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Taking stock of the high court term

August 03, 2009

Lawyers who argued some of the key cases of the 2008-2009 Supreme Court term gathered last month at Georgetown University Law Center for the eighth annual Legal Times Supreme Court Review, now under the auspices of The National Law Journal.

NLJ Supreme Court correspondent Tony Mauro moderated the discussion, which analyzed some of the most-watched cases of the term and looked ahead to the upcoming one with Sonia Sotomayor likely joining the Court. The transcript of the discussion, edited for length and clarity, follows.

PARTICIPANTS



NEAL KATYAL, principal deputy solicitor general of the United States

Katyal argued the crucial Voting Rights Act case, *Northwest Austin Municipal Utility District Number One v. Holder*.



GREGORY COLEMAN, partner, Yetter, Warden & Coleman in Austin, Texas

Coleman was Katyal's adversary in the Voting Rights Act case. He also argued in the high-profile New Haven firefighter case, *Ricci v. DeStefano*.



DAVID FREDERICK, partner, Kellogg, Huber, Hansen, Todd, Evans & Figel in Washington

Frederick represented an injured plaintiff in the biggest business case of the year, *Wyeth v. Levine*.



PAMELA HARRIS, director of the Supreme Court Institute at Georgetown University Law Center

While a partner in the Washington office of O'Melveny & Myers, Harris argued in *Pleasant Grove City v. Summum* on behalf of the religious group Summum, which wanted to place a monument to its "Seven Aphorisms" near a Ten Commandments display on public land in Utah.

TONY MAURO: Pam, I was hoping you could start by talking about the Summum case, which certainly seemed like an establishment clause case but wasn't really handled that way.

PAMELA HARRIS: I thought my clients, the Summum, had a very sympathetic free speech claim. I mean, they were very sincere. And so, on their face, there was nothing outrageous, nothing hateful and really nothing offensive about the speech that they wanted to engage in in this public park, except, except — and this was really the crux of the case, I thought — that their proposed monument would have been placed very close to the Ten

Commandments monument, and so it might have conveyed the idea that the Ten Commandments were not a singular or the only religious truth.

I think people were very deeply and very genuinely offended by that implicit message, and some people found it quite literally blasphemous to put a different religious monument so close to the Ten Commandments monument, which raised what I thought was a fairly compelling set of free speech questions. You know, over the last 25 years or so, there's been a very consistent move toward opening the public square to religious views and to religious speech.

I think that's all to the good, but it does raise some difficult questions like whose religious speech exactly will be included. And if you want to bring your religious views out of your religious community and into the public square, the public marketplace of ideas, do you have to be prepared for the give and take of that public marketplace and ideas?

It's not without problems, no question about it. Monuments are different from other forms of speech and maybe government needs more latitude in regulating monuments, but there was something sympathetic there, I thought, which then leads to the question of, well, then how did we manage to lose this case 9-0? The problem for us was that the Court didn't really think about it as a free speech case, they thought about it against the background of the establishment clause and that was what was playing out strategically in this case. It made it very hard for us, because the more liberal justices, who should have been sympathetic, were actually very concerned about calling a monument in a public park private speech. That would protect it under the free speech clause but makes it much harder to challenge it under the establishment clause, to show that it's conveying a governmental religious message and not just a private message.

So the justices who should have been our allies were actually against us because they were very worried that our free speech position would end up insulating religious monuments under the establishment clause....

For us, just as a strategic question, we knew we were losing this case going in. We could see what was going on, we knew we were going to lose, and the question for us was how did we want to lose the case. That was sort of what was driving our litigation strategy: How did we want to lose? Our client's first choice was, "Let a thousand flowers bloom, we'll all express our religious views in the park." But if they couldn't get that, their second choice was losing in a way that would be helpful under the establishment clause and, specifically, losing with the ruling we actually got: that any monument in a public park is going to be reasonably seen as conveying a governmental message, as a kind of government speech.

