



WHAT WERE THEY THINKING

THE SUPREME COURT IN REVUE, OCTOBER TERM 2009

John P. Elwood

“Procedurally, this is a little boring.”

Stephen G. Breyer¹

IT IS SAID THAT JUST BEFORE A CAR ACCIDENT, those involved perceive events occurring in slow motion. October Term 2009 was a lot like that. I don’t mean to suggest that a car accident has much in common with the recently completed Term as a *general* matter. Far from it. One is a traumatic event, a wrenching collision of forces that will scar those involved for years to come, leaving hideous, deforming wounds that will heal slowly, if at all. The other just involves banged-up cars.

But I suppose they are alike in some ways. Some of the major decisions of OT2009 were widely anticipated, so that once events were set in motion, all that remained was to wait . . . and wait . . .

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¹ Oral argument, *Salazar v. Buono*.

and wait . . . for the expected outcome to come to pass. Which is not to say OT2009 was not entertaining. Far from it. But people continue to flock to horror movies to see if a group of preternaturally good-looking and clear-skinned teenagers will once again decide that the best course of action when confronted with a grisly murder is to split up; go to Hugh Grant movies to see whether a stammering Englishman with fluttering eyelids who uses “actually” for every part of speech will get the girl; and watch Supreme Court confirmation hearings hoping to learn something about the views of the nominee. It is uncharitable to think that humans have a poorer ability to anticipate than, say, laboratory mice, so let us assume instead that humans are able to derive greater entertainment from foreseeable events, and in any event, the stimuli are more pleasant than electrified lumps of cheese. Well, maybe not confirmation hearings.

But back to my point. Many of OT2009’s headlining cases were as foreseeable as the outcome of *Reagan v. Mondale* ’84, the breakup of Jake and Vienna, and June *New York Times* features entitled “Court Tilts Sharply Right.” And still people couldn’t turn away. It was like . . . a car wreck, or something.

1.

CITIZENS UNITED V. BLAHBLAHBLAH

Part of the reason that OT2009 had such a pervasive feeling of déjà vu is that OT2009 began in OT2008, and with a reargued case to boot. As the Justices left town at the end of the last Term, they ordered rehearing in *Citizens United v. Federal Election Commission*, involving whether Congress could prohibit corporate funding of an election-eve broadcast of an unfavorable feature-length movie about the then-junior Senator from New York aptly entitled, *Hillary: The Movie*. The Court ordered a special September sitting, so, it was assumed, it could render judgment before upcoming primary elections. Although Solicitor General Elena Kagan – appearing for the first time in any court because a lifelong invisibility spell had only recently been broken – acquitted herself well, it was apparent to everyone in the courtroom that the law would likely be struck

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down. But the Court did not deliver the opinion until January 21, 2010; and the feverish work going into Justice Kennedy's majority opinion and Justice Stevens' heated 3,246-page dissent absorbed so much effort that the Court did not deliver its first opinion in an argued case until December 8, the 64th day of the Term, tying OT2007 and OT1984 as the latest initial-hand-down days of the Postwar period.

The opinion has been called a latter-day *Bush v. Gore* because of its importance, its largely party-line 5-4 margin, its authorship by Justice Kennedy, and the immediate unfavorable response – proving once again that, aside from finding raisins in what you thought to be a chocolate-chip cookie, there is nothing so disappointing as a Kennedy opinion that you feel should have come out the other way. But in some ways, *Citizens United* was more *Bush v. Gore* than *Bush v. Gore* itself. Because while *Bush v. Gore* was deeply upsetting to a broad swath of people, ranging from journalists to legal academics, most Americans accepted it and moved on. So much so that when a group of former law clerks leaked details of the decisionmaking process to *Vanity Fair*, the magazine's supposed stunning expose received less attention than youtube videos of people dropping Mentos² into bottles of Diet Coke. But *Citizens United* had actual ripple effects. Reading from a bench statement summarizing his impassioned, 5,432-page dissent, Justice Stevens stumbled briefly, confusing Corey *Haim* with Corey *Feldman*. While his statement was *still* more coherent than most of his colleagues' actual opinions, the experience left Justice Stevens shaken, and he has confirmed in off-the-record interviews that it prompted him to retire, giving President Obama his second opportunity to reshape the Court, and marking the departure of the last person who knows how to turn Justice Kennedy's pathological fear of spider monkeys into liberal majorities.

