

Recent Civil Decisions of the United States Supreme Court: The 1997-1998 Term

by Charles H. Whitebread

During the 1997-1998 Term, the Supreme Court handed down a number of significant decisions in a variety of civil cases.¹ These decisions addressed First Amendment issues, sexual harassment in the workplace, Native Americans, and the Americans with Disabilities Act. The Court also announced rulings on the attorney-client privilege and the constitutionality of the Line Item Veto Act.

FIRST AMENDMENT

In the recent Term, the Supreme Court addressed two cases raising freedom of speech issues under the First Amendment. In both cases, the Court ruled in favor of the government, consequently restricting freedom of speech rights. One case upheld a candidate's exclusion from a public broadcaster's televised candidate debate; the other allowed the National Endowment of the Arts to consider "standards of decency and respect for diverse beliefs and values of the American public" when awarding grants for art.

In *Arkansas Educational Television Commission v. Forbes*,² the Court held that a state-owned broadcaster's exclusion of independent candidate, Ralph Forbes, from a televised candidate debate was not a violation of the First Amendment, but rather a reasonable exercise of journalistic discretion. In the six to three decision, the Court explained that although the public forum doctrine did not apply to public television broadcasting in general, broadcasting of candidate debates was an exception to this general rule. Applying the public forum doctrine, the Court found that the debates were not a traditional public forum because public television broadcasting had not been historically subjected to "unfettered access." The televised debates did not constitute a designated public forum because the government allowed selective access for individual speakers rather than general access for a class of speakers.



Thus, the debates were a nonpublic forum and the Court applied rational basis review. The Arkansas Educational Television Commission (AETC) excluded Forbes on the following grounds: voters and news organizations did not consider him to be a viable candidate, he had little financial support, and he had no campaign headquarters. The Court concluded that these were legitimate reasons to exclude Forbes and that the AETC made its decision in good faith. Justices Stevens, Souter, and Ginsburg dissented, arguing that AETC's standards

were too subjective and arbitrary to withstand First Amendment scrutiny.

Consistent in its narrow application of the First Amendment, the Court in *National Endowment of the Arts v. Finley*³ upheld the constitutionality of 20 U.S.C. section 954(d)(1), which requires the National Endowment of the Arts "to consider general standards of decency and respect for the diverse beliefs and values of the American public" when judging grant applications. This provision revised the NEA's grant-making process and was adopted by Congress in response to the public outrage over the use of NEA grant money to fund two provocative works, one depicting a "crucifix immersed in urine," the other containing "homoerotic photographs." In order to prevail on a claim that this statute was facially invalid, the respondents would have had to have established that there was a "substantial risk that application of the provision [would] lead to the suppression of speech."

Justice O'Connor, writing for the majority, rejected respondents' argument that the provision prevented the NEA from funding certain categories of artistic expression, because the provision only required the NEA to *consider* standards of decency and respect for American values. Respondents also

Footnotes

1. For an overview of the Court's criminal procedure decisions of the past Term, see Charles H. Whitebread, *Recent Criminal Procedure Decisions of the United States Supreme Court: The 1997-1998 Term*, COURT REVIEW, Summer 1998, at 14. For a more in-

depth review of the decisions of the past Term, see CHARLES H. WHITEBREAD, RECENT DECISIONS OF THE UNITED STATES SUPREME COURT, 1997-1998 (Amer. Acad. of Jud. Educ. 1998).

2. 523 U.S. 666 (1998).
3. 524 U.S. 569 (1998).

argued that the subjective nature of the criteria allowed the NEA to apply them as a means to discriminate based on viewpoint. In rejecting this argument, O'Connor explained that due to the very nature of arts funding, content-based considerations must necessarily be made. Moreover, the Court's decision was based in large part on the fact that "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or criminal penalty at stake." Finally, the provision withstood a vagueness challenge on the grounds that in the context of selective subsidies it would not have been feasible for Congress to have legislated with greater specificity.

NATIVE AMERICANS

The 1997-1998 Term was unique in that the Court decided three cases affecting the rights of Native Americans. The Court ruled against the Native American parties in two cases concerning jurisdictional authority over land, yet held in their favor in a case involving tribal immunity from suits on contracts.

