

## A new term, a new justice

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On Monday, October 5, the Supreme Court formally began its 2009 October term. The most important change from the year before was the presence of the Court's newest member, Justice Sonia Sotomayor, who replaced retired Justice David Souter.

In a highly unusual event, the Court came back from its summer recess on September 9 to hear oral arguments in a case concerning the constitutionality of laws limiting corporate expenditures in election campaigns—*Citizens United v. Federal Election Commission*.<sup>1</sup> By starting early and with a potential blockbuster decision, the Court may well have begun a term of exceptional importance.

The Court traditionally sets about half of the docket for the coming term before it adjourns at the end of June for its summer recess.<sup>2</sup> The docket for the October term already has a number of cases that may bring about significant changes in the law in areas such as the First Amendment, criminal procedure, property rights, and separation of powers.

### The First Amendment

In *Citizens United*, the Court will decide whether restrictions on corporate spending in political campaigns violate the First Amendment.

In 2007, the conservative nonprofit advocacy group Citizens United produced an anti-Hillary Clinton documentary and wanted to air it on a cable video-on-demand service and advertise it on television during the 2008 presidential primaries. But a provision of the McCain-Feingold Bipartisan Campaign

Finance Reform Act prohibits corporations or unions from running issue advertisements on television or radio for or against an identifiable candidate 30 days before a primary election or 60 days before a general election.

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Fearing criminal penalties for showing and promoting the documentary, the group sought to enjoin the FEC from enforcing that provision with regard to the documentary. The U.S. District Court for the District of Columbia denied the group's motion for a preliminary injunction.<sup>3</sup>

In March, the Supreme Court heard oral arguments in the case on the narrow question of whether the statute applies to the documentary and, if so, whether this violates the First Amendment. A decision was expected in early summer. But on June 29, the Court surprised everyone by asking the parties for new briefing and arguments on whether the Court's prior decisions upholding limits on corporate campaign spending should be overruled.

Many Court watchers speculate that five justices—Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas—would support a ruling that restrictions on corporate campaign spending are unconstitutional, and perhaps these five would vote to strike down laws that have existed for a century prohibiting corporate contributions to candidates for elective office. The same five might even vote in favor of holding that all limits on campaign contributions except disclosure requirements are unconstitutional.

The Court, though, is unlikely to go that far in this case.

But if the Court does the expected and holds that corporations have a First Amendment right to spend money in elections, that decision will change the nature of federal, state, and local elections and greatly alter our political system. The infusion of tremendous amounts of corporate money into elections likely will have a great impact in many campaigns.

Another First Amendment case on the docket—*Salazar v. Buono*—centers on a large Latin cross that sits atop a prominent rock outcropping in the Mojave National Preserve.<sup>4</sup> The Court will determine who has standing to challenge the display of a religious symbol on federal property and whether Congress's attempt to preserve the cross by transferring the land on which it sits to a private entity violated the Establishment Clause.

This will be the first major Establishment Clause case to be decided since Roberts and Alito joined the Court. There may now be five votes—if Roberts and Alito join Kennedy, Scalia, and Thomas—to significantly change the law to allow much more government support for and involvement with religion.

In *United States v. Stevens*,<sup>5</sup> the Court will consider whether a federal law that bars “knowingly creat[ing], sell[ing], or possess[ing] a depiction of animal cruelty”<sup>6</sup> violates the Free Speech Clause. And in *Milavetz v. United States*, the Court will decide whether the new provisions of the bankruptcy code violate that clause by prohibiting lawyers from advising clients to take on additional

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debt, even if it is lawful to do so, and by requiring certain disclosures in lawyer advertisements.<sup>7</sup>

## Criminal procedure

In 2005, in *Roper v. Simmons*, the Court held in a 5-4 decision that the death penalty cannot be imposed for crimes committed by juveniles.<sup>8</sup> In *Graham v. Florida*<sup>9</sup> and *Sullivan v. Florida*,<sup>10</sup> the Court will decide whether a sentence of life imprisonment without the possibility of parole is cruel and unusual punishment when imposed for a crime committed by a juvenile.