But that was just one of the ways that *Citizens United* has reshaped the legal landscape. Another is that it will cause Netflix rentals of *Beavis and Butthead Do America* to spike every January as

² The Freshmaker.

the Justices look for other ways to fill their evening entertainment calendars. Because during this year's State of the Union address, when the Justices sat helpless in the audience, protected only by lifetime tenure, an irreducible salary, high approval ratings, and two-ply cotton-poly robes, the President assaulted them in the strongest possible terms, calling the *Citizens United* opinion, quote, "not necessarily something I would entirely agree with, unless I did." Had the Justices not just come from the Chief's traditional pre-SOTU "Botox Party," braced with foreheads full of botulism toxin, they would not have been able to retain youthfully placid expressions during this vicious aural assault. Democrats cited precedents for the comment, noting that President Van Buren had fairly recently chided the Supreme Court for "profligate use of quill pens," but the harm was done. Legal commentators – by which I mean myself and the guy who just watered my office plant – expect fewer Justices to attend next year's State of the Union, unless something else happens. Now, when the Justices want to be bored out of their minds while remaining expressionless, they will have no choice but to schedule argument.

2.

SECOND AMENDMENT

Another slow-mo moment came in *McDonald v. City of Chicago*, involving whether the individual Second Amendment right to bear arms recognized two Terms ago in *District of Columbia v. Heller* is incorporated against the states. No one who isn't mystified by instant replay ("He dropped the ball *again!*") could look at the still-extant *Heller* majority and think the outcome here would be any different, and so it was widely expected the Court would hold the right incorporated. The petitioners thus decided to use the opportunity to try to revive incorporation through the Privileges and Immunities Clause, which is not unlike when the dominant 1985 Bears decided to have rookie defensive lineman William "The Fridge" Perry throw his first NFL pass during Super Bowl XX. Perhaps as a result (of the argument, that is – Perry's pass attempt resulted only in a one-yard loss), the Court took the rare step of granting argu-

ment time to a non-governmental amicus – the NRA – to advocate incorporation through the conventional Due Process Clause route. Only Captain Renault was surprised – nay, *shocked* – when the Court held for McDonald by a 5-4 vote, and the Privileges and Immunities boomlet was over before it began, as four members of the majority (and all of the dissenters) reaffirmed traditional Due Process Clause incorporation. Justice Thomas seized the opportunity to advocate overruling the *Slaughterhouse Cases* and *United States v. Cruikshank* – the last two empty spaces on his “Overrule ‘em All!” punch-card. Having finally completed the set, he won a toaster.

Washington hospitals noticed a sharp increase in injuries as politicians of all stripes (even liberal Democrats representing states with large numbers of hunters) tripped over one other rushing to microphones to praise the decision. Some conservative Members of Congress seized on the fact that Justice Sotomayor joined a dissenting opinion stating that “the Framers did not write the Second Amendment in order to protect a private right of armed self defense,” to argue that she had testified falsely during her confirmation hearing when she said “I understand the individual right fully that the Supreme Court recognized in *Heller*.” But they neglected to note the significance in Newyorkese of the introductory phrase, “*Sure* I understand the individual right . . . recognized in *Heller*.”

3.

CRIMINAL LAW

Since 1988, the federal mail and wire fraud statutes have prohibited depriving someone of the “intangible right of honest services.” The statute was meant to overrule the Supreme Court’s decision in *McNally v. United States* (1987), holding that the mail and wire fraud statutes only prohibit depriving victims of money or property. The statutory language is so straightforward that its meaning did not generate confusion for nearly ten minutes after enactment, when the two congressional staffers who first proposed the phrase came to blows after realizing they thought it meant completely different things. Courts adopted a variety of different interpretations over the years, sweeping in varying amounts of conduct.

In a spirit of compromise, the government took an intermediate position and decided the law prohibited all human endeavor. While some complained that the law was unduly broad and vague, an expansive reading had some benefits: After 1990, Louisiana stopped conducting a decennial census, and simply estimated its population by transmitting the year's indictments to the Department of Commerce.

If the Court hadn't quite found the opportunity to authoritatively construe the statute during the scant 22 years since its passage, they made up for lost time this Term by granting cert in *three* "honest services" cases – two involving prominent CEOs (Conrad Black and Jeff Skilling), and one involving a former state legislator (Jeff Weyhrauch). The case thus represents the only time in history the Court has taken three cases to construe a statute that is *one sentence long*. Anyone who sat through all three cases came away with two unshakable conclusions: first, no subject really warrants three hours of discussion; second, the "honest services fraud" statute was going to be taking a haircut. The apparent choice was between the position Justice Scalia advocated during argument – to invalidate the statute in its entirety as void for vagueness – and construing the statute narrowly to reach only a narrow subset of cases that were covered under judicial interpretations of the predecessor statute before *McNally* that Congress apparently was seeking to reinstate – bribery and kickbacks.

In the end, the result was overwhelming: Justice Ginsburg, writing for six Justices in *Skilling*, held that the statute had to be construed to apply only to bribery and kickbacks to save it from unconstitutional vagueness. Justice Scalia, joined by Justices Kennedy and Thomas, thought the statute could not be salvaged. For me, the biggest surprise was that Justice Kennedy sided with the hardliners – that and the fact that the Court simply vacated and remanded in *Weyhrauch*, making the passing observation in *Skilling* that there was a split on whether the duty underlying a fraud claim had to be established by state law, without noting that *Weyhrauch* had teed up that very issue for decision.

