9-1990

1990-91 Supreme Court Preview: Schedule and Panel Members

Institute of Bill of Rights Law, William & Mary Law School

SUPREME COURT PREVIEW
WHAT TO EXPECT FROM THE 1990-91 TERM
Institute of Bill of Rights Law
Williamsburg, Virginia

Friday, September 21

12:30 p.m.--1:00 p.m. — Registration
Law School Lobby

1:05 p.m.--2:15 p.m. — **RELIGION AND SPEECH**
Room 119

What is the future of the Establishment Clause? What do cases such as *Employment Division, Oregon Dept. of Human Resources v. Smith* portend? What is the future of the Court's free-speech jurisprudence? What do last term's decisions in *U.S. v. Eichman*, *Osborne v. Ohio*, *Milkovich v. Lorain Journal Co.*, and *Rutan v. Republican Party of Illinois*, for example, portend?
New case: *Lehnert v. Ferris Faculty Association*, No. 89-1217 (Lyle Denniston)
Panel: Lyle Denniston, Bruce Fein, Ruth Marcus, Tony Mauro, Bob Nagel, Ron Rotunda, Ed Yoder

2:30 p.m.--3:30 p.m. — **PRIVACY**
Room 119

What is the future of privacy under the Constitution? What should we make of *Cruzan v. Director, Missouri Department of Health* from last term? What is the fate of *Roe v. Wade*?
New cases: *New York v. Sullivan*, No. 89-1392 (Suzanna Sherry)
Perry v. Louisiana, No. 89-5120 (Steve Wermeil)
(Please note that *New York v. Sullivan* will be argued at a moot court on Saturday--Fein v. Dellinger.)
Panel: Suzanna Sherry, Steve Wermeil, Nat Hentoff, Linda Greenhouse, Kathleen Sullivan, Richard Carelli, Erwin Chemerinsky

3:45 p.m--5:00 p.m. — **EQUALITY**
Room 119

What is the future in this area? What, for example, can we discern from *Metro Broadcasting v. F.C.C.* from last term?
New cases: *Powers v. Ohio*, No. 89-5011 (Michael McConnell)
Board of Education of Oklahoma City Public Schools v. Dowell, No. 89-1080 (Tony Mauro)
(Please note that *Board of Education v. Dowell* will also be a moot court case on Saturday--Rotunda v. Chemerinsky)
Panel: Michael McConnell, Tony Mauro, Walter Dellinger, Aaron Epstein, David Savage, Mel Urofsky, Stephanie Garrett, William and Mary Law Student Journalist, *The Advocate*

5:00 p.m. — Reception
Law School Lounge

Saturday, September 22

9:00 a.m.--9:30 a.m. — Coffee
Law School Patio or Lounge

9:30 a.m.--10:30 a.m. — **CRIMINAL LAW AND PROCEDURE**
Room 119

New cases: *Minnick v. Mississippi*, No. 89-6332 (Ruth Marcus)
Harmelin v. Michigan, No. 89-7272 (Mel Urofsky)
Arizona v. Fulminante, No. 89-839 (Linda Greenhouse)
Burns v. Reed, No. 89-1715 (Michael Gerhardt)
Panel: Ruth Marcus, Mel Urofsky, Linda Greenhouse, Michael Gerhardt, Suzanna Sherry, Ed Yoder, Kathleen Sullivan

10:45 a.m.--11:45 a.m. — **OTHER CONSTITUTIONAL LAW ISSUES**
Room 119

New cases: *Auto Workers v. Johnson Controls Inc.*, No. 89-1215 (Nat Hentoff)
Pacific Mutual Life Insurance Co. v. Haslip, No. 89-1279 (Aaron Epstein)
Eastern Airlines Inc. v. Floyd, No. 89-1598 (Ed Yoder)
U.S. v. R. Enterprises Inc., No. 89-1436 (Kathleen Sullivan)
Panel: Nat Hentoff, Aaron Epstein, Ed Yoder, Lea Brilmayer, Michael Gerhardt, Neal Devins, Michael McConnell

11:45 a.m.--1:30 p.m. — Break for Lunch (on your own)