So in that sense, to bring you to full closure, this was a huge victory for us, a 9-0 loss. We got just what we wanted. We'll get them next time under the establishment clause.

MAURO: Neal, I wanted to ask you about your transition from private attorney to government attorney and the different pressures and expectations that involves.

NEAL KATYAL: Well, my transition was frankly pretty rough. Anything I say is in my personal capacity. Now, when I got to the department on January 21st, it was an enormous time of transition in the government in terms of the executive branch, but the Solicitor General's Office is actually a little different than other parts of the government.

One thing that's different is just the structure of the office. So I'm one of the deputies. There are three other deputies who know a heck of a lot more about the Supreme Court and law than I do. And then there's the solicitor general. That's different than, say, the Office of Legal Counsel in which all of the deputies are political deputies and they change from one administration to the next. There's a lot of continuity in our office, and there's a great premium placed on stability in the positions that we take from one administration to the next.

That creates no doubt an untold amount of frustration on the part of activists in the party and otherwise, but I think it serves the government quite well, because, after all, we are not simply the administration's lawyers; we are the government of the United States' lawyers. That means, for example, that we defend laws of Congress that were passed, enacted and enacted into law. That is not to say that we won't ever change our position or think about stuff in a new way.

I think one example, an interesting case, a high-profile case this term is the Fourth Amendment case involving the strip search of a 13-year-old girl, Savana Redding [*Safford Unified School District v. Redding*]....What we argued in that case was that Ms. Redding's rights had been violated, her Fourth Amendment rights, but that there was a qualified immunity defense available to those officials, and ultimately that's what the Supreme Court concluded, 8 to 1.

MAURO: I almost need to say nothing more except to turn it over to you, Greg, and ask you to talk about the two cases you argued, which were scheduled within one week of each other, I believe. How did you prepare for those, and what do you think they stand for?

GREGORY COLEMAN: It wasn't by design that we had two cases come up together in the same year, and it certainly wasn't by design that we had two cases that involved race issues, which does create some emotional context to it. It is interesting to see people's reactions. Some people have very strong reactions. We have tried throughout the process to keep a dialogue going about both of these cases. Obviously you know, I feel that the position that we took is the right one. We're extremely happy that we won. Section 5 [of the Voting Rights Act] is something that we have struggled with for quite some time, and you know the remedy that the Court gave was a remedy that we had been pushing for.

A lot of commentators have asked, well, were you disappointed that you didn't get Section 5 of the Voting Rights Act struck down? The answer is clearly no. Yes, we asked for that. I do think the argument is right, but this is the first case that the Supreme Court has had in quite some time where any part of Section 5 or the apparatus surrounding it has been challenged. Three years ago, nobody was talking about Section 5 or whether its application to various parts of the country might be unfair. People are talking about that now. There are commentators on both sides of the philosophical aisle [who] have been suggesting that Congress really ought to rethink some of what it did in 2006. Maybe it should make some changes.

The idea of opening up the statute to allow bailouts, which frankly have not been permitted really since the '80s, is I think a really good thing. It allows political subdivisions to go before the Department of Justice and ultimately the district court here and say, you know, we've been committed to living up to our obligations under the Voting Rights Act for 10 years or more, which is the statutory requirement. We don't have any violations. Nobody's accused us of discrimination. Nobody has objected to our preclearance submissions. We've done all that has been asked for us, so let us out....

MAURO: David, your case, which I know affected you quite deeply, was *Wyeth v. Levine*. I wanted you to talk about that and how you think that decision on federal pre-emption fits in with the trends of the Court. Is pre-emption dead?

DAVID FREDERICK: *Wyeth* was one where I got called and asked whether I'd be interested in helping out Diana Levine. She came to my office and we met, and it was a really kind of an extraordinary meeting....But one thing that was really striking was the sense in which she still viewed the case as about her, and I tried gently to suggest to her that now that the case was in the Supreme Court it was no longer just about her and that she needed to be a spokesperson for all persons who had been injured by drugs that had been negligently warned, and that I, as her advocate, had the responsibility to represent all of those people that were similarly situated to her.