If you noticed that society refilled the tank without being asked

the last time it borrowed the car, you're not alone in marking the progress of a maturing society. Justice Kennedy has been sufficiently impressed that he's recently voted (and sometimes written opinions) to render unconstitutional previously lawful sentencing practices under the Eighth Amendment's Cruel and Unusual Punishments Clause – think *Atkins v. Virginia* (2002) (holding it unconstitutional to execute mentally retarded offenders); *Roper v. Simmons* (2005) (holding it unconstitutional to execute defendants who murdered while under age 18), and to a lesser extent (because the Court had already so held regarding rape of an adult), *Kennedy v. Louisiana* (2008) (holding capital punishment cannot be imposed for rape of a child). Kennedy reprised his role as a one-man evolving standard of decency in *Graham v. Florida*, which is one of those opinions that people seem to forget when they're bemoaning the arch-conservative Roberts Court. The Court held 6-3 that the Cruel and Unusual Punishments Clause does not permit imposing a sentence of life without parole on a juvenile offender convicted of a non-homicide offense. The Court noted that while 37 states permit such sentences, only 11 impose them as a practical matter, and they were mostly states without a first-rate daily paper or bookstore. Thus, there was a national consensus against imposing sentences of life without parole on such offenders.

The sort of numerical analysis that is reserved for Eighth Amendment cases, movie-studio accounting, and the federal budget alone would have been enough to cause TMJ-aggravating tooth-gnashing on the right, but Kennedy was not done yet. In a selfless effort to promote renewable energy, Kennedy ended his opinion by noting that the Court's conclusion was supported by the fact that the sentencing practice was "rejected the world over." The resulting geysers of steam emanating from conservatives' ears promise to be a significant source of thermal energy for years to come.

Every year, there are cases that appear destined to spawn a whole line of cases – think *Apprendi v. New Jersey* or *Crawford v. Washington*. This year's Camel's Nose Award goes to *Padilla v. Kentucky*, in which the arch-conservative Roberts Court again arch-conservatively ruled in favor of a criminal defendant, holding by a

5-2-2 vote that the Sixth Amendment requires defense counsel to inform a noncitizen client that his guilty plea carries a risk of deportation, and that failure to so advise can constitute constitutionally ineffective assistance of counsel. Majority opinion author Justice Stevens acknowledged that deportation “is not, in a strict sense, a criminal sanction,” in the sense that it is not, well, part of a “criminal prosecution[]” at all, but because “removal [is] nearly an automatic result for a broad class of noncitizen offenders,” “we find it most difficult to divorce the penalty from the conviction in the deportation context.” Arch-conservative Justice Alito, joined by the arch-conservative Chief Justice, arch-conservatively concurred in the judgment, agreeing that the affirmative misadvice about deportation constitutes ineffective assistance.

Because heaping additional woe upon convicted offenders is as time-honored a congressional activity as adopting a federal budget every decade or so, empty posturing, or even graft, the U.S. Code is full of such collateral consequences. Some of them are as “nearly an automatic result” of conviction as deportation – if not more so, because less procedure is required beforehand. It will be interesting to see if the courts apply the same standards to, say, mandatory debarment from federal contracting. The Court’s opinion tries to suggest that this ticket is good for this train only, but we’ve heard that before.

4.

FREE ENTERPRISE FUND V. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD

It was rightly billed as “the most important separation-of-powers case regarding the President’s appointment and removal powers to reach the courts in the last 20 years.”³ But because of a lack of competition, that is less impressive than it sounds, sort of like being “Riyadh’s favorite pork snack!” or “Pyongyang’s best exotic dancing.” *Free Enterprise Fund v. Public Company Accounting Oversight Board*

³ *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

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presented a variety of formal constitutional challenges to the entity Congress created in the wake of scandal to police accounting practices at publicly traded companies, known unphonetically as “Peekaboo.” Free Enterprise Fund principally argued that the fact that the Board was removable by the Securities and Exchange Commission only upon a showing of cause, and the SEC is itself subject to for-cause removal, unconstitutionally insulated PCAOB from effective presidential control. FEF also argued that Board members were principal officers and thus had to be appointed by the President under the Appointments Clause, and argued that the multi-member SEC could not be a “head of department” capable of appointing inferior officers. The case largely flew under the radar until the D.C. Circuit rejected FEF’s claims over the impassioned 58-page dissent of Judge Brett Kavanaugh, former clerk to a well known swing Justice, who argued that the case represented the apogee of legislative incursion on presidential control of Executive Branch officials. Kavanaugh argued that PCAOB’s removal restrictions were less “*Humphrey’s Executor* redux” than “*Humphrey’s Executor* squared,” thus using that particular case name more in two sentences than the Eighth and Tenth Circuits have managed to do in sixty years. It was impossible to read the dissent and not picture Justice Kennedy’s brow furrowing. Some readers also pictured two men in safari outfits slapping each other with fish, but that mental image was dismissed as idiosyncratic.

