NATIONAL LAW JOURNAL

Supreme Court Brief

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Aug 28, 2019

Welcome to the last August issue of Supreme Court Brief! After next week's issue, we'll be just a month away from the start of the October 2019 Term. For this week, we caught up with UT Law's Steve Vladeck, who is taking on more and more military justice cases. We look at a GVR disagreement between the Office of Solicitor General and lawyers for a disability discrimination victim. And, the cover page of a Cato Institute amicus brief lights up Twitter.

Thanks for reading. Contact us at **tmauro@alm.com** *and* **mcoyle@alm.com**, *and follow us on Twitter at* **@Tonymauro** *and* **@MarciaCoyle**.

Stephen Vladeck of the University of Texas School of Law.

A Niche in Military Justice

Sexual assault in the military has been an ongoing concern in Congress, and now it has arrived at the Supreme Court in two petitions **filed** by Solicitor General **Noel Francisco**.

At the core of the petitions is the Justice Department's unhappiness with a February 2018 decision by the U.S. Court of Appeals for the Armed Forces (CAAF). In *United States v. Mangahas*, the court held that rape is not an offense punishable by death under the Uniform Code of Military Justice, and so instead of having no statute of limitation, rapes that occurred between 1986 and 2006 can be prosecuted only if discovered and charged within five years. A 2006 amendment to the UCMJ that allowed rape prosecutions at any time, the court ruled, was not retroactive.

In applying that decision, the appellate court overturned the rape convictions of Michael Briggs, Richard Collins and Humphrey Daniels III. The government disagrees with the court's interpretation of the 2006 amendment as well as its view that rape is not punishable by death.

Opposing the petitions is **Stephen Vladeck** of the University of Texas School of Law who will be back at the lectern for a separate case in the new term **once again** advocating for the family of a Mexican teen killed in a cross-border

shooting. The military rape cases are not Vladeck's first experience with military justice. We recently spoke with him about his interest and growing niche practice.

What triggered your interest in military justice?
I started working on military commissions when I was in law school. I was involved in early litigation challenging the Bush administration's first round of military commissions. I realized there were all these other questions about military justice, questions that don't get nearly enough attention as they should.

Law schools don't teach enough military law and law professors don't pay enough attention to it. There are all these interesting federal court questions and the relationship with military law that are worth pursuing. That's how I ended up with my **first case**—*Dalmazzi v. United States* (Vladeck's first high court argument in 2018)

How did you come to represent Briggs?
He was one of the service members at issue in the Dalmazzi case. We had consolidated 156 [service members] and he was one of them. This was mostly through the Air Force lawyers. Once I was representing him before the Supreme Court, I didn't think it would be appropriate to be done when that issue went away. While all that was pending before the Supreme Court, CAAF came along and decided Mangahas which created a new basis for Briggs to challenge his conviction.

Is your military justice practice growing?
Yes. There are so many cases in the military justice system and so many areas where there's still a lot of unsettled law. Through these cases, I've been able to make friends in the defense appellate offices. It's been a lot of fun to look out for especially interesting cases and lend a hand where I can.

It would be nice if the Supreme Court looked more carefully at military justice system, especially in those cases that raise questions of constitutional and statutory law that transcend courts-martial. We haven't seen it yet. --Marcia Coyle

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CATO INSTITUTE AND PROFESSOR JEREMY RABKIN AS *AMICI CURIAE* SUPPORTING DACA AS A MATTER OF POLICY BUT PETITIONERS AS A MATTER OF LAW

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August 26, 2019

Is It a "Thing?" An Unusual Amicus Cover

The twitterverse **erupted** briefly Monday night with criticism and reactions to the cover of the **amicus brief** filed by the Cato Institute in the Deferred Action for Childhood Arrivals—or DACA—case, *Department of Homeland Security v. Regents, University of California*.

Cato briefs have earned attention for their cleverness and humor—but on the inside, not the outside of the brief. The cover departed from the usual simple statement of support for either the petitioner or respondent by stating that Cato and professor Jeremy Rabkin were amicus **"supporting DACA as a matter of policy but Petitioners as a matter of law.**" Reactions were swift:

"I'm afraid this is not a thing."

"I actually think this brief should get bounced. Would def get bounced in CAFC."
"Bold move to inject some argument into the brief title."

"The similarity, to my eyes, is the gratuitously, transparent attempt to burnish the writers' 'We're good people, really!' credentials."

"Does it violate some rule to assert support for a policy while supporting a contrary application of law?"

