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FEDERAL COURTS SECTION NEWSLETTER

December 15, 2020

2021 Annual Meeting Program

Over the last two years, there have been several high-profile allegations of sexual harassment and other workplace misconduct by federal judges. In response to the first wave of allegations, the judiciary made some reforms, including clarifying that clerks have the option to anonymously report workplace misconduct to the court where they work. More recent allegations, however, have raised questions about whether these reforms and current mechanisms are sufficient to address and respond to workplace misconduct in the courts. As a result, there have been calls to extend Title VII and other statutes to the federal courts, among other reforms. This panel will discuss possible reforms that would address and prevent workplace misconduct.

Leah Litman (Michigan) will be the moderator. The speakers are Michael Gerhardt (UNC), Tara Grove (Alabama), Carolyn Lerner (Georgetown), Veronica Martinez (Notre Dame), and Lesley Wexler (Illinois).

In the Supreme Court

Here are brief summaries of cases the Court decided in the October 2020 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 Supreme Court opinions, lower court decisions, mentioned cases, statutes, and argument transcripts.

Decided in the October 2020 Term

***Carney v. Adams*, 2020 WL 7250101 (U.S. Dec. 10, 2020) (Decision below: 922 F.3d 166 (3d Cir. 2019)) (Argument transcript)**

An attorney registered as an independent challenged the Delaware Constitution's provision that limited membership on major state courts to a bare majority Republicans or Democrats, with the balance of seats to be filled by members of the other party. The eight participating Justices ruled that the attorney presented only a generalized grievance. In his deposition, the plaintiff had testified, "I would apply for any judicial position that I thought I was qualified for, and I believe I'm qualified for any position that would come up . . . [o]n any of the courts." He had not, however, made any application, rejection of which (on the grounds of the Delaware constitutional provision) might have furnished the concrete and particularized injury-in-fact that standing doctrine requires.

***Tanzin v. Tanvir*, 2020 WL 7250100 (U.S. Dec. 10, 2020) (Decision below: 894 F.3d 449 (2d Cir. 2018)) (Argument transcript)**

The Court's eight participating Justices held that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et. seq.*, by its express remedies provision, does permit suits seeking money damages against individual federal employees.

***Taylor v. Riojas*, 2020 WL 6385693 (U.S. Nov. 2, 2020) (Decision below: 946 F.3d 211 (5th Cir. 2019)) (Argument transcript)**

A *per curiam* Court, Justice Thomas dissenting without opinion, reversed the Fifth Circuit's grant of summary judgment on immunity grounds. The Court decided the case without oral argument, affirming the Circuit's finding "that the conditions of confinement alleged by inmate, whereby for six full days he was confined in a pair of shockingly unsanitary cells, the first of which was covered nearly floor to ceiling in 'massive amounts' of feces and the second of which was frigidly cold and equipped with only a clogged floor drain to dispose of bodily wastes, violated the Eighth Amendment's prohibition on cruel and unusual punishment," but ruling that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time." Justice Alito concurred in the judgment but thought that the Court should not have granted review in a case he characterized, quoting the Court's rules, as " 'the misapplication of a properly stated rule of law.' "

Argued Cases

Brownback v. King, No. 19-546 (Decision below: 917 F.3d 409 (10th Cir. 2019))

The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq., waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA also imposes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

The question presented is whether a final judgment in favor of the United States in an action brought under § 1346(b)(1), on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.

California v. Texas, No. 19-840 (Decision below: 945 F.3d 355 (5th Cir. 2020)) (Consolidated with 19-1019 (immediately below) for one hour oral argument.) **(Argument transcript)**

As part of the Patient Protection and Affordable Care Act (ACA), Congress adopted 26 U.S.C. § 5000A. Section 5000A provided that "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage," 26 U.S.C. § 5000A(a); required any "taxpayer" who did not obtain such coverage to make a "[s]hared responsibility payment," § 5000A(b); and set the amount of that payment, § 5000A(c). In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 574 (2012), the Court held that Congress lacked the power to impose a stand-alone command to purchase health insurance but upheld Section 5000A as a whole as an exercise of Con-

gress's taxing power, concluding that it affords individuals a "lawful choice" between buying health insurance or paying a tax in the amount specified in Section 5000A(c). In 2017, Congress set that amount at zero but retained the remaining provisions of the ACA.