The Court held by a 5-4 vote in an opinion written by the Chief that adding two layers of for-cause removal restrictions was “contrary to Article II’s vesting of the executive power in the President.” The Court, unsurprisingly, held that the removal restriction was severable from the rest of the statute, so Board members henceforth are removable *at will* by the SEC. But the Court rejected FEF’s other challenges. Thus, PCAOB will go about its business more or less as usual, although you will notice Board members complimenting SEC Commissioners more frequently. The decision thus represents a largely symbolic victory, sort of the Separation of Powers equivalent of *United States v. Lopez*, which held that the Gun-Free Schools Act exceeded Congress’s authority under the Com-

merce Clause. Like *Lopez*, *PCAOB* permits the Court to send Congress a message to mind the constitutional lines in a context where it won't actually make much difference. Justice Breyer disagreed with the majority so vehemently that he took the unusual⁴ step of reading a dissenting bench statement.

5.

FOURTH AMENDMENT

The Internet really took off in the mid-1990s. Here it is a mere 15 years later, and *already* the Supreme Court, in its usual headlong amble to address the pressing legal issues of the day, took its first Fourth Amendment case involving new digital communications: *City of Ontario v. Quon*. The underlying facts are a heartwarming tale of modern romance: A SWAT-team member, his wife, his police-issue pager, his girlfriend, and a few thousand smutty text messages, mostly tapped out on Department time. Who hasn't been there before? While the police department had an official no-privacy policy, a supervisor winked at personal use of pagers. A departmental audit brought Quon's emails to light, and he apologized for his infidelity to his wife and for bringing shame on the Police Department.

Oh, I'm sorry. Maybe that would have happened on Bizarro World or someplace where people retained even a modest sense of decorum, but here in the United States, Quon (indeed, the whole Bizarre Love Triangle) sued. The Ninth Circuit, apparently on a dare, held that the city had violated Quon's reasonable expectation of privacy in transmitting lewd adulterous emails on city time using city property, which really goes without saying. The Court was thus presented with the question of a person's reasonable expectation of privacy in text messages. Some pundits questioned whether a Court

⁴ By which I mean it happens all the time. See William D. Blake & Hans J. Hacker, "The Brooding Spirit of the Law": *Supreme Court Justices Reading Dissents from the Bench*, 31 Justice Sys. J., No. 1, at 6 (2010) (noting that Justice Ginsburg reads dissenting bench statements in 10.6% of dissents she authors, Breyer 8.1%, and Scalia 7.9% percent; other Justices use them far less).

whose average member graduated college at a time when the telephone was dismissed as a fad would be able to address technological issues more complicated than inserting a wedge, but thanks to the law clerks' extraordinary efforts to suppress instinctive eye-rolling, combined with the Justices' heroic feats of feigned comprehension, the Court came through it admirably.

By which I mean that they were able to duck the issue a little while longer. Because of the low standard of reasonableness for searches of government employees that are not conducted for law-enforcement purposes, the Court was able to uphold the search without having to rush willy-nilly into novel Fourth Amendment issues. The Court made a virtue of its issue-duckery, saying, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear," thus marking the first time since 1995 that a two-way pager has been referred to as "emerging technology." While some commentators interpreted the Court's reticence as an indication it takes privacy rights in digital media seriously, the longer the Court waits, the greater the likelihood that society's "reasonable expectation of privacy" will be determined by the preferences of a 19-year-old who puts photos of himself smoking pot on Facebook before the bong even stops smoldering.

6.

FIRST AMENDMENT

At the end of "Planet of the Apes," Charlton Heston, playing an astronaut who lands on a planet of talking, reasoning apes who live in a complex, multilayered civilization, discovers that he has actually returned to Earth after a nuclear holocaust. In the controversial original ending, Heston, standing at the feet of a shattered Statue of Liberty, discovers that a Supreme Court composed entirely of atomic-bomb-worshipping mutants had met solely to grant five First Amendment cases for that Term. That's how much the Supreme Court loves First Amendment cases. And so life imitates Rod Serling-scripted art, sort of. In a Term when the Court chugs along taking just 70-some cases, including just one – *one* – Petro-

leum Marketing Practices Act case, the Court managed to take six First Amendment cases.

