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FEDERAL COURTS SECTION NEWSLETTER

February 1, 2016

2016 Annual Meeting Program

During this year's business meeting, the Section adopted the proposal for the Daniel J. Meltzer Award, to be given not more often than every three years, to "a professor of Federal Courts who exemplifies Professor Meltzer's excellence in teaching, careful and ground-breaking scholarship, engagement in issues of public importance, generosity as a colleague, and overall contribution to the field of Federal Courts."

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2015 Term, followed by descriptions of cases awaiting review and cases in which the Court has heard argument that appear to present Federal Courts issues. Material new in this issue of the newsletter appears in blue type, as do hyperlinks to lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2015 Term

***Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (Argument transcript)**

A sharply divided Court held that an unaccepted offer of judgment pursuant to Rule 68 does not moot the plaintiff's case, adopting Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). A contractor who sent unsolicited marketing text messages on behalf of the Navy, allegedly in violation of the Telephone Consumer Protection Act, lacks derivative sovereign immunity.

***Montgomery v. Louisiana*, 2016 WL 280758 (U.S. Jan. 25, 2016) (Argument transcript)**

Miller v. Alabama, 132 S. Ct. 2455 (2012), adopted a new substantive rule of constitutional law that applies retroactively in collateral review proceedings. The Court had directed the parties to brief and argue whether the Supreme Court had jurisdiction to review the Louisiana Supreme Court's refusal to give retroac-

tive effect to *Miller* in state collateral-review proceedings.

> If, however, the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court . . . States may not disregard a controlling, constitutional command in their own courts.

So much for former Attorney General Ed Meese's declaration during the Reagan administration that Supreme Court decisions bind only the parties to the case.

The Court had appointed *amicus* to argue against jurisdiction but ultimately rejected *amicus*'s argument that, although states clearly had to follow new constitutional rules for cases on direct review, collateral review was different because the Court's exceptions to *Teague*'s general disapproval of retroactivity "are based in statutory equitable discretion rather than the Constitution." Justice Kennedy's majority opinion distinguished *Teague*'s effect on new procedural rules of constitutional law, noting that, "A conviction or sentence imposed in violation of a substantive rule is not just erroneous but contrary to law and, as a result, void."

***Mullenix v. Luna*, 136 S. Ct. 305 (2015)**

A *per curiam* Court, Justice Sotomayor dissenting, summarily reversed a judgment in favor of the estate of a motorist whom state trooper Mullenix killed when the motorist was fleeing from arrest. The district court and the Fifth Circuit had found that under the Court's clearly established precedents, the use of deadly force in the circumstances was unreasonable. The majority reversed and chided the lower courts for having addressed to case at too great a level of generality, finding that the constitutional rule the Fifth Circuit applied was not "beyond debate."

Justice Sotomayor's dissent painted a different picture:

> Chadrin Mullenix fired six rounds in the dark at a car traveling 85 miles per hour. He did so without any training in that tactic, against the wait order of his superior officer, and less than a second before the car hit spike strips deployed to stop it. Mullenix's rogue conduct killed the driver, Israel Leija, Jr. Because it was clearly established under the Fourth Amendment that an officer in Mullenix's position should not have fired the shots, I respectfully dissent from the grant of summary reversal.

***Shapiro v. McManus*, 2015 WL 8074453 (U.S. Dec. 8, 2015) (Argument transcript)**

A unanimous Court ruled that a district judge may not dismiss an action challenging apportionment of congressional districts under Fed. R. Civ. P. 12(b)(6), but must instead notify the chief judge of the need to convene a three-judge court pursuant to 28 U.S.C. § 2284. Dismissal would have been permissible if there were no subject-matter jurisdiction, but the district court's dismissal under 12(b)(6) was a decision on the merits, in contravention of § 2284(b)(3).

Cases Argued

***Americold Realty Trust v. ConAgra Foods, Inc.*, No. 14-1382 (Decision below: 776 F.3d 1175 (10th Cir. 2015) (Argument Transcript)**

(This really is more of a civil procedure case than one for federal courts, but I'm throwing it in to mislead folks into thinking that I actually do something.) Does a trust have the citizenships of the trustees, that of the settlor, or those of the beneficiaries? The Tenth Circuit held, in

conflict with several other circuits, that the beneficiaries' citizenships determined the trust's citizenship for diversity purposes.