We asked the amicus brief's author, Cato's **Ilya Shapiro**, about the cover and he said:

"I thought that what made our brief unique... is that we were likely to be the only people who liked DACA who also think it was unlawful. So why not make that point

on the cover? There aren't any rules about this sort of thing, other than to identify which side you're supporting, which we did.

It goes back to the advice I always give law students: ask your professors to give examples of policies they like but think are unconstitutional, or those they don't but think that are. That's a real test of intellectual integrity, because if your policy preferences and legal theories align, chances are you're doing it wrong. As for the tweets critical that we didn't make a policy argument, well, that wasn't the point of the brief—which is a legal brief, not a Brandeis brief." --Marcia Coyle

U.S. Solicitor General Noel Francisco

A GVR Fight

Earlier this month, the Justice Department **urged** the Supreme Court to GVR (grant, vacate and remand) a disability discrimination ruling that the Equal Employment Opportunity Commission won against BNSF Railway Co. The government's **brief**, which no lawyer from the EEOC signed, said the United States now agreed with the railway company that summary judgment in the EEOC's favor was "inappropriate."

The justices should GVR the case for consideration of the position taken in the government's brief, wrote Solicitor General Noel Francisco.

But the government's proposed GVR "would stretch the GVR procedure beyond

its justification and past use," said Stanford Law's **Brian Fletcher** and **Pam Karlan**, who represent Russell Holt, the intervenor who originally sought the EEOC's help with his discrimination claim.

"The Solicitor General's brief in this case is not signed by any attorney from the EEOC and does not otherwise purport to reflect the Commission's views," wrote Fletcher in his **brief in** opposition. "It also does not state that the EEOC (which has independent litigating authority in the lower courts) would urge the Ninth Circuit to adopt the Solicitor General's position after a GVR. As a result, this is not a case in which a remand would present the court of appeals with a prevailing party that has changed positions. Instead, the only intervening development for the Ninth Circuit to consider would be the Solicitor General's expressed disagreement with its original decision."

And that disagreement, they argue, has never been and should never be grounds for a GVR. Several justices, they add, have already criticized the court's existing GVR practice "as too quick to upset lower-court judgments based on briefs from the Solicitor General."

The case has not yet been set for conference so it may be a little time before learning who has the correct view of what has been called "the sleepy backwater of appellate procedure."--Marcia Coyle

Supreme Court Headlines: What We're Reading

>> **Gender Pronouns Part of LGBT Fight**. The U.S. Justice Department avoided using gender pronouns in its amicus brief asking the Supreme Court to deny workplace protections under Title VII to Aimee Stephens, who claims she was fired after announcing her intent to transition to a woman. [**Associated Press**] More at ABA Journal **here**.

>> **Ruth Bader Ginsburg Makes First Public Appearance Since Completing Cancer Treatment**. "Supreme Court Justice Ruth Bader Ginsburg on Monday made her first public appearance since completing radiation treatment for her latest bout with cancer, saying it was 'both a joy and a sorrow' to appear at an event organized by a college friend who died late last year." [**The Washington Post**]

>> **The Trump Administration Asked the Supreme Court to Legalize Firing Workers Simply for Being Gay**. "The Trump administration took its hardest line yet to legalize anti-gay discrimination on Friday when it asked the Supreme Court to declare that federal law allows private companies to fire workers based only on their sexual orientation." [**BuzzFeed News**] The WSJ has more **here**. Read the Justice Department's **amicus brief**.

>> **Differences Between Trump, Obama Administrations at Heart of Supreme Court Cases**. "Differences between the Trump administration and the Obama administration are not difficult to find, but they will be front and center in the most important cases on the Supreme Court's docket this fall." [**The Washington Post**]

>> **Sotomayor, SCOTUS Condone Execution in 'Kafkaesque' System**. "The justice said she'd be up for reviewing Florida's system in a future case, but that Gary Ray Bowles' appeal wasn't the right one in which to take on the state's regime that blocks certain defendants from pressing intellectual disability claims." [**Bloomberg Law**]

TRENDING STORIES

Albany DA Says Appeals Court Judge's Death 'Does Not Appear to Be Homicide'

DAILY REPORT ONLINE

In-House Lawyer at Tech Company Taps Don Samuel for Fatal Traffic Charges Defense

DAILY REPORT ONLINE

Midlevel Associates Are Feeling the Burn From All That Work

THE AMERICAN LAWYER

Which Firms Keep Midlevel Associates Happiest? The 2019 National Rankings

THE AMERICAN LAWYER

How LeClairRyan's Grand Plans Unraveled

THE AMERICAN LAWYER