1:30 p.m.--2:30 p.m. — **THE COURT'S FUTURE DIRECTION**
Room 119

(This will include a profile of David Souter)
Panel: Richard Carelli, Lea Brilmayer, Bob Nagel, Steve Wermeil, Lyle Denniston, David Savage, Stephanie Garrett, William and Mary Law Student Journalist, *The Advocate*

2:45 p.m.--3:15 p.m. — **MOOT COURT:**
Moot Court Room — ***Board of Education of Oklahoma City Public Schools v. Dowell***

Ron Rotunda representing Board of Education
Erwin Chemerinsky representing Dowell
The Court: Bob Nagel-Chief Justice, Neal Devins, Stephanie Garrett, William and Mary Law Student Journalist, *The Advocate*, Michael Gerhardt, Edwin Yoder, Lyle Denniston, Lea Brillmayer, David Savage, Mel Urofsky

3:30 p.m.--4:00 p.m. — **MOOT COURT:**
Moot Court Room — ***New York v. Sullivan***

Walter Dellinger representing New York (attacking the regulations)
Bruce Fein representing HUD (defending regulations)
The Court: Linda Greenhouse-Chief Justice, Richard Carelli, Aaron Epstein, Tony Mauro, Ruth Marcus, Nat Hentoff, Suzanna Sherry, Kathleen Sullivan, Steve Wermeil

Religion and Speech

89-1217 LEHNERT v. FERRIS FACULTY ASSOCIATION

Public employees—Mandatory union dues—First Amendment.

Ruling below (CA 6, 881 F2d 1388, 132 LRRM 2088):

Teacher union's expenditures for costs of conventions, lobbying and electoral campaigns, activities on behalf of persons not employed in plaintiff's bargaining unit, strike preparation and public relations activities, and miscellaneous professional activities were reasonably undertaken to implement or effectuate duties of union as exclusive representative of public employees, and as such were constitutionally chargeable to non-union employees through their service fees.

Question presented: Do First and Fourteenth Amendments permit public employer to compel objecting non-union public employees to contribute, as condition of their employment, to costs of following activities engaged in by their exclusive bargaining representative and its state and national affiliates: (a) activities on behalf of persons not in employees' bargaining unit, including employees in other states and different professions, and retirees; (b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds for, bargaining agreement covering employees' bargaining unit; (c) electoral politics, including campaigns concerning ballot issues; (d) public relations activities; (e) non-bargaining activities related only generally to employees' profession; (f) meetings of affiliates that primarily serve political and ideological purposes; and, (g) threatening and preparing for illegal strikes?

Petition for certiorari filed 1/30/90, by Raymond J. LaJeunesse Jr., of Springfield, Va.

Privacy

89-1392 NEW YORK v. SULLIVAN

Abortions—Counseling—Restrictions on information—First Amendment.

Ruling below (CA 2, 889 F2d 401, 58 LW 2293):

Federal regulations that prohibit abortion counseling and referral by family planning clinics that receive funds under Title X of Public Health Service Act do not violate constitutional rights of pregnant women or Title X grantees.

Questions presented: (1) Do new regulations promulgated by Department of Health and Human Services under Title X of Public Health Service Act that prohibit abortion counseling, referral, and advocacy in programs funded under act, and that require physical separation of Title X-funded facilities and facilities engaging in abortion-related services, violate woman's and health professional's First Amendment rights? (2) Does regulations' prohibition of abortion counseling and referral in Title X-funded program violate woman's constitutionally protected privacy right to make fully informed decision on whether or not to continue her pregnancy? (3) Do regulations' ban on funding of abortion counseling and referral and requirement of physical separation violate congressional intent underlying Title X? (4) Are new regulations arbitrary and capricious because they reverse longstanding agency policy in absence of any intervening change in circumstances and because change in policy admittedly was politically motivated?

Petition for certiorari filed 3/1/90, by Robert Abrams, N.Y. Atty. Gen., O. Peter Sherwood, Sol. Gen., Suzanne J. Lynn and Sanford M. Cohen, both Asst. Attys. Gen., Victor A. Kovner, New York City Corp. Counsel, and Lorna Bade Goodman and Gail Rubin, both Asst. Corp. Counsel.