In *South Dakota v. Yankton Sioux Tribe*,⁴ the Court declared that the Land Surplus Act of 1894 diminished the reservation status of the Yankton Tribe surplus lands, thereby transferring primary jurisdiction over the lands to the State of South Dakota. Under the terms of the 1894 enactment, the tribe agreed to "cede, sell, relinquish, and convey to the United States all of the unallotted lands on the reservation" in exchange for one payment of \$600,000 and a \$20 gold piece for each member of the tribe. In reaching its decision, a unanimous Court relied on the following factors: the language of the 1894 Act used to open the Indian lands, the historical context surrounding the passage of the various surplus land acts, and the subsequent treatment of the area in question and pattern of settlement. With respect to statutory language, the Court felt that the "cession" and "sum certain" language of the 1894 Act was precisely suited to terminating reservation status. Turning to the historical context of the 1894 Act, the Court determined that the manner of the preceding negotiations and the tenor of legislative reports manifested "the understanding that by surrendering its interest in the unallotted lands, the Tribe would alter the reservation's character." Finally, the Court's conclusion that the status of the Yankton reservation had diminished was based on the fact that the demographic trend of the lands in question was predominantly non-Indian.

In *Alaska v. Native Village of Venetie Tribal Government*,⁵ the Court concluded that the land owned in fee simple by the Native Village of Venetie Government was not "Indian country" within the meaning of 18 U.S.C. section 1151(b); therefore, the tribe did not have the authority to impose taxes on non-members of the tribe. The Native Village of Venetie Tribal Government had sought to impose taxes on a private contractor hired by the State of Alaska to build a public school on the tribe's lands. Under 18 U.S.C. section 1151, the tribe could

only impose taxes on non-members if it satisfied the statutory definition of "Indian country," which included "all dependent Indian communities within the . . . United States . . ." The issue before the Supreme Court was whether the tribe's land constituted a "dependent Indian community" under section 1151(b).

Justice Thomas, writing for a unanimous Court, held that in order to be classified as Indian country under section 1151(b), the lands "must have been set aside by the Federal Government for the use of the Indians as Indian land" and the lands "must be under federal superintendence." Thomas concluded that the tribe had failed to prove both requirements.

First, the lands were transferred to the tribe pursuant to the Alaska Native Claims Settlement Act (ANCSA), which by its terms evinced a clear break from the tradition of setting aside Indian lands. Also, ANCSA allowed title to the lands to be transferred to non-Indians or to be used for non-Indian purposes. Thus, the lands were not "set aside by the Federal Government for the use of Indians as Indian land."

Second, ANCSA explicitly stated that its purpose was to "avoid a 'lengthy wardship or trusteeship.'" Any protections afforded the tribe's lands under ANCSA were insufficient to constitute "federal superintendence." Consequently, the tribe's lands received pursuant to ANCSA were not Indian country within the meaning of section 1151(b) and the tribe could not impose taxes on non-members of the tribe.

By contrast, the Court expanded the rights of Native Americans in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*⁶ There, the Court held that Indian tribes were entitled to immunity from suits on contracts, regardless of whether the contract was with the government or a private entity, and regardless of whether the contract was carried out on or off reservation lands. In a six to three decision, Justice Kennedy stated that precedent simply could not support a finding that tribal immunity from suit was confined to transactions that occurred on reservations and those that involved governmental activities. Kennedy emphasized that tribal immunity was a matter of federal law and was not subject to diminution by the states. Tribal immunity was not coextensive with state sovereign immunity because the "tribes were not at the Constitutional Convention" and "were thus not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" The Court noted that it reserved for another day the issue of whether there was a need to abrogate tribal immunity altogether.

AMERICANS WITH DISABILITIES ACT

The Supreme Court expanded the individual protections afforded under the Americans with Disabilities Act in two recent decisions.

In *Bragdon v. Abbott*,⁷ the Court held that HIV was a disability under the ADA beginning at the point of infection. This case involved a dentist who refused to fill a patient's cavity in

4. 522 U.S. 329 (1998).

5. 522 U.S. 520 (1998).

6. 523 U.S. 751 (1998).

7. 524 U.S. 624 (1998).

The Supreme Court announced four decisions ... having a significant impact on sexual harassment law.

his office, but offered to do so in a hospital, because she was infected with HIV. Justice Kennedy, writing for the majority, stressed that the ADA should be construed to grant at least as much protection as that afforded by the Rehabilitation Act of 1973, since an almost identical definition of “handicapped individual” was used in both.