The questions presented are:

1. Whether the individual and state plaintiffs in this case have established Article-III standing to challenge the minimum coverage provision in § 5000A(a).

2. Whether reducing the amount specified in § 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

***Texas v. California*, No. 19-1019 (Decision below:** 945 F.3d 355 **(5th Cir. 2020)) (**Consolidated with 19-840 (immediately above) for one hour oral argument.)

Congress passed the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), with the express goal of achieving near universal health-insurance coverage. To achieve that goal, Congress found it was "essential" to require healthy Americans to ensure that they have what Congress considered minimum essential coverage. In 2012, the Court held that "[t]he Federal Government does not have the power to order people to buy health insurance." 567 U.S. 519, 575. The Court upheld the minimum-essential-coverage requirement, however, because it was "fairly possible" to construe the mandate as a tax. In 2017, Congress eliminated that alternative construction by zeroing out any penalty. Texas agreed with the Fifth Circuit's conclusion that the 2017 legislative change rendered the individual mandate unconstitutional, and presents the following questions:

1. Whether the unconstitutional individual mandate to purchase minimum essential coverage is severable from the remainder of the ACA.

2. Whether the district court properly declared the ACA invalid in its entirety and unenforceable anywhere.

Granted Certiorari

***CIC Services, LLC v. Internal Revenue Service*, No. 19-930 (Decision below: 925 F.3d 247 (6th Cir. 2019))**

Whether the Anti-Injunction Act's bar on lawsuits for the purpose of restraining the assessment or collection of taxes also bars challenges to unlawful regulatory mandates issued by administrative agencies that are not taxes.

***Nestlé USA, Inc. v. Doe I*, No. 19-416 (Decision below: 766 F.3d 1013 (9th Cir. 2014)) (Argument transcript)**

Does the judiciary have authority under the Alien Tort Statute to impose liability on a domestic corporation?

The case arises in the context of allegations that the defendants "aided and abetted child slavery by providing assistance to" Ivory Coast farmers who employed plaintiffs as child slaves. The case also presents the issue of whether general corporate activity in the United States, not traceable to plaintiff's alleged harms, at the hands of unidentified actors abroad, overcomes the extraterritoriality bar.

***Republic of Hungary v. Simon*, No. 18-1447 (Decision below: 911 F.3d 1172 (D.C. Cir. 2018))**

May the district court abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost during World War II, and where the plaintiffs made no attempt to exhaust local Hungarian remedies?

This may turn out to be an interesting case, since it has the potential of raising again the questions many of us have had

about the legitimacy of abstention generally. That was the subject of the Section meeting in 1990. Abstention, after all, looks to some of us like the Court ruling not on the constitutionality of a jurisdiction statute, but rather on the wisdom of applying it in particular situations, a policy consideration against which the Court routinely cautions. Comity considerations count for *Younger* abstention; one of the questions this case raises is whether they can stand without federalism and equity.

***Uzuegbunam v. Preczewski*, No. 19-968 (Decision below: 781 Fed. Appx. 824 (11th Cir. 2019))**

Does a government's post-filing change of an unconstitutional policy moot nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right?

Comments, Questions, Submissions

Celestine McConville (Chapman) and Don Doernberg (Pace and McGeorge) prepared this newsletter. If you would like to contribute to a newsletter, contact Seth Davis, Section Chair for 2021, at (Boalt) (949) 824-3761, sethdavis@berkeley.edu, Leah Litman, Chair-Elect of the Section for 2021, (Michigan), (734) 647-0549, lmlitman@umich.edu, Celestine McConville, (Chapman) (714) 628-2592, mcconvil@chapman.edu, or Don Doernberg, Pace and McGeorge, (530) 274-1228, DLD@law.pace.edu, so that your name can be placed in nomination "at"[1] the 2021 meeting. Please make the contact as quickly as reasonably possible.

NOTICE

1 These days "at" isn't what it used to be.