89-1391 RUST v. SULLIVAN

Abortions—Counseling—Restrictions on information—First Amendment.

Ruling below (*New York v. Sullivan*, CA 2, 889 F2d 401, 58 LW 2293):

Federal regulations that prohibit abortion counseling and referral by family planning clinics that receive funds under Title X of Public Health Service Act do not violate constitutional rights of pregnant women or Title X grantees.

Questions presented: (1) Do regulations promulgated under Title X of Public Health Service Act that prohibit abortion counseling, information, and referral in federally funded family planning programs, while simultaneously requiring provision of information to "protect the health of . . . [the] unborn child" and referral to prenatal care providers that "promote the welfare of . . . [the] unborn child," impermissibly discriminate on basis of viewpoint in violation of First Amendment? (2) Do regulations that require physical as well as financial separation between services provided by and those prohibited under Title X, as construed by Department of Health and Human Services, impermissibly burden ability of petitioners to provide abortion counseling, information, and referral with non-Title X funds in violation of First Amendment? (3) Do regulations that require health professionals working in Title X programs to provide their patients with incomplete and medically inappropriate information regarding subject crucial to informed choice between terminating pregnancy and carrying it to term violate Fifth Amendment? (4) Are regulations that prohibit abortion counseling, information, and referral in Title X programs and require such programs to be physically as well as financially separate from these newly "prohibited" activities, as determined by Secretary, consistent with language and intent of Title X and otherwise within Secretary's authority?

Petition for certiorari filed 3/1/90, by Rachael Pine, Janet Benshoof, Lynn Paltrow, Kathryn Kolbert, Louise Melling, Norman Siegel, Arthur Eisenberg, Laurie Rockett, and Hollyer, Jones, Brady, Smith, Troxell, Barrett & Chira, all of New York, N.Y.

89-5120 PERRY v. LOUISIANA

Capital punishment—Insane persons—Administration of anti-psychotic drugs.

Ruling below (La SupCt, 5/12/89)

Petition for supervisory or remedial writs is denied without opinion.

Questions presented: (1) Do Eighth and Fourteenth Amendments prohibit state from forcibly injecting insane death row inmate with mind-altering drugs when such drugs are not used for treatment but are administered solely in attempt to make him competent to be executed? (2) Is it unconstitutionally cruel and unusual punishment to circumvent prohibition of *Ford v. Wainwright*, 477 U.S. 399, 54 LW 4799 (1986), against executing insane person by forcibly injecting insane inmate with mind-altering drugs in attempt to make him sane, particularly when court's order imposes no limits whatsoever on these injections? (3) What standard applies to determine whether Louisiana inmate is competent to be executed? (4) Do that standard, Eighth Amendment, and *Ford v. Wainwright* prohibit execution of person who has been unanimously diagnosed as suffering from major psychotic illness, whose sanity, even on medication, varies from moment to moment, and who varies "like moving target" in his appreciation for crime for which he was convicted and punishment that he has been condemned to suffer? (5) Is Fourteenth Amendment violated when trial court receives ex parte communications from state department of corrections and then relies upon them in reaching its decision to order forcible injections, without giving defense notice or opportunity to be heard? (6) Is it denial of right to counsel for court to have inmate interviewed without counsel being notified or being allowed to be present?

Petition for certiorari filed 7/10/89, by Keith B. Nordyke, June E. Denlinger, and Nordyke and Denlinger, all of Baton Rouge, La., and Joe Giarrusso Jr. and McGlinchey, Stafford, Mintz, Cellini and Lang, both of New Orleans, La.

Equality

89-5011 POWERS v. OHIO

Jury selection—Peremptory challenges—Racial bias—Exclusion of blacks from white defendant's jury—Standing.

Ruling below (Ohio CtApp, FranklinCty, 12/13/88):

If members of defendant's race have not been excluded from jury service by prosecution's use of peremptory challenges, prosecution need not explain its use of peremptory challenges to exclude members of another race from jury, in absence of demonstration by defendant that such exclusion was systematic and results in prejudice to defendant or, in effect, denied him fair trial; white criminal defendant who challenged prosecution's exercise of peremptory challenges to dismiss black potential jurors did not establish that jury that tried case did not include at least some black members, or that he was somehow prejudice from prosecution's use ofperemptory challenges.