The Supreme Court exists to say what the law is, not to resolve individual cases. I restate that at the outset because it's not so easy to remember when discussing the first of the Court's noteworthy First Amendment cases this term, *Salazar v. Buono*, where the main limit on the number of opinions filed seemed to be that there are only nine Justices. Former park ranger Frank Buono successfully brought suit under the Establishment Clause to challenge the presence of a Latin cross on California's Sunrise Rock that the VFW erected in 1934 as a memorial to World War I dead, and which had been maintained by private citizens ever since. Because Sunrise Rock is federal land, the district court concluded that its presence conveyed an impression of governmental endorsement of religion and entered an injunction forbidding its display, which the Ninth Circuit affirmed. Congress, in a characteristic effort to defuse tension on a divisive issue and eschew political posturing, promptly forbade the use of government funds to remove the cross, designated the cross as a national memorial to veterans of WWI, and then (to eliminate state action) transferred the land to the VFW in exchange for nearby private land. The district court enjoined the transfer after concluding that it was an effort to keep the cross atop Sunrise Rock, and the Ninth Circuit affirmed.

The Supreme Court reversed by a 5-4 vote. There were a total of six opinions, none for a majority. Justice Kennedy, writing for a plurality consisting of himself, the Chief, and Justice Alito (each of whom also wrote separately), concluded that the district court had erred because "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." Here, the cross was erected and maintained by private citizens to honor war dead by "evok[ing] thousands of small crosses in foreign fields" rather than "to promote a Christian message," and the federal government "could not remove the cross without conveying disrespect" for those honored. Also, the district court failed to consider less drastic relief to dispel concerns about endorsement, such as putting up prominent notices of VFW ownership, or perhaps

sponsorship by Jiffy Lube. Ten days later, vandals employed a “self-help” remedy and simply stole the cross, which, remarkably enough, *still* has not appeared on Oprah to discuss its ordeal.

Justice Kennedy said in his plurality opinion, “this case is ill suited for announcing categorical rules.” Which, now that I think of it, should probably be printed at the top of every one of his opinions in lieu of the quote from *United States v. Detroit Timber*, or perhaps engraved on the pediment over the Court’s (now exit-only) front doors. True to that statement, none of the opinions in the case did anything material to resolve enduring uncertainty about the role of the “endorsement test” for the validity of government speech under the Establishment Clause. It remains as much of a mess as it was before.

It has long been observed that strict scrutiny is “strict in theory, fatal in fact,” and that laws subjected to such rigorous review have about the same long-term outlook as the last donut in the precinct break room. But there are exceptions to every rule. Just as you can count on finding at least half of the Metamucil-rhubarb-swirl donut sitting in the corner of the box, there will always be the odd *Holder v. Humanitarian Law Project*. The case involved the constitutionality of a federal statute making it a crime to “knowingly provid[e] material support or resources” (including “training” and “expert advice and assistance”) to “a foreign terrorist organization.” A group of U.S. citizens and organizations brought suit, saying they wished to support the “lawful, nonviolent activities of two designated foreign terrorist organizations” – presumably, by teaching festive flower arrangement to the Taliban’s relentlessly upbeat “Perk Up! Brigade.” The district court partially enjoined enforcement. Pursuant to a standing order, the Ninth Circuit, after first confirming that the decision would give succor to America’s most implacable and deadly enemies, affirmed.

By a 6-3 vote, the Supreme Court upheld the statute against the facial challenge. The Court made no bones about the statute being a content-based restriction on expression, but upheld it anyway as applied to the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations. The Chief wrote for the con-

servatives plus – such are the Chief’s powers of persuasion – Justice Stevens. Because you’re doubtlessly rubbing your eyes feverishly now, I’ll repeat that: *Justice Stevens* voted to uphold a content-based restriction on supporting terrorism. You’d almost think he was a Republican appointee. The Court held that Congress acted reasonably in concluding “that any contribution to such an organization facilitates [terrorist] conduct,” because support even to further lawful activities could be diverted to advance terrorism in light of terrorists’ inexplicable failure to maintain organizational firewalls; the support could help legitimate the group; and it undermines cooperative efforts with U.S. allies. The Chief’s opinion conspicuously stated that the Court was not relying exclusively on factual inferences it had drawn from the record, but because of the national security and foreign affairs implications, it was *deferring to* the Executive Branch’s judgments. I pretty much thought you’d have a better chance of working the word “pumpkin” into an opinion about statistical census adjustments on a bet⁵ than you would of getting any form of “defer! w/225 executive” into a majority opinion after *Hamdan v. Rumsfeld* (2006). The Court emphasized that the statute would not prohibit “independent advocacy” on behalf of foreign terrorist organizations and that it only addressed foreign groups known to the donor to be terrorists. So while the Pick-Me-Up Bouquets in Kandahar caves may be artlessly heavy on Gerbera daisies for a year or two, future legal challenges may yield an outcome that will help Turn Any Day Into A Special One!

7.