That created a very awkward moment in the first meeting between an attorney and a client because, up until then, with the trial and the appeal in the state supreme court, she knew that it was about her claim and whether or not she was going to be recompensed at a level that would enable her to get on with her life. I mean this was a musician, a professional musician whose arm was amputated just at the elbow point and she could no longer perform or record music....

The pharmaceutical industry had argued for a very broad pre-emption principle that whenever the FDA approves a drug label that would pre-empt a state law failure-to-warn claim.

For decades, the Food and Drug Administration had essentially and tacitly taken the position that these state law claims provided information that facilitated the government's regulatory mission of ensuring safe use of drugs, and that imposed on the manufacturer the duty to ensure that their labels were up to date with the most recent information. The Bush administration had changed that view and, in a rather radical position in which I think the Bush administration overreached, argued that the FDA's approval of the drug label negated and pre-empted the rights of people to bring claims for negligence in the drug company's failure to warn. When you go up against the government, it is one thing. When you go up against the government with industry and a change in position, there's a special dynamic at play.

We were quite concerned because the government had never lost a case on implied pre-emption in which it asserted that there was pre-emption through a governmental action.

So looking forward, one of the things that I think will be very interesting is to see to what extent the Obama administration in carefully reassessing the pre-emption positions taken by the Bush administration will hew to the line that the Bush administration took, or [will] reassess and evaluate, in light of changed circumstances with the agencies' changed policies, how far pre-emption should properly go....

MAURO: In the Voting Rights Act case, it really did appear to many people that the Court was going to deal with the constitutionality issue from the oral argument, and yet they stepped back and eight justices joined in an opinion that was really quite critical of the Voting Rights Act but didn't quite pull the trigger. I think that still has a lot of people mystified. What are your thoughts?

KATYAL: Well, one of the remarkable things I think about Chief Justice [John] Roberts' Voting Rights decision is that it allowed — you heard Greg declare victory, the attorney general right after the decision also praised the

ruling. I mean, it was a remarkable act in which all sides are in agreement that the decision was wise and wonderful....

I think many people were surprised that the statutory bailout decision was the way in which the Court dealt with this. I think that's a fairly tough argument to get to from the text of the statute. One of the interesting things that people will be debating and talking about in the years to come is really what is the appropriate model for judging, and here you have Chief Justice Roberts' model, which I think one could think of in terms of Chief Justice [John] Marshall. Or you could think about it in terms of Bill Brennan cobbling together majorities of people for positions that aren't always intuitively obvious as a legal matter but in some sense have this real underbelly of pragmatism and politics, in the best sense of the word....There is some cost to that of course, a cost in terms of fidelity to the statutory texts and to precedent as well. But particularly in a multimember court, there may be a real strong case to be made for it.

On the other hand, you could say, well, there's the view of the true intellectual, [a Felix] Frankfurter,...then-Justice [William] Rehnquist writing these lone dissents in the 1970s [that] ultimately become in many cases the law of the land. Justice [Clarence] Thomas I think is really staking out a bit of that territory, and not being afraid to be the lone dissenter in the Voting Rights Act case or in the strip search case. It's unclear to me which is the right way to be, but I do think that that is a really powerful question that is set up by the voting lineups in the opinions written in these cases. But I think the very interesting thing about Chief Justice Roberts' decision is that it does allow everyone to come away feeling very pleased.

COLEMAN: One thing I've never understood since the moment the decision came out is some of the commentators have said that statutory interpretation argument just doesn't make any sense....

You asked about whether the Court really was stepping back. There's another way of looking at that, and that is my experience is that most of the justices have already pretty much made up their minds before they get into oral arguments. There's some question in my mind whether the commentators are correct in suggesting that they got scared off after oral argument or whether they had already pretty much decided the way they were going to go and simply felt free to use oral argument to plumb the depths of a variety of arguments, including the constitutional argument, even though they had already decided that that's not the way that they wanted to go.