***California Franchise Tax Board v. Hyatt*, No. 14-1175 (Decision below: 335 P.3d 125 (Nev. 2014)) (Argument transcript)**

1. May Nevada refuse to extend its own sovereign immunity to States haled into Nevada's courts? 2. Should the Court overrule *Nevada v. Hall*, 440 U.S. 410 (1979)?

***Duncan v. Owens*, No. 14-1458 (Decision below: 781 F.3d 360 (7th Cir. 2015)) (Argument transcript)**

Was the Seventh Circuit's grant of habeas relief consistent with 28 U.S.C. § 2254 as elaborated by the Court in a long line of decisions in the absence of "clearly established precedent from this Court"?

***Evenwel v. Abbot*, No. 14-940 (Decision below: 2014 WL 5780507 (W.D. Tex. 2014)) (Argument transcript)**

Does the "one-person, one-vote" principle of the Fourteenth Amendment create a judicially enforceable right ensuring that the districting process does not deny voters an equal vote?

***Merrill Lynch v. Manning*, No. 14-1132 (Decision below: 772 F.3d 158 (3d Cir. 2014)) (Argument transcript)**

Does § 27 of the Securities Exchange Act of 1934 provide federal jurisdiction over state-law claims attempting to establish liability based on violations of the Act or its regulations or to enforce duties that they create?

***Spokeo, Inc. v. Robins*, No. 13-1339 (Decision below: 742 F.3d 409 (9th Cir. 2014) (Argument transcript)**

May Congress confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?

This case potentially raises a familiar question: whether anyone has standing to enforce a statute (in this case the Fair Credit Reporting Act) in the absence of "any actual or imminent harm." Robins alleged that Spokeo's web site, which contains "contact data, marital status, age, occupation, economic health and wealth level," contained false information about him, although he could not identify any particular harm flowing from the misinformation of which he complained. The case is clearly not a generalized grievance case, but it calls to mind *Paul v. Davis*, 424 U.S. 693 (1976), in which the Court held that there is no liberty or property interest in one's reputation cognizable under the Fourteenth Amendment. Here, however, Congress has created a statutory right to reasonably accurate information enforceable by the individual. Title 28 U.S.C. § 1681n creates a private right of action, allowing damages for (§ 1681(1)(A)) "any actual damages" or (§ 1681n(2)) punitive damages. The Court could duck the question by construing the statute to require actual damages as a prerequisite to punitive damages, but the wording of the statute is at least ambiguous on that point.

Granted Certiorari

***Microsoft Corp. v. Baker*, No. 15-457 (Decision below: 797 F.3d 607 (9th Cir. 2015)**

If the named plaintiffs in an action seeking class certification voluntarily dismiss their claims with prejudice, is the district court's subsequent order denying class certification appealable under Article III and 28 U.S.C. § 1291?

***Ross v. Blake*, No. 15-339 (Decision below: 787 F3d 693 (4th Cir. 2015)**

Is there a common-law "special circumstances" exception to PLRA's exhaustion requirement if the inmate believes that he satisfied the exhaustion requirement by participating in the prison's internal investigation?

***United States v. Texas*, No. 15-674 (Decision below: 809 F.3d 134 (5th Cir. 2015)**

The Secretary of Homeland Security issued a guidance memorandum to his subordinates mandating a process for considering deferred action for certain aliens whom the United States would otherwise deport. Texas has voluntarily provided subsidies to aliens with deferred action. The case presents four issues, the first of particular importance for federal-courts purposes and one of importance for constitutional-law purposes. (1) Does Texas have standing to challenge the guidance memorandum on the ground that it will lead to more aliens in that category? (2) Is the memorandum arbitrary and capricious? (3) Do the APA's notice-and-comment procedures apply to issuance of the memorandum? (4) Does the memorandum violate the Take Care Clause, U.S. CONST. art. II, § 3?

Comments, Questions, Submissions

Don Doernberg (Pace) prepared this newsletter. Anyone who would like to contribute to (or do entirely) future newsletters should contact Amanda Tyler, (Boalt), 2016 Chair of the Section, at (510) 664-4986, mailto:atyler@law.berkeley.edu, Bradford Clark, 2016 Program Chair of the Section, at GWU, (202-994-2073, bclark@law.gwu.edu, or Don Doernberg, (Pace), 2016 Section Secretary, at (914) 422-4368, mailto:DLD@law.pace.edu so that your name can be placed in nomination at the 2016 meeting in New York. Please make the contact as quickly as reasonably possible.

NOTICE

This newsletter is a forum for the exchange of points of view. Opinions expressed here are not necessarily those of the section and do not necessarily represent the position of the Association of American Law Schools.