PATENT LAW

Patent cases are the Scooby Doo of the Supreme Court docket, in that you can frequently tell what is going to happen before you even know the facts. Just as you know that the meddling kids and their semi-speaking canine companion will foil still another in a series of ever-more-improbable nonviolent property crimes involving remarkably effective spook costumes, most of the time you can

⁵ See *Wisconsin v. City of New York*, 517 U.S. 1, 8-9 (1996).

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pretty much guess that the Court is going to reverse the Federal Circuit, tell it not to be so rigid, and remand the case with an opinion ambiguous enough that the court of appeals is left to wonder, “Wait – this was supposed to be *guidance*?” So it was this Term with *Bilski v. Kappos*.

The case involved a business method patent for minimizing risks from fluctuations in market demand that, simplified slightly, can be restated as the Jeff Spicoli principle: “Dude! Be cool!” The Federal Circuit, looking for (bright) lines in all the wrong places, adopted a “machine-or-transformation” test as the sole test governing the patentability of a process. The conventional wisdom rapidly settled into the expectation that the Spicoli Principle was not patentable but that the Federal Circuit’s test was too restrictive. Then ensued months of waiting for the Court to confirm that the Obvious Villain was responsible for the big doorknob heist and Scooby snacks all around. But the snacks were not forthcoming. After 170 days of Waiting for Velma, through process of elimination, it appeared that the likely author of the opinion was Justice Stevens, who had no other argument assignments for the sitting, and who had written several noteworthy IP decisions for the Court previously.

On the Court’s last hand-down day, the Court released a 5-4-0 opinion by . . . Justice Kennedy. To no one’s great surprise, the specific process here was held ineligible for a patent. Also to no one’s great surprise, the Court rejected the Federal Circuit’s conclusion that the “machine-or-transformation test” is “the sole test governing [patentability] analyses,” holding that while that the test may be a “useful and important clue” in determining whether a process would be covered by patent laws, the test was not supported by the “ordinary, contemporary, common meaning” of the words of the statute. But the Court *also* concluded that the language of the statute “precludes the broad contention that the term ‘process’ categorically excludes business methods.” The upshot is that business method patents survive, and are somewhat more patentable under the Court’s opinion than under the Federal Circuit’s standard. But, this being a Kennedy opinion, the patentability inquiry fundamentally turns on “one’s own concept of existence, of

meaning, of the universe, and of the mystery of human life.” *Planned Parenthood v. Casey* (1992).

Justice Stevens concurred in the judgment, joined by Justices Ginsburg, Breyer, and Sotomayor. Stevens agreed that the “machine-or-transformation” test is useful, and ordinarily does the trick in determining patentability. But, after reviewing the historical evidence at length, Stevens concluded that business processes *are not eligible for patent protection*. Stevens’ opinion – which was nearly *three times* longer than the majority opinion – faulted the majority for being “less than pellucid in more than one respect,” suggesting that, even after more than 34 years on the Court, Justice Stevens was still capable of surprise. Stevens’ extraordinarily detailed concurrence, and Kennedy’s more abbreviated majority, together with the fact that Stevens has no majority opinion from that sitting, is enough to make you wonder whether Stevens was originally assigned the majority opinion in *Bilski* and lost the majority after circulating a draft. But because a case from that sitting (*Pottawattamie County v. McGhee*) was settled after the opinion was assigned, it is impossible to know whether Stevens originally was writing the *Pottawattamie* or *Bilski* majority opinion. At least until some Justice releases his or her papers concerning the case, or until somebody leaks.

7½.

SUMMARY DOCKET

There was a time when summary reversal by the Supreme Court was a powerful rebuke for a lower court. The Supreme Court, it was endlessly repeated, didn’t sit to correct errors, but to make law, so the Court only found errors egregious enough to correct through summary action a couple times a term, if that. Back then, a summary reversal *stung* – plus, all the other judges would de-friend you, and write embarrassing things on your face the next time you passed out at a party. Well, apparently there is something to all that talk about “defining deviancy down,” because there’s a lot more summary action in recent terms. Either lower courts are making a lot more egregious errors, or the Supreme Court is just noticing it a lot more.

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OT2009 was a banner year for summary reversals at the Supreme Court. There were eleven, nine in criminal cases, seven of them capital murder cases. The statistics are remarkable: of the nine summary reversals in criminal cases, *none* of the defendants had the middle names “Wayne” or “Dale,” which alone is probably enough to support a claim of actual innocence. But there is a larger point here. *Eleven* summary reversals?!? That is more than any other term in at least a decade. There were various explanations for the trend, but one common theme was that the Court’s steady diet of only 75-80 cases for plenary review leaves plenty of extra time for the Court to maintain an “Outrage Docket” of factbound cases that still warrant further review. Plus, a steady supply of summary reversals keeps the lower courts on their toes and gives the Justices an outlet besides crank-calling the D.C. Circuit.

The favorite flavor for cases on this docket during OT2009 was ineffective assistance of counsel, which accounted for over half the nine criminal cases. At least one case didn’t fit quite so comfortably in the “summary action column”: *Presley v. Georgia* (2010), where the Court held that the right to a public trial under the Sixth Amendment extends to jury selection. To reach that “clear” holding required a combination of *Press-Enterprise Co. v. Superior Court* (1986) (holding that the First Amendment requires jury selection to be open to the public) and *Waller v. Georgia* (1984) (holding the Sixth Amendment right to a public trial extends beyond the actual proof at trial, but without specifying how much beyond) to make its conclusion sufficiently “well settled . . . that this Court may proceed by summary disposition.”

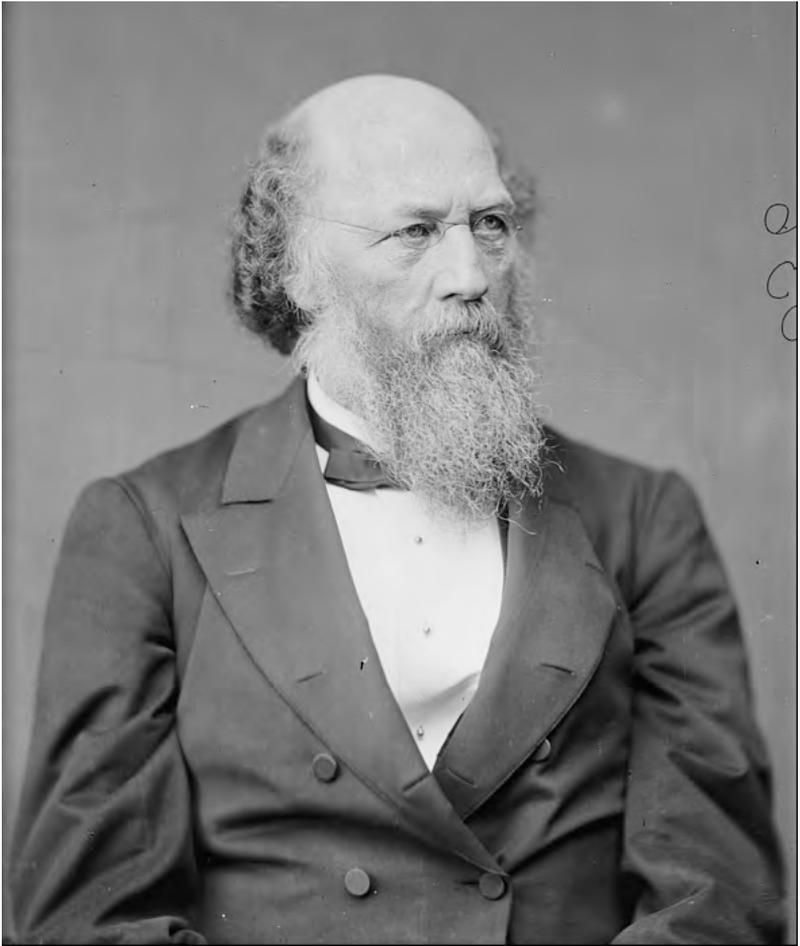
8.

PERSONNEL CHANGES

OT2009 was a Term that saw an important personnel change, as the Court’s respected senior presence announced his retirement, resulting in a flurry of speculation about who would succeed him. Frank D. Wagner, the Court’s 15th Reporter of Decisions, who had served for more than 23 years, announced his retirement on June 28. Wagner oversaw publication of 82 volumes of

United States Reports, more than any previous Reporter. He also created the Court's first website, which at first consisted only of jokes his Aunt Trudy in Hibbing had forwarded him from her AOL account, but later featured recipes, lost pet postings, "pong," and, eventually, Supreme Court opinions and orders. Wagner also issued what must be the Court's longest syllabus, the 19-page stemwinder from *McConnell v. FCC* (2003), whose sheer density is said to warp time and space, and which as a work of pure distilled horror rivals the *Reader's Digest* condensed version of *Helter Skelter*. A successor to the position the 13th Reporter, Henry Putzel, Jr., described as "double revolving peripatetic nitpicker" (in an apparent effort to distract people from the fact that his name was "Henry Putzel, Jr.") has not yet been named, but the leading contenders are his daughters Goneril and Regan.

My research assistant informs me that apparently, one of the Justices retired too. During OT2009, as Justice Stevens entered into his 34th year on the Court, the Justice from Chicago went breezing past the tenure of pikers John Marshall Harlan, Hugo Black, and the great John Marshall himself. There was rampant speculation that Justice Stevens would resign from the Court. It would have remained just that – speculation – had it not been for widespread discontent about the viscous chipped beef on toast in the Court's dining room. Desperate to escape the junior Justice's life of cornstarch-infused drudgery on the Court's Cafeteria Committee, Justice Sotomayor contrived to create a vacancy. Moments before Justice Stevens took the bench with his 7,486-page *Citizens United* dissent, Justice Sotomayor surreptitiously replaced "I respectfully dissent" in his bench statement with the more bilabially challenging, "Banning blandiloquent broadcasts before big biennial ballots broadly benefits banishing backroom bargains but barely burdens basic banter between blocs." While Justice Stevens finished his bench statement without a hitch, at an embassy reception later that day, he mispronounced the diphthong in the Finnish word *laiva* (ship), provoking whispers of concern among courtwatchers and speakers of semi-agglutinative Finno-Ugric languages. Realizing that the day he could no longer *juuruta* with his *kaveri* was the day he



Not so fast, sonny.

would leave the Court, Stevens timed his departure to tie (but not surpass) the tenure of Justice Stephen J. Field.

Had Stevens only held on two years and two weeks longer, he could have matched the tenure of Justice William O. Douglas, who by the time of his retirement had surpassed the Bristlecone Pine Tree as the oldest living organism on Earth.

The President's advisers recommended he appoint a liberal John Roberts, by which they meant someone whose nomination to the

bench had died the first time around. He selected Elena Kagan, the former Clinton White House staffer and Harvard Law School Dean, and current Solicitor General, who reputedly made up in people skills and raw smarts what she lacked as a potential NBA power forward. Her nomination immediately engendered controversy because, while Dean at Harvard, she had required military recruiters interviewing on campus to sing “I’m a little teapot” complete with hand gestures. Because Kagan had only had six appearances in *any* court (all in the Supreme Court, and all in the space of a few months), she also was roundly criticized for having nearly as little experience practicing law as all members of the Senate Judiciary Committee combined. While her confirmation hearings largely involved reciting the same bland generalities heard in other recent confirmation hearings, Kagan’s quick sense of humor brought almost as much levity to the proceedings as former Senator Biden simply asking questions. Kagan was confirmed by a vote of 63-37 – a vote so close it traditionally has been reserved for Republican nominees – and assumed her duties in early August approving lima bean vendors for the Court’s salad bar.

With the departure of Justice Stevens, the Chief Justice assigned Ruth Bader Ginsburg to serve in one of the Court’s most important positions: Obligatory Object of Retirement Speculation. The job has only one official duty: To be the subject of impertinent chin-waggery without surcease. While she is, at 77, the Court’s oldest Justice, has survived bouts with cancer, and this June lost her husband of 56 years (legendary tax lawyer and cook Martin D. Ginsburg), you would think it would be enough of an answer that Justice Ginsburg still has the vigor to drive law clerks a third her age into rest homes. But her duties as OORS required her to take more direct action this year. During recent interviews, she noted her goal of remaining on the Court at least until her touring Josef Albers painting is returned to her (2012), or to follow the lead of Louis Brandeis (which would require her to retire in 1939). That seems to have placated the press corps enough to end speculation. Until next spring.



This is the point where the software that automatically generates these articles places summaries of a few of the high-profile cases from next Term in an effort to derive humorous effect from them. There is much rejoicing in the subterranean caves where ape-hating mutants administer sacraments involving thermonuclear devices, because many of next Term's leading cases involve . . . you guessed it, the First Amendment. The Court will be considering the constitutionality of a California law imposing penalties on the sale of violent video games to minors; in one of those rich ironies of life that would be deemed implausible in a movie script, the person defending the law previously made his living impaling people on a broadsword while jabbering "crush your enemies, see them driven before you, hear the lamentations of their women." See *Schwarzenegger v. Entertainment Merchants Association*. The Court will also be considering whether the First Amendment protects members of a religious group from tort liability for protesting soldiers' funerals bearing signs that read "Thank God for dead soldiers," "You're going to Hell," "God hates fags," plus some signs that were offensive.⁶ Reached for comment at his cave in Pakistan, Osama bin Laden suggested that the group might be taking its religious views too far. The Court will take a brief respite from its First Amendment docket to address some other issues during October Term 2010, including the propriety of a federal court order requiring California to release prisoners to reduce overcrowding, *Schwarzenegger v. Plata*; and the lawfulness of an Arizona statute that imposes sanctions on employers who hire undocumented aliens, *Chamber of Commerce v. Candelaria*; plus a Term-opener that is generating unparalleled excitement: *Ransom v. MBNA America*, which presents the question whether, in calculating a debtor's "projected disposable income" under Chapter 13 of the bankruptcy code, the bankruptcy court may allow an ownership cost deduction for vehicles only if the

⁶ The same group protested Chief Justice Rehnquist's funeral, some with signs reading "Judge in Hell."

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debtor is actually making payments on the vehicles. With a storyline like that, the script for the *Lifetime* special event practically writes itself.

Until next time, that's today's baseball!