FREDERICK: Tony, can I just jump in, because I wrote a brief in the case on behalf of some Texas districts so we were on Neal's side of the case rather than on Greg's....To me, the case came down to this kind of basic, metalevel common sense: You've got a utility district that had not any evident history of doing anything wrong and they were simply trying to get out from what they perceived to be the strictures of preclearance. There was a common sense to that. And maybe this was case selection, Greg had brilliantly been approached by the right client at the right time, but it was at that level that I think that the government side, our side, had a hard time persuading....

HARRIS: I'm very intrigued by Greg's suggestion that maybe the justices really knew what was going on before they got to argument, because otherwise I was actually a little bit puzzled by the tone of argument and the chief justice's tone in particular. I thought if he was trying to sort of woo Justice [Anthony] Kennedy, bring Justice Kennedy fully on board for invalidating the Voting Rights Act, to do that I thought he would have to persuade Justice Kennedy that you could do it in a way that was actually respectful of the act, that respected what it had done, what it had achieved, what it meant to this country. That was not the chief justice's tone at argument at all. So I almost had thought that his tone was somewhat counterproductive and that it might have cost him Justice Kennedy's vote. But another way of thinking about it is maybe he already knew how this was coming out and it didn't really matter, so this was almost his chance to, you know, a little catharsis, as in, 'If it were up to me, we'd get rid of this thing but, and I'm just going to vent about that for a few minutes.'...

KATYAL: Standing 6 feet away from him, I didn't perceive that at all. I found the typical chief kind of, you know, get to the heart of the thing, but I never felt hostility to the act in the questioning. I don't know if there's something about the dynamics of that courtroom that make it different, the kind of very close interaction between advocate and justice or not, but just being so close there I didn't feel it, and trust me, I'm perfectly used to feeling it in other arguments....

MAURO: I want to ask generally about Justice [David] Souter departing the Court. Will you miss his questioning, or are you glad, and what role do you think he played on the Court?

FREDERICK: Well, all of my arguments before the Court have been before Justice Souter, and I'm going to miss him greatly. He had a way at the argument of asking a question in a way that he really conveyed wanting to know the answer to the question in a very deep and sincere way. He asked questions in a balanced tone with an expression of curiosity, but they were questions of great sophistication and depth. You avoided answering them at your peril because he was very quick to follow up if he thought you hadn't answered the question directly, in the way that he thought an advocate should do. But I thought — and I will always admire the civility and the tone and the decency that he brought to his role as a Supreme Court justice....

KATYAL: In the DNA argument, which I did in March, there was a line of questioning I was really worried about

getting, and sure enough Justice Souter was the one to launch that volley of questions. His opinion in the DNA case I think is a really moving opinion. It's a kind of ode to Burkean conservatism, and it is I think worth everyone's study because it's a really interesting way of thinking about substantive due process and about the need to go slow. That is not something that we have traditionally seen a lot of in the Supreme Court, from both supposed right and left....But Justice Souter is really staking that position out in that case. I think it will be one of his great legacies for the Court.

COLEMAN: In the firefighters case, you know, he asked the one question really that got reported in the media, which is, 'What is the city supposed to do? You're damned if you do and you're damned if you don't,' which got to the heart of this intersection between disparate impact and disparate treatment in Title VII. How do you define a rule that allows these employees to be fairly treated but doesn't unfairly prejudice the employer, the city, at the same time. He was looking for that test, something that would allow him to do that.

MAURO: And did the Court come up with the right answer in your view?

COLEMAN: Yes, they did. It was the evidence test that we put forward in our brief....That the Court said that the 'strong basis in evidence' test would be the test for Title VII and then ruled as a matter of law that the city was liable under Title VII, I think was something that we hadn't necessarily thought was a strong expectation on our part.

I'm not sure why the Court went that far, but I think it wanted to make a clear statement in terms of where the law was, and it may be that they wanted to make a statement with respect to the individual petitioners who had been waiting for promotions for six years.

