THE ORANGE COUNTY REGISTER
ocregister.com

Sunday, July 5, 2009

Going straight for the narrow

Black-robed U.S. Supreme Court ends term in constitutional gray.

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The phrase you often see in summaries of the U. S. Supreme Court's major decisions during the 2008-09 term, which ended (with one interesting exception) Monday is "sidestepping the larger constitutional issue." In a challenge to the landmark 1964 Voting Rights Act, which as renewed in 2006 for another 25 years still requires districts and states (mostly in the South) with a history of racial discrimination, to get federal approval before changing voting procedures, (Northwest Austin Municipal Utility District Number One or NAMUDNO) the high court, on an 8-1 vote, allowed the Texas district to opt out of the preapproval process but declined to declare the statute itself unconstitutional, as some had expected.

The pattern of preferring to decide narrowly, interpreting a statute to get a preferred result rather than reaching for a constitutional principle to overturn a statute – of what Roger Pilon, vice president for constitutional studies at the libertarian-oriented Cato Institute, calls "constitutional avoidance" – was fairly consistent throughout the term. It is roughly in line with the way Chief Justice John Roberts said he wanted the high court to operate when he was appointed in 2005. Jack Balkin of Yale, on his Balkinization blog, recently posted a piece wondering why the court has "suddenly gone minimalist." But as Jonathan Adler of Case Western Reserve Law School pointed out, it isn't a sudden turn at all, but where the court has been pointing since Roberts took the helm.

The trend is partly the result of conviction and partly pragmatic. Justices Roberts and Samuel Alito seem to be genuinely convinced that taking baby steps, especially when such steps lead to larger majorities than potentially divisive and delegitimizing 5-4 decisions on contentious issues, is the way to go. By comparison, Justices Antonin Scalia and Clarence Thomas – Thomas especially – are inclined to argue for the conservative/constitutionalist home run. In addition, however, there is the presence of Justice Anthony Kennedy, the quintessential swing vote, who can and does side with both the "conservative" (Roberts-Alito-Scalia-Thomas) and the "liberal" (John Paul Stevens, Ruth Bader Ginsburg, David Souter, Stephen Breyer) camps on occasion. An incrementalist and pragmatist at heart, Kennedy can seldom be persuaded to swing for the fences.

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This proclivity put Kennedy on the side of the majority 92.4 percent of the time (Scalia was next, at 83.5, with Thomas, Alito and Roberts at 81).

This conservative minimalism hasn't led to the end of 5-4 decisions, as Roberts might have preferred. Of the 79 cases handled by the high court in the just-ended term, 32 were decided by 5-4 votes, a higher percentage than in the prior two terms. But 15 cases were unanimous (no formal vote), 11 were decided 9-0, 4 were 8-1, 13 were 7-2 and 13 were 6-3.

And, as UCLA law professor Eugene Volokh, proprietor of The Volokh Conspiracy, a popular blog for law professors, emphasized to me, the 5-4 votes included some splits that didn't fall along traditional ideological lines. Only 11 had the four conservatives with Kennedy, while five had the four liberals with Kennedy. Scalia sided with the liberals a couple of times, notably on a case (Melendez-Diaz) giving defendants the right to cross-examine lab techs, as did Thomas.

Douglas Kmiec, who teaches law at Pepperdine, told me that a complication of deciding cases incrementally, or saying, as in the NAMUDBO voting-rights case, that a given statute might be unconstitutional but we don't have to decide that right now, is that "you almost guarantee it will come back to you," and you don't give lower courts very clear-cut guidance. But some observers think that is precisely what Chief Justice Roberts has in mind. He may be incremental but he is conservative and has some conservative goals. The NAMUDBO decision pretty much invited Congress to correct the law or see another case in which the preapproval requirement will be invalidated.

Then there's the case of Citizens United, also known as the Hillary movie case, which the court, in a novel move, scheduled for another hearing in September, before the next term begins in October. The case involves a Federal Elections Commission ruling that a documentary film critical of then-presidential candidate Hillary Clinton, could not be shown in the days prior to an election under the McCain-Feingold campaign finance law. Scuttlebutt is that the court is preparing to invalidate significant portions of that law as a violation of the First Amendment – which it is, of course.

Chief Justice Roberts may figure he has time to move in small steps. Even if President Barack Obama serves two terms, he might not be able to appoint a liberal to replace a conservative. The next likely candidates to step down will be Justice Stevens, who will turn 90 next year, and Justice Ginsburg, who is 76 and has had serious health problems. Roberts is 54, Alito is 59, Thomas is 61. Scalia and Kennedy are 73 but seem quite vigorous. So Roberts may have eight years with his minimalist conservative majority.

Although there were few landmark cases this term – nothing involving the great "war on terror," which dominated the prior couple of terms – there were some important ones. The environmental lobby went 0-5, losing a couple of cases in which the court allowed agencies to use cost-benefit analysis in determining how to mitigate water pollution, a couple of cases in Alaska where the Army Corps of Engineers was allowed to issue development permits using less-stringent guidelines than the Environmental Protection Agency wanted, and the case where the Navy was allowed to use sonar in training exercises regardless of sonar's alleged effects on whales.

The Ricci case involving New Haven, Conn., firefighters established that anti-discrimination laws also outlaw discrimination against white

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people, but it didn't mandate a remedy, leaving it to lower courts (which originally ruled the other way) to clean up the details. The strip-search of a 13-year-old girl (suspected of hiding ibuprofen) was ruled unconstitutional, but it didn't establish a bright line as to what circumstances might make such a search acceptable, and didn't allow for damages against the vice principal and teacher who ordered and did the search – nor did it take note of the absurd lengths to which the "war on drugs" has been taken.

In Herring v. U.S., the protection of the Fourth Amendment against unreasonable searches was vitiated a bit, allowing evidence obtained as a result of an apparently inadvertent mistake by a neighboring police jurisdiction to be used at trial. Likewise in Arizona v. Gant, a questionable search of a car was allowed even though the driver was already in handcuffs in the back of a police cruiser.

One final note. Although retiring Justice David Souter was widely viewed as the quiet man of the court, who authored no standout opinions and turned no memorable phrases, Kmiec noted that Souter was one of the sharpest questioners in oral arguments, with a gift for uncovering the weak aspects of attorneys' cases on all sides. The other justices, he believes, will miss that uncanny ability.

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