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FEDERAL COURTS SECTION NEWSLETTER

April 16, 2019

2020 Annual Meeting Program

Federal Courts at the Border

In recent years growing dysfunction in the United States' immigration system has put pressure upon the federal courts to play a central role in lawmaking at the nation's border. Dysfunction within the administrative system of immigration adjudication, for example, has lead to strain upon the Article III courts. Disputes about asylum and refugee policy, the Trump Administration's border wall, cross-border shootings, and the application of the Suspension Clause to undocumented immigrants have underscored the difficult role of federal courts at the border. This panel will consider three questions about that role. First, it will consider federal courts doctrines, such as doctrines of standing, implied rights of action, and statutory preclusion of judicial review, that bear upon the availability of judicial review at the border, asking whether and to what extent those doctrines create zones free from judicial oversight. Second, the panel will ask in what ways recent challenges to immigration law and policy have shaped the doctrines of federal courts law. Third, the panel will look to see what light disputes at the border may shed upon the design of—and practical constraints upon—the federal courts system.

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2018 Term, followed by descriptions of cases awaiting review that appear to present Federal-Courts issues. Material new in this issue of the newsletter appears in blue type. There are hyperlinks to lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2018 Term

Cases Argued

***California Franchise Tax Board v. Hyatt*, No. 17-1299 (Decision below: 407 P.3d 717 (Ca. 2017)) (Argued Jan. 9, 2019)**

Should the Court overrule *Nevada v. Hall*, 440 U.S. 410 (1979), which held that neither the Eleventh Amendment nor Article III nor the doctrine disallowing non-consensual suit against a sovereign in its own courts prevents a state's courts from hearing a case against another state?

***Knick v. Township of Scott*, No. 17 647 (Decision below: 862 F.3d 310 (3d Cir. 2017)) (Argued Jan. 16, 2019)**

"Should the Court reconsider the por tion of *Williamson County Regional Plan ning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), requiring property owners to exhaust state court remedies to ripen federal takings claims . . .?"

***Lamone v. Benisek*, No. 18-726 (Decision below: 348 F. Supp. 3d 493 (D. Md. 2018) (Argument transcript) (Argued with *Rucho v. Common Cause, infra*)**

The Maryland legislature enacted a redistricting plan in the wake of the 2010 census, which revealed that the Sixth District contained approximately ten thousand more voters than it should have. Rather than moving approximately ten thousand voters out of the Sixth District, the plan redrew district boundaries, removing approximately sixty-six thousand republicans and adding approximately twenty-four thousand democrats. The plan reduced the number of republican-majority districts from two to one. Prior to the redistricting, the Sixth District was the strongest republican district in Maryland. Afterwards, it was strongly democratic. Many of the voters removed from the Sixth District were placed in the Eighth District, a strong democratic district that remained strong even after redistricting. The plaintiffs filed an action claiming that the redistricting plan retaliated against republican voters in the Sixth District for the exercise of their First Amendment rights of political association. The federal-courts question in this case is whether there are judicially manageable standards to evaluate plaintiffs' First Amendment challenge to Maryland's redistricting plan.

***Rucho v. Common Cause*, No. 18-422 (Decision below: 318 F. Supp. 3d 777 (M.D.N. Car. 2018)) (Argument transcript) (Argued with *Lamone v. Benisek, supra*)**

North Carolina enacted a redistricting plan in 2011, which a federal court invalidated as an unconstitutional racial gerrymander. State legislators enacted a second plan in 2016, which plaintiffs then challenged as an unconstitutional partisan gerrymander. Plaintiffs argued that the 2016 plan diluted non-republican votes and burdened associational rights of non-republican voters to entrench republican control of a majority of the state's congressional districts, in violation of the Equal Protection Clause and the First Amendment. On appeal, the Supreme Court remanded for reconsideration in light of its decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), which addressed the requirements for standing to raise a partisan gerrymandering claim. On remand, the three-judge district court ruled that at least one plaintiff in each of the state's thirteen districts had standing under *Gill*, that the case was justiciable, and that the 2016 plan was an unconstitutional partisan gerrymander. The federal-courts issues in this case are whether the plaintiffs have standing and whether there are judicially manageable standards to evaluate plaintiff's Equal Protection and First Amendment challenges to the state's redistricting plan.

***Thacker v. TVA*, No. 17-1201 (Decision below: 868 F.3d 979 (11th Cir. 2017)) (Argument transcript)**

Did the Eleventh Circuit err in applying the "discretionary-function exemption" to grant immunity to the Tennessee Valley Authority, thereby limiting the "sue and be sued" sovereign immunity waiver contained in the Tennessee Valley Authority Act.

Granted Certiorari

***Fort Bend County v. Davis*, No. 18-525 (Decision below: 893 F.3d 300 (5th Cir. 2018)) (Argument date: Apr. 22, 2019)**

Is "Title VII's administrative exhaustion requirement . . . a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held"?

***Gray v. Wilkie*, No. 17-1679 (Decision below: 875 F.3d 1102))**

"[Does] the Federal Circuit ha[ve] jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting VA's definitive interpretation of its own regulation, even if VA chooses to promulgate that rule through its adjudication manual[?]"

The Court was originally to hear argument on February 25, 2019, but removed the case from the argument calendar and suspended the briefing schedule pending further order.

***McDonough v. Smith*, No. 18-425 (Decision below: (2d Cir. 2018)) (Argument date: Apr. 17, 2019)**

Does "the statute of limitations for a Section 1983 claim based on fabrication of evidence in criminal proceedings begin[ ] to run when those proceedings terminate in the defendant's favor (as the majority of circuits has held) or . . . begins to run when the defendant becomes aware of the tainted evidence and its improper use (as the Second Circuit held below)"?

Comments, Questions, Submissions

Celestine McConville (Chapman) and Don Doernberg (McGeorge) prepared this newsletter. If you would like to contribute to a newsletter, contact Gillian Metzger, Chair of the Section for 2020, at Columbia Law School, (212) 854-2667, gmetzg1@law.columbia.edu, Seth Davis, Chair-Elect of the Section for 2020, at Boalt Hall, (949) 824-3761, sethdavis@berkeley.edu, Celestine McConville, Chapman Law School, (714) 628-2592, mcconvil@chapman.edu, Don Doernberg, McGeorge Law School, (530) 274-1228, DLD@law.pace.edu, or so that your name can be placed in nomination at the 2020 meeting in Washington. Please make the contact as quickly as reasonably possible.

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