MAURO: A lot of the analyses after the term suggested that the Roberts Court this year was more incremental or more interested in smaller steps and compromise, perhaps. Is that a theme that all of you agree with or not?

HARRIS: To my eye at least, there's another equally plausible account for a lot of the decisions this term, which is that the chief justice is going just as far to the right and he's going there just as fast as Justice Kennedy is prepared to go along with him. At least to my mind it seems at least fairly clear that, in some of the Court's decisions — like the *Herring* [*v. U.S.*] case, the very early exclusionary rule decision from the beginning of this term — that there are four votes, including the chief justice, for really getting rid of the exclusionary rule pretty much altogether. It's Justice Kennedy who's sort of holding them back, who's not quite there with him....

FREDERICK: That's certainly borne out by the statistics. I mean, if you look at the 23 5-4 votes, Justice Kennedy was in the majority in, what, 18 of them, but for pretty clearly the largest number. And the coalitions that formed around most of them were the predictable ones, but there were some outlier cases, four or five where Justice [Antonin] Scalia might peel off and form the fifth vote or Justice Thomas might peel off and form the fifth vote.

COLEMAN: One little anecdote I'll share. During the firefighters argument, Justice [Stephen] Breyer started asking me a series of hypotheticals, and I do mean a series, not one, but multiple ones in the same question. I said, well, Justice Breyer, those are Justice Kennedy's hypotheticals from his concurrence in *Parents Involved* [*v. Seattle School District No. 1*]. He says, well, precisely — he obviously was aiming toward Justice Kennedy in terms of his questioning.

MAURO: OK, I'd like to open it up to questions from the audience.

QUESTION: What might you say was an underrated case of the term, something that's going to have long-ranging impact that's not really getting a lot of play in the media?

COLEMAN: The [*Ashcroft v.*] *Iqbal* case. This was about the suit against the attorney general, John Ashcroft, and the FBI director, Robert Mueller, about the use of discriminatory motives in bringing about post-9/11 decision-making and then saying that those suits could not be brought. The Court applied a pleading standard, a rule of pleading about what needs to be in a complaint to survive a motion to dismiss. They took it from the antitrust area and they imported it into this area of official immunity. *Iqbal* probably will be the single most cited case from this Supreme Court term, except *Wyeth v. Levine*. I say that because there are, I don't know, tens of thousands of drug cases out there, and so the *Wyeth* case is going to get cited a zillion times. But *Iqbal* is going to be cited a lot in kind of determining whether or not the most basic requisites of pleading a complaint have changed in light of the standard that the Court announced. That's my view of the sleeper.

QUESTION: One case that struck me the most is the case that overruled the prior precedents on search of compartments in automobiles by Justice Scalia. Is that a liberal side of the justice or his civil libertarian side, or is there any difference between those two concepts?

HARRIS: It's like there are two Courts when it comes to criminal procedure. There's the Scalia court, which is sort of triggered when there is an originalist argument to be made for a pro-defendant ruling, and you see it in the

sentencing cases. You see it in the confrontation clause cases like *Melendez-Diaz* [*v. Massachusetts*] this term, and you saw it in [*Arizona v.*] *Gant*, which is the case overruling prior precedent, the *New York v. Belton* case. Well, the majority says it's not overruling *Belton* but reconfiguring *Belton* in a way that really narrows police discretion to search cars incident to an arrest. In these cases Justice Scalia and also Justice Thomas, and I think really to their credit — there's an originalist argument, there is a serious argument, it takes them to a place that might not be their preferred political position but they follow it along. You get this very unusual voting lineup where you have these two very conservative justices on the pro-defendant side, and you have some justices people think of as more liberal, but very concerned about the pragmatic impact of these decisions in dissent.