The Court then applied a three-part test. The first step in the Court’s analysis was to determine whether HIV infection was a “physical impairment” within the meaning of the ADA. Kennedy wrote, “In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold [HIV] is an impairment from the moment of infection.” Second, the Court addressed whether HIV substantially affected “one or more of [an individual’s] major life activities.” The Court concluded that “reproduction and the sexual dynamics surrounding it” were major life activities, since they were “central to the life process itself.” Third, the Court considered whether HIV was a “substantial limit” on “reproduction.” The Court determined that HIV was a substantial limit on reproduction because “a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected” and further “risks infecting her child during gestation and childbirth.”

Moreover, the Court ruled in *Pennsylvania Department of Corrections v. Yeskey*⁸ that inmates in state prisons were covered under the ADA. The inmate in question had been refused admission into a boot camp facility, as an alternative to the Pennsylvania correctional facility, because of his medical history of hypertension. The district court had dismissed the inmate’s claim under the ADA on the grounds that the ADA did not apply to state prisoners. The United States Court of Appeals for the Third Circuit reversed. In a unanimous decision affirming the Third Circuit, the Supreme Court stated that “the statute’s language unmistakably includes State prisons and prisoners within its coverage” because “the statutory definition of ‘public entity’ includes ‘any department, agency, special purpose district, or other instrumentality of a State.’”

SEXUAL HARASSMENT

The Supreme Court announced four decisions in the recent Term having a significant impact on sexual harassment law. The Court outlined the standard for vicarious liability of an employer for acts of harassment by an employee, as well as the standard for vicarious liability of a school district for acts of harassment by one of the district’s teachers. Also, in a landmark, high-publicity case, the Court expanded the scope of sexual harassment laws to protect against same-sex harassment.

In two companion cases, *Burlington Industries, Inc. v. Ellerth*,⁹ and *Faragher v. City of Boca Raton*,¹⁰ the Court held that an employer could be held vicariously liable for the hostile work environment created by a supervisor. However, where no tangible employment action was taken, the employer could assert an affirmative defense based on the reasonableness of the employer’s actions and the unreasonableness of the employee’s actions. In *Burlington Industries*, Kimberly Ellerth alleged that her supervisor had sexually harassed her by making various remarks that could have been interpreted as threats to deny her tangible job benefits. In *Faragher*, Beth Ann Faragher alleged that her supervisors had created a sexually hostile work environment through repeated, uninvited and offensive touching, lewd remarks, and by speaking of women in a derogatory manner. In both cases, neither plaintiff had suffered a tangible, adverse employment consequence.

The Court relied on principles of agency in reaching its decision in both cases. Under normal principles of agency, the acts of a supervisor may impute liability on the employer where the supervisor was acting within the scope of his employment. However, the Court concluded that acts of sexual harassment were clearly conduct outside the scope of employment. Yet, the Court explained that liability could still be imputed on employers when “workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relationship.” Therefore, when a supervisor makes a “tangible employment decision,” such an act becomes the act of the employer for purposes of Title VII.

The Court went on to state that an employer could assert an affirmative defense by establishing that it had exercised reasonable care to prevent sexual harassment and that the plaintiff had unreasonably failed to take advantage of the preventative opportunities offered by the employer. Elaborating on the contours of this defense, the Court noted that “[w]hile proof that an employer had promulgated an anti-harassment policy with complaint procedure [was] not necessary in every instance as a matter of law,” it certainly could be addressed in litigating the first element of the defense. Similarly, while proof that an employee unreasonably failed to use any complaint procedure provided by the employer was not necessary to prove the second element of the defense, it generally would be sufficient. Justices Thomas and Scalia dissented in both *Burlington Industries* and *Faragher* on the grounds that, where the plaintiff failed to suffer any tangible adverse employment consequence, the standard of employer liability should be *negligence* in allowing the supervisor’s conduct to occur, not vicarious liability.

The Court outlined a different standard for employer sexual harassment liability when the claim is brought against a school district under Title IX. In *Gebser v. Lago Vista Independent School District*,¹¹ the Court held that a school district could be held liable under Title IX for the sexual harassment of a student by one of the district’s teachers only when an official of the district, with the authority to institute corrective measures,

8. 524 U.S. 206 (1998).