Question presented: Does white criminal defendant have standing, under *Batson v. Kentucky*, 476 U.S. 79, 54 LW 4425 (1986), to challenge prosecution's removal of black prospective jurors?

Petition for certiorari filed 6/30/89, by Randall M. Dana and Robert L. Lane, both of Columbus, Ohio.

89-1080 BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS v. DOWELL

Desegregation—Dissolution of decrees—Unitary status.

Ruling below (CA 10, 10/6/89):

School board's attempt to alter court-approved desegregation plan, in light of changes in demographics and fact that system may now be considered "unitary," violates original injunction since changes are not sufficiently narrow to affect only conditions that warrant them, unitariness alone is insufficient to warrant change, and no hardship that was unforeseen at time original plan was adopted has been demonstrated to exist and thus justify altering original injunctive decree under *U.S. v. Swift & Co.* 286 U.S. 106 (1932).

Questions presented: (1) Should compulsory desegregation decree remain operative after formerly de jure school system achieves unitary status? (2) Does traditional standard for dissolution of injunctive decrees involving private parties, as enunciated in *United States v. Swift & Co.* 286 U.S. 106 (1932), govern dissolution of school desegregation decrees? (3) What affirmative desegregation obligations, if any, does formerly de jure school system have following its elimination of official discrimination and achievement of unitary status? (4) Subsequent to achievement of unitary status, is school board's action to adopt elementary neighborhood school plan that curtails compulsory busing scrutinized by board's lack of discriminatory intent, or by plan's racially disproportionate effect? (5) What are proper criteria for determining whether unitary status has been maintained? (6) Did court of appeals afford sufficient deference to factual findings of district court in compliance with *Anderson v. Bessemer City*, 470 U.S. 564 (1985)?

Petition for certiorari filed 1/3/89, by Ronald L. Day, and Fenton, Fenton, Smith, Reneau & Moon, both of Oklahoma City, Okla.

Criminal Law and Procedure

89-6332 MINNICK v. MISSISSIPPI

Interrogation—Request for counsel—Re-initiation of questioning.

Ruling below (Miss SupCt, 551 So2d 77):

By its own terms, rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), against police-initiated, custodial interrogation of defendant who has invoked right to counsel does not apply once counsel has been provided to defendant, and, therefore, *Edwards* was not violated by interrogation of accused who, prior to interrogation, invoked right to counsel and then spoke with appointed counsel; accused who had advice of counsel, and who was again warned that he had right to counsel, and who continued to speak with detective, even though he expressly refused to sign waiver of rights, nonetheless made knowing and intelligent waiver of his Sixth Amendment right to counsel.

Question presented: Once accused has expressed his desire to deal with law enforcement officers only through counsel, may police re-initiate interrogation in absence of counsel as soon as accused has completed one consultation with lawyer?

Petition for certiorari filed 12/19/89, by Clive A. Stafford Smith, of Atlanta, Ga.

89-7272 HARMELIN v. MICHIGAN

Sentencing — Life imprisonment — Possession of drugs — Cruel and unusual punishment.

Ruling below (Mich CtApp, 176 MichApp 524):

Mandatory sentence of life imprisonment for conviction of possession of more than 650 grams of cocaine does not violate Eighth Amendment's ban on cruel and unusual punishment.

Question presented: Does mandatory sentence of life imprisonment without possibility of parole in this case constitute cruel and unusual punishment?

Petition for certiorari filed 4/2/90, by Ronald Harmelin, pro se, of Plymouth, Michigan.

89-839 ARIZONA v. FULMINANTE

Confessions—Voluntariness of inmate's confession to informer—Promise of protection from other inmates—Harmless error.

First ruling below (Ariz SupCt, 6/16/88):

Inmate acting as government informer exerted improper coercion, thereby vitiating voluntariness of confession given by inmate-defendant, by promising that if defendant told him truth about rumor then circulating at prison that defendant had killed child, informer would protect him from other other inmates who had been giving defendant "rough" treatment because of rumor; error in admitting confession was harmless, however, in view of proper admission of similar and even more explicit confession defendant gave to another.