FREDERICK: *Melendez-Diaz* could end up being a hugely important case in the practicalities of how criminal cases unfold. This is the case where the Court held, 5 to 4, that when a lab examiner has done scientific analysis in a case, produces a report that's used by the prosecution, the defense has a confrontation clause right to cross-examine the lab examiner who did the actual lab work. Historically, lab work in this country has not always been done by the person who testifies. In fact, the FBI for decades had a tradition of somebody who knew something about science doing the work and then a very handsome, typically white male agent would go testify. Lots of people were convicted, even though that agent didn't know anything about science....

Thankfully that practice has been changing in the FBI, but some of the state and local labs have not yet caught up to these more modern practices. *Melendez-Diaz* I think really throws down the gauntlet to the prosecution to ensure that there is absolute fairness in providing a mechanism for defendants to cross-examine the actual people who do the actual work in the science lab.

QUESTION: With Judge [Sonia] Sotomayor possibly becoming Justice Sotomayor this coming term, do you anticipate that advocates are going to have to change their litigation argument strategies, and how?

FREDERICK: I would say that it would be unusual for a highly skilled advocate to try to change an argument just because of a new member of the Court coming on. It's hard enough to come up with a really good argument that enables you to answer the hard questions that come in from whoever, from whatever the source. What I think will be interesting to watch is the extent to which the 2d Circuit's docket, which has got a very heavy business component to it, a very heavy finance component, will end up causing Justice Sotomayor to look at the law in ways that may be different from Justice Souter, simply because they have different backgrounds from their legal work that they bring to bear to the Supreme Court's problem-solving.

KATYAL: One thing that I think I'll be watching for — and it goes to David's point about experiences — [is that,] unlike Justice Souter, Judge Sotomayor has been a prosecutor for a number of years. It'll be interesting to see whether that will influence the direction the Court takes in some of these criminal procedure and criminal law matters....

I've had the privilege of sending clerks to her almost every year for several years, and they uniformly rave about her skill at argument, her hard working, just how hard she works to get it right.

MAURO: I just thought we could maybe go down the line and ask for your thoughts about next term....

HARRIS: There are two big criminal cases on the docket right now. The [*Maryland v.*] *Schatzer* case...raises questions about invocation of the Fifth Amendment right to counsel and how protective that rule will be. There's another *Miranda* [*v. Arizona*] case, the [*Florida v.*] *Powell* case about how explicit the warnings you get under *Miranda* have to be in terms of explaining the right to have counsel present at questioning itself.

My guess is that both cases will be decided on fairly narrow grounds, but they also are the first opportunity for the chief justice and Justice [Samuel] Alito to really weigh in on how they feel about *Miranda*.

KATYAL: The things I'm watching most closely are *United States v. Stevens*, which is a case about a congressional statute that's been struck down that prohibits the commercial sale of these really horrific videos about cruelty to animals, and in a case that we have a petition up for now called *International Humanitarian Project v. Holder*, which is about the material support statute, parts of which have been struck down by the 9th Circuit as unconstitutional violations of free speech. This is a criminal law that prohibits material support against terrorism. It's of enormous importance to the department that the Court take this and get it right.

FREDERICK: I think next term is going to be a very interesting term from the perspective of having the Court look closely at the aftermath of the financial crisis. Not only do you have the [Public Company Accounting Oversight Board] case, you've got a case called *Jones v. Harris Associates*, which will have a very profound effect potentially on mutual funds that common investors invest in....Then there is a case called *Merck v. Reynolds*, which will go into the inquiry-notice test for bringing claims against companies for violations of securities laws. What's going to happen, I think, as these cases play out is that there will be a focus on the aftermath of the financial crisis and the Court looking doctrinally at a couple of these historic statutes in the aftermath of this very large financial meltdown.

Institutionally, my observation is that the justices will be taking quite some time to get a sense of their new

member, and Chief Justice Roberts will be on the Court for his fifth term. This combination of kind of feeling each other out will play itself out both in the arguments and in the opinion writing. I mean, Justice Alito's very first opinion, Justice Scalia slammed him for relying on legislative history, you know, welcome to the Supreme Court. And it'll be interesting to see what kind of welcome Justice Sotomayor receives.