9. 524 U.S. 742 (1998).

10. 524 U.S. 775 (1998).

11. 524 U.S. 274 (1998).

had actual knowledge and failed to take action. Unlike determining employer liability under Title VII, the Court refused to apply agency principles in determining a school district's liability under Title IX. Although Title VII expressly prohibits discrimination by an employer through "any agent," Title IX "contains no comparable reference to an educational institution's 'agents.'" Moreover, Title IX is framed in terms of a condition to receiving federal funds, whereas Title VII is in the form of an outright prohibition. The Court emphasized that the remedial scheme under Title IX required notice to an "appropriate" person and the opportunity to comply. Therefore, a remedy for damages should be fashioned along the same lines. Applying these standards, the Court concluded that the school district could not be held liable for the teacher's misconduct because it did not have actual notice, nor did it react with "deliberate indifference."

In the spotlight case, *Oncala v. Sundowner Offshore Services, Inc.*,¹² the Court ruled that sex discrimination where the harasser and the harassed employee were of the same sex was actionable under Title VII. In a short opinion, the unanimous Court reasoned that there was simply no justification for a "conclusive presumption" that employers would not discriminate against members of their own class (here, gender). The Court also pointed to the lack of specific language in Title VII to support barring a sex discrimination claim simply because the plaintiff and harasser were of the same sex. Respondents in this case argued that allowing same-sex sexual harassment claims would transform Title VII into "a general civility code for the American workplace." The Court rejected this argument on the grounds that this risk, while virtually the same for opposite-sex sexual harassment claims, was all but eliminated by the specific limitations of the statute itself.

LINE ITEM VETO ACT

The Court held that the Line Item Veto Act violated the Presentment Clause under Article I of the Constitution in *Clinton v. City of New York*.¹³ The Act granted the President the authority to rescind three types of provisions that had already been signed into law: "any dollar amount of discretionary budget authority," "any type of new direct spending," or "any limited tax benefit." The President subsequently exercised his authority under the Act by canceling section 4722(c) of the Balanced Budget Act of 1997 and section 968 of the Taxpayer Relief Act of 1997. The Court determined that the President's actions both legally and practically constituted an amendment of acts of Congress. This directly violated the requisite processes for repealing a statute set forth in Article 1. The Presentment Clause, Article I, Section 7, clause 2, required presentment to the President "before [the bill] becomes law," giving only the options of signing the bill, vetoing it or allowing it to become law without the President's signature. Since, under the statute, the cancellation of a part of the act occurred after the bill became law, the Presentment Clause was violated. Furthermore, nothing in the Constitution granted the

President the authority to unilaterally enact, amend, or repeal statutes. The Court interpreted this constitutional silence as an "express prohibition" of a line item veto.

ATTORNEY-CLIENT PRIVILEGE

In the last case of the Term, the Court declared that the attorney-client privilege extended beyond the death of the client. In *Swidler & Berlin v. United States*,¹⁴ attorney James Hamilton sought to protect three pages of notes taken during a meeting with his client, Deputy White House Counsel Vincent Foster, Jr., from being subpoenaed by the Office of the Independent Counsel after Foster took his own life. In interpreting the scope of the privilege, the Court relied on "principles of common law . . . as interpreted by the courts . . . in light of reason and experience." Moreover, the Court emphasized that the attorney-client privilege was "one of the oldest recognized privileges in the law."

The Independent Counsel had argued that allowing an exception to the privilege after the client died, for the limited purpose of obtaining information of substantial importance to a criminal case, would have "minimal impact" on clients' incentives to reveal confidences to their lawyers. However, the Court rejected this argument, finding no case authority to support the assertion that the privilege applied differently in criminal and civil cases.

[T]he Court declared that the attorney-client privilege extended beyond the death of the client...



Charles H. Whitebread (A.B., Princeton University, 1965; LL.B. Yale Law School, 1968) is the George T. and Harriet E. Pflieger Professor of Law at the University of Southern California Law School, where he has taught for almost two decades. His oral presentation at the annual meetings of the American Judges Association exploring recent Supreme Court decisions on criminal procedure have been well received for many years. Professor Whitebread gratefully acknowledges the research assistance of Stephanie Zavala.

12. 523 U.S. 75 (1998).
13. 524 U.S. 417 (1998).

14. 524 U.S. 399 (1998).