Second ruling below (Ariz SupCt, 7/11/89):

On reconsideration of earlier opinion, conclusion that erroneous admission of confession was harmless is changed in light of authority holding that admission of coerced confession can never be harmless error; accordingly, conviction must be reversed.

Questions presented: (1) Did state supreme court err in failing to apply totality-of-circumstances test in addressing question whether defendant's confession to inmate-informer was made voluntarily? (2) Did court err in holding that confession was coerced by inmate-informer's implied promise to protect defendant from other inmates who were subjecting him to rough treatment, in view of fact that defendant never expressed any fear of other inmates and never sought inmate-informer's protection? (3) Can erroneous admission of involuntary confession be subject to harmless error analysis in case in which there is overwhelming evidence of guilt, including second, voluntary confession, and there has been no especially egregious conduct by law enforcement officials?

Petition for certiorari filed 11/17/89, by Robert K. Corbin, Ariz. Atty. Gen., Jessica Gifford Funkhouser, Chief Counsel for Crim. Div., and Barbara M. Jarrett, Asst. Atty. Gen.

89-1715 BURNS v. REED

Prosecutorial immunity—Use of hypnosis—Participation in search warrant application and arrest.

Ruling below (CA 7, 894 F2d 949, 46 CrL 1426):

State prosecutor's conduct in advising police officers to hypnotize assault suspect, which officers had been taught was unacceptable investigative technique, was prosecutorial rather than investigative function and, therefore, is shielded by absolute immunity from 42 USC 1983 action brought by suspect; similarly, prosecutor's act of presenting evidence during probable cause hearings, which allegedly included elicitation of false testimony from police officers, was prosecutorial and is therefore covered by immunity.

Questions presented: (1) Is deputy prosecutor entitled to absolute immunity when he gives approval to police conduct that is known or should be known to him to be improper? (2) Is deputy prosecutor entitled to absolute immunity when, in seeking search warrant in probable cause hearing, he intentionally fails to fully inform court by failing to state that arrestee's alleged confession was made while arrestee was under hypnosis and that arrestee had persistently denied committing any crime before and after hypnosis? (3) Is deputy prosecutor entitled to absolute immunity when he participates in unlawful arrest, given fact that under state law prosecutor possesses same arrest powers as police officers? (4) Are such activities individually and collectively outside protected activities of initiating prosecution and presenting state's case? (5) Is question of whether activity is investigative one for jury to decide, when veracity of witnesses and conflict in testimony do not define issue of immunity purely as matter of law?

Petition for certiorari filed 5/7/90, by Michael K. Sutherlin, of Indianapolis, Ind.

Other Constitutional Law Issues

89-1215 AUTO WORKERS v. JOHNSON CONTROLS INC.

Sex—Fetal protection policy—Employer's justification.

Ruling below (CA 7, 886 F2d 871, 58 LW 2193, 50 FEP Cases 1628):

Business necessity defense shields battery manufacturer's fetal protection policy, which excludes women of childbearing age from high lead exposure jobs, from liability under Title VII of 1964 Civil Rights Act, and policy is also justified under bona fide occupational qualification defense; animal research evidence does not present type of solid scientific data necessary for reasonable fact-finder to reach non-speculative conclusion that father's exposure to lead presents same danger to unborn child as that resulting from mother's exposure.

Questions presented: (1) Where employer policy excluding all fertile women from certain jobs because of concerns for health of any fetus that those women may conceive is challenged as unlawful gender discrimination violative of Title VII of 1964 Civil Rights Act: (a) does plaintiff or defendant bear burden of proving that employer's justification for excluding women from certain jobs meets Title VII standards? (b) is that justification judged under explicit provisions of statutory affirmative defense for bona fide occupational qualifications or is employer entitled to assert additional, broader "legitimate business justification" defense not explicitly stated in statute? (c) if only statutory bona fide occupational qualification defense is available, does fetal protection purpose come within bounds of that defense? (2) Are scientific animal studies insufficient as matter of law to demonstrate significant risk to humans due to exposure to toxic substance?