In *Maryland v. Shatzer*, the Court will consider whether *Edwards v. Arizona*,<sup>11</sup> which barred police from initiating questioning with criminal suspects who have invoked their right to counsel under the Fifth Amendment, applies to an interrogation that takes place nearly three years later.<sup>12</sup>

This is particularly significant because last May, in *Montejo v. Louisiana*, the Supreme Court overruled a 23-year-old precedent, *Jackson v. Michigan*,<sup>13</sup> and held that the Sixth Amendment does not bar police from attempting to elicit incriminating statements from a defendant who is represented by counsel.<sup>14</sup> The Court, in an opinion by Scalia, stressed that police officers are barred by *Edwards* from doing this with a suspect who has invoked the right to counsel under the Fifth Amendment. In *Shatzer*, the justices must decide whether the Court will continue to adhere to the holding and scope of the *Edwards* decision.

Another case involving the scope of the right to counsel under the Fifth Amendment is *Florida v. Powell*.<sup>15</sup> A suspect was told, "You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any question-

ing." But the suspect was not told of his right to have an attorney present during any questioning. The Court will consider whether this violated the suspect's Fifth Amendment privilege against self-incrimination.

## Property rights

Two cases center on important property rights issues. In *Alvarez v. Smith*, the Court will consider whether local law enforcement agencies may seize and retain custody of personal property indefinitely without judicial or administrative review.<sup>16</sup> In *Stop Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, the Court will consider whether government restoration of an eroded beachfront that changes property lines amounts to a taking that violates the Fifth Amendment.<sup>17</sup>

These are the first Supreme Court cases concerning the Takings Clause since the Court's highly controversial decision in *Kelo v. City of New London*, which held that a city could use its eminent domain power to take private property and then sell it to economic developers.<sup>18</sup> They also are the first of these cases to be heard by the Court's three newest justices—Roberts, Alito, and Sotomayor.

## Separation of powers

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court will decide whether the Sarbanes-Oxley Act violates the separation of powers by insulating members of an accounting oversight board from appointment or removal by the president of the United States.<sup>19</sup>

The underlying issue is whether the Constitution requires that administrative boards be directly accountable to the president. Depending on how broadly the Court writes the opinion, the decision could have important im-

plications for many agencies in the federal government.

Much has been written about how the Court's newest justice will affect its ideological balance. It is widely thought that Sotomayor's votes will mirror Souter's, especially in high-profile cases, and so her presence will not significantly change the Court's direction.

But the Court is a small group, and this one new justice might prove to be a powerful persuader. Perhaps Sotomayor might sway Kennedy to her way of seeing an issue where Souter could not. With such a divided Court and so many weighty issues before it, this term will certainly test Sotomayor's persuasive skills and provide some indication of how much her presence may affect the outcome of future cases. ■

### Notes

1. 129 S. Ct. 594 (2009), *rehearing ordered*, 129 S. Ct. 2893 (2009).
2. This column covers only those cases for which certiorari was granted before the Court adjourned for its summer recess.
3. *Citizens United v. Fed. Election Comm.*, 2008 WL 2788753 (D.D.C. July 18, 2008).
4. 527 F.3d 758 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 1313 (2009).
5. 533 F.3d 218 (3d Cir. 1998), *cert. granted*, 129 S. Ct. 1984 (2009).
6. 18 U.S.C. §48 (2006).
7. 541 F.3d 785 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2769 (2009).
8. 543 U.S. 551 (2005).
9. 982 So. 2d 43 (Fla. App. 2008), *cert. granted*, 129 S. Ct. 2157 (2009).
10. 987 So. 2d 83 (Fla. App. 2008), *cert. granted*, 129 S. Ct. 2157 (2009).
11. 451 U.S. 477 (1981).
12. 954 A.2d 1118 (Md. 2009), *cert. granted*, 129 S. Ct. 1043 (2009).
13. 475 U.S. 625 (1986).
14. 129 S. Ct. 2079 (2009).
15. 998 So. 2d 531 (Fla. 2008), *cert. granted*, 129 S. Ct. 2827 (2009).
16. 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 1401 (2009).
17. 998 So. 2d 1102 (Fla. 2008), *cert. granted*, 129 S. Ct. 2792 (2009).
18. 545 U.S. 469 (2005).
19. 537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (2009).