute requiring the contracts does not provide a private right of action for the clinics in the event that the drug companies overcharge them in violation of the underlying contracts. Do the clinics, as intended third-party beneficiaries, have a common-law private right of action under the contracts?

***Berghuis v. Smith*, No. 08-1402**

In a federal habeas challenge to a state criminal conviction, the Sixth Circuit ruled that the Michigan Supreme Court

has ignored clearly established Supreme Court precedent with respect to whether the venire was properly representative (a fair cross-section) of the community. The Circuit ruled that continuing significant disparity that has a disproportionate impact on a minority group violates the Sixth Amendment even in the absence of systematic exclusion *per se*. A unanimous Court held that the Sixth Circuit erred in applying that standard, which the Supreme Court had never articulated and which several circuits had rejected.

***Connick v. Thompson*, No. 09-571**

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton, Ohio v. Harris* and *Board of County Commissioners v. Brown*?

***Harrington v. Richter*, No. 09-587**

1) In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt?
(2) Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland*? Note that the Court directed briefing and argument of the second issue.

***Los Angeles County v. Humphries*, No. 09-350**

Are claims for declaratory relief against a local public entity subject to the requirement of *Monell*, that the plaintiff demonstrate that the constitutional violation was the result of a policy, custom, or practice attributable to the local public entity, as determined by the First, Second, Fourth, and Eleventh Circuits, or are such claims exempt from *Monell's* requirement,

as determined by the Ninth Circuit? Note that Justice Kagan recused herself

***Ortiz v. Jordan*, No. 09-937**

Where defendants unsuccessfully sought summary judgment on the grounds of qualified immunity, may they appeal after verdict on the ground that the trial court should have granted summary judgment, even though they did not seek an interlocutory appeal of the summary judgment ruling under 28 U.S.C. § 1292? Note that if the Court rules that they cannot, the ruling will have potentially strong implications with respect to seeking Supreme Court review under 28 U.S.C. § 1257 before all proceedings in the case in the state courts are complete. In that context, consider *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

***Renico v. Lett*, No. 09-338**

In a federal habeas case, did the Sixth Circuit err in concluding that the Michigan Supreme Court failed to apply a clearly established Supreme Court rule when it denied relief on double jeopardy grounds after a mistrial granted because the foreperson of the jury told the trial court that the jury would not be able to reach a verdict?

***Salazar v. Buono*, No. 08-472**

Does a party have standing to challenge the display of a cross on federal public land when he does not object to the cross *per se* but rather to the Mojave National Preserve's refusal to permit displays of other symbols? If the party had standing initially, does Congress's transfer of the land to private hands remove the case from proper consideration by the federal courts?

***Skinner v. Switzer*, No. 09-9000**

May a convicted prisoner bring a § 1983 claim seeking access to biological evidence for DNA testing, or must he seek federal habeas relief instead?

***Smith v. Bayer Corp.*, No. 09-1205**

After a multidistrict court has denied certification of a class, may it enjoin an attempt to certify the class in a state court

under the relitigation exception of 28 U.S.C. § 2283?

Smith v. Spisak, No. 08-724

Did granting relief to habeas petitioner based on allegedly deficient performance of counsel and improper jury instruction with respect to the need for jury unanimity in deciding that a particular factor was mitigating violate the AEDPA when the state supreme court on direct review had rejected petitioner's *Strickland* claim?

Sossamon v. Texas, No. 08-1438

May an individual seek damages against a state or state official pursuant to the Religious Land Use and Institutionalized Persons Act, which specifically provides for "appropriate relief against a government"?

Stern v. Marshall, No. 10-179

Can a bankruptcy judge enter final judgment on a compulsory counterclaim?

Turner v. Price, No. 10-10

An indigent defendant in a family court proceeding for failure to comply with a child support order received a conditional sentence of one year in prison for civil contempt, the state courts ruling that he was not entitled to appointed counsel to represent him on the contempt charge before sentencing. Does the Supreme Court have jurisdiction to review the decision of the South Carolina Supreme Court in light of the fact that the defendant can purge himself of contempt at any time before the completion of his sentence by paying the amount owed?

United States v. Tohono O'odham Nation, No. 09-846

Does the Court of Federal Claims lack jurisdiction under 28 U.S.C. § 1500 over an action when the plaintiff, claiming violation of fiduciary obligations, has a substantially similar action pending in the United States District Court seeking overlapping relief?

Wall v. Kholi, No. 09-868

Is a plea for leniency sentence-reduction motion in state court an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), tolling AEDPA's one-year limitation period for habeas petitions?

Wood v. Allen, No. 08-9156

Was a state post-conviction court's review an unreasonable determination of the facts when it decided that trial counsel's tactical decisions of what witnesses to call during the capital sentencing phase were reasonable in light of certain material in the record that petitioner argues conflicts with other material in the record that the state court did not consider?

Comments, Questions, Submissions

This newsletter was prepared by Don Doernberg (Pace) and Amanda Frost (American). Anyone who would like to contribute to (or do entirely) a future newsletter should contact Tom Lee, Fordham University School of Law, Program Chair of the Section for 2010-11, at (212) 636-6728, ThLee@law.fordham.edu, or Don Doernberg, Pace University School of Law, 78 North Broadway, White Plains, NY 10603-3796. Telephone: (914) 422-4368; e-mail DLD@law.pace.edu so that your name can be placed in nomination at the 2010 meeting in New Orleans. Please make the contact as quickly as reasonably possible.

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