Petition for certiorari filed 1/29/90, by Jordan Rossen and Ralph O. Jones, both of Detroit, Mich., Marsha S. Berzon, of San Francisco, Calif., Carin Ann Clauss, of Madison, Wis., and Laurence Gold, of Washington, D.C.

89-1279 PACIFIC MUTUAL LIFE INSURANCE CO. v. HASLIP

Punitive damages—Due process—Appellate review.

Ruling below (Ala SupCt, 553 So2d 537):

Award of punitive damages against insurance company, based on fraudulent acts of individual that jury found, based on sufficient evidence, to be its agent, was supported by adequate findings of trial judge stating why law did not authorize him to order remittitur, and did not violate First, Fourth, Fifth, Sixth, Eighth, or Fourteenth Amendments.

Questions presented: (1) Does Alabama law violate due process by allowing jury to award punitive damages as matter of "moral discretion," without adequate standards as to amount necessary to punish and deter and without necessary relationship to amount of actual harm caused? (2) Did Alabama law violate insurance company's right to due process under Fourteenth Amendment by allowing punitive damages to be awarded against it under respondeat superior theory? (3) Was amount of punitive damages in this case excessive, in violation of insurance company's due process right to be free of grossly excessive, disproportionate damages awards? (4) Must suit below, although nominally civil, be considered criminal in nature as to punitive damages awarded therein, entitling insurance company to protection under Fifth, Sixth and Fourteenth Amendments? (5) Does Alabama law discriminate against those defendants subjected to open-ended punitive damages by limiting amount of such damages that may be awarded against other classes of defendants, without rational basis? (6) Were constitutional defects in award of punitive damages against insurance company cured by judicial review and potential for remittitur?

Petition for certiorari filed 2/7/90, by Bruce A. Beckman, Vicki W.W. Lai, and Adams Duque & Hazeltine, all of Los Angeles, Calif., and J. Mark Hart, Ollie L. Blan Jr., Bert S. Nettles, and Spain, Gillon, Grooms, Blan & Nettles, all of Birmingham, Ala.

89-1598 EASTERN AIRLINES INC. v. FLOYD

Warsaw Convention—Air carrier liability for emotional injury.

Ruling below (CA 11, 872 F2d 1462, 57 LW 2645):

Cause of action for emotional injury unaccompanied by physical harm is cognizable under Warsaw Convention; Montreal Agreement, which followed Warsaw Convention, is consistent with that interpretation.

Questions presented: (1) In view of presumed liability under Warsaw Convention for death, wounding, or any other bodily injury, is air carrier liable for fright, psychic injury, or emotional distress absent objective bodily injury or absent any physical manifestation of injury? (2) Does Montreal Agreement, which modifies Warsaw Convention and which eliminates air carrier's "due care" defense, make international air carriers insurers of their passengers against any fright, psychic injury, or emotional distress absent showing of objective bodily injury or absent physical manifestations of injury?

Petition for certiorari filed 4/10/90, by John Michael Murray, Aurora A. Ares, and Thornton, David, Murray, Richard & Davis, P.A., all of Miami, Fla., and Linda Singer Stern.

89-1436 U.S. v. R. ENTERPRISES INC.

Subpoenas—Business records—Enforcement.

Ruling below (*U.S. v. Under Seal (In re Grand Jury 87-3 Subpoena Duces Tecum)*, CA 4, 884 F2d 772, 45 CrL 2441):

Subpoena duces tecum ordering production of business records is not enforceable, under Fed.R. Crim.P. 17(c), if records would not be relevant and admissible at trial.

Question presented: Must government, in order to enforce compliance with grand jury subpoena for corporate business records, establish that subpoenaed materials would be relevant and admissible at trial on merits?

Petition for certiorari filed 3/12/90, by Kenneth W. Starr, Sol. Gen., Edward S.G. Dennis Jr., Asst. Atty. Gen., William C. Bryson, Dpty. Sol. Gen., and Lawrence S. Robbins, Asst. to Sol